Intra-Racial, Color-Based Discrimination and the Need for Theoretical Consistency after Walker v. Internal Revenue Service

Sandi J. Robson
1990]

INTRA-RACIAL, COLOR-BASED DISCRIMINATION AND THE NEED FOR THEORETICAL CONSISTENCY AFTER
WALKER V. INTERNAL REVENUE SERVICE

I. INTRODUCTION

Our nation’s courts have struggled for years with the interpretation of Title VII of the Civil Rights Act of 1964 (Title VII)\(^1\) and 42 U.S.C. § 1981 (section 1981),\(^2\) two federal civil rights statutes that provide remedies for both public and private acts of discrimination. Title VII makes it unlawful for an employer to engage in certain discriminatory employment practices which are motivated by an individual’s race, color, religion, sex or national origin.\(^3\) Section 1981, derived from the Civil Rights Acts of 1866 and 1870, provides a means of redress for those individuals who have been denied certain rights “enjoyed by white citizens.”\(^4\) The combined scope of these two federal statutes provides broad protection against many forms of discrimination.\(^5\) The difficulty in the interpretation of these two statutes has arisen from the vague wording of section 1981 and from judicial confusion as to the intent of the drafters in enacting Title VII.\(^6\)

---

2. Id. § 1981.
3. Id. §§ 2000e-2000e-17. Title VII of the Civil Rights Act of 1964 provides in pertinent part:
   (a) Employer Practices.
       It shall be an unlawful employment practice for an employer-
       (1) to fail or refuse to hire or to discharge any individual, or oth-
       erwise to discriminate against any individual with respect to his com-
       pensation, terms, conditions, or privileges of employment, because of
       such individual’s race, color, religion, sex, or national origin

4. Id. § 1981. Section 1981 had its origins in the Civil Rights Act of 1866
   and was later reenacted in 1870 after the adoption of the fourteenth amend-
   ment. C. ANTEAU, FEDERAL CIVIL RIGHTS ACTS § 19 (2d ed. 1980). Section
   1981 provides:
   All persons within the jurisdiction of the United States shall have
   the same right in every State and Territory to make and enforce con-
   tracts, to sue, be parties, give evidence, and to the full and equal benefit
   of all laws and proceedings for the security of persons and property as
   is enjoyed by white citizens, and shall be subject to like punishment,
   pains, penalties, taxes, licenses, and exactions of every kind, and to no
   other.

5. See generally C. ANTEAU, supra note 4.

6. This difficulty can be seen when one compares the various decisions ren-
   ded by different courts on the same § 1981 or Title VII issue. Compare Brown
   v. General Servs. Admin., 425 U.S. 820, 835 (1976) (Title VII establishes exclu-
   sive remedy for employment discrimination directed against federal employee)
Recently, the emergence of a new form of discrimination has sorely tested the limits of these two civil rights statutes and has become a persistent quandary for the nation’s courts. It has been termed intra-racial, color-based discrimination, and it involves discrimination by a member of one race against a member of the same race because of a difference in skin color between the two. It is an atypical form of discrimination, one that was likely never contemplated by the drafters of the civil rights statutes. Generally, such claims of discrimination have failed under a section 1981 analysis because that statute traditionally has been available only for claims of discrimination based on race, and not color. The same result has occurred under Title VII as well because, although the statute specifically refers to “color” discrimination as a prohibited activity, it has generally been applied only to cases of discrimination by an individual of one color directed at an individual of another color, where the two are also members of different races. Yet, litigants have continually sought out these two statutes to remedy intra-racial, color-based discrimination even after a series of decisions denying their availability as statutory remedies. Perhaps their attractiveness to potential litigants


7. This is an atypical form of discrimination because it does not involve traditional notions of discrimination between the races. Rather, the discriminatory acts reflect intra-racial hostilities, perhaps resulting from the difference in treatment that members of the same race often receive based on the similarity or dissimilarity of their skin color to the majority group’s skin color.

8. See Sere v. Board of Trustees, 628 F. Supp. 1543, 1546 (N.D. Ill. 1986) (plaintiff’s claims dismissed because § 1981 not available for claims of intra-racial, color-based discrimination), aff’d, 852 F.2d 285 (7th Cir. 1988); Waller, 578 F. Supp. at 314 (plaintiff’s claims dismissed because color not cognizable claim under § 1981 and plaintiff did not prove racial discrimination existed).


10. See Sere, 628 F. Supp. at 1546 (denying § 1981 availability as statutory remedy); Waller, 578 F. Supp. at 314 (same); Brown, No. 83-2531 (denying Title VII as statutory remedy).
lies in the fact that both statutes easily could be interpreted by the courts to cover this type of discrimination.\textsuperscript{11}

The courts' unwillingness to extend section 1981 and Title VII coverage to intra-racial, color-based discrimination is not the result of a direct mandate from Congress, but rather stems from judicial interpretation of these statutes. Apparently the courts have determined that Congress, because of its silence on the issue, did not intend these statutes to extend to this type of discrimination, or at the very least the courts were sufficiently confused about the issue to justify denying the extension. Civil rights litigants, however, have continued to press for a broader reading of the statutes, particularly Title VII.

The District Court for the Northern District of Georgia recently confronted a claim of intra-racial, color-based discrimination in the context of a Title VII discriminatory termination of employment action. In \textit{Walker v. Internal Revenue Service},\textsuperscript{12} the plaintiff, a light-skinned black woman, sued her employer under Title VII and section 1981,\textsuperscript{13} alleging that her dark-skinned black supervisor terminated her employment because of her lighter skin pigmentation.\textsuperscript{14} The employer moved for summary judgment with respect to each of the plaintiff's claims.\textsuperscript{15} The court granted the motion as to the section 1981 claims and denied it with respect to the Title VII claims, allowing the plaintiff to prove her case.\textsuperscript{16} Consequently, \textit{Walker} represents the first decision by a court, since the enactment of Title VII allowing a plaintiff to sue a member of the same race for color-based discrimination. Since the reason many courts gave for refusing to allow such a cause of action in the past was the lack of supporting precedent, \textit{Walker} will be an important watershed case for future discrimination plaintiffs.

This Note will briefly visit the chief cases in this area, highlighting

\textsuperscript{11} For a discussion of the reasons why Title VII and § 1981 would serve as effective remedies for intra-racial, color-based discrimination, see infra notes 98-136 and accompanying text.


\textsuperscript{13} Walker also sued under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706 (1988). The court affirmed the Magistrate's recommendation granting the defendant's motion for summary judgment on this claim because "[t]he APA does not create substantive rights on which a claim for relief can be based." \textit{Walker}, 713 F. Supp. at 409 (citations omitted).

\textsuperscript{14} \textit{Walker}, 713 F. Supp. at 404-05. For a further discussion of the facts of \textit{Walker}, see infra notes 49-53 and accompanying text.

\textsuperscript{15} \textit{Walker}, 713 F. Supp. at 405. The case was originally heard by a magistrate, following the usual procedure for Title VII cases. \textit{Id.} The magistrate recommended granting summary judgment for the defendant on the plaintiff's claims under § 1981 and the Administrative Procedure Act, as well as under the plaintiff's Title VII invidious discrimination claim. \textit{Id.}

\textsuperscript{16} \textit{Id.} at 408-09. As to the Title VII claims, the district court recognized the substantial problems of proof involved, but concluded that the plaintiff had presented a factual issue that could not be reached by summary judgment. \textit{Id.} at 408. The case ultimately went to trial on the merits in February, 1990.
decisions that address the availability of Title VII and section 1981 to remedy color-based discrimination, both inter-racial and intra-racial.17 Further, this Note will discuss the Walker court’s solution to the complex problem of intra-racial, color-based discrimination.18 Finally, this Note will suggest approaches to analyzing both Title VII and section 1981 intra-racial, color-based discrimination suits.19

II. BACKGROUND

A. The Initial Hurdle: Color as a Cognizable Claim

In light of the judicial interpretations of Title VII and section 1981, a plaintiff’s goal in an intra-racial, color-based discrimination suit is to convince the court that a claim of color-based discrimination between members of the same race is actionable. The initial hurdle in such a suit, however, is to first persuade the court that color-based discrimination between members of different races is a cognizable claim under section 1981 or Title VII.

Section 1981 does not mention the word “color,” but rather provides a remedy to an aggrieved individual who has been denied certain rights “enjoyed by white citizens.”20 Most courts have construed this phrase to mean that discrimination on the basis of color, as opposed to race, is not actionable.21 This construction was inevitable given the United States Supreme Court’s analysis of the language. The Court has stated that the words “enjoyed by white citizens” were added to the original house bill to “emphasize the racial character of the rights being protected.”22

Other courts, however, have taken a broader view of the scope of section 1981. For instance, in Vigil v. City of Denver,23 a Mexican-Ameri-

17. For a discussion of the cases deciding the question of Title VII and § 1981 applicability to color discrimination, see infra notes 20-48 and accompanying text.
18. For a discussion of the Walker court’s solution, see infra notes 57-84 and accompanying text.
19. For a discussion of suggested approaches to Title VII and § 1981 cases, see infra notes 97-136 and accompanying text.
21. See, e.g., Waller v. International Harvester Co., 578 F. Supp. 309 (N.D. Ill. 1984). In Waller, the plaintiff, a black employee, brought a § 1981 action alleging that his employer purposely discriminated against him and in favor of other employees because of his race and color. Id. at 313. The plaintiff believed that he was denied training, promotion and transfer privileges because of his race and color, while others of different races and colors received such privileges. Id. at 313-14. The district court did not allow the plaintiff to bring the § 1981 action because “[s]ection 1981 applies only to race discrimination, not to discrimination on the basis of color.” Id. at 314.
can plaintiff sought to use section 1981 to charge the city with discrimination on the basis of color.\textsuperscript{24} The \textit{Vigil} court allowed the plaintiff to proceed on his color discrimination theory, recognizing that although most discrimination against Mexican-Americans was based on their national origin, "at least in this area [Denver], Mexican-Americans are subject to color-based discrimination and are within the coverage of §1981."\textsuperscript{25} The court did not elaborate on why it took the view that section 1981 covers discrimination on the basis of color other than to say: "We note that skin color may vary significantly among individuals who are considered ‘blacks’ or ‘whites’; both these groups are protected by §1981, and §1981 is properly asserted where discrimination on the basis of color is alleged."\textsuperscript{26}

Title VII, in contrast, prohibits employment practices that discriminate on the basis of "race, color, religion, sex, or national origin."\textsuperscript{27} Yet in spite of the literal inclusion of "color" in Title VII, some Title VII defendants have been successful in arguing that color discrimination does not provide the basis for a claim upon which relief can be granted. Typically, the theory advanced is that although Title VII specifically includes color as an impermissible employment criterion, the term gener-

\begin{enumerate}
\item \textit{Id.} at 6938. The court cited the Supreme Court's decision in McDonald v. Santa Fe Trail Transportation Co. as authority for the proposition that §1981 covers discrimination on the basis of color. \textit{Id.} (citing \textit{Santa Fe}, 427 U.S. 273 (1976)). That decision lends little support for the court's conclusion, however. In \textit{Santa Fe}, white employees of the defendant-company were fired for misappropriating cargo, but a black employee charged with the same offense had been retained by the company. \textit{Santa Fe}, 427 U.S. at 276. The white employees brought a §1981 action claiming discrimination on the basis of race. \textit{Id.} The Court held that §1981 prohibits racial discrimination in private employment against whites as well as nonwhites. \textit{Id.} at 287. This does not specifically address the issue of whether §1981 is a remedy for color discrimination, however, because \textit{Santa Fe} involved a suit by white workers alleging discrimination because of their race, not their color. \textit{Id.} at 276. Thus the Court was concerned with \textit{racial} discrimination, and did not focus on color discrimination. This is best illustrated by the Supreme Court's own framing of the issue: "[W]e must decide whether §1981, which provides that '[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . affords protection from \textit{racial} discrimination in private employment to white persons as well as nonwhites." \textit{Id.} (emphasis added).
\end{enumerate}
ally has been interpreted as synonymous with race. Thus, color discrimination is not an actionable claim in and of itself, independent of a claim of race discrimination. This argument was advanced by the defendant in Felix v. Marquez, a color-based discrimination suit in which the plaintiff alleged that she was discriminated against by her employer, the Office of the Commonwealth of Puerto Rico. The defendant countered that Title VII, in reality, does not encompass color discrimination. The Felix court found the plaintiff’s argument more persuasive, however, saying that “[c]olor may be a rare claim, because color is usually mixed with or subordinated to claims of race discrimination, but considering the mixture of races and ancestral national origins in Puerto Rico, color may be the most practical claim to present.”

B. The Intra-racial/Inter-racial Color-Based Discrimination Dichotomy

If a potential claimant can surmount the initial hurdle of the availability of section 1981 or Title VII to remedy color-based discrimination, there still remains a substantial obstacle to overcome. Many courts refuse to allow a cause of action for intra-racial, color-based discrimination, even if they do accept the premise that section 1981 and/or Title VII provide a remedy for inter-racial, color-based discrimination. Those courts that refuse to read Title VII to include intra-racial, color-

28. For example, the defendant in Walker argued that “[a]lthough the Act includes ‘color’ as one of the bases for prohibited discrimination, the term has generally been interpreted to mean the same thing as race.” Defendant’s Memorandum in Support of Motion for Summary Judgment at 8, Walker v. Internal Revenue Serv., 713 F. Supp. 403 (N.D. Ga. 1989) (No. 87-1789) [hereinafter Defendant’s Memorandum] (citation omitted).


30. Id. The court noted with some acrimony that the defendant-employer was “so aware of the existence of color discrimination in Puerto Rico that the [employer] proposed to study such discrimination.” Id.

31. Id.

32. See, e.g., Brown v. EEOC, No. 83-2551 (S.D.N.Y. Oct. 11, 1984) (LEXIS, Genfed library, Dist file). In Brown, the plaintiff claimed that the New York State Division of Human Rights (NYSDHR) improperly conducted an investigation into a charge he had filed alleging discriminatory hiring practices by Exxon Enterprises. Id. at 4. A NYSDHR Specialist determined that there was no probable cause to believe that Exxon had engaged in any discriminatory practices because Exxon employed 58 managers of the same race and color as the plaintiff and approximately 12% of Exxon’s staff was the same race and color as the plaintiff. Id. The plaintiff claimed that this finding by the Specialist was in error because the plaintiff, whom the Specialist never met, was a light-skinned black, while the Specialist was a dark-skinned black. Id. The plaintiff alleged that the Specialist’s findings were clouded by his erroneous perceptions of the plaintiff as a dark-skinned black, and this resulted in discriminatory treatment of the plaintiff in the investigation of his charge against Exxon. Id. The district court indicated that the plaintiff failed to allege any act of discriminatory conduct under § 1981 or Title VII based on his race or color. Id. at 2-4. The court noted that even assuming he could meet this burden, his claim against the Specialist for intra-racial, color-based discrimination was not cognizable under any statute. Id. at 4.
based discrimination generally adopt one of two postures. Some are of
the view that Title VII expressly does not embrace this cause of action.33
One possible explanation for this view is that in the early 1960s, when
Title VII was being developed, discrimination between blacks and
whites was the primary national concern. It is possible that this back-
drop to Title VII's enactment has led the courts to conclude that Con-
gress did not consider questions of intra-racial discrimination in
connection with Title VII. These courts thus refuse to give the statute a
meaning that Congress did not expressly intend at the time it was en-
acted.34

Other courts have adopted an alternative view in which they recog-
nize that intra-racial, color-based discrimination exists and that Title VII
is a potential remedy, but they still do not allow the claim because of the
typically weak evidence supporting the plaintiff's allegations of color-
based discrimination.35 A fitting example is found in Ali v. National Bank
of Pakistan.36 The plaintiff in that case was a light-skinned citizen of the
Punjab province of Pakistan.37 He brought an action against the bank
where he was employed, alleging that the bank discriminated against
him in favor of darker-skinned employees from the Sind province of
Pakistan.38 The district court concluded that even if it were to accept as
true the plaintiff's contention that his light skin placed him in a pro-
tected class for Title VII purposes, it would nevertheless be compelled
to deny the plaintiff's claim because he failed to meet his burden of

33. See id. ("The distinction which plaintiff attempts to create based on skin
complexion finds no support under any relevant statute.").

34. This type of reasoning can be seen with respect to other questions of
interpretation under Title VII. For example, in DeSantis v. Pacific Telephone &
Telegraph Co., the plaintiffs alleged discriminatory treatment by their employer
because of their sexual preference. 608 F.2d 327, 328-29 (1979). They sought
relief under Title VII, arguing that "in prohibiting certain employment discrimi-
nation on the basis of 'sex,' Congress meant to include discrimination on the
basis of sexual orientation." Id. at 329. The court rejected their claims, finding
no congressional intent in the legislative history to support the conclusion that
sex discrimination was meant to include anything other than gender discrimina-
tion. Id. at 329. The court therefore held that Title VII "should not be judicially
extended to include sexual preference such as homosexuality." Id. at 329-30.

(S.D.N.Y. 1981) (Title VII would apply to discrimination based on skin color,
but plaintiff failed to establish prima facie case of Title VII employment discrimi-
nation or applicability to his situation). The problem of potentially insufficient
evidence can be seen in Walker as well. The plaintiff there presented no direct
evidence of discriminatory motive on the part of her supervisor, but rather
sought to have the court infer that her supervisor was prejudiced towards light-

37. Id. at 611-12.
38. Id. According to the evidence adduced at trial, a number of other Pakis-
tani employees were light-skinned and predominated in lower-paying bank posi-
tions. Id. at 612.
showing disparate treatment.\footnote{Id. at 614. The court noted: While differences in complexion exist between [the plaintiff] and other employees of the Bank . . . and the literal language of the statute which prohibits discrimination on the basis of “color” would seem to apply to [the plaintiff’s] claim, the testimony regarding skin color variations among the peoples of Pakistan does not suffice to merit the division of Pakistanis into distinct “protected classes” according to color. Id. at 613. Disparate treatment occurs under Title VII when an employer, union or employment agency overtly accords different treatment to individuals based exclusively on their race, color, religion, sex or national origin. J. FRIEDMAN & G. STRICKLER, THE LAW OF EMPLOYMENT DISCRIMINATION 70-71 (2d ed. 1987).}

The distinction drawn by the courts between inter-racial and intra-racial discrimination suits under both Title VII and section 1981 appears to be based mainly on the perception that allowing such a cause of action would result in insurmountable problems of proof that are not present in inter-racial suits. Because the courts feel that they can objectively discern the different skin colors in an inter-racial suit between, for example, black and white parties, an inference of discrimination is easier to maintain. When the parties are members of the same race, however, and the difference between them is perhaps only a slight difference in skin tone, it is much more difficult for the courts to accept that invidious discrimination may have occurred.\footnote{See, e.g., Sere v. Board of Trustees, 628 F. Supp. 1543 (N.D. Ill. 1986) (court recognized substantial problems of proof involved in measuring differences between skin tone of parties), aff’d, 852 F.2d 285 (7th Cir. 1988).} Moreover, the courts are hesitant to allow this cause of action in light of Congress’s silence on whether intra-racial, color-based discrimination suits have any place in Title VII or section 1981 litigation, and the consequent lack of judicial precedent resulting from that silence.\footnote{See id. (court did not allow claim because of lack of precedent). It is interesting to note that two of the court’s asserted justifications—problems of proof and lack of precedent—have been advanced in the past in the area of emotional distress claims. For a discussion of how these perceived obstacles were overcome in that area, see infra note 108.}

In \textit{Sere v. Board of Trustees},\footnote{628 F. Supp. 1543 (N.D. Ill. 1986), aff’d, 852 F.2d 285 (7th Cir. 1988).} the District Court for the Northern District of Illinois faced the issue of whether a black individual could bring an action, under section 1981 or Title VII, against a member of his own race alleging discrimination on the basis of a variation in skin pigmentation.\footnote{Id. at 1546. In \textit{Sere}, the plaintiff claimed that the University of Illinois discriminated against him on the basis of race, national origin and color when it refused to renew his employment contract for the next school year. \textit{Id.} at 1543, 1546. He based his suit on both Title VII and § 1981. \textit{Id.} at 1543. The plaintiff in \textit{Sere} was of a darker hue than the primary defendant, his supervisor. \textit{Id.} at 1546. Thus, although the issue was intra-racial, color-based discrimination, in \textit{Sere} it was the dark-skinned plaintiff who brought the suit. \textit{Id.}} The plaintiff in \textit{Sere} was a Nigerian black; his supervisor was an

In \textit{Walker}, the roles were reversed with the darker-skinned defendant the purported discriminator. \textit{Walker}, 713 F. Supp. at 404-05. For a discussion of \textit{Walker}, see infra notes 49-84 and accompanying text. The \textit{Sere} court ultimately
American black with lighter skin color. The plaintiff, his supervisor refused to renew his contract after the plaintiff did not succumb to pressure to relinquish his job voluntarily. The individual who replaced the plaintiff was also of lighter skin pigmentation. The court recognized that discrimination based on skin color can occur among members of the same race, but concluded that it lacked precedent to allow the plaintiff to proceed with his suit under section 1981. The court was unwilling to "create a cause of action that would place it in the unsavory business of measuring skin color and determining whether the skin pigmentation of the parties is sufficiently different to form the basis of a lawsuit." It was exactly this "unsavory business" that the District Court for the Northern District of Georgia undertook in Walker.

III. WALKER V. INTERNAL REVENUE SERVICE

The plaintiff in Walker was a light-skinned black woman employed as a clerk-typist in the Internal Revenue Service's Atlanta Office. Her supervisor, with whom she was in constant conflict, was a dark-skinned black woman. Upon the recommendation of her supervisor, was fired for the following reasons: "1) tardiness to work; 2) laziness; 3) incompetence; and 4) attitude problems." Walker alleged that these reasons were fabricated, and that the actual reason for her discharge was her supervisor's personal hostility towards her because of her lighter skin. Walker brought an action against the Internal Revenue Service pursuant to Title VII and section 1981 alleging that her termination was due to invidious discrimination on the part of her supervisor, and that it constituted retaliation for a complaint she had dismissed the § 1981 count, and held that the Title VII count properly stated a claim of national origin discrimination. Sere, 628 F. Supp. at 1546. For a discussion of the § 1981 count, see infra notes 47-48 and accompanying text.

44. Sere, 628 F. Supp. at 1546.
45. Id.
46. Id. The plaintiff alleged that his replacement was also less qualified than he for the position. Id.
47. Id. The court stated that the "plaintiff is unable to offer any authority for the novel proposition that such discrimination may form the basis of a cause of action under § 1981." Id. The court did allow the plaintiff to proceed on his Title VII discrimination claim, but only because the court felt he had "stated a valid cause of action for national origin discrimination." Id. (emphasis added). National origin discrimination is listed as a prohibited employment practice under Title VII. For the relevant text of Title VII, see supra note 3.
50. Id. The rest of the employees in the office were predominantly black as well. Id.
51. Id.
52. Id. at 404-05.
lodged with an Equal Employment Opportunity program manager.\textsuperscript{53}

The defendant moved for summary judgment with respect to all of Walker's claims, maintaining that Title VII and section 1981 do not allow a cause of action for discrimination based on color.\textsuperscript{54} The court granted the defendant's motion with respect to the section 1981 claim, stating that Title VII is the exclusive remedy for federal employment discrimination.\textsuperscript{55} Thus, the remainder of the court's opinion focused on the plaintiff's Title VII claims of invidious discrimination and retaliation.\textsuperscript{56}

The district court first addressed the question of whether color-based, as opposed to racial, discrimination is an actionable claim under Title VII.\textsuperscript{57} The defendant contended that "[a]lthough [Title VII] includes 'color' as one of the bases for prohibited discrimination, the term has generally been interpreted to mean the same thing as race," and, therefore, color-based discrimination is not an actionable claim.\textsuperscript{58}

Relying on the explicit language of Title VII and judicial interpretations of section 1981, the court concluded that color discrimination is a cognizable claim independent of race.\textsuperscript{59} The court noted that "Title VII was amended in 1972 to provide generally that 'all personnel actions affecting employees . . . shall be made free from any discrimination based on race, color, religion, sex or national origin.'"\textsuperscript{60} In light of the Supreme Court's policy that "the plain meaning of legislation should be conclusive," the fact that Title VII refers separately to both race and color was sufficient for the court to reject the defendant's argument that color should be interpreted as synonymous with race for Title VII

\textsuperscript{53} Id. at 405. The case was originally heard by a magistrate, following the usual procedure in Title VII cases. Id. The district court also ruled on a claim that Walker brought under the Administrative Procedure Act (APA), 5 U.S.C. § 701-706 (1988). Walker, 713 F. Supp. at 405. This claim was dismissed following the defendant's motion for summary judgment. Id. The court stated that "'[t]he APA does not create substantive rights on which a claim for relief can be based.'" Id. at 409 (citations omitted).

\textsuperscript{54} See Walker, 713 F. Supp. at 405.

\textsuperscript{55} Id. at 409 (citing Brown v. General Serv. Admin., 425 U.S. 820 (1976)).

\textsuperscript{56} Since the focus of this Note is on intra-racial, color-based discrimination, Walker's claims of discriminatory retaliation under Title VII will not be addressed. For a thorough analysis of retaliation claims, see C. Antieau, supra note 4.

\textsuperscript{57} Walker, 713 F. Supp. at 405-07.

\textsuperscript{58} Defendant's Memorandum, supra note 28, at 8-9.

\textsuperscript{59} Walker, 713 F. Supp. at 405-07.

\textsuperscript{60} Id. at 406 (citing 42 U.S.C. § 2000e-16(a)(1982)) (emphasis in original). Additionally, the court noted the Supreme Court's statement of the purpose of Title VII: "'To assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin.'" Walker, 713 F. Supp. at 406 (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) (emphasis in Walker)).
purposes.\textsuperscript{61}

To bolster its position, the \textit{Walker} court cited with approval \textit{Vigil} \textit{v. City of Denver}.\textsuperscript{62} The \textit{Vigil} court had stated that section 1981 "is properly asserted where discrimination on the basis of color is alleged."\textsuperscript{63} The \textit{Walker} court relied on section 1981 case law like \textit{Vigil} for its decision regarding Title VII's applicability to the suit because it concluded that "the legal elements and facts necessary to support a claim for relief under Title VII are identical to the facts which support a claim under § 1981."\textsuperscript{64}

The \textit{Walker} court also relied heavily on the United States Supreme Court's decision in \textit{Saint Francis College v. Al-Khazraji}.\textsuperscript{65} In \textit{Saint Francis}, the plaintiff, a United States citizen born in Iraq, alleged that his employer, a Caucasian, discriminated against him on the basis of race in violation of section 1981.\textsuperscript{66} The question for the Court was whether this allegation of discrimination, based as it was on the plaintiff's Arabian ancestry, was sufficient to constitute racial discrimination within the meaning of section 1981.\textsuperscript{67} The defendant, stating that Arabs are now considered to be within the Caucasian race, contended that section 1981 does not permit a suit between members of the same race, and that the plaintiff therefore could not assert a claim of racial discrimination under

\begin{itemize}
  \item \textsuperscript{61} \textit{Walker}, 713 F. Supp. at 406 (citing United States v. Ron Pair Enter., 109 S. Ct. 1026, 1031 (1989)). The \textit{Walker} court stated that it was left with no choice but to conclude, when Congress and the Supreme Court refer to race and color in the same phrase, that "race" is to mean "race," and "color" is to mean "color." To hold otherwise would mean that Congress and the Supreme Court have either mistakenly or purposefully overlooked an obvious redundancy.
  
  \textit{Id.}
  
  \textsuperscript{62} \textit{Id.} at 407. For a discussion of the facts of \textit{Vigil}, see supra notes 23-26 and accompanying text.
  
  \textsuperscript{63} \textit{Vigil}, 15 Empl. Prac. Dec. (CCH) ¶ 8000, at 6938. The \textit{Walker} court also noted that "[t]he stated purpose of § 1981 is the 'protection of citizens of the United States in their enjoyment of certain rights without discrimination on account of race, color, or previous condition of servitude.'" \textit{Walker}, 713 F. Supp. at 405 (quoting United States v. Cruikshank, 92 U.S. 542, 555 (1875) (emphasis in \textit{Walker})).
  
  \textsuperscript{64} \textit{Walker}, 713 F. Supp. at 405 (citing Lincoln v. Board of Regents, 697 F.2d 928, 935 & n.6 (11th Cir. 1983), \textit{cert. denied}, 464 U.S. 826; Caldwell v. Martin Marietta Corp., 632 F.2d 1184, 1186 (5th Cir. 1980)). This Note contends that the court was mistaken in this determination. For a more thorough discussion of the reasons why judicial approaches to the two statutes cannot be mingled, see infra notes 84-91 and accompanying text.
  
  \textsuperscript{65} 481 U.S. 604 (1987). In \textit{Saint Francis}, the plaintiff was a citizen of the United States born in Iraq. \textit{Id.} at 606. He alleged in his complaint that he was denied tenure as a professor because of his Arabian ancestry. \textit{Id.}
  
  \textsuperscript{66} \textit{Id.} at 607.
  
\end{itemize}
that statute.68

The Court stated that the defendant’s argument was based on the erroneous assumption that “all those who might be deemed Caucasians today were thought to be of the same race when § 1981 became law in the nineteenth century.”69 Citing dictionaries and encyclopedias of the nineteenth century and the legislative history of section 1981, the Court concluded that, at the time section 1981 became law, race was defined in terms of ethnic groups and common ancestry.70 Moreover, the Court concluded that Congress intended section 1981 to prohibit intentional discrimination based on ancestry or ethnic characteristics.71 These findings provided the impetus for the Court to affirm the appellate court’s holding that section 1981 “‘at a minimum’ reaches discrimination against an individual ‘because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of homo-sapiens.’”72 The Court noted, however, that a “distinctive physiognomy is not essential to qualify for § 1981 protection.”73

The Court’s holding was a product of its struggle to interpret section 1981 so that it would allow a cause of action for ethnic discrimination, yet still not allow a plaintiff to assert discrimination on the basis of place of birth (i.e., national origin).74 The Court remanded the case so that Al-Khazraji could attempt to “prove that he was subjected to intentional discrimination based on the fact that he was born an Arab, rather than solely on the place or nation of his origin.”75

68. Saint Francis, 481 U.S. at 609. The defendant argued that the plaintiff was, in actuality, alleging national origin discrimination, not racial discrimination. Al-Khazraji v. Saint Francis College, 784 F.2d 505, 514 (3d Cir. 1986), aff’d, 481 U.S. 604 (1987). “The defendants argue that because Arabs are taxonomically Caucasians, they are therefore ‘white citizens’ for purposes of Section 1981 and a fortiori, Section 1981 offers them no greater protection than they enjoy absent Section 1981.” Al-Khazraji, 784 F.2d at 514. As noted earlier, the prevailing judicial view on § 1981 is that it is not available for claims of national origin discrimination. For cases espousing the unavailability of § 1981 as a remedy for national origin discrimination, see supra note 24.

69. Saint Francis, 481 U.S. at 610.

70. Id. at 610-11. For example, the Court cited the Encyclopedia Americana which, in 1854, referred “to various races such as Finns, . . . gypsys, . . . Basques, . . . and Hebrews.” Id. at 611 (citations omitted). In addition, the legislative history of § 1981, which can be found in the debates surrounding its predecessor, the Civil Rights Act of 1866, supports this broad definition of race, as it contains references to the Scandinavian, Chinese, Latin and Gypsy races, among others. Id. at 612.

71. Id. at 613.

72. Id. (quoting Saint Francis College v. Al-Khazraji, 785 F.2d 505, 517 (3d Cir. 1986)).

73. Saint Francis, 481 U.S. at 613.

74. Id.

75. Id. (emphasis added). The Court likened national origin discrimination to “place or nation of [birth]” to distinguish it from the type of discrimination that it believed Al-Khazraji experienced, which was based more on the fact that he was born into a group called “Arabs” than the fact that he was born in Arabia.

https://digitalcommons.law.villanova.edu/vlr/vol35/iss5/8
The *Walker* court reasoned that “[a] person's color is closely tied to his ancestry and could result in his being perceived as a 'physiognomically distinctive sub-grouping (sic) of homo sapiens,' which in turn could be the subject of discrimination.”76 Thus, in light of the *Saint Francis* and *Vigil* decisions and the plain language of Title VII, the *Walker* court concluded that color-based discrimination is an actionable claim.77

The court next discussed whether Title VII or section 1981 allows a cause of action for color-based discrimination where the plaintiff alleges discrimination by a member of the same race. The defendant argued that there simply was no cause of action available to a light-skinned black person for color-based discrimination against a dark-skinned black person, essentially because such suits had been rejected under both Title VII and section 1981 in the past.78 The court relied mainly on *Saint Francis* in concluding that a claim, such as Walker's, is indeed actionable.79 The court reiterated the *Saint Francis* Court's pronouncement that ‘‘a distinctive physiognomy is not essential’’ to establish a claim under section 1981.80

Although the *Walker* court realized that the determination of whether there is a sufficient difference in skin tone between the parties is a difficult and uneasy task, it simply stated that “the issue is a question of fact that must be determined by the fact finder.”81 Thus, the court concluded that it was “not controlling that in the instant case a black person is suing a black person.”82 It is not clear, however, whether the court was referring only to claims pursuant to Title VII or to claims pursuant to either Title VII or section 1981.

Finally, the court noted that the Supreme Court in *Saint Francis* had determined that “Congress intended § 1981 to apply to all forms of dis-

---

77. It is not clear, however, whether the *Walker* court held that such a claim is actionable only under Title VII, or whether it is also actionable under § 1981. As noted earlier, the plaintiff's § 1981 claim was dismissed, yet the court based its decision almost exclusively on § 1981 case law. See supra note 55 and accompanying text. Therefore it is possible that the *Walker* court would extend its holding to cases where § 1981 is properly pleaded.
79. *Walker*, 713 F. Supp. at 407-08. The court never made clear, however, whether it was referring to a cause of action under only Title VII or under both Title VII and section 1981.
80. *Id.* at 408 (quoting *Saint Francis*, 481 U.S. at 613). The court stated that this was a “particularly relevant fact to the case at hand.” *Id.* at 406.
81. *Id.* at 408.
82. *Id.* In holding that a black person may sue another black person under Title VII, the court relied on the fact that protection under § 1981 did not require a distinctive physiognomy, according to *Saint Francis*. *Id.* The pertinent statute in *Walker*, however, was Title VII, not § 1981. *Id.* at 405. This distinction apparently did not seem to trouble the court. For a discussion of the improvidence of this approach, see infra notes 85-91 and accompanying text.
crimination including acts of discrimination against groups including Finns, gypsies, Basques, Hebrews, Swedes, Norwegians, Germans, Greeks, Finns, Italians, Spanish, Mongolians, Russians, Hungarians, Chinese, Irish and French.”

The Walker court cited this to demonstrate that society recognizes that discrimination occurs between the various sub-groups of the Caucasian and Mongolian races. Summing up its feelings for the defendant’s position in strong words, the court thus concluded that “[i]t would take an ethnocentric and naïve world view to suggest that we can divide caucasians into many sub-groups but some how all blacks are part of the same sub-group.”

IV. Analysis

The Walker court was in a difficult position. It wanted to provide a remedy for this type of discrimination but had no precedent on which to rely. Accordingly, it searched for the Supreme Court decision most closely akin to the facts before it and stretched that decision to justify its determination that Walker had stated a cognizable claim. Ultimately, the Walker court’s decision was a just one, opening an avenue for legal recourse where one was undoubtedly needed. The court’s nearly exclusive reliance on Saint Francis was misplaced, however, for several reasons.

In relying on Saint Francis, the Walker court mistakenly treated Title VII and section 1981 as the same statute and incorrectly commingled Title VII and section 1981 analyses. The two statutes are not interchangeable in this manner, Walker notwithstanding. There is a fundamental difference between Title VII and section 1981 where color-based discrimination is advanced as a cause of action. Title VII’s language expressly includes “color” discrimination as a prohibited activity. Section 1981 does not mention “color,” but rather focuses on discrimination that denies an individual certain rights enjoyed “by white citizens.” Besides the obvious difference in language, there are also

84. Id. at 407-08. The court pointed out that “[t]here are sharp and distinctive contrasts amongst native black African peoples (sub-Saharan) both in color and in physical characteristics.” Id. at 408.
85. Note, however, that the district court in Walker stated that “in a suit such as this one, the legal elements and facts necessary to support a claim for relief under Title VII are identical to the facts which support a claim under § 1981.” Walker, 713 F. Supp. at 405 (citations omitted). The court cited two cases for this proposition: Lincoln v. Board of Regents, 697 F.2d 928, 935 n.6 (11th Cir.) (when plaintiff predicates liability under Title VII on disparate treatment, legal elements of claim identical to those of § 1981 claim), cert. denied, 464 U.S. 826 (1983) and Caldwell v. Martin Marietta Corp., 632 F.2d 1184, 1186-87 (5th Cir. 1980) (facts necessary to support claim under Title VII nearly identical to facts which support claim under § 1981). Walker, 713 F. Supp. at 405.
86. For the relevant text of Title VII, see supra note 3.
87. For the text of § 1981, see supra note 4. The courts generally have equated § 1981’s language with racial discrimination. See Runyon v. McCrory,
substantial differences between Title VII and section 1981 in administrative exhaustion requirements and remedies. Moreover, Title VII applies only to discrimination in employment; section 1981 has no such restriction. Given these differences, a section 1981 test is not relevant to the question of whether a plaintiff can recover for color-based discrimination under Title VII. The *Walker* court ignored these distinctions when it based its Title VII decision on the section 1981 holding in *Saint Francis*. The *Walker* court apparently determined that a Title VII analysis and a section 1981 analysis were equivalent, so that case law construing section 1981 controls the determination of a Title VII cause of action. This is an erroneous conclusion. As the Supreme Court has stated: "Congress clearly has retained § 1981 as a remedy against private employment discrimination *separate from and independent of* the more elaborate and time-consuming procedures of Title VII." In addition, at least one court has rejected the contention that section 1981 and Title VII are coextensive and some courts have specifically held that section 1981 does not provide a remedy for color-based discrimination.

The *Saint Francis* Court's test for section 1981 cases was not designed to encompass non-ethnic, intra-racial discrimination, and, therefore, it should not be extended into areas it was not designed to remedy.

This is not to say that section 1981 is not a feasible remedy for intra-racial, color-based discrimination in certain circumstances. This

427 U.S. 160, 168 (1976) (Section 1981 "prohibits racial discrimination in the making and enforcement of private contracts.") (footnote and citations omitted); *see also* Georgia v. Rachel, 384 U.S. 780, 791 (1966) ("The legislative history of [§ 1981] clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality.").


90. *See Croker*, 662 F.2d at 989. For a more thorough discussion of *Croker*, see *supra* note 88. For a discussion of one court's view that § 1981 does not serve as a remedy for color-based discrimination, see *supra* note 21.

91. Furthermore, applying the *Saint Francis* test to Title VII actions raising claims of intra-racial, color-based discrimination may result in greater hesitancy on the part of the courts to grant relief. Those judges who do not view § 1981 as a remedy for color-based discrimination may be less inclined to grant relief if they are compelled to apply a § 1981 test. Instead, they may opt to join the ranks of those who believe that intra-racial, color-based discrimination is not actionable under Title VII. This would be an unfortunate result for those plaintiffs with valid Title VII causes of action.

92. Section 1981 can be used to remedy intra-racial, color-based discrimi-
Note submits only that the Saint Francis interpretation of section 1981 should not have been extended to Walker’s Title VII claim. Even assuming, however, that the Walker court was correct in its assessment that the Saint Francis Court’s interpretation of section 1981 should be applied to Walker’s Title VII claim, the Saint Francis test was incorrectly applied to the facts of Walker. The Saint Francis Court held that section 1981 reaches discrimination directed at an individual because he is genetically part of an ethnically distinct sub-grouping of homo-sapiens. The Walker court obviously felt that the plaintiff met this test, even though she made no allegations that she was ethnically distinct from her supervisor. The plaintiff merely asserted that she was physiognomically distinctive—in skin color. The court attempted to justify its analysis by arguing that “[a] person’s skin is closely tied to his ancestry and could result in his being perceived as a ‘physiognomically distinctive sub-grouping of homo-sapiens,’ which in turn could be the subject of discrimination.” The issue in Saint Francis, however, was not whether the claimant was physiognomically distinctive—it was whether he was genetically and ethnically distinct. The Walker court had before it no evidence that the plaintiff and her supervisor were ethnically distinct. The plaintiff, therefore, could not have met the Saint Francis test.

Most significantly, the Walker court should not have relied on Saint Francis to resolve the specific question presented because Saint Francis did not involve discrimination on the basis of color between members of the same race, as did Walker. Discrimination based on color by members of the same race is not the same as racial or ethnic discrimination, and should not be treated in a similar manner. This type of discrimination is not based on a view that one individual is inferior to another because he or she is genetically different, or has a different ethnic ancestry. The basis of this type of discrimination is even more complex. It appears to be grounded in the resentment an individual feels when a
member of his own race is treated more favorably by others simply because he looks more like a member of the dominant or favored race. In the context of intra-racial discrimination between blacks, the situation in *Walker*, the darker-skinned black feels that he has been "sold out" by his lighter-skinned counterpart. He feels two layers of oppression: the first from prejudice by whites, and the second from members of his own race who are not as oppressed because of their lighter skin color. This type of discrimination can work in reverse as well, with the lighter-skinned black, who is viewed more favorably by the white majority, expressing hostility towards the darker-skinned black in order to disassociate himself from his own minority race and thereby protect his favored status. Regardless, though, of the proponent of the discriminatory acts, such intra-racial color-based discrimination has no basis in ancestry, ethnicity, or race, and it cannot be measured by the same standards.

Finally, the *Walker* court's decision has left open the question of whether section 1981 alone may be used as a remedy for intra-racial, color-based discrimination. Although the court based its Title VII decision on section 1981 case law, it never specifically stated whether its holding would apply to cases where section 1981 was the only available remedy. This is a particularly important distinction because of the differences in section 1981 and Title VII in terms of coverage and statutes of limitations. Thus, if a plaintiff maintains a suit only under section 1981 because a Title VII claim is time-barred, will *Walker* apply?

C. A Suggested Approach to Intra-Racial, Color-Based Discrimination Suits

What, then, are the proper approaches to an intra-racial, color-based discrimination suit under Title VII or section 1981? Relying on *Saint Francis* for a Title VII decision obviously creates more problems than it solves, and it is submitted that the *Saint Francis* test is not even the appropriate way to approach a section 1981 action. Nevertheless, the issue of intra-racial, color-based discrimination must be addressed. The first step is to undo the damage done by the *Walker* court in commingling Title VII and section 1981 analyses. They are separate and distinct statutes and cannot be used interchangeably.

1. *Title VII:* Let The Plain Meaning Prevail

Title VII explicitly prohibits discrimination on the basis of color. The Supreme Court, speaking on Title VII, has stated that in general terms "[w]hat is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other

---

97. For a discussion of an alternative approach to § 1981 intra-racial, color-based discrimination suits, see infra notes 109-36 and accompanying text.
98. For the relevant text of Title VII, see supra note 3.
impermissible classification." 99 Surely a court could allow a Title VII cause of action for intra-racial, color-based discrimination based solely on the plain meaning of the statutory language and case law of Title VII alone, without any reference to section 1981.100 Title VII should be available as a means of redress for any type of discrimination that sets up an arbitrary barrier to employment if the discrimination falls within one of Title VII's prohibited categories. If the express language of Title VII prohibiting color discrimination cannot be brought to bear on situations such as that in Walker, then arguably the prohibition serves no purpose in the statute. If Congress had intended that only racial, gender, national origin, and religious discrimination should be eradicated, then the insertion of the word "color" is superfluous. The Walker court similarly believed that color had a specific purpose:

This court is left with no choice but to conclude, when Congress . . . refer[s] to race and color in the same phrase, that "race" is to mean "race," and "color" is to mean "color." To hold otherwise would mean that Congress and the Supreme Court have either mistakenly or purposefully overlooked an obvious redundancy.101

Since it does not take an expansive reading of the statute to include this type of discrimination within its prohibited categories, using Title VII to remedy intra-racial, color-based discrimination is conceptually less difficult to envision than section 1981. In addition, at least one court has intimated that Title VII could provide a proper remedy if the facts of the case before it were appropriate.102 Given these factors, there is no need to borrow an interpretation of section 1981 in order to decide a Title


100. The Walker court easily could have taken this stance. The court appeared to have done that initially when it referred to the "plain meaning" of the statutory language, and cited Felix v. Marquez, an earlier case in which a plaintiff was allowed to utilize Title VII to remedy color discrimination. Walker, 713 F. Supp. at 406 (citing 24 Empl. Prac. Dec. (CCH) §131,279 (D.D.C. 1980)). The court thus could have based its decision on these two factors, without further reference to § 1981.


102. In Ali v. National Bank of Pakistan, the court hinted that the literal language of the statute would allow a plaintiff to assert a claim of intra-racial, color-based discrimination, but the facts of the case before it did not warrant its use. 508 F. Supp. 611, 613 (S.D.N.Y. 1981). Interestingly, one court that had rejected the use of § 1981 to remedy this type of discrimination did so, in part, because it viewed problems of proof as insurmountable. See Sere v. Board of Trustees, 628 F. Supp. 1543 (N.D. Ill. 1986), aff'd, 852 F.2d 285 (7th Cir. 1988). For a discussion of Sere, see supra notes 42-48 and accompanying text. The Walker court recognized "full well that such difficulties are genuine and substantial. Nevertheless, the court must find that the issue is a question of fact that must be determined by the fact finder." Walker, 713 F. Supp. at 408. Arguably, problems of proof are poor reasons for denying a remedy. If more cases like
It has been argued that an expansion of Title VII to include this type of discrimination would open up the "floodgates of litigation." It is a genuine concern, but it is not a valid reason for withholding a necessary remedy. As one court noted: "[T]he existence of a multitude of claims merely shows society's pressing need for legal redress." It has also been argued that the problems of proof arising out of these cases would be insurmountable. Interestingly, the problems of proof that the courts envision are largely caused by the way these cases are approached. Judges seem to think that they would have to measure the skin tones of the litigants to see if they are different enough to form the basis of a lawsuit. This measuring is unnecessary. The courts need only focus on the plaintiff's proof. If the plaintiff proves that he was discriminated against because of his skin color, it does not matter how many shades apart the plaintiff and defendant are. After all, the issue is discrimination. The courts have drowned themselves in a quagmire of "protected class" analyses in Title VII (and also section 1981) cases, trying desperately to develop all-inclusive criteria for membership in the various protected classes, only to find that the criteria are unworkable. This Note proposes that courts should instead focus on what the defendant has done, and not on the plaintiff's status.

Walker were allowed to proceed, the courts could fashion ways of dealing with proof as they have in other areas of the law such as emotional distress claims.

103. For a discussion of the practical differences between § 1981 and Title VII that preclude such "borrowing," see supra notes 86-89 and accompanying text.

104. The defendant in Walker argued:
To expand Title VII protection to every individual who has a different skin tone without the limitation of a clearly identifiable subgroup which has experienced a history of disparate treatment would make each individual into a protected class since no two individuals are of the same skin tone as others of their race, whether they be black, white, or oriental.

Defendant's Memorandum, supra note 28, at 9-10.

105. Dillon v. Legg, 68 Cal. 2d 728, 735 n.3, 441 P.2d 912, 917 n.3, 69 Cal. Rptr. 72, 77 n.3 (1968).

106. See Sere, 628 F. Supp. at 1546. For a discussion of the difficulties the Sere court perceived in measuring the skin tones of the parties, see supra notes 42-48 and accompanying text.

107. For a discussion of three divergent views on protected class membership criteria in the context of § 1981 suits and how those criteria have served to only confuse the issue, see infra notes 111-25 and accompanying text.

108. In addition, as more cases of this type are heard, the courts will be better able to fashion judicially manageable standards of proof as they have in other areas of the law. For instance, in the area of negligent infliction of emotional distress claims, courts in the past had refused to allow recovery for those persons not in the "zone of danger." See Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 302-03, 379 P.2d 513, 517-18, 29 Cal. Rptr. 33, 37-38 (1963). As the prevailing judicial view on the issue changed, however, courts discarded the zone of danger requirement, and devised new standards of proof for dealing with these claims. See Dillon v. Legg, 68 Cal. 2d 728, 739-41, 441...

Section 1981 is much more troubling than Title VII in terms of its application to intra-racial, color-based discrimination suits. Although its plain language is sufficiently broad to include this type of discrimination, it has been interpreted by the courts in a narrow fashion. As the courts have struggled to decide which groups may invoke section 1981 for relief, three distinct tests have emerged. They are: (1) the common perception of the community test; (2) the objectively nonwhite skin color test; and (3) the membership in an objectively verifiable distinct class test.

The common perception test is based on the way members of the community-at-large view the section 1981 claimant. If the community commonly views the claimant as belonging to a "distinct minority," then the claimant can assert a section 1981 action, regardless of whether he or she is taxonomically a member of the same race as the defendant. This approach seems equitable since the existence of discrimination is determined with respect to the plaintiff's own community. It has, however, the deleterious effect of allowing claims only when "the poor anthropology of the defendant[1] coincide[s] with the poor anthropology

P.2d 912, 919-20, 69 Cal. Rptr. 72, 79-80 (1968). Similarly, the courts will be able to devise standards for dealing with intra-racial, color-based discrimination.


112. Note, supra note 111, at 158.

113. Id. The theory behind this test is that "[p]rejudice is as irrational as is the selection of groups against whom it is directed. It is thus a matter of practice or attitude in the community . . . ." Manzanares v. Safeway Stores, Inc., 593 F.2d 968, 971 (10th Cir. 1979) (emphasis added). For a discussion of Manzanares, see infra note 114.

114. Note, supra note 111, at 158. The leading case espousing this view is Manzanares v. Safeway Stores, Inc. See 593 F.2d 968 (10th Cir. 1979). In that case, a Mexican-American was permitted to assert a § 1981 claim for relief, even though he was taxonomically a Caucasian, because members of the community perceived Mexican-Americans to be nonwhite; thus the racial discrimination requirement of § 1981 was met. Id. at 971-72.
of the community at large." Thus, under this test, a cause of action will not be allowed, even in cases of intentional discrimination, when the community-at-large does not perceive the plaintiff to be a member of a "distinct minority."

The second test involves determining whether the claimant's skin color is perceived as nonwhite. As one commentator has stated: "If the pigmentation [of the plaintiff] were such that it might be perceived as nonwhite, the plaintiff could invoke section 1981." This approach, like the common perception test, also involves the determination of how others view the claimant, although it is arguably more objective.

The third test requires the section 1981 claimant to plead membership in a distinct group that has historically received less favorable treatment. This test, more than the previous two, directly focuses on delineating those groups that qualify for section 1981 protection.

Taken together, these tests clearly evince the courts' preoccupation with focusing on the status of the plaintiff instead of on the nature of the defendant's discriminatory acts. The Supreme Court's decision in *Saint Francis* gives even more weight to this practice by predicated use of section 1981 on membership in a group that is, at a minimum, "ethnically

---


116. *Id.*

117. *Id.* at 160. This test is often used when courts have difficulty determining "prevalent subjective community perceptions." *Id.*


119. Note, *supra* note 111, at 160. This test appears to be slightly more objective than the common perception test because, at a minimum, the court must look at the plaintiff and defendant and compare their skin tones. *See id.* It is submitted, however, that the court is in a sense substituting its perception of the plaintiff for the community's.

120. *Id.* at 161; *see* LaFore v. Emblem Tape & Label Co., 448 F. Supp. 824 (D. Colo. 1978). In *LaFore*, the court required the Mexican-American plaintiff to prove that he belonged to an identifiable class that received less favorable treatment than a historical class called "white citizens." *Id.* at 826. Judge Kane wisely thought that § 1981 should not be limited merely to claims of inter-racial discrimination because "[equating 'white citizens' with a racial classification is utterly lacking in sophistication. There is no scientific justification for the equation and its use inevitably leads to irretrievable confusion." *Id.*

121. *See* Note, *supra* note 111, at 161. The courts' struggle to delineate those groups that are entitled to § 1981 protection stems largely from the vague wording of § 1981 itself. Section 1981's reference to rights "enjoyed by white citizens" has caused the problem. The interpretation of that phrase has led to the three judicial tests enunciated above. Such confusion is surprising given the legislative history of the phrase. It was added to prohibit the statute from giving to women and minors rights that they did not possess before its enactment. *Cong. Globe, 39th Cong., 1st Sess.* 157 app. (1866). As Representative Wilson, who added the phrase in an amendment, said: "[T]he words are intended to operate as a limitation and not as an extension." *Id.* Given that the words were added only to limit the statute's application to women and minors, there is no point in the courts' efforts to interpret them in ways that delineate protected classes.
and physiognomically distinctive."  

122 The problem with such an approach is that the definitions of a "race," an "ethnicity," and even a "color" have never been clear, and are still constantly evolving.  

123 In addition, one commentator has argued that the federal courts have so many conflicting views on what groups can avail themselves of section 1981's protection that the statute does not provide protection equally to all plaintiffs.  

124 Consequently, a better approach in section 1981 suits would be to focus on the defendant's discriminatory motive alone, without reference to the plaintiff's status in any definable group.  

Judge Wilkinson took just such an approach in his dissenting opinion in Shaare Tefila Congregation v. Cobb. In Shaare, a group of neo-Nazis desecrated a synagogue. The Congregation brought, inter alia, a section 1981 action against the group. The Court of Appeals for the Third Circuit denied the Congregation relief, concluding that, because Jews are not considered a separate race, the defendants' actions could not have been racially motivated. In effect, the Congregation's

122. Saint Francis, 481 U.S. at 613.  
123. As Judge Kane stated in LaFore v. Emblem Tape & Label Co.:  
The Encyclopaedia Britannica lists nine races and suggests the possibility of a tenth. The categories are delineated on the basis of taxonomic characteristics which are genetically transmittable such as blood traits, hair form and chemical composition. Further, races are subject to evolution: some vanish, some new ones emerge and all change.  

Suffice it to say that an analysis based upon questionable concepts of race is not productive.

448 F. Supp. 824, 826 (D. Colo. 1978) (emphasis added). For a discussion of LaFore, see supra note 120.


125. It has been suggested that "a plaintiff [should] be able to invoke [§ 1981] protection if the defendant's discriminatory acts have racial content. The content is racial if the acts communicate that the plaintiff is a member of a group that shares a genetic makeup distinct from any comparative group." Case Comment, supra note 124, at 849 (footnote omitted). Such a proposal would be applicable, with slight modification, in the case of intra-racial, color-based discrimination suits brought under § 1981. A claimant should be able to state a cause of action under § 1981 if he can prove that the defendant's acts communicated to him that the defendant viewed him as not being a true member of the black race, and, as such, exhibited the same hostility towards the plaintiff that he exhibited towards members of the white race.


127. Id. at 524-25.

128. Id. at 525. The Congregation also brought suit under 42 U.S.C. §§ 1981, 1982 and 1985(3), as well as common law trespass, nuisance and intentional infliction of emotional distress claims. Id. The Fourth Circuit affirmed the dismissal of the plaintiff's § 1981 claim because it concluded that state action was required where a claim is predicated on the language in § 1981 giving the right to parties to the "full and equal benefit of the laws." Id. at 525-26.

129. Id. at 526-27. The majority concluded that the defendants' actions
claims were rejected because "the victims did not actually belong to the distinct racial class in which defendants placed them." 130

Judge Wilkinson rejected this approach in a forceful dissent.151 He argued that for purposes of discrimination suits under section 1981, the only relevant factor was the defendants' subjective intent.152 He argued that it should not matter if the plaintiff was not in reality a member of a distinct race, noting that it would be "preposterous to require that [the defendants'] beliefs be objectively true before the federal law provides protection. . . . [I]t is precisely because such beliefs are false and reprehensible that federal civil rights laws were enacted."153 Finally, Judge Wilkinson noted that "[t]he focus on the subjective intent of the actor reflects the reality that discrimination and prejudice is grounded in erroneous perceptions."154

This is the proper judicial approach to intra-racial, color-based discrimination claims under section 1981.135 In much the same way that a member of the Jewish faith cannot control the fact that some individuals perceive him to be of a distinct race, neither can a light-skinned black individual control the fact that others may perceive him to be more like a member of the white race than his own race. Thus, if a plaintiff can prove that the defendant intended to discriminate against him because he views him as more like a member of the white race, and hence transfers the hostility he feels for whites to the plaintiff, then the plaintiff should be considered as having asserted a proper claim under section 1981.136

were not racially motivated, even though the Congregation presented a substantial amount of evidence showing that the defendants mistakenly believed that Jews were a distinct race. Id. at 529 (Wilkinson, J., concurring in part and dissenting in part).

130. Id. at 532 (Wilkinson, J., concurring in part and dissenting in part).

151. Judge Wilkinson, however, did agree that the "full and equal benefit" clause of 42 U.S.C. § 1981 requires state action, and therefore he agreed with the majority's dismissal of that claim. Id. at 528 n.1 (Wilkinson, J., concurring in part and dissenting in part). His separate opinion focused on § 1982, but emphasized that his discussion of racial discrimination under that section "applies with equal force to § 1981 where other predicates for § 1981 coverage are established." Id. (Wilkinson, J., concurring in part and dissenting in part).

152. Id. at 533 (Wilkinson, J., concurring in part and dissenting in part). Judge Wilkinson argued: "Permitting the subjective belief of defendants to give a claim the 'racial character' necessary to bring it within the civil rights statutes thus not only ensures adequate coverage but also avoids in many cases the difficult and troubling task of drawing racial lines." Id. (Wilkinson, J., concurring in part and dissenting in part).

153. Id. at 530 (Wilkinson, J., concurring in part and dissenting in part).

154. Id. (Wilkinson, J., concurring in part and dissenting in part).

155. To date there have been no decisions allowing a plaintiff to proceed on the sole basis of the defendant's subjective perceptions.

156. Interestingly, a plaintiff in a § 1981 action must prove discriminatory intent. This requirement was announced by the Supreme Court in General Building Contractors Association v. Pennsylvania, 458 U.S. 375 (1982). Note, supra note 111, at 167 (citing General Bldg. Contractors Ass'n, 458 U.S. at 388). The
V. Conclusion

The Walker court, despite its flawed analysis, rendered a vitally important decision. Discrimination is as dynamic a concept as race or ethnicity, and the scope of our federal civil rights laws must change to fit today’s changing types of discrimination, regardless of the form the discrimination takes.

In all likelihood, it will take years and many adverse decisions before there is federal legislation directed at intra-racial, color-based discrimination. In the meantime, the courts must provide the only means of redress through existing Title VII and section 1981 remedies. While courts must have some manageable standards to apply during this period, the Walker court’s analysis should not be viewed as the correct approach because of its commingling of section 1981 and Title VII analyses. The Walker court must be applauded, however, for being the first court in the nation to realize that color-based discrimination is no less injurious when it occurs between members of the same race. The Walker court has provided the much sought-after precedent in this area; now let us hope that other courageous courts will move still further towards the

---

Note’s author recognized that “the absolute necessity of proving the defendant’s intent overcomes the perceived problem that recognizing claims based on national origin will cause an explosion of litigation.” See id. at 167. A similar rationale can rebut arguments that anticipate an explosion of litigation under § 1981 intra-racial, color-based discrimination claims. The § 1981 plaintiff will always have to prove that the defendant acted intentionally to discriminate on the basis of color, and this requirement will “weed out” frivolous claims. See id. at 168.

137. See Case Comment, supra note 124, at 858 (“As the ethnic makeup of society changes, racial perceptions change accordingly. Consequently, society tends to categorize people into new racial groups. For this reason, rigid definitions of race are no longer effective tools for determining the scope of coverage under section[] 1981 . . .”). For a concise discussion of the changing concepts of race and ethnicity, see the Supreme Court’s decision in Saint Francis College v. Al-Khazraji, 481 U.S. 604, 610 n.4, 611 (1987).

138. An example of the changing nature of discrimination is the Supreme Court’s decision in McDonald v. Santa Fe Trail Transportation Co., where the Court held that whites as well as blacks could use § 1981 as a remedy for discrimination. 427 U.S. 273, 295-96 (1976). Before that decision, the lower federal courts were split on the question of whether § 1981 applied to discrimination against white persons. Compare Ripp v. Dobbs Houses, Inc., 366 F. Supp. 205, 211 (N.D. Ala. 1973) (§ 1981 does not apply to whites) and Perkins v. Banster, 190 F. Supp. 98, 99 (D. Md.) (same), aff’d, 285 F.2d 426 (4th Cir. 1960), with Carter v. Gallagher, 452 F.2d 315, 325 (8th Cir. 1971) (§ 1981 does apply to whites), cert. denied, 406 U.S. 950 (1972) and Central Presbyterian Church v. Black Liberation Front, 303 F. Supp. 894, 899 (E.D. Mo. 1969) (same). It is not that discrimination against whites never existed before the Supreme Court’s decision in Santa Fe; rather, the Court decided to recognize it by allowing § 1981 to protect white victims of discrimination. Therefore, it is no answer to say that the lack of precedent in the area of intra-racial, color-based discrimination is a valid reason for denying a remedy. On the contrary, the courts should recognize that this new type of discrimination exists and that Title VII and § 1981 are appropriate remedies.
development of fair and just standards for the resolution of this emerging dilemma.

Sandi J. Robson