No. 85-2169

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

SAINT FRANCIS COLLEGE, et al.,
Petitioners,

v.

MAJID GHAIDAN AL-KHAZRAJI, a/k/a
MAJID AL-KHAZRAJI ALLAN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Does 42 U.S.C. § 1981 prohibit discrimination on the basis of ancestry?

2. Did the court of appeals err in refusing to apply retroactively that court's decision in Goodman v. Lukens Steel Co., 777 F.2d 113 (3d Cir. 1985)?

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Respondent is a naturalized American citizen born in Iraq of Arab ancestry. Respondent came to the United States more than two decades ago to complete his education; he received his bachelor's

degree from Cornell University and his Ph. D. from the University of Wisconsin. Respondent was hired in 1971 as a member of the faculty of St. Francis College, and taught in the Sociology Department until 1979. In 1977 the Sociology Department unanimously recommended that respondent be awarded tenure; according to the complaint, in every other case in the history of the school such a unanimous departmental recommendation had been accepted by the college. (J. App. 63). However, the complaint also alleged that as of 1978 St. Francis had never awarded tenure to any faculty member of non-European ancestry. (J. App. 63).

On February 10, 1978 the college's tenure committee, ignoring the views of respondent's own colleagues, urged that St. Francis College deny respondent

tenure; later that month the college's board of trustees voted to deny respondent tenure. Respondent requested that this decision be reconsidered, and in September 1978 the faculty senate voted to authorize the faculty affairs committee to review the recommendation of the tenure committee. The faculty affairs committee in January, 1979, recommended that the faculty senate request reconsideration of the tenure decision, and the senate did so. On February 6, 1979, however, the tenure committee met and decided not to reconsider respondent's application for tenure. (Pet. App. 2a-3a).

During 1978 and early 1979 respondent contacted the Pennsylvania Human Relations Commission ("PHRC") and attempted to file a complaint of

discrimination. Although respondent provided the Commission with written material documenting his allegation, PHRC expressly refused to formally "docket" any complaint. Prior to 1980 it was PHRC's express policy to refuse to process a complaint based on a denial of tenure until the complainant had ceased working for the school involved. (Pet. App. 3a-5a). On May 26, 1979, respondent's employment by St. Francis college ended; 24 days later respondent duly filed a charge with PHRC. On May 19, 1980, however, PHRC dismissed respondent's 1979 complaint as untimely, holding that he should have filed his charge in 1978, when PHRC itself had forbidden respondent to do so. (Pet. App. 3a-4a). PHRC's decision was squarely contrary to then prevailing

third circuit law, which held that the Title VII limitations period began to run, not when an employee was denied tenure, but only when the employee ceased working for his or her employer. Ricks v. Delaware State College, 605 F.2d 7710 (3d Cir. 1979), rev'd. 449 U.S. 250 (December 15, 1980).

Following dismissal of his charge by PHRC, respondent obtained an EEOC right to sue letter, and commenced this action on October 30, 1980. Six weeks later this Court decided Delaware State College v. Ricks, holding that the discriminatory act in a case such as this is the final decision to deny tenure. 449 U.S. at 256-59. The district court, applying in Ricks retrospectively, dismissed the Title VII claim as untimely. (Pet. App.. 51a-55a). The court of appeals affirmed,

agreeing that Ricks should be applied retroactively. (Pet. App. 9a-12a).

Respondent also asserted a claim under 42 U.S.C. § 1981. The original pro se complaint, and subsequent amended complaints, asserted inter alia that respondent had been discriminated against because of his ancestry, Arabian, and his national origin, Iraqi. One of the complaints alleged that respondent had been denied tenure because of his " race (Arabian)." (J. App. 16, 22, 51). The district court dismissed the complaint, holding that section 1981 does not forbid discrimination on the basis of ancestry. (Pet. App. 37a-39a). The court of appeals reversed, holding that section 1981 forbids discrimination against any "group that is ethnically and physiognomically distinctive." (Pet.

App. 24a). The court of appeals also declined to apply retroactively Wilson v. Garcia, 85 L.Ed.2d 254 (1985) reasoning that respondent had been entitled prior to Wilson to rely on "absolutely clear" circuit precedent establishing a longer period of limitations than is appropriate under Wilson. (Pet. App. 15a-16a).

SUMMARY OF ARGUMENT

I. The interpretation of section 1981 must take into account the ease with which racial concepts can be manipulated to reflect popular prejudices. For most of the first half of this century the United States government insisted that Arabs were not "white". The Justice Department urged that "the average man in the street would find no difficulty in assigning to the yellow race a ... Syrian with as much

ease as he would bestow the designation on a Chinaman or a Korean." In re Halladjian, 174 F. 834, 838 (1909). This Court upheld that approach, insisting that the "whites" eligible for naturalization under federal law were generally limited to Europeans. United States v. Thind, 261 U.S. 204 (1923). Lower court decisions applying Thind refused to permit naturalization of Arabs because in part of their "dark skin." In re Ahmed Hassan, 48 F. Supp. 843, 845 (E.D.Mich. 1942).

II. Section 1981, like the Fourteenth Amendment, prohibits discrimination on the basis of ancestry. Discrimination on the basis of ancestry is racial discrimination within the meaning of the Equal Protection Clause. Hirabayashi v. United States, 320 U.S.

81, 100 (1943). Section 1981 presumptively prohibits the same types of discrimination forbidden by the Fourteenth Amendment. Hurd v. Hodge, 334 U.S. 24 (1948).

A review of 50 English dictionaries printed between 1750 and 1985 demonstrates that in 1866 "race" meant "ancestry" or "ethnic group." This usage is clearly reflected in mid-nineteenth century publications. The 1854 Encyclopedia Americana, for example, characterized Arabs, Bedouins, Berbers, Hebrews, Tartars, Finns, and gypsies all as distinct races. (See pp. 55-57, infra). Members of the thirty-ninth Congress, which adopted the 1866 Civil Rights Act, referred variously to "the Scandinavian races," "the Chinese race," "the Latin races," "the Spanish race" and

the "Anglo-Saxon race." (See pp. 73-76, infra).

The 1866 Civil Rights Act was adopted in part to prohibit the sort of discrimination on the basis of ancestry which had been expressly advocated in the 1850's by the Know Nothing Party. One prominent Know Nothing tract denounced the Germans and Irish as "degenerated races" unfit to live with native Americans. S. Busey, Immigration: Its Evils and Consequences, p. 23, 39, 42 (1855). In response to such proposals, Senator Shellabarger emphasized that the 1866 Act would forbid discrimination against "the German race." Cong. Globe, 39th Cong., 1st Sess., 1294.

Petitioners argument that "Caucasians" are not "protected persons" presents insurmountable practical

problems. (Pet. Br. 16, 28). By 1866 ethnologists propounded a dozen different theories regarding the appropriate definition of Caucasian; under most classification systems neither Jews nor Arabs were then classified as Caucasian. The proposed definition of Caucasian has varied widely over the last 120 years; at the turn of the century, for example, Finns, Turks and Lapps were all regarded as orientals. It is inconceivable that the scope of the protections established by section 1981 shift with such changes in ethnological thinking.

III. Wilson v. Garcia, 85 L.Ed.2d 254 (1985), held that the appropriate limitations period for a section 1983 action should be that established by state law for an action for damages for personal injuries. In Pennsylvania that

limitation period is two years. This Court has granted certiorari to decide whether the limitations rule in a section 1981 case should be based on the limitation period applicable to a personal injury action, or to an action in contract. Goodman v. Lukens Steel Co., No. 85-1626.

However Goodman may be resolved, it should not be applied retroactively to the instant case. As the court of appeals observed, when the instant case arose it was "absolutely clear" under third circuit decisions that a section 1981 action was subject to a six year period of limitations in Pennsylvania. (Pet. App. 15a-16a). A circuit court's reading of its own past decisions is entitled to considerable deference. The minor changes that occurred in the

Pennsylvania statutes in 1978 did not vitiate the precedental significance of the third circuit's decisions.

ARGUMENT

I. THE HISTORY OF FEDERAL TREATMENT OF INDIVIDUALS OF NON-EUROPEAN ANCESTRY

The interpretation of section 1981, like that of the Equal Protection Clause, must take into account the ease with which racial concepts have in the past been manipulated to fit the prejudices of the day, and the danger that such changes could occur again. Over the course of modern history the problems of racial discrimination have been inextricably interrelated with shifting popular theories as to which groups constitute distinct races. Today few Americans would, out of either insensitivity or ill will, describe Arabs or Jews as a "race,"

or suggest that either group is somehow distinct from the "white race." But it was not always so.

Sixty-four years ago this Court ruled unanimously that a Caucasian native of the continent of Asia was, as a matter of federal law, not "white," and was thus absolutely ineligible for naturalization as a United States citizen, solely because his ancestry was Asian rather than European. United States v. Thind, 261 U.S. 204 (1923). Although the individual declared non-white in that case was an Asian Indian, both the Department of Justice and the lower courts interpreted Thind to mean that any Arab born in Asia was also as a matter of federal law non-white. An Arab or Indian excluded from naturalization by Thind was subject as a consequence to a host of

discriminatory state statutes, including laws barring such individuals from many public and private jobs, and from practicing a number of professions.[1] In the instant case petitioners urge this Court to rule that employment discrimination against Asian Indians, Arabs and others is permitted by section 1981, and to ground that result on a holding that Arabs, Indians, and other non-European "Caucasians" are now, as a matter of federal law, to be declared to be officially "white."

The decision in Thind, and the Justice Department racial theories which Thind endorsed and perpetuated, had their roots in the virulent hostility that

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[1] See Note, Aliens' Right to Work: State and Federal Discrimination, 45 Fordham L.Rev. 835 (1977); O'Conner, Constitutional Protection of the Alien's Right to Work, 18 N.Y.U.L.Q. Rev. 483 (1941).

emerged at the turn of the century towards the waves of immigrants then arriving from southern Asia, northern Africa, and central and southern Europe. In 1899 the reports of the Bureau of Immigration began to list new immigrants by "race" as well as nationality; the Bureau explained that

> [A]n Englishman does not lose his race characteristics by coming from South Africa, a German his by coming from France, or a Hebrew his, though he come from any country on the globe.[2]

The 1899 report classified immigrants into 49 races, including "Syrian" and "Hebrew." Hispanics were divided into six races; "Spanish," "Cuban," "Mexican," "South American," "Central American" and "West Indian," and Italians were divided

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[2] Annual Report of the Commissioner-General of Immigration: 1899, 5.

into two races "Italian (northern)" and "Italian (southern)."[3] This official list of races remained in use by federal immigration authorities for over 35 years, with the intermittent addition of additional races, including "Arabian" and "Spanish-American." (See Appendices A and B). In 1904 the Bureau of Immigration promulgated an official ethnological theory, dividing these 49 races into six "well-recognized divisions;" the Syrian race was placed in the Iberic division together with the Spanish and South Italian races, the Hebrew race was part of the Slavic division together with most eastern European races, and the North Italian race was classified in the Celtic division, which included the Irish and

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[3] Id. 6-7.

French races (See Appendix C). In 1906 the Bureau called attention to a "startling" shift in the sources of immigration away from northern European nations "inhabited by races nearly akin to our own;" southern and eastern Europe and Asia Minor, the Bureau warned, were the "racial sources [from which] the blood is drawn that is being constantly injected into the veins of our own race."[4]

In 1911 an Immigration Commission established by Congress issued an exhaustive report on the character of the new "races" of immigrants from central and southern Europe and asiatic Turkey. It concluded

The new immigration as a class is

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[4] Annual Report of the Commissioner-General of Immigration: 1906, 5.

> far less intelligent than the old ... Racially they are for the most part essentially unlike the British, German, and other peoples who came here during the period prior to 1880, and generally speaking they are actuated in coming by different ideals...[5]

The Commission recommend the imposition of a "limitation of the number of each race arriving each year to a certain percentage of the average of that race arriving during a given period of years." The Commission also urged that the immigration of undesirable races be curbed by adoption of a literacy requirement, explaining there were six races of immigrants half or more of whom could be turned away by means of this test, including the "Syrian," "Mexican," and "South Italian" races.[6] The

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[5] Sen. Doc. No. 747, 61st Cong., 1st Sess., 14 (1911).

[6] Id. 47, 99.

Commission published a separate volume describing in detail the racial characteristics of over 600 different races, explaining, for example, that members of the North Italian race were "cool, deliberate, patient, practicable, and ... capable of great progress," while the South Italian race, "closely related to be Iberians of Spain and the Berbers of northern Africa," and possibly with "traces of African blood," was "excitable, ... impulsive, highly imaginative, impracticable, having little adaptability to highly organized society." [7]

The Commission's avowedly racial proposals soon became law. In 1917 a literacy test was enacted for the avowed

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[7] Sen. Doc. No. 662, 61st Cong. 3d Sess., 82 (1911).

purpose of excluding undesirable "races".[8]

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[8] The 1916 House Report, expressly relying on the 1911 Commission Report, explained that the literacy test was designed in particular to stem immigration by southern and eastern Europeans, particularly Italians, who it described as prone to "crimes of personal violence." H.R. No. 95, 64th Cong., 1st Sess., 4-5 (1916). Speaking in favor of the literacy requirement, Representative McKenzie explained that the newer immigrants were unlike the earlier "Anglo-Saxon, Celtic, and Germanic ... races":

> "The congenial assimilation of races so different in temperament and traditions as those of southern Europe and oriental countries with the races of northern and western Europe is a practical impossibility."

53 Cong. Rec. 4776-77 (1916). See also id. at 4783 (remarks of Rep. Hood) (citing Immigration Commission's racial views) 4789 (remarks of Rep. Vinson) (emphasizing "the difference between the north and south Italians"), 4796 (remarks of Rep. Wilson) (literacy test needed to end immigration of illiterate "European ... races"), 4806 (remarks of Rep. Focht) (favors admission of "the Jew, the Armenian, and the Dago, and any other

(continued...)

39 Stat. 877. The 1917 act also created what came to be called the "Asiatic Precluded Zone," forbidding any immigration whatever from the Moslem regions of Asian Russia and part of the Arabian peninsula, as well as from Indo-China and the Indian subcontinent. 39 Stat. 876. Immigration quotas largely excluding non-Europeans were enacted in 1924. 43 Stat. 159.

The same racial views that shaped federal policy towards future immigration also affected federal treatment of immigrants who had already reached our shores. The vehicle for the latter policy was section 2169 of the Revised

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[8](...continued)
race" only if literate), 4810-11 (literacy of immigrant "races," including Syrian, etc.), 4881-3 (remarks of Rep. Chandler) criticizing racial purpose of literacy test).

Statutes, which provided that the procedures for naturalization were open only to "aliens being free white persons and to aliens of African nativity and to persons of African descent."[9] Beginning in 1909, the Department of Justice initiated an aggressive campaign to utilize section 2169 to prevent the naturalization of immigrants from southern and western Asia. Between 1909 and 1923 a majority of the reported section 2169 cases involving non-Oriental Asians were directed at preventing the naturalization of Syrian Arabs.[10]

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[9] See 1 Stat. 103, 16 Stat. 256.

[10] In re Balsara, 171 F. 294 (S.D.N.Y. 1909) (Indian; dicta forbidding naturalization of Arabs); In re Najour, 174 F. 735 (N.D.Ga. 1909) (Syrian Arab); In re Halladjian, 174 F. 834, 844 (D. Mass. 1909) (Armenian; noting the existence of three unreported cases involving Arabs); In re Mudarri, 176 F.

(continued...)

The Justice Department's extraordinary racial theories were quoted at length in In re Halladjian, 174 F. 834 (D.Mass. 1909). According to the government, the non-Negro peoples were divided into two races, the white or European race, and the "Asiatic or yellow race." 174 F. at 837-38. "European, or its analogous term white," the Department argued, referred

> not merely to the local habitat of the person to who it applied, but ... [to] the prevailing ideals, standards, and aspirations of the people of Europe. 174 F. at 837.

The "Asiatic or yellow race," included

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[10](...continued)
465 (D.Mass. 1910) (Syrian Arab); In re Ellis, 179 F. 1002 (D.Ore. 1910) (Syrian Arab); In re Shahid, 205 F. 812 (E.D.S.C. 1913) (Syrian Arab); In re Mozumdar, 207 F. 115 (E.D. Wash. 1913) (Indian); Ex parte Dow, 211 F. 486 (E.D.S.C. 1914), 213 F. 355 (E.D.S.C. 1914) (Syrian Arab); In re Singh, 246 F. 496 (E.D.Pa. 1917) (Indian); In re Singh, 257 F.2d 209 (S.D.Cal. 1919) (Indian).

"substantially all the aboriginal peoples of Asia." 174 F. at 838. The racial identity of particular individuals, according to the government, was self-evident to ordinary citizens:

> [T]he average man in the street ... would find no difficulty in assigning to the yellow race a Turk or Syrian with as much ease as he would bestow the designation on a Chinaman or a Korean. 174 F. at 838.

Asian Indians were to be excluded from naturalization, the United States contended, "because many Englishmen treat them with contempt and call them 'niggers.'" 174 F. at 838. The Justice Department apparently agreed that the Jewish people, like Turks or Syrians, had their origins in Asia, but insisted that Jews were "white" because they had "become westernized and readily adaptable to European standards." 174 F. at 841.

The federal decisions holding that Arabs were not white relied primarily on the fact that their native Syria had in earlier times been occupied by the Mongols, and more recently by the Turks, who were then generally regarded as an oriental race.[11] Syrians were said to have a complexion with "a yellow tinge more characteristic of the Turk and Mongol than the olive of southern Europe." In re Dow, 213 F. at 362. While it was possible that some Arabs of the region had no such oriental blood, the court in Dow emphasized that "[t]here is no known ocular, microscopic, Philological, ethnological, physiological, or historical test that can settle the race

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[11] In re Shahid, 205 F. 812, 816 (E.D.S.C. 1913); In re Dow, 213 F. 355, 361-62 (E.D.S.C. 1914); see also In re Balsara, 171 F. 294, 295 (S.D.N.Y. 1909).

of the modern Syrian." 213 F. at 362. The Syrian petitioner in Dow argued in vain that Arabs were members of the same Semitic family as Jews, whose eligibility for naturalization had not been questioned. The court reasoned:

> The European Jew has become racially, physiologically ,and psychologically a part of the peoples he lives among .... [N]o one can tell how much so-called Aryan blood runs in the veins of the modern European Jew.... The Jew of Northern Germany and Northern Russian is frequently blue eyed and fair haired.... But there are communities professing the Jewish religion in Northern Africa and the east who are as dark as Negroes or the peoples among whom they live, and who probably by intermixture of blood are physiologically the same. The European Jew is as white as the peoples among whom he lives and the African or Asiatic Jew as dark.... A professing Jew from Syria who was not of European nativity or descent would be as equally an Asiatic as the present applicant, and as such not within the terms of the statute.

213 F. at 363.

Prior to Thind, however, the Justice

Department's litigation campaign was largely unsuccessful. The decision in Dow was reversed on appeal,[12] and the government prevailed in only two of the reported cases in which it opposed the naturalization of a non-oriental Asian.[13] But Thind largely sustained the government's interpretation of section 2169 and expressly spurned the suggestion of the lower courts that all "Caucasians" be deemed legally "white." 261 U.S. at 208-11. There was, this Court reasoned, an obvious "racial difference" between Hindus and European whites; white Americans would react with "astonishment" to any suggestion they belonged to the

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[12] Dow v. United States, 226 F. 145 (4th Cir. 1910).

[13] In re Shahid and In re Singh (E.D.pa. 1917), supra.

same race as Indians, Polynesians, or "the Hamites of north Africa,"[14] whose complexion ranged "from brown to black." 261 U.S. at 211, 215. Although the original "Aryan" invaders of India may have been fair skinned, they had failed "to preserve their racial purity" because "the rules of caste ... seem not to have been entirely successful." 261 U.S. at 213.

Thind concluded that Congress had intended to limit the privilege of American citizenship to the white peoples of Europe -- "bone of their bone and flesh of their flesh." 261 U.S. at 213. A decade later this Court explained that under Thind "men are not white if the strain of colored blood in them is a half

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[14] The Hamites are Arab inhabitants of northern Africa.

or a quarter, or, not improbably, even less ... Cf. the decisions in the days of slavery." Morrison v. California, 291 U.S. 82, 86 (1934). Morrison noted that, because of the "strain of Indian blood in many of the inhabitants of Mexico as well as in the peoples of Central and South America," it was an "unsettled question" whether Mexican immigrants were legally white and thus eligible for naturalization. 291 U.S. at 96 n. 5. Few decisions of this Court since Dred Scott v. Sanford, 60 U.S. 19 (1857) have been as overtly racial in their reasoning or conclusion.

Not content with having won in Thind a prohibition against future naturalization of non-European immigrants, the Justice Department after 1923 embarked on a campaign to

denaturalize Indians, Arabs and Armenians who had been formally naturalized as much as 12 years earlier. Those singled out for this vindictive action included the chief research engineer of the General Electric Corporation and an affluent California attorney with a Ph. D.[15] The Justice Department insisted, usually with success, that Thind had held "that Asiatics generally ... were excluded as racial groups, regardless of the origin of their foundation stock or the speculations of ethnologists."[16] Relying

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[15] United States v. Gokhale, 26 F. 2d 360 (2d Cir. 1928); United States v. Pandit, 15 F.2d 285 (9th Cir. 1926); see also United States v. Cartozian, 6 F.2d 919 (D.Ore. 1925); United States v. Ali, 7 F.2d 728 (E.D.Mich. 1929), 20 F.2d 998 (E.D.Mich. 1927); United States v. Khan, 1 F.2d 1006 (W.D.Pa. 1924); Mozumdar v. United States, 299 F. 240 (9th Cir. 1924).

[16] Brief for United States, Wadia v. United States, 101 F.2d 7 (2d Cir. 1939), p. 6.

on Thind, several lower court cases held that Arabs as a class were not white and were therefore ineligible for naturalization:

> Apart from the dark skin of the Arabs, it is well known that they are a part of the Mohammedan world and that a wide gulf separates their culture from that of the predominantly Christian peoples of Europe. It cannot be expected that they would readily intermarry with our population and be assimilated into our civilization.... Arabia, moreover, is not immediately contiguous to Europe or even to the Mediterranean..[17]

It was not until after the outbreak of World War II that the Immigration and Naturalization Service, noting that then recent events had made "disastrously apparent" "the evil results of race discrimination," ruled that Arabs were

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[17] In re Ahmed Hassan, 48 F. Supp. 843, 845 (E.D.Mich. 1942); see also United States v. Ali, 7 F.2d 728, 732 (E.D.Mich. 1925) (emphasizing that skin of Arab involved was "unmistakably dark").

legally "white," at least if they came from areas outside the Asian Precluded Zone.[18]

The position now advanced by petitioners is of course precisely the opposite of the ruling in Thind, but petitioners' arguments and reasoning of Thind are entirely consistent in demonstrating the ease with which racial myths and categories can be manipulated to legitimize purposeful discrimination. This Court has refused in the past to permit such manipulation to eviscerate the principle of non-discrimiation. Texas authorities for over a century regarded Mexican-Americans as a distinct

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[18] Immigration and Naturalization Service, Monthly Bulletin, v. 1, No. 4, pp. 12-16 (October 1943). The underlying statute was finally repealed in 1952. 66 Stat. 239.

and inferior race;[19] state forms asked individuals to list their races as "white," "negro," or "Mexican,", Mexican-Americans were directed by state officials to use public facilities for blacks rather than those for whites, Mexican-American children were required to attend separate segregated schools, and Mexican-Americans were largely

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[19] Officials of other states also regarded Mexican-Americans as a distinct race. See, e.g., State v. Martinez, 673 P.2d 441, 443, 105 Idaho 841 (1983); Riggin v. Dockweiler, 104 P.2d 367, 367, 15 Cal.2d 651 (1940); State v. Quigg, 155 Mont. 119, 147, 467 P.2d 692 (1970); Herrera v. People, 87 Colo. 360, 361, 287 P.2d 643 (1930); Flores v.. McCoy, 186 Cal. App.. 2d 502, 504, 9 Cal.Rptr. 349 (1960). See also 53 Cong. Rec. 4846 (remarks of Rep. Slayden) ("Down in the Southwestern states ... we employ the word 'Mexican' to define a race rather than a nationality.") (1916); U.S. Department of Commerce, Bureau of the Census, Fifteenth Census of the United States, 1930, v.iii, parts 1 and 2 (1932) (data on "Mexican race").

excluded from participation on juries.[20] When the constitutionality of the latter practice was challenged, however, the Texas courts held, and the Attorney General of that state argued in this Court, that deliberate state discrimination against Mexican-Americans was entirely permissible because, they asserted, the state's invidious racial theories were simply mistaken; Mexican-Americans, counsel for the state argued, could be discriminated against because, contrary to the belief which pervaded all aspects of Texas policy, members of that minority were "not a separate race" but merely "white people of Spanish

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[20] Hernandez v. Texas, 347 U.S. 475, 479-80, 479 n. 9 (1954); Brief for Petitioner, No. 406, October Term, 1953, pp. 13, 37-41.

descent."[21] In Hernandez v. Texas, 347 U.S. 475 (1954), this Court unanimously rejected that brazen defense, and it should do so again in the instant case.

II. SECTION 1981 PROHIBITS DISCRIMINATION ON THE BASIS OF ANCESTRY

A. Introduction

The central substantive problem presented by this appeal is to determine what the thirty-ninth Congress meant by discrimination on the basis of "race". The original language of section 1 of the 1866 Civil Rights Act provided that "there shall be no discrimination in civil rights or immunities ... on account of race." 14 Stat. 27. Senator Trumbull, in introducing the bill ultimately enacted in 1866, described it as a

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[21] Hernandez v. State, 251 S.W. 2d 531, 535 (Tex. Crim. App. 1952); Brief in Opposition, No. 406, October Term, 1953, p. 12.

measure to protect "every race and color". Cong. Globe, 39th Cong., 1st Sess. 211 (1866). The legislative history of the act is replete with references to "race" as the prohibited basis of discrimination. McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 287-96 (1976).

Petitioners contend that the term "race" in the 1866 Civil Rights Act, and in the congressional debates of that year, should be construed in the manner in which that word would be used by a late twentieth century ethnologist -- to refer to the 4 or 5 major divisions of mankind currently recognized by scientists, i.e., caucasian, black, oriental, and American Indian.[22] The

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[22]This narrow reading of section 1981 of the 1866 Act is necessarily (continued...)

third circuit rejected that reading of the language and history of section 1981, reasoning that the framers of the 1866 Act did not use the term"'race' ... in a crabbed fashion or to signify only those races identified by anthropologists as distinct." (Pet. App. 22a). We believe that the court of appeals was correct; we maintain that the term "race" was understood by the framers of the 1866 Civil Rights Act to refer to an individual's ancestry, the ethnic group to which he or she belongs.

Our contention that section 1981 forbids discrimination on the basis of ancestry is not controlled by the

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[22](...continued)
inconsistent with this Court's decision in Takahashi v. Fish and Game Commission, 334 U.S. 410, 420 (1948), that section 1981 prohibits discrimination on the basis of alienage.

conflicting dicta in this Court's past decisions regarding whether section 1981 prohibits discrimination on the basis of national origin.[23] An individual's ancestry, the ethnic group from which he and his ancestors are descended, is not necessarily the same as that individual's national origin, the country from which the individual or his forbearers

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[23] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968), asserts in dicta that section 1982 does not forbid discrimination on the basis of national origin. In Yick Wo v. Hopkins, 1218 U.S. 356 (1886), on the other hand, the Court observed that the Fourteenth Amendment prohibited discrimination on the basis of race, color, or nationality, and that "[i]t is accordingly enacted ... that 'All persons within the jurisdiction of the United States shall have the same right to make and enforce contracts ...,'" quoting section 1981. 118 U.S. at 369 (emphasis added). See also United States v. Wong Kim Ark, 169 U.S. 649, 695-96 (1898). Most recently Delaware State College v. Ricks, 449 U.S. 250, 256 n. 6 (1980), regarded the issue as an open question.

emigrated to the United States. Although an individual's ancestry and national origin are in some instances identical, as in the case of a Greek from Greece, that often is not the case. Some distinct groups, such as Arabs, Jews, and gypsies, have lived in and emigrated to the United States from a large number of different countries. Other groups, such as the Welsh or the Basques, constituted a distinct minority within their native lands, and were not in modern times part of a distinct Welsh or Basque nation. Even where an ethnic group constitutes the primary stock of one country, members of the same group may also be native to other nations; there are indigenous Hungarians in Rumania and Irishmen in the United Kingdom. Thus an employer which had no policy of discriminating on the

basis of national origin against immigrants from the United Kingdom could conceivably discriminate on the basis of ancestry against an Irishman from Belfast, a Jew from London, or a Welshman from Cardiff. In the instant case the district court expressly noted that respondent's national origin, Iraqi, was different than his ancestry, Arabian. (Pet. App. 38a).

Nor is our proposed construction of section 1981 precluded simply because of the existence of Title VII. Petitioners, although conceding as they must that Title VII did not repeal section 1981 in its entirety, urge that section 1981 should be construed narrowly in light of the availability of other remedies under Title VII. (Pet. Br. 20-21, 39-40). But to interpret section 1981 in a more

constricted manner than would have been appropriate had Title VII not been enacted would be to violate the express intent of Congres "that the two procedures augment each other and ... not [be] mutually exclusive." Johnson v. Railway Express Agency, 421 U.S. 454, 459 (1975). Section 1981 provides a number of important remedies and procedures not available under Title VII. First, the retrospective relief provided to a complainant in a section 1981 action is not limited to equitable back pay, but includes both actual and punitive damages. Johnson v. Railway Express Agency, 421 U.S. at 460. Second, although both Title VII and section 1981 prohibit racial harassment of an employee, Title VII provides no monetary remedy for a harassed employee who lost

no income as a consequence of that discrimination; the only monetary redress available for any mental suffering in such a case must come under section 1981. Third, in a section 1981 action for compensatory relief, unlike a Title VII for back pay action, the plaintiff would be entitled to a jury trial; if the plaintiff seeks relief under both section 1981 and Title VII for the same alleged discrimination, the Seventh Amendment requires the trial judge adjudicating the Title VII claim to defer to the liability findings of the jury in the section 1981 action. Beacon Theatres v. Westover, 359 U.S. 500 (1959).

If, as we urge, the section 1981 prohibition against racial discrimination encompasses a ban on discrimination on the basis of ancestry, dismissal of

respondent's claim was necessarily improper. The district court expressly and correctly acknowledged that respondent had claimed that he had been discriminated against because of his Arab ancestry. (Pet. App. 38a). Similarly, the anti-Semitic incident in Shaare Tefila was manifestly based on the Jewish ancestry of the individual petitioners and other members of the petitioners' synagogue, rather than on their religious views. As one amicus has observed, most anti-Semitism during the last century has been based on the ancestry and purported "racial" character of the Jewish people[24]

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[24] See also Mayers v. Ridley, 465 F.2d 630, 631 n.1 (D.C. Cir. 1972) (en banc) (quoting restrictive covenant forbidding sale or lease of property "to any person of the Semitic race, blood or origin, which racial description shall be deemed to include Armenians, Jews, Hebrews, Persians and Syrians....)

rather than on theological differences with the religious tenets of Judaism.[25]

We ground our proposed interpretation of section 1981 on four distinct arguments. First, we urge that because the Fourteenth Amendment prohibits discrimination on the basis of ancestry, the 1866 Civil Rights Act should be read in the same manner, since the Congress which adopted both measures understood them to contain similar prohibitions. (Pp. 46-49, infra). Second, we contend that during the nineteenth century "race" had a meaning similar to "ancestry" or "ethnic group" in modern English, and that Arabs and Jews, for example, were commonly referred to as races. (Pp. 50-73, infra). Third,

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[25] Brief Amicus Curiae of the Anti-Defamation League, etc., et al., p. 15.

we argue that the framers of section 1981 used the term "race" in this manner, and expressly intended that statute to prohibit discrimination by the Know Nothings against particular white ethnic groups, such as "the German race." (Pp. 73-88, infra). Finally, we suggest that the interpretation of section 1981 proposed by petitioners would be unworkable in practice. (Pp. 88-103, infra).

B. The 1866 Civil Rights Act and the Fourteenth Amendment

The non-discrimination principle embodied in the equal protection clause of the Fourteenth Amendment has never been tied to any technical ethnological meaning. This Court has repeatedly held that the equal protection clause forbids discrimination on the basis of

ancestry.[26] Hirabayashi v. United States, 320 U.S. 81 (1943), which first ruled that the Fourteenth Amendment forbids discrimination on account of ancestry, was expressly premised on the view that discrimination on the basis of ancestry constitutes racial discrimination within the meaning of the Fourteenth Amendment:

> Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrrimination based on race alone has often been held to be a denial of equal protection. 320 U.S. at 100. (Emphasis added).

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[26] Fullilove v. Klutznick, 448 U.S. 448, 491 (1980) (discrimination on the basis of "ethnic criteria"); Hernandez v. Texas, 347 U.S. 475, 479 (1954) (discrimination on the basis of "ancestry"); Oyama v. California, 332 U.S. 633, 646 (1948) (discrimination on the basis of "ancestry"); Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

If, as Hirabayashi reasoned, the "racial" discrimination prohibited by the Fourteenth Amendment encompasses discrimination on the basis of ancestry, it would be surprising indeed if the 1866 Civil Rights Act's similar prohibition against racial discrimination, enacted less than three months before Congress approved the Fourteenth Amendment, had any different meaning. The fact that the Fourteenth Amendment itself prohibits discrimination on the basis of ancestry is weighty evidence that the 1866 Civil Rights Act does so as well:

> In considering ... the kind of governmental action which the first section of the Civil Rights Act of 1866 was intended to prohibit, reference must be made to the scope and purpose of the Fourteenth Amendment; for that statute and the Amendment were closely related both in inception and in the objectives which Congress sought to achieve... It is clear that in many significant

> respects the statute and the Amendment were expressions of the same general congressional policy.

Hurd v. Hodge, 334 U.S. 24, 32 (1948). The thirty-ninth Congress adopted the Fourteenth Amendment in part to assure that the Civil Rights Act's prohibition against government discrimination could not be repealed by a simple majority of a later Congress. Section one of the Amendment, Representative Thayer noted, was "but incorporating in the Constitution of the United States the principle of the civil rights bill which has lately become law."[27]

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[27] Cong Globe, 39th Cong., 1st Sess., 2465 (1866).

B. The Etymology of the Word "Race"

When Congress frames a statute with words which enjoy a meaning familiar and intelligible to ordinary members of the public, the statute must be interpreted in light of that common understanding, not on the basis of some possibly different definition used by scientists. Maillard v. Lawrence, 54 U.S. (16 How.) 251, 261 (1853). The interpretation of statutes enacted a century or more ago requires particular caution, for the words chosen by Congress, like any other part of the English language, may have had a significantly different common meaning 50 or 100 years ago than they do today. The word "race" is a term whose meaning has indeed changed substantially over the course of the last 150 years. We set out in Appendix E the definitions

of "race" contained in 50 dictionaries published between 1750 and 1985.[28] As we explain at length below, this Appendix demonstrates that the term race has had three quite distinct meanings over that period of time -- in 1800 "race" meant "family", between roughly 1850 and 1950 "race" was generally understood to denote an individual's ancestry or ethnic background, and only in the last several decades has "race" been widely understood among laymen to refer to one of the 4 or 5 basic divisions of mankind. Prior to 1850 the primary meaning of "race" was family. Samuel Johnson's 1768 Dictionary of the English Language defines race as

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[28] A chronological list of the dictionaries cited is set forth in Appendix D. The brief citations which follow refer to the author or title and date of publication; the full citation can be found in that appendix.

"[a] family ascending ... [a] family descending ... a collective family." The first edition of Noah Webster's American Dictionary, published in 1830, defines race as "[t]he lineage of a family, or continued series of descendants from a parent who is called the stock." In Alfred Lord Tennyson's 1832 poem "Locksley Hall" the protagonist uses the term in this sense, declaring "I shall take some savage woman, and she shall rear my dusky race".[29] Consistent with this meaning, the most common definition of "kinsman" until early in the twentieth century was "man of the same race"; "kin," "kinfolk" and "kindred" were

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[29] A. Tennyson, Poems, 282 (1853). The reference appears to be to an Asian Indian woman; an earlier line refers to "Mahratta," (Maratha), a people and region of south central India. The protagonist of the poems is an Englishman.

similarly defined as referring to persons of "the same race". See Appendix F. "Race" was frequently given as a synonym for "family," "lineage," and "progeny." See Appendices G, H, I. "House", which at times still denotes a family ("The House of Windsor"), was also defined as a "race". See Appendix J.

The use of the term race to refer to an ethnic group dates from at least 1600[30], but it appears to have been relatively uncommon until the middle of the nineteenth century. The earliest instance in which any English language dictionary clearly utilized "race" in this sense appears to be the 1830 edition of Websters, which defines gypsies as "a

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[30]The Oxford English Dictionary cites references to "the British race" (c. 1600), the "Pigmean race" (1667), and "Troy's whole race" (1713). V. 8, p. 87 (1933).

race of vagabonds which infest Europe, Africa and Asia." Four other dictionaries published prior to 1850 also refer to gypsies as a "race", a usage which may well reflect the fact that the small bands of gypsies more closely resembled families than the large ethnic groups that would later be characterized as races. See Appendix K. The other ethnic group to be defined as a race prior to 1850 was the Semites.[31] American dictionaries published in 1846 and 1855 expanded the definition of "race" to include "ancestry" as well as "family,"[32] and the definition of race in the 1876 edition of Websters was altered to include a "tribe, people, or nation, believed or presumed to belong to the

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[31] Worcester (1846), p. 656.

[32] Id., p. 585; Smalley (1855) p. 381.

same stock."[33] After 1840 "race" also begins to appear as a synonym for words which clearly refer to groups larger than blood relatives, such as stock[34], tribe[35], and even nation[36].

The use of the term race to refer to an individual's ethnic background is clearly reflected in the encyclopedias of the era. The 1854 edition of the Encyclopedia Americana, for example, explained in a description of northern Africa:

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[33]Webster (1876), p. 589.

[34]Reid (1846), p. 391; Worcester (1846), p. 698; Bolles (1847), p. 715; Smalley (1855), p. 506.

[35]Reid (1846), p. 420; Worcester (1846), p. 754; Boag (1847), p. 1357; Craig (1849), p. 920; Smalley (1855), p. 571.

[36] Clark (1855), p. 255 (nation defined as "a great body of people born of the same race, as the English in England and America").

> The Arab natives are, for the most part, a wandering race, dwelling in tents ... Their business is war; their income is plunder.(V. 1, p. 563) (Emphasis added).

Amongst the Berbers, the encyclopedia explained, "[a]ll the branches of this race are distinguished by beards." (v.1, p. 563) (emphasis added). The Bedouins were "a numerous Mohammedan race, which dwells in the deserts of Arabia, Egypt and Northern Africa" (v. 2, p. 79) (emphasis added), and the Copts of Egypt were "evidently a distinct race" (v.3, p. 526) (emphasis added). The description of "Hebrews", although less perjorative than the discussion of Arabs, was equally racial:

> This singular people ... presents the wonderful spectacle of a race preserving its peculiarities of worship, doctrine, language and

> feelings in a dispersion of 1800 years over the whole globe.[37]

The Encyclopedia Americana also characterized as distinct races Finns, gypsies, "Hindoos", Basques, Sclavonians, Tatars, Georgians, and Samoiedes.[38]

The New American Cyclopaedia, published in the years 1858-63, refers to Arabs as a race in nine different entries,[39] and characterized the Arab peoples as comprised in turn of a number of subsidiary races:

> [T]he various races and tribes known collectively as Arabs comprise

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[37] V.6, p. 209 (emphasis added). Another passage characterized Jews as a race. V.11, p. 118.

[38] V.5, p. 123; v.6, pp. 123, 333-4; v.11, p. 118. "Samoiedes" appears to be a reference to the Samoyeds, a people inhabiting northeastern European Europe and northwestern Siberia.

[39] V.1, p. 739; v.2, p. 610; v.3, p. 158; v.5, p. 697; v.7, p. 34; v.9, p. 742; v. 13, p. 159; v. 15, pp. 603, 653.

> nearly seven-eights of the population [of Arabia]. Of the Arabs... the ... Bedouins are a wandering race, living in tents and moving in troops from place to place.[40]
>
> [T]he Berbers are an interesting race ... [r]ude, warlike, and nomadic.[41]
>
> [T]he Copts are beyond question the best representatives of the ancient Egyptian race[42].
>
> Druses ... [are] a race and a religious sect of Syria, chiefly in the southern ranges of Lebanon[43].

The Jews were described as "a people of the Semitic race".[44] The New American Cyclopaedia refers in all to more than 20

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[40] V.1, p. 739 (emphasis added).

[41] V.3, p. 158 (emphasis added).

[42] V.5, p. 697 (emphasis added).

[43] V.6, p. 630 (emphasis added).

[44] V. 9, p. 27; see also v.2, p. 610 (Jews one of the six races inhabiting the Barbary states), v.11, p. 742 (Jews one of the six races inhabiting Morocco), v.15, p. 603 (Jews one of the seven races inhabiting Tripoli).

different ethnic groups as constituting races, including Afghans, Celts, Danes, Swedes, Norwegians, Germans, Greeks, Italians, Wallachians, Magyars, Persians, Kurds, Spaniards, Portuguese, Russians, Turks, and Tatars.[45]

The 1878 American edition of the Encyclopedia Britannica also used "race" to refer to what we would now describe as ethnic groups:

> The origin of the Arab race ... can only be a matter of conjecture ... [T]he first certain fact is the ... division of the Arab race into two branches, the "Arab", or pure; and the "Mostareb", or adscititious.[46]

> BARBARY ... The name is derived from the Berbers, one of the most

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[45] V.1, p. 166; v.4, p. 638; v.6, p. 382; v.7, pp. 335-37, 655; v.9, p. 335-6; v.13, pp. 159-60, 506; v.14, pp. 225-26, 804; v.15, pp. 216, 264, 603, 653.

[46] V.2, p. 245 (emphasis added); see also v.1, p. 564.

remarkable races in the region.[47]

> The Druses are a mysterious people ... The mere fact that they possess a knowledge of the Celestial Empire in such contrast to the geographical ignorance of the other Syrian races is in itself remarkable ... the rise and progress of the religion which gives unity to the race can be stated with considerable precision.[48]

Jews were expressly referred to as a race, as were Afghans, Turks, Germans, Poles, Croatians, Servians, Danes, Finns, Germans, Hungarian, Greeks, Albanians, and the Persians.[49]

The definition of "race" urged by petitioners, denoting one of a small number of branches of mankind, does not appear in an English language dictionary

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[47] v.4, p. 363 (emphasis added); see also v.1, p. 564.

[48] v.7, p. 483

[49] v.1, pp. 236, 564; v.3, p. 118; v.7, p. 84; v.9, p. 216; v.10, p. 473; v.11, p. 83; v.12, p. 365; v.18, p. 627.

until the publication at the turn of the century[50] of the Century Dictionary and Cyclopedia. The eight volume Century Dictionary expressly distinguished three separate meanings of the word "race": (1) "[a] geneological line . . . . family; kindred;" (2) "[a] tribal or national stock ... as, the Celtic race; the Finnic race ...; the English, French and Spani[sh] ... races;" and (3) "a great division of mankind ... as, the Caucasian race."[51] The editors of the Century Dictionary made clear by their own use of words, however, that they regarded the second meaning as the most

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[50] Counsel for respondents were able to locate a 1911 edition of this multi-volume publication. There appears to have been an 1891 edition, but we have not been able to locate a copy ascertain its contents.

[51] V. 8, p. 4926 (emphasis in original)

widely used and accepted. Thus in other definitions the Century Dictionary refers to "[t]he English race," "the Arabic race," "the ancient Egyptian race or races," "the Irish race," "the Italian race," "the French race," "the Spanish race," "the German race," "the Hungarian race," "the Greek race," "the Finnic race," "the Slavic race," "the native race of India," "the races speaking Iranian languages," and "a race inhabiting Kafiristan."[52] A Moor was described as "[o]ne of a dark race dwelling in Barbary ... a mixed race, chiefly of Arab and Mauritanian origin", and "semitic" was defined as "pertaining to the Hebrew race or any of those

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[52] v. 1, p. 214; v. 3, pp. 1856, 1933; v. 4, pp. 2226, 2373, 2499, 2614, 2823; v. 5, pp. 2920, 3058, 3180, 3202, 3261; v. 8, pp. 5279, 5794.

kindred to it, as the Arabians...."[53]

The definition of race in the 1876 edition of Webster's, quoted earlier, remained essentially unchanged for 40 years. In 1916 the editors for the first time noted that the term had acquired a new scientific meaning in addition to the meaning understood by laymen. The additional entry read "6. Ethnol[ogy]. A division of mankind possessing constant traits, transmissible by descent, sufficient to characterize it as a distinct human type." But the editors themselves continued to use "race" in the popular sense of ethnic group. Thus an Iraq was defined as "[O]ne of the natives of Iraq, chiefly of the Arabic race", and a Hamite was defined as "[a] member of

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[53] V. 6, p. 3852; v. 8, p. 5487.

the chief race of North Africa."[54] Among the definitions of "race" in the other dictionaries published between the turn of the century and 1940, four do not include division of mankind as an alternative meaning, two characterize that meaning as a use peculiar to ethnologists, and only one characterizes that meaning as found common parlance.[55] The editors of all of these dictionaries, moreover, continued themselves to use the word race to refer to ethnic groups.[56]

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[54] Webster (1916), pp. 450, 532; see also id. at 224 (Copt), 472 (Hindu), 510 (Indian), 740 (Persian).

[55] Price (c. 1899), 608 (no such meaning); Chambers (1908) 762(no such meaning); Skeat (1910) 494 (no such meaning); Winston (1919), 502 (an alternative meaning); Weekley (1921), 1190 (no such meaning); Universal (1932), 955 (ethnological term).

[56] See, e.g., Winston (1919) pp. 21, 28, 56, 135, 273, 342, 346, 502.

World War II marks the beginning of a decided shift in the common usage of the term race. Virtually all English dictionaries published after 1940 offer "division of mankind" as a possible meaning of "race", and in most instances this is a popular rather a scientific definition, although the earlier definition of race as "stock", "ancestry", or "ethnic group" remains.[57] Among dictionaries published during the 1940's, references to ethnic groups as "races" continue, but those groups are referred to with equal frequency as

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[57] Thorndike (1941), p. 751 (common meaning); Odham (1946), p. 862 (common meaning); Funk and Wagnalls (1947), p. 964 (common meaning); Thorndike-Barnhart (1955), p. 639 (common meaning); Random House (1966), p. 1184 (ethnology); Webster's (1985), p. 969 (common meaning); but see American College (1947), p. 997 (no such meaning); Origins (1966), p. 546 (no such meaning.

"peoples". The Thorndike Century Senior Dictionary (1941), for example, characterizes Semites, Hindus, Moors, Hamites and Berbers as distinct races, but describes the Jews as a "people", and gypsies as a "group".[58] Among dictionaries printed after 1960, ethnic groups are virtually never referred to by the editors themselves as races,[59] although the dictionaries recognize, within their definitions of "race," that such usage still occurs among the public.[60] This change in usage is

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[58] Pp. 44, 84, 417, 421, 441, 505, 603, 830.

[59] But see Webster's (1963), p. 289 (Copt defined as "an Egyptian of the native race"); Oxford American (1980), p. 617 (Semite defined as "a member of the group of races that includes the Jews and Arabs").

[60] Funk and Wagnalls (1963) p. 1038 (German race); Webster's (1985), p. 969 (continued...)

signaled most clearly in the differences in the definitions found in Webster's Second New International Dictionary, originally published in 1934 and reprinted as late as 1956, and Webster's Third New International Dictionary, first published in 1961. Webster's Second characterizes Arabs, Jews, Anglo-Saxons, Moors, Semites, Hamites, Hindus, and Indians each as distinct races; in Webster's Third the word "people" has been substituted for "race" in every one of those definitions.[61] The editors of

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[60](...continued)
(English race); Webster's (1971), p. 1870 (Anglo Saxon race, Jewish race).

[61] Webster's (1956), pp. 103, 136, 1334, 1591, 2276, 1130, 1180, 1309; Webster's (1971), pp. 84, 108, 1047, 1467, 2065, 1024, 1070, 1193. Webster's Second contains detailed lists of various "races" inhabiting Persia and India, pp. 1263, 1827; no comparable list is included in the subsequent edition. The
(continued...)

Webster's Third note that while the "anthropological and ethnological" definition of race referred to "distinct physical type[s]", such as the "Caucasian", "Malay". and Ethiopian" races, there was also a "popular use" which was applied to any group "because of a common or presumed common past", such as "the Anglo-Saxon race ... the Celtic race ... [and] the Hebrew race." (P. 1870) (emphasis omitted).

The long standing usage of the word "race" to encompass ancestry is reflected in the decisions of this Court. The military commander who in 1942 directed the eviction of the Japanese-Americans from the Pacific coast characterized individuals of Japanese descent as

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[61](...continued)
only ethnic group referred to as a race in Webster's Third is the Copts. P. 588.

belonging to "an enemy race" whose "racial strains are undiluted." Korematsu v. United States, 323 U.S. 214, 236 (1944) (Murphy, J., dissenting). The prosecutors office in Dallas County, Texas, utilized a jury-selection manual that instructed government attorneys, "Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or well educated." Batson v. Kentucky, 90 L.Ed.2d 69, 92 n. 3 (1986) (Marshall, J., concurring). In Near v. Minnesota, 283 U.S. 697 (1931), Chief Justice Hughes described the newspaper whose publication the government sought to restrain as "largely devoted to malicious, scandalous and defamatory articles' concerning . . . the Jewish race." 283 U.S. at 703. See also Hirabayashi v. United States, 320

U.S. 81, 111 (1943) ("Jewish race"); Fong Yue Ting v. United States, 149 U.S. 698, 757 (1893) (Field, J., dissenting) ("Jew[ish] ... race.") The decisions of this Court are replete with references to "the Chinese race." [62]

An American coming of age after 1960[63] doubtless uses and understands the word "race" differently than did his or her parents, or the framers of the Civil Rights Act of 1866. This is certainly a

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[62] E.g. United States v. Wong Kim Ark, 169 U.S. 649, 694, 696, 698 (1897) Fong Yue Ting v. United States, 149 U.S. 698, 717 (1893); Quock Ting v. United States, 140 U.S. 417, 417 (1891).

[63] The framers of the civil rights acts of the 1960's were from a generation familiar with the earlier use of the word "race," and certainly intended the prohibition against "racial" discrimination to be at least as broad as the prohibition contained in the Fourteenth Amendment. Regents of University of California v. Bakke, 438 U.S. 265 (1978); see n. 26, supra.

salutary development. For over a century the popular use of the word race, whether to refer to Arabs or Jews, Indians or Italians, has been a practice freighted with enormous potential for triggering or rationalizing ethnic hatreds.[64] Seventy-five years ago a prescient few objected in vain to the continued designation of such minority groups as separate races. [65] But change was to come only after the atrocities of World War II, the uprooting of the European colonial

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[64]"The theory of racial types was a fateful error which contributed significantly to Europe's imperial arrogance . . . and to the politics that entailed the murder of six million Jews' M. Banton & J. Harwood, The Race Concept, 32 (1975).

[65]Sen. Doc. No. 747, 61st Cong., 3d Sess., pp. 17-20 (1911) (testimony of Union of American Hebrew Congregations). Other early objections are described in A. Montague, The Concept of Race, pp. 15 et. seq. (1964).

empires, and the civil rights movement revealed the danger inherent in such racial designations. [66] Today most Americans avoid characterizing ethnic groups as "races" because such language necessarily carries an offensive implication that the speaker regards the group referred to as in some manner inferior.[67] The gradual substitution of words such as "people", "ancestry" and "ethnic group" in contexts where "race" was once used is an event of sociological as well as etymological significance.

But the language used in 1866 by the men who framed, debated and adopted the Civil Rights Act of that year must be

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[66] Ashley Montague's Man's Most Dangerous Myth: The Fallacy of Race (1942) played a critical role in bringing this popular use of the term into disrepute.

[67] But see infra p. 34 n.19.

understood in the light of the meaning commonly given those words 121 years ago. At that time, to anyone except perhaps to a minority of ethnologists, the word "race" referred to any distinct ethnic group, and racial discrimination meant discrimination on account of such ancestry.

D. The Legislative History of Section 1981

The term "race" was used throughout the debates of 1866 to refer to the ancestry of an individual. In defending the proposal in section 1 of the Civil Rights Act to extend citizenship to all native born Americans, Senator Morrill admonished:

> [A]ll the varieties of the races of the nations of the earth have gathered here. In the early settlements of the country, the Irish, the French, the Swede, the Turk, the Italian, the Moor, and so might

> I enumerate all the races and all the variety of races, came here.[68]

Senator Davis, opposing that citizenship clause, argued that the nation had been founded by and for Europeans, including "the Scandinavian races of the North", rather than "the barbarian races of Asia."[69] Senator Hendricks asserted that American citizenship belonged and should be limited to "the inhabitants of the United States who were descended from the great races of Europe."[70] In other debates in 1866 regarding the Civil Rights Act and related legislation, speakers referred to "the Chinese

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[68]Cong. Globe, 39th Cong., 1st Sess. 570 (1866).

[69]Id. at 499 (emphasis added)

[70]Id. at 2939 (emphasis added).

race",[71] "the Latin races," [72] "the Spanish race",[73] and the "Anglo-Saxon race."[74] President Johnson, in his message vetoing the 1866 Civil Rights Act, characterized "the people called Gypsies" as a race,[75] as did several members of Congress.[76]

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[71] Id. at 498 (remarks of Sen. Cowan), 523 (remarks of Sen. Davis); see also id. at 497 (remarks of Senator Van Winkle) (the "inferior races that are now settling on our pacific coast") (emphasis added), 1269 (remarks of Rep. Kerr.) ("race" of "coolies")

[72] Id. at 238 (remarks of Rep. Kasson)

[73] Id. at 251 (remarks of Sen. Morrill).

[74] Id. at 180 (remarks of Rep. Scofield), 238 (remarks of Rep. Kasson), 291 (remarks of Sen. Nesmith), 209 (remarks of Sen. Stewart), 542 (remarks of Rep. Dawson).

[75] Id. at 1857.

[76] Id. at 1759 (remarks of Sen. Trumbull) (gypsies are within the protections of a presidential order

(continued...)

Members of the thirty-ninth Congress repeatedly equated "white" with "Anglo-Saxon". Senator Stewart admonished, "I believe the Anglo-Saxon race can govern this country . . . . I believe the white man can govern it without the aid of the negro." [77] Representative Dawson argued

> We have, then, to insist upon it that this government was made for the white race . . . . We must make our own laws and shape our own destiny. Negro suffrage will, in its tendency, force down the Anglo-Saxon to the negro level, and result inevitably in amalgamation and deterioration of our race [78].

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[76](...continued)
forbidding discrimination based on "color or caste"), 2891 (remarks of Sen. Cowan), 3215 (remarks of Rep. Niblack)(Civil Rights Act protects gypsies)

[77]Id. at 1120; see also id at 298 (remarks of Sen. Stewart) ("this is a white man's government . . . . we are a race descended from the original Anglo-Saxon stock")

[78]Id at 542.

Senator Nesmith also equated "white" with "Anglo-Saxon".[79]

The 1866 debates do contain a reference to the "Caucasian" race, but the passage makes clear that the speaker understood the term to refer only to individuals of European ancestry. Speaking of past practices in granting American citizenship, Senator Davis asserted:

> The whole material out of which citizens were made . . . was from the European nationalities, from the Caucasian race, if I may use the term . . . . I controvert that a single citizen was ever made by one of the States out of the Chinese race, out of the Hindoos, or out of any other race of people but the

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[79] Id. at 291 ("I still believe that this is a white man's government, framed by white men . . . . [T]he hardy, persevering, industrious, brave, and intelligent Anglo-Saxon race and their descendants. . . are not to be overridden").

Caucasian race of Europe. [80]

Davis' insistence that Hindus were not "Caucasian" makes clear that he was using that word in a manner quite different from do modern ethnologists. Other speakers maintained that not all the natives of Europe itself were "white", arguing, for example, that Basques are not "what we call white men."[81]

Representative Dawson, using the term "race" in a similar manner, insisted that Jews were a race:

> It is the homogeneous races which have controlled the world. The Jew, though without a country and every where the object of prejudice, yet maintains his physical and mental excellence even to this present day; and it is because he intermarries chiefly with his own race.

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[80] Cong. Globe, 39th Cong., 1st Sess., 523 (1866).

[81] Id. at 306 (Rep. Kelley).

Representative Kerr expressly regarded Mexicans just as a distinct race, like blacks and orientals.[82]

Those who supported the adoption of the 1866 Act expressly intended that it would protect from discrimination not only newly freed slaves, but also immigrant groups whose ancestry was or might become the object of popular hostility. In the two decades prior to the Civil War, such hostility had been a major factor in American political life, destroying the old Whig party and at times eclipsing slavery as the dominant national issue. That bigotry, the primary policy of a movement known as Nativism or know Nothingism, was largely directed against two unpopular groups--the Irish immigrants in the northeast,

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[82] Id. at 1268 (emphasis added).

and the German immigrants in the midwest. Nativist groups and individuals circulated a variety of proposals for restricting the rights of these groups, and the flourishing bigotry at times led to bloodshed. One Know Nothing tract described the Germans and Irish as "degenerated races" imbued with "bitter hostility ... for the Anglo-Norman race." These new immigrants, the Know Nothings argued, lacked the intelligence, honesty and democratic principles of native Americans: "It is contrary to the laws of nature for any two people so unlike physically, mentally, morally, socially, and politically to live together under the same jurisdiction.... It is a conflict of races."[83]

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[83] Samuel C. Busey, Immigration: Its Evils and Consequences, pp. 23, 39, 42 (1856).

In 1854 and 1855 the nativist Know Nothing party captured control of the state legislatures in Massachusetts, Maryland, California Connecticut and Indiana, and in 1856 the Know Nothing candidate received 25% of the popular vote in the presidential election.[84] German and Irish immigrants were openly denounced on the halls of Congress.[85] In response, the Republican platform of 1860 expressly denounced the Know Nothing movement, and declared the Republicans "in favor of giving a full and efficient

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[84] See generally Ray Allen Billington, The Protestant Crusade 1800-1860: A Study of the Origins of American Nativism (1963); M. Evangeline Thomas, Nativism in the Old Northwest, 1850-60 (1936); Humphrey J. Desmond, The Know-Nothing Party (1904).

[85] See, e.g. Cong. Globe, 34th Cong., 1st Sess., 1409-14 (1856) (remarks of Sen. Adams).

protection to the rights of all classes of citizens, whether native or naturalized. . . ."[86] German voters played a pivotal role in the election of Lincoln in 1860, and the successful Republican effort to win their ballots was coordinated by Carl Schurz,[87] who six years later played a key role in winning congressional support for the protections embodied in both the Fourteenth Amendment and the 1866 Civil Rights Act.[88]

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[86]Franklin L. Burdette, The Republican Party: A Short History, 149 (2d ed. 1972)

[87]Thomas, supra n. 84, 239.

[88]Joseph B. James, The Framing of the Fourteenth Amendment, 11, 17-19, 51 (1908); Memphis v. Greene, 451 U.S. 100, 131 n. 4, 132 (1981) (White, J., concurring). Schurz's report on the condition of blacks in the south was repeatedly referred to during the 1866 debates. See, e.g., Cong. Globe, 39th Cong., 1st Sess., App. 58 (remarks of Rep. Julian), 589 (remarks of Rep. Donnelly), 2083 (remarks of Rep. Perham).

This history of hostility towards German and Irish immigrants was one of the express concerns of the framers of the 1866 Civil Rights Act. Senator Shellabarger explained that the Act was intended to prohibit the states from engaging in the type of discrimination favored by the infamous Know Nothings. Section 1 of the Act, he urged, would if adopted defeat any attempt

> to deprive races and the members thereof as such of the rights enumerated in this act. . . .
>
> Who will say that Ohio can pass a law enacting that no man of the <u>German race</u> . . . shall ever own any property in Ohio, or shall ever make a contract in Ohio, or even inherit property in Ohio, or ever come into Ohio to live, or even to work? If Ohio may pass such a law, and exclude a German citizen, . . . because he is of the <u>German nationality or race</u>, then may every other State do

so.[89]

Representative Lawrence was equally unequivocal in his explanation that the Civil Rights Act was necessary to prohibit enactment of the discriminatory schemes of the Know Nothings:

> If the people of a state should become hostile to a large class of naturalized citizens and should enact laws to prohibit them and no other citizens from making contracts, from suing, from giving evidence, from inheriting, buying, holding, or selling property, or even from coming into the State, that would be . . . a denial of justice.
>
> Yet twelve years have not passed since these and other hostile measures against naturalized citizens were gravely discussed in several of the States...[90]

In urging adoption of the Fourteenth

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[89]Cong. Globe, 39th Cong., 1st Sess., 1294 (emphasis added).

[90]Id. at 1833.

Amendment, Representative Ashley analogized southern treatment of the freed men to the plight of unpopular immigrants "in the days of Know Nothingism"[91].

The virtually universal use of the term "race" in 1866 to refer to distinct ethnic groups is sufficient by itself to compel the conclusion that the "racial" discrimination forbidden by section 1981 is discrimination on the basis of ancestry. The Civil Rights Act of that year was framed by mid-nineteenth century lay men, not by late twentieth century ethnologists. The opponents of the Act expressly denounced as inferior "races" a variety of ethnic groups whom a modern anthropologists might categorize as Caucasian. Those who voted for the Civil

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[91] Id. at 2882.

Rights Act did so to protect, not only blacks, orientals, and Indians, but any ethnic group which, like blacks in the past, might in subsequent years be characterized as "inferior in mental caliber and lacking ... poise of character."[92]

The members of the Thirty-ninth Congress knew from the schemes of the infamous Know Nothings that the bigotry and abuses then being directed at blacks could with equal vehemence be inflicted on any ethnic group which did not happen to be Anglo-Saxon. Congress clearly intended to protect not only the particular ethnic groups that had been attacked by the Know Nothings, but also future immigrants who might be the

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[92] Id. at 177 (remarks of Rep. Boyer).

targets of similar hostility. As Representative Lawrence explained, in a speech given on the very day the House overrode President Johnson's veto and made the civil rights bill law:

> This bill, in that broad and comprehensive philanthropy which regards all men in their civil rights as equal before the law, is not made for any class or creed, or race or color, but in the great future that awaits us will, if it becomes a law, protect every citizen, including the millions of people of foreign birth who will flock to our shores to become citizens and to find here a land of liberty and law.[93]

In the decades since the Civil War the intolerance once directed at the Germans and the Irish has been focused on immigrants of other ancestries, Italian, Greek, Japanese, Chinese, Mexican-American, Puerto Rican, Jewish and Arab.

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[93] Id. at 1833.

In some instances events abroad have stirred up animosity towards groups that had long thought themselves fully accepted by their fellow Americans. The 1866 Civil Rights Act, remains, as it was intended to be, an essential charter of justice and equality for all Americans, the descendants of those who fled to our shores seeking to escape the hatreds and strife of the Old World, as well as the descendants of those who came here in chains, prisoners of the slave system that ended only with the victory of the Union army.

E. The Difficulties Inherent in Respondents' Proposed Construction of Section 1981

(1) The Definition of "Caucasian"

Petitioners urge that section 1981 permits discrimination on the basis of ancestry so long as both the victimized

group and the preferred group are "Caucasian". The federal courts, in order to administer such a distinction, would necessarily be required to establish and apply some official definition of "Caucasian", so that the racial identity of the various affected groups could be determined. The term Caucasian, however, unlike, for example, the word carbon, does not have among either the public or ethnologists a clear and unvarying meaning.

There was certainly no consensus in the mid-nineteenth century as to the definition of "Caucasian". One prominent authority, writing in 1854, commented, "What is meant by the word 'Caucasian?' Almost every ethnologist would give a

different reply."[94] The state of ethnology when the 1866 Civil Rights Act was adopted was depicted in detail in the New American Cyclopaedia of 1858. The Cyclopaedia set forth a summary of "the most important and generally accepted" racial classification systems, describing 24 different systems, based variously on complexion, hair, facial angle, skull volume, skull length, skull shape, and area of presumed origin. Half of these systems refer to the existence of a "Caucasian" race, but the definitions vary radically, and in a majority of the systems Arabs and Jews are not classified as Caucasian at all.[95] The editors of

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[94]Samuel George Morton, Types of Mankind, p.88 (1854) (emphasis omitted).

[95] See, e.g., v. 8, p. 307 (Fisher distinguishes homo Caucasicus from homo Arabicus), 307 (according to Desmoulins

(continued...)

the Cyclopaedia denounced the whole idea of a "Caucasian" race as "incorrect and inconvenient. (V. 8, pp. 306-11).

Today the term "Caucasian" is generally identified with the system proposed in 1790 by the German naturalist I. F. Blumenbach. The groups designated as Caucasian by Blumenbach, however, differ substantially from the views of

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[95](...continued)
the Caucasian race is one of several races falling within the "Japetic stock;" the North African, Syrian and Adamic races belong instead to the "Arabian stock"), 308 (Martin distinguishes several separate nations in the Asiatic branch of the Japetic stock, including the Caucasic nation and the Semitic nation), 308-09 (according to Prichard the Caucasians, now found in Russia, are members of the ancient Allophylian race, as distinguished from the three modern races; among the modern races the Arabs and Jews belong to the Semitic or Syro-Arabian race, rather than the Indo-European or Aryan race), 310 (according to S.G. Morton the Caucasians are one branch of the Semitic species, whereas the Arabian tribes belong to the Ishmaelitic species).

subsequent ethnologists. On the Indian subcontinent, for example, Blumenbach expressly classified as Mongolian rather than Caucasian all inhabitants east of the Ganges, an area that includes all of Bangladesh and a significant portion of India. As for the rest of India, Blumenbach explained that "the Hindoos may be considered as a subdivision or secondary Race, distinct from the Caucasian." No subsequent ethnologist treats Asian Indians in this manner. Within Russia Blumenbach classified as Mongolian all inhabitants east of the Ob river, a region that coincides roughly with the region now known as Siberia. The population of this area, however, is overwhelmingly Russian, Tatar and

Finnish.[96] In addition to the Ganges and the Ob, Blumenbach also delineated as the Caspian Sea as marking the eastern boundary of the Caucasian race, but the Caspian Sea lies approximately 2000 miles to the west of the Ganges and the Ob. How Blumenbach proposed to treat natives of the region west of the Ob and Ganges, but east of the western shore of the Caspian Sea, is entirely unclear; a significant portion of respondent's native Iraq is not, to use Blumenbach's definition of Caucasian "on this side ... [of] the Caspian Sea."[97]

Early in this century this Court commented that "[t]he various authorities are in irreconcilable disagreement as to

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[96] Encyclopaedia Britannica, v. 20, pp. 599-600 (1963).

[97] A Manual of the Elements of Natural History, pp.36-38 (London 1825).

what constitutes a proper racial division." United States v. Thind, 261 U.S. at 211-12 (1923). Any consensus of that era soon shifted. The 1910 Encyclopedia Britannica, for example, classified as orientals the Finns, Lapps, and Turks, but characterized as Caucasian the Indonesians, the Hawaiians, and the Ainus of Japan. (V. 9, p. 850). The 1986 Encyclopedia Britannica, on the other hand, transferred the Finns, Lapps and Turks into the Caucasian race, placed the Indonesians and Hawaiians in a new group denoted "Malay-Australoid-Oceanic," and described as still unresolved the appropriate classification of the Ainus. (V. 18, pp. 973, 976-77). The classification of Turks is of particular importance, since the Turks for centuries ruled much of the Arab world, and some

Arabs undoubtedly are in part of Turkish ancestry.

Acceptance of petitioners' proposed distinction between Caucasians and non-Caucasians would require this Court to promulgate an official judicial system of racial classification, delineating which ethnic groups fall into which category. Utilization of Blumenbach's original system however, would be at odds with the views of virtually all subsequent ethnologists. It seems equally inconceivable, on the other hand, that the protections of section 1981 are to expand and contract with the substantial changes in ethnological thinking that have occurred since 1866, and that might indeed occur in the future.[98] Half a

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[98] With regard to Asian Indians, for example, the Encyclopedia Britannica (continued...)

century ago this Court observed that the delineation of the members of a so-called Caucasian race was "the most debatable field in the whole range of anthropological studies", and that to arrange the peoples of mankind into such sharply bounded divisions is an undertaking of such uncertainty "that common agreement is practically impossible." United States v. Thind, 261 U.S. 204, 211 n.4, 212. The only peoples whom all authorities have agreed are Caucasian are the original inhabitants of Western Europe, a group of which respondent, of course, is not a member.

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[98](...continued)
notes "It is possible that the inhabitants of India will prove to belong to an Asiatic subrace, or even a separate race, serologically, but information is still lacking." V. 2, p. 52 (1963).

Petitioners apparently urge this Court to hold that Arabs as a group are Caucasian, and thus outside the protections of section 1981 (Pet. Br. 29). But even under petitioners' view of section 1981, a significant number of Arab-Americans would in fact be protected by that statute. The Arabs of the Sudan, like the Jews of Ethiopia, are black. Arabs of mixed or primarily black ancestry are frequently found in the southern portions of Morocco, Algeria, Libya, and Egypt. Among Asian Arabs, there is a significant amount of oriental ancestry. Respondents' native Iraq, for example, was occupied and ruled by the Mongols from 1258 to 1508. Subsequently the Turks, who until recently were classified as non-Caucasian, occupied Iraq from 1534 up to

1917.[99] Similarly, although petitioners appear to maintain that all Mexican-Americans are "white," and thus outside the scope of section 1981, many Mexican-Americans are in fact of Indian ancestry[100]

Petitioners seem to contend that these problems can be overcome simply by asking a complainant to declare whether he regards himself as Caucasian; indeed that contention seems to be the core of petitioners' argument. (Pet. Br. 9-10, 18, 36). But whether respondent is "Caucasian" within petitioners' proposed construction of section 1981 would turn on the legal definition of Caucasian, of which respondent could not have been

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[99] Encyclopedia Britannica, v. 21, p. 943 (1988).

[100] Encyclopedia Britannica, v. 15, p. 387 (1963).

aware, and on the race of respondent's possibly remote ancestors, which respondent did not purport to describe. The fact that respondent chooses to regard himself as Caucasian is of no obvious relevance. Homer Plessy expressly insisted that because he appeared to be white and had "the reputation of belonging to the dominant race" he was entitled to be treated as white, Plessy v. Ferguson, 163 U.S. 537, 542, 549 (1896); neither the majority nor the dissent in Plessy thought Plessy's self-image to be of any legal relevance.

(2) Discrimination on the Basis of Color

In McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976), this Court held that section 1981 prohibits discrimination on the basis of color as well as discrimination on the

basis of race. 427 U.S. at 287-95. Section 1981 clearly forbids an employer to discriminate on account of color even among individuals of the same race, and petitioners do not suggest otherwise. Petitioners urge only that the complaint and related pleadings cannot fairly be read as alleging discrimination on the basis of color, an issue not addressed by the lower courts.[101]

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[101]The district court observed that "The thrust of plaintiff's claim, namely, that he was denied tenure by St. Francis College because he is an Arabian born in Iraq, is clear to all concerned." (Pet. App. 7(a). In an affidavit filed in opposition to petitioners' motion for summary judgment, respondent asserted "I, with others of Arab ancestry, have darker skin color than those customarily referred to as Caucasian". (J. App. 89-90). Respondent can reasonably be understood to have contended in the district court that respondents discriminated against Arabs because of their color. The existence of that contention, we believe, provides an alternative ground for affirmance.

If, as McDonald holds, section 1981 prohibits discrimination on the basis of color, there would be little sense to petitioner's constricted reading of the statutory prohibition against racial discrimination. Most Arabs, like most Asian Indians, are of a decidedly darker complexion than most Europeans.[102] If St. Francis college discriminated against Arabs as a group because of their color, that would clearly violate section 1981, and entitle any injured Arab to relief. The difference between discriminating against Arabs because of their color, a practice undeniably forbidden by section 1981, and discriminating against Arabs

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[102] This Court commented in United States v. Thind that "The Arabs and Swedes ... are scarcely less different than the Americans and Malays, who are set down as two distinct races." 261 U.S. at 211 n.4.

because of their ancestry, which petitioners urge to be legal, is elusive at best.

As a practical matter, many of the "Caucasian" groups that have been the most frequent victims of discrimination are, like Arabs, generally characterized by a complexion darker than Americans of European ancestry. Most of the section 1981 ancestry cases have been brought by plaintiffs who would have been classified as non-white under Thind and Morrison.[103] For those who regard a dark

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[103] See, e.g., Shah v. Mt. Zion Hospital, 642 F.2d 268 (9th Cir. 1981) (Asian Indian); Shah v. Halliburton, 627 F.2d 1055 (10th Cir. 1980) (Asian Indian); Sethy v. Alameda County Water Dist., 545 F.2d 1157 (9th Cir. 1986) (Asian Indian); Rajender v. University of Minnesota, 24 F.E.P. Cas. 1051 (D. Minn. 1979) (Asian Indian); Anandam v. Fort Wayne Community Schools, 19 F.E.P. Cas. 773 (N.D. Ind. 1978) (Asian Indian); Jawa v. Fayetteville State University, 426

(continued...)

complexion as a sign of racial inferiority, the difference between discrimination on the basis of race and discrimination on the basis of color would be meaningless.

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[103](...continued) F.Supp. 218 (E.D.N.C. 1976) (Asian Indian); Sud v. Import Motors Limited, Inc., 379 F. Supp. 1064 (W.D. Mich. 1974) (Asian Indians); Naraine v. Western Electric Co., 507 F.2d 590 (8th Cir. 1974) (Asian Indian); Banker v. Time Chemical, Inc., 579 F. Supp. 1183 (N.D. Ill. 1903) (Asian Indian) Barvah v. Young, 536 F. Supp. 356 (D.Md. 1982) (Asian Indian); Khawaja v. Wyatt, 494 F. Supp. 302 (W.D.N.Y. 1980) (Pakistani); Tayyari v. New Mexico State University, 495 F. Supp. 1365 (D.N.M. 1980) (Iranian); Abdulrahim v. Gene B. Glick Co., 612 F. Supp. 256 (C.D. Ind. 1985) (Syrian); Annoya v. Hilton Hotels Corp., 733 F.2d 48 (7th Cir. 1984) (Iraqi); Alizadeh v. Safeway Stores, Inc., 41 F.E.P. Cas. 1556 (5th Cir. 1986) (Iranian); Ibrahim v. New York Dept. of Health, 581 F. Supp. 228 (E.D.N.Y. 1984) (Egyptian); Saad v. Burns International Security Services, 456 F. Supp. 33. (C.D. 1978) ("Arabian") Gonzalez v. Stanford Applied Engineering, 597 F.2d 1298 (9th Cir. 1979) (Mexican American).

III. THE THIRD CIRCUIT CORRECTLY REFUSED TO GIVE RETROSPECTIVE EFFECT TO ITS DECISION IN GOODMAN v. LUKENS STEEL

Two years ago this Court held in Wilson v. Garcia, 85 L.Ed.2d 254 (1985), that the limitations period for a section 1983 action should be the period established by state law for an action for damages for personal injuries. The rule in Wilson was adopted for the avowed purpose of overturning the quite different standard that had been applied by the lower federal courts prior to 1985. The majority opinion in Wilson expressly denounced the approach of most circuit courts, 85 L.Ed.2d at 264-65 and nn. 25, 32, 33, and did not dispute Justice O'Connor's observation that the Wilson rule overruled decisions in almost every circuit and "leaves behind a century of precedent." 85 L.Ed.2d at

220-71 (dissenting opinion). Although Wilson was intended to reduce in the long term both litigation and uncertainty, the immediate impact of that decision was to create turmoil in the large number of section 1983 cases that had been filed at a time when most circuits applied limitations rules different than that contemplated by Wilson. See Mulligan v. Hazard, 54 U.S.L.W. 3808 (1986) (White, J., dissenting from denial of certiorari).

The instant action arises under section 1981, not section 1983. The decision in Wilson was grounded on the legislative history of the Civil Rights Act of 1871, from which section 1983 derives, not on the rather different concerns underlying the Civil Rights Act of 1866, from which section 1981 is

taken. 85 L.Ed.2d at 266-68. Despite that difference, the third circuit has held that the Wilson rule should be applied to section 1981 actions, thus shortening the limitations period in Pennsylvania federal courts from six years to two. Goodman v. Lukens Steel Co., 777 F.2d 113 (3d Cir. 1985). This Court subsequently granted certiorari in Goodman to decide whether this extension of Wilson to section 1981 cases was correct. (No. 85-1626). We agree with the view advanced by the petitioners in Goodman that six years is the appropriate period of limitations period for a section 1981 action in Pennsylvania. Should this Court hold otherwise, however, we urge that Goodman should not be applied retroactively to the instant case.

(1) Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), directs that three factors be considered in evaluating whether a judicial decision should be applied retroactively: (1) whether that decision "overrul[ed] clear past precedent on which litigants may have relied ... or ... decid[ed] an issue of first impression whose resolution was not clearly foreshadowed"; (2) whether retrospective operation will further or retard the purpose of the rule established by that decision, and (3) whether retroactive application "could produce substantial inequitable results." 404 U.S. at 106-07. The interpretation of these principles is of considerable importance, for they affect the outcome not only of civil litigation, such as the instant case, but also of criminal

proceedings as well. See 404 U.S. at 106. In a civil proceeding, whether or not a decision is applied retrospectively may affect whether a particular action may be time barred, as well as the amount of back pay which may be awarded.

Notwithstanding the ongoing disputes about how to apply these principles to the decision in Wilson v. Garcia, the circuit courts have readily arrived at a consensus on several issues. All the circuit courts to reach the question agree that Wilson should be applied retrospectively where it has the effect of lengthening the applicable limitations period.[104] The decision in Wilson itself

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[104] Bartholomew v. Fischl, 782 F.2d 1148, 1155-56 (3d Cir. 1986); Jones v. Shankland, 800 F.2d 77, 80 (6th Cir. 1986); Farmer v. Cook 782 F.2d 780, 780-81 (8th Cir. 1986); Jones v. Preuit & Maudlin, 763 F.2d 1250 (11th Cir. 1985); (continued...)

arguably constituted just such a retroactive application; Wilson applied a three year limitation period to section 1983 actions arising in New Mexico, despite the fact that prior state decisions had utilized a two year rule.[105] In states where Wilson had the effect of lengthening the limitations period, retrospective application is clearly appropriate under Chevron. Since it is the plaintiff who decides when a civil action will be filed, plaintiffs often if not ordinarily rely on the limitations rule in effect at a given

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[104](...continued)
Rivera v. Green 775 F.2d 1381, 1383-84 (9th Cir. 1985); Marks v. Parra, 785 F.2d 1419, 1419-20 (9th Cir. 1986).

[105] DeVargas v. New Mexico, 97 N.M. 563, 642 P.2d 166 (1982). There was also tenth circuit precedent supporting the shorter limitations period. Zuniga v. AMFAC Foods, Inc., 580 F.2d 380 (10th Cir. 1978).

time. A defendant, on the other hand, is primarily if not exclusively concerned with the substantive commands of a statute; once an arguable violation has occurred, a defendant rarely takes actions that might be affected by knowledge of the relevant limitations period. None of the defendants in the post-Wilson litigation appear to have asserted that they relied in any way on the pre-Wilson caselaw.[106]

The circuit courts are similarly in agreement that Wilson should not be applied retroactively where Wilson had the effect of overturning a clearly established circuit rule, on which a plaintiff might have relied, establishing a longer period of limitations. A number

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[106] See Bartholomew v. Fischl, 782 F.2d at 1148.

of decisions, including the third circuit decision in the instant case, have refused for this reason to give Wilson retroactive effect.[107] Significantly, even the appellate decisions that have applied Wilson retroactively to dismiss a complaint have insisted that such retroactive application would have been inappropriate had the plaintiff had a stronger claim of reliance on pre-Wilson case law.[108] In Wilson itself this Court quoted with apparent approval the tenth circuit's decision that that circuit's

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[107] Anton v. Lehpamer, 787 F.2d 1141, 1142-46 (7th Cir. 1986); Ridgway v. Wapello County, Iowa, 795 F.2d 646, 647-48 (8th Cir. 1986); Gibson v. United States, 781 F.2d 1334, 1339-40 (9th Cir. 1986); Jones v. Bechtel, 788 F.2d 571, 573-74 (9th Cir. 1986); Jackson v. City of Bloomfield, 731 F.2d 652, 653-55 (10th Cir. 1984).

[108] Smith v. Pittsburgh, 764 F.2d 188, 195 (3d Cir. 1985); Wycoff v. Menke, 773 F.2d 983, 986-87 (8th Cir. 1985).

decision in Wilson "would not be applied retroactively to bar 'plaintiffs' right to their day in court when their action was timely under the law in effect at the time their suit was commenced.'" Wilson v. Garcia, 85 L.Ed.2d at 260 n. 10, quoting Jackson v. City of Bloomfield, 731 F.2d 652, 655 (10th Cir. 1984).

In applying this principle the courts of appeals have correctly looked to the state of the law in the particular circuit in which the action at issue arose. Chevron itself mandated precisely such an inquiry into the law of each circuit. The decision denied retroactive application in Chevron, this Court explained,

> overruled a long line of decisions by the Court of Appeals for the Fifth Circuit.... When the respondent was injured ... these Court of Appeals decisions represented the law governing his

> case. It cannot be assumed that he ... could foresee that this consistent interpretation would be overturned. The most he could do was to rely on the law as it then was. 404 U.S. at 107.

This Court has also looked to the law of each circuit in determining whether a government official should have known that his or her conduct was unconstitutional. Procunier v. Navarette, 434 U.S. 555, 563-65 (1978).

In the instant case, however, petitioners assert that reliance on circuit caselaw is never warranted, since there is always a possibility that this Court will overturn such a precedent. That argument ignores not only the holding to the contrary in Chevron and Procunier, but also the manner in which this Court exercises its discretionary jurisdiction. Most issues decided by the appellate courts are not accepted for

further review by this Court; for most litigants, and most issues, the law of the circuit is the law that will govern. Prior to granting certiorari in Garcia this Court had repeatedly refused to review appellate decisions regarding which state limitations rule should be applied in a section 1983 action.[109]

(2) Although the possible retroactive application of Wilson may in other contexts present difficult issues, the instant case is a relatively clear one. Under Wilson the appropriate period of limitations for a section 1983 action arising in Pennsylvania is now two years. (Pet. App., 13a). Petitioners urged that this two year rule should be extended to

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[109] This Court denied certiorari in at least eight such cases between 1979 and 1982 alone. See Garcia v. Wilson, 731 F.2d at 642-48.

section 1981 claims, and should be applied retroactively to claims arising in 1978, some seven years before Wilson was decided.

The panel below, however, noted that the third circuit, "from at least 1977 until 1985, had applied Pennsylvania's six-year statute of limitations in discrimination cases brought under Section 1981." (Pet. App. 13a).[110] After 1977, the panel observed, "a potential plaintiff ... could be fairly confident that a federal court in this Circuit would apply Pennsylvania's six-year statute of limitations to his or her section 1981 claim." (Pet. App. 15a). Because the law after 1978 was

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[110] The district court also noted that the third circuit had "uniformly concluded" that the six year limitation period applied to § 1981. (Pet. App. 58a).

"absolutely clear," the court below reasoned, respondent "could reasonably have relied upon them when deciding to delay filing his Section 1981 claim." (Pet. App. 16a). The third circuit thus concluded that retroactive application of Wilson and Goodman would be inappropriate in the instant case.

Petitioners urge, first, that the third circuit misread its own decisions when it held that the applicability of the six-year limitation period was well established by 1977 or 1978. (Pet. App. 50-53). A circuit court's reading of its own past decisions, however, is entitled to considerable deference. Such deference is particularly appropriate here, since Judge Adams, who joined the decision below, had also sat on the panels which decided several of the

earlier third circuit cases relied on.[111] In the instant case the appellate panel's reading of prior third circuit caselaw was clearly correct. Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894, 902 (3d Cir. 1977) held that a six year limitation rule would apply to a section 1981 claim in which a plaintiff alleged "the denial of his right to lawfully pursue his ... employment." 559 F.2d at 902. Davis v. United States Steel Supply, 581 F.2d 333 (3d Cir. 1978), again applied that six year limitation period, reasoning that a claim of racial discrimination in employment was analogous to wrongful interference with economic rights or interests, a tort

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[111] Davis v. United States Steel Supply, 581 F.2d 335 (3d Cir. 1978) and Meyers v. Pennypack Woods Home Ownership Ass'n., 559 F.2d 894 (3d Cir. 1977).

governed by the six-year rule under Pennsylvania law, rather than to a claim for assault, which state law required be filed within two years. 581 F.2d at 3338-39. See also Skehan v. Board of Trustees of Bloomsburg State College, 590 F.2d 470, 476-77 (3d Cir. 1978); Liotta v. National Forge Co., 629 F.2d 903, 906 (3d Cir. 1980), cert. denied, 451 U.S. 970 (1981).

Petitioners urge, in the alternative, that the third circuit decisions in Mayers, Davis, Skehan and Liotta were all vitiated as precedent by certain 1978 amendments to the Pennsylvania statutes. (Pet. Br. 52-53). The new Pennsylvania statute, like that which preceded it, provides a six-year limitations period for wrongful interference with an employment relation,

as well as for most contract actions. (Pet. App. 60-65). Even after the 1978 statute became effective, the third circuit continued to apply the six-year limitations rule to federal civil rights actions alleging unlawful denial of employment. Fitzgerald v. Larson, 741 F.2d 32, 35 (3d Cir. 1984) vacated and remanded in light of Wilson v. Garcia, 85 L.Ed.2d 424 (1985). Both the district court and the court of appeals in the instant case concluded that the minor changes made by the 1978 amendments were insufficient to render unreasonable further reliance on third circuit caselaw.[112]

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[112] Smith v. City of Pittsburgh, 764 F.2d 188, 195 n. 3 (3d Cir. 1985), suggests only that the decisions in Davis and Skehan, recognizing a six-year limitations rule where a plaintiff challenges the legality of the

(continued...)

Respondent is not a plaintiff who has slept on his rights, but a complainant whose efforts to receive a hearing have been repeatedly frustrated by changes in the law. In September 1978, well within the limitations period established by Title VII, respondent attempted to file a discrimination complaint with the Pennsylvania Human Relations Commission (PHRC). Although respondent submitted to PHRC written documents in support of this claim, PHRC refused to "docket" the complaint, explaining that "notification of impending termination at some future date was considered insufficient reason to

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[112](...continued)
substantive basis for his dismissal or other treatment, may be of lesser significance in determining the applicable limitations period where a plaintiff alleges only that he or she was dismissed without procedural due process.

docket the charge or to proceed with the investigation." (Pet. App. 4a). PHRC instructed respondent that he could not file a charge based on the decision denying tenure, and directed him to do so only after "he had worked his last day at St. Francis College." (Id.) Respondent ended his employment at St. Francis on May 26, 1979, and filed a complaint with PHRC 27 days later. (Id.) PHRC subsequently reversed its filing rule, and dismissed respondent's complaint as untimely. Respondent then sought a right to sue letter from EEOC, and brought suit 85 days after receipt of that letter. The Third Circuit, applying retroactively Ricks v. Delaware State College, 449 U.S. 250 (1980), held that respondent's Title VII claim was barred because respondent had not succeeded in

filing an administrative complaint in 1978. (Pet. App. 9a-11a). The court of appeals also concluded, correctly in our view, that it would be unduly harsh to also apply retroactively both Wilson and Goodman, and thus deny respondent any hearing on the merits of his section 1981 claim. (Pet. App. 17a-18a).

(3) The primary source of controversy regarding the retroactivity of Wilson concerns whether that decision should be given retrospective effect where the circuit court decision overturned by Wilson had itself been decided only after the action at issue was filed. In Goodman v. Lukens Steel Co., for example, the complaint was filed in 1973, but the third circuit decisions establishing a six-year limitations period were not issued until 1977. That

problem has occurred in several circuits, and could theoretically arise in any circuit depending on the date on which a given action was commenced.

Although the situation that arose in Goodman presents a close case, we believe retroactivity would be inappropriate in such circumstances. Ordinarily a federal litigant must look to the law within his circuit to establish the rules that will govern his or her case; in some instances the law may already be "absolutely clear," but in others counsel will have to use a certain amount of judgment to ascertain how his or her case will be affected by existing circuit precedent. Where, as occurred in Goodman, counsel for plaintiffs correctly concluded that third circuit precedent, read in conjunction with state law, would result

in a six- year limitations period in that circuit, it would seem peculiar to penalize a party for relying on a legal judgment which, with regard to the law of that circuit, proved absolutely correct.

More importantly, Wilson's expressed goal of minimizing uncertainty and litigation can best be met by denying retroactive application in a situation like Goodman. Although Wilson overruled existing precedent in most federal circuits, many of those appellate opinions had only been issued within the last 15 years. If Wilson is applied retroactively to cases arising prior to the relevant circuit precedent, older cases will be subject to dismissal because of Wilson, while more recently filed cases in the same circuit will not. Applied in this way Wilson would result

in a lack of uniformity within a single circuit; such a divergence in the treatment of older and more recent cases has already emerged within several circuits.[113]

(4) Should this Court extend Wilson to actions arising under section 1981, and hold that that rule should be applied retroactively in Pennsylvania, this case should be remanded for further

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[113] Compare Goodman v. Lukens Steel Co., 777 F.2d at 120 (3d Cir. 1985) (Wilson applied retroactively to action filed in 1973, prior to 1977 decision establishing longer limitations period), with Pet. App. 15a-16a (Wilson not applied retroactively to action filed in 1980, after 1977 decisions establishing longer period of limitations); compare Wycoff v. Menke, 773 F.2d 983, 984-85 (8th Cir. 1985) (Wilson applied retroactively to action filed in 1981, prior to 1982 decision establishing longer period of limitations), with Ridgway v. Wopello County, Iowa, 795 F.2d 646, 647-49 (8th Cir. 1986) (Wilson not applied retroactively to action filed in 1983, after 1982 decision establishing longer period of limitations).

consideration regarding whether the complaint was nonetheless timely filed. Both in the district court[114] and in the court of appeals[115] we urged that petitioners were estopped from asserting the limitations defense because the President of St. Francis College, as well as the chairman of respondent's department, had admonished respondent throughout 1978 to "do nothing" until there was "a final decision" on his still pending application for tenure. (Pet. App. 3a). Such an admonition, if it occurred, would distinguish this case from Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229, 234-35 (1976),

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[114] Plaintiff's Brief in Opposition to Motion for Summary Judgment, pp. 17-18.

[115] Brief for Appellant, No. 80-1550 (3d Cir.), pp. 23-24.

in which "all parties ... understood" that the initial termination order was the employer's "final decision", and from Delaware State College v. Ricks, 449 U.S. 250, 261 (1980), where a final decision was merely the subject of a collateral grievance proceeding. If the asserted statements were in fact made in the instant case by college officials, the limitation period would begin to run no sooner than February 6, 1979, rather than February 23, 1978, and would thus fall within two years of the date in October 1980 when the complaint was filed.

In the proceedings below, however, petitioners apparently denied that the College President and department chairman had indeed requested respondent to defer any action while his tenure application remained under consideration by the

faculty senate, the faculty affairs committee, and the tenure committee, or that those officials had represented that the college had not yet made a final decision.[116] The lower courts did not resolve this dispute, since both believed that a six year limitation period should apply in this case.[117] Accordingly, if

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[116] Brief for Appellees, No. 80-1550 (3d Cir.), p. 23 n. 9 ("appellees do not waive the right to factually and legally dispute and contest the accuracy and admissibility of the statements or conclusions therein.")

[117] The Title VII claim was held untimely by Judge Ziegler in 1981 (Pet. App. 50-55a); in 1985 the section 1981 claim was dismissed by Judge Mencer for failure to state a claim on which relief could be granted. (Pet. App. 44a-45a). Although the estoppel claim was clearly raised when the section 1981 claim was considered by Judge Mencer, the court of appeals held that respondent could not rely on estoppel to save his Title VII claim because that argument had not been raised four years earlier when Judge Ziegler was considering the timeliness of the Title VII count. (Pet. App. 10a n. 7).

this Court concludes that a two year limitation rule should be applied, the case should be remanded for a determination regarding the substance of the disputed representations.

CONCLUSION

For the above reasons the judgment and opinion of the third circuit should be affirmed.

Respectfully submitted,

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