Applying 42 U.S.C. § 1981 to Claims of Consumer Discrimination

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ABSTRACT:

This Comment explores several interesting legal questions regarding the proper interpretation 42 U.S.C. Section 1981, which prohibits racial discrimination in contracting, when discrimination arises in the context of a consumer retail contract. It explores how the Fifth Circuit's and other federal courts' narrow interpretation of section 1981's application in a retail setting, which allows plaintiffs to invoke the statute only when they have been prevented from completing their purchase, is contrary to the statute's express language, Congressional intent, and to evolving concepts of contract theory, all of which encompass our society's deep commitment to combating racial discrimination through strict enforcement of civil rights protections. It examines the legislative and interpretive history of 42 U.S.C. § 1981, emphasizing the trend in both Congress and the courts to interpret this and other civil rights laws broadly.

It then reviews a selection of federal court interpretations of § 1981's application to the retail setting, from the very restrictive to those that have found a workable, broader interpretation that encompasses the various stages of the retailer-consumer contractual relationship. It highlights the standard adopted in the Sixth Circuit that finds actionable "markedly hostile" discriminatory conduct affecting the contractual relationship. Finally, the Comment examines how, as contract theory itself evolves to encompass a more expansive view of responsibility and liability between contracting parties, so should the non-discrimination statute which governs contractual relations. In conclusion, an adoption of the Sixth Circuit's "markedly hostile" test is urged.

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I. Introduction

On March 26, 1995, Denise Arguello and her family stopped at a Conoco gas station in Forth Worth, Texas on their way to a family picnic.[1] She approached the counter with her items and attempted to pay for them with a credit card. The sales clerk, Cindy Smith, was instantly rude.[2] She requested Ms. Arguello's identification, and when Ms. Arguello provided her out of state driver's license, Ms. Smith stated that it was Conoco policy not to accept out of state licenses as valid forms of identification.[3] An argument ensued, after which Ms. Smith accepted the credit card and completed the transaction.[4]

After Ms. Arguello paid for her purchase, the tension between Ms. Smith and Ms. Arguello escalated into an altercation, during which Ms. Smith called Ms. Arguello a "f**king Iranian Mexican bitch."[5] After Ms. Arguello exited the store, Ms. Smith continued her verbal assault on Ms. Arguello by screaming racial epithets on the gas station's intercom, which broadcast in the store's parking lot. She also laughed at and made several crude gestures toward Ms. Arguello and her family, who was waiting in the car.[6]

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[1] Arguello v. Conoco, No. 397CV0638-H, 2001 WL 1442340, at *1 (N.D. Tex. Nov. 9, 2001).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.* (Ms. Arguello is Hispanic).

[6] *Id.*

Ms. Arguello brought a 42 U.S.C. § 1981[7] claim against Conoco, alleging that the discriminatory and abusive treatment that she received during this encounter deprived her of the right to contract on the same terms as white customers, in violation of § 1981.[8] The Fifth Circuit Court of Appeals decided that Ms. Arguello did not have a cognizable section 1981 claim because she was not prevented from making her purchases, despite the "offensive" and "egregious" conduct to which she was subjected.[9] The U.S. Supreme Court denied Ms. Arguello's petition for writ of *certiorari*.[10]

Ms. Arguello's case presents several interesting legal questions regarding the proper interpretation of a Reconstruction era civil rights statute that is of vital importance to this country's civil rights jurisprudence. This Comment explores how the Fifth Circuit's and other

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[7] 42 U.S.C. § 1981 (2000) ("(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. (b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.").

[8] *Arguello*, 2001 WL 1442340, at *2. Ms. Arguello's father, Mr. Govea, who was in the store at the time of this incident, also brought an unsuccessful section 1981 claim as part of the same suit. *Id.* This Comment will explore only the merits of Ms. Arguello's claim.

[9] Arguello v. Conoco, 330 F.3d 355, 362 (5th Cir. 2003).

[10] Arguello v. Conoco, Inc., 540 U.S. 1035 (Nov 17, 2003) (NO. 03-342).

federal courts' narrow interpretation of section 1981's application in a retail setting, which allows plaintiffs to invoke the statute only when they have been prevented from completing their purchase, is contrary to the statute's express language, Congressional intent, and to evolving concepts of contract theory, all of which encompass our society's deep commitment to combating racial discrimination through strict enforcement of civil rights protections. Part II of this Comment examines the legislative and interpretive history of 42 U.S.C. § 1981, emphasizing the trend in both Congress and the courts to interpret this and other civil rights laws broadly. Part III reviews a selection of federal court interpretations of § 1981's application to the retail setting. Part III(A) considers several district and circuit court cases, such as *Arguello*, which have adopted a narrow and restrictive interpretation of section 1981. Part III(B) reviews decisions that have found a workable, broader interpretation that encompasses the various stages of the retailer-consumer contractual relationship, and highlights the standard adopted in the Sixth Circuit that finds actionable "markedly hostile" discriminatory conduct affecting the contractual relationship. Part IV examines how, as contract theory itself evolves to encompass a more expansive view of responsibility and liability between contracting parties, so should the non-discrimination statute which governs contractual relations. Part V concludes with general recommendations to the courts on how best to incorporate the language and intent of section 1981 in a retail setting, specifically encouraging universal adoption of the Sixth Circuit's "markedly hostile" test.

II. Legislative and Interpretive History of Section 1981

The Thirteenth Amendment to the U.S. Constitution was passed in 1865 to abolish the institution of slavery.[11] It states: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to its jurisdiction. Congress shall have power to enforce this article by appropriate legislation."[12] In response to the end of the Civil War and the ratification of the Thirteenth Amendment, many Southern states passed laws that became known as the Black Codes. The purpose of the Black Codes was to deprive freed slaves of many of the promises of their newly granted freedom.[13] In reviewing the history preceding the adoption of the Fourteenth Amendment, the Supreme Court, in the *Slaughter House Cases*, observed that the Black Codes, along with other extra-legal methods of discrimination, "saddled Negroes with onerous disabilities and burdens, and curtailed their rights . . . to such an extent that their freedom was of little value."[14]

The *Slaughter House Cases* brought before the Supreme Court the question of whether the Thirteenth and Fourteenth Amendments forbid the state of Louisiana from creating a state-sanctioned monopoly in the slaughter house business in New Orleans.[15] The Court reasoned that Louisiana's conduct, however unwise, was not unconstitutional because the intent of the

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[11] U.S. CONST. amend. XIII.

[12] *Id.*

[13] Jones v. Alfred H. Mayer, Co., 392 U.S. 409, 426 (1968) (reviewing the history of the times preceding the passage of the Civil Rights Act of 1866). *See also* discussion *infra* pp. **XX**

[14] The Slaughter-House Cases, 83 U.S. 36, 70 (1872).

[15] *Id.* at 49.

Thirteenth and Fourteenth amendments was primarily to abolish the institution of slavery and its legacy, not to render unconstitutional legislative efforts to regulate economic activity.[16] In tracing the history and intent of the Fourteenth Amendment, the court discussed the practical effect of the Black Codes, recalling that in some states former slaves were forbidden to enter town unless as menial servants.[17] They were required to live and work on land that they were not allowed to buy; only certain occupations were available for former slaves to enter; and they were not permitted to give testimony in the courts in any case where a white man was a party.[18] It was said that "their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced."[19] Thus, the Slaughter-House Cases clarified that the purposes of the Thirteenth, Fourteenth, and Fifteenth Amendments was essentially to combat slavery's legacy of discrimination, such as that embedded in the Black Codes.

In the same year Congress passed the Fourteenth Amendment,[20] it also passed the Civil Rights Act of 1866, also in an effort to combat the Black Codes and other laws and practices limiting the freedom guaranteed by the Thirteenth Amendment.[21] The 1866 Act was passed pursuant to Congress's authority under the Thirteenth Amendment to pass laws to enforce the

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[16] *Id.* at 72.

[17] *Id.* at 70.

[18] *Id*.

[19] *Id.*

[20] The Fourteenth Amendment was passed by Congress in 1866, though not ratified until 1868. U.S. CONST. Am. XIV (historical notes).

[21] Cong. Globe, 39th Cong., 1st Sess., 1809, 1861. *See also Jones*, 392 U.S. at 422-436.

abolition of the institution of slavery.[22] The Civil Rights Act of 1866, now codified in 42 U.S.C. §§ 1981 and 1982, granted all citizens "the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefits of all laws and proceedings for the security of person and property as is enjoyed by white citizens . . . ."[23] The Act's overarching purpose was to give "real content to the freedom guaranteed by the Thirteenth Amendment."[24] The lofty aspirations of the 1866 Act, however, were soon grounded by the Supreme Court.

In 1883, the Supreme Court heard a conglomeration of appeals known as *The Civil Rights Cases.*[25] *The Civil Rights Cases* challenged the constitutionality of the 1875 Civil Rights Act, which forbade discrimination in places of public accommodation and provided criminal penalties for those who denied to persons of color "the full enjoyment of any accommodations" covered by the section.[26] The Supreme Court decided in the *Civil Rights Cases*, even after conceding that the enforcement clause of the Thirteenth Amendment gave Congress the "power to pass all laws necessary and proper for abolishing all badges and incidents of slavery," that a refusal to accommodate or to enter into a contract with another person because of their race could not "be

[22] *Jones*, 392 U.S. at 433.

[23] The original section 1 of the 1866 Act, now codified as 42 U.S.C. §§ 1981 and 1982 (2000). *Excerpted in Jones*, 392 U.S. at 422.

[24] *Jones*, 322 U.S. at 433.

[25] The Civil Rights Cases, 109 U.S. 3 (1883).

[26] *Id.* at 9 (citing Act Cong. March 1, 1875, 18 Stat. 335).

justly regarded as imposing any badge of slavery or servitude upon the applicant . . . ."[27] The Court continued:

> an act of refusal [to accommodate] has nothing to do with slavery or involuntary servitude, and that if it is violative of any right of the party, his redress is to be sought under the laws of the state . . . It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business.[28]

The Court distinguished between what it deemed were the prohibitions of state interference with "fundamental rights" in the 1866 Act, of which it approved, and the 1875 Act's attempt to regulate "social rights" and private interactions between individual citizens, which it found unacceptable.[29] In conclusion, the Court asserted that because Congress had attempted to regulate such "social rights" with the 1875 Civil Rights Act, it had exceeded its authority under the Thirteenth Amendment, and therefore found the 1875 Act unconstitutional.[30]

As a result of the *Civil Rights Cases*, the 1875 Civil Rights Act was defunct, and the 1866 Civil Rights Act, which also ostensibly prohibited racially-motivated refusals to contract or serve, was in many ways delegitimized.[31] The Court had decided that such outright contract

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[27] *Civil Rights Cases*, 109 U.S. at 20, 24.

[28] *Id*.

[29] *Id*. at 25-28.

[30] *Id.* at 25.

[31] *See e.g.* Cynthia Gail Smith, Patterson v. McLean Credit Union: *New Limitations on an Old Civil Rights Statute*, 68 N.C. L. REV. 799, 809-10 (April 1990).

discrimination was not illegal unless perpetrated by state law or custom.[32] Individuals could refuse to contract with each other – the state was only required to enforce the contract once formed.[33] This decision ushered in an era of restrictive reading of all civil rights laws, as well as of Congress's ability under the Thirteenth and Fourteenth Amendments to pass legislation aimed at eradicating "the badges and incidents" of slavery.[34] Consequently, the goal of infusing of "real content" into the freedom guaranteed by the Thirteenth Amendment, was severely and suddenly halted.[35] Segregationist laws were instituted, allowable because they simply restricted the "social rights" of citizens,[36] legally sanctioning second-class citizenship for minorities, and were not successfully challenged until over eighty years later.[37]

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[32] Although the Court did not specify that its holding specifically affected the scope of the 1866, its discussions of the nature of the 1866 Act versus the nature of the 1875 Act indicated its intent clarify the reach of both enactments. *Civil Rights Cases*, 109 U.S. at 16-25; *see also* Smith, *supra* note 31 at 809-810. In addition, Justice Harlan, writing for the dissent, states that these "badges and incidents of slavery," which the majority misconstrued, "lie at the very foundation of the Civil Rights Act of 1866." 109 U.S. at 35. Therefore there is little doubt that the restrictive holding in this case was equally applicable to the 1866 Act.

[33] *Civil Rights Cases*, 109 U.S. at 16-17.

[34] *See* Smith, *supra* note 31, at 809-10.

[35] *Id.*

[36] *See Civil Rights Cases*, 109 U.S. at 22.

[37] *See* Smith, *supra* note 31, at 809-10.

The Supreme Court returned to the issue of the Civil Rights Act of 1866's applicability to private conduct in 1968.[38] Its decision in *Jones v. Alfred Mayer Co.* revisited the legislative history and intent of the 1866 Act and concluded that its prohibitions against discrimination should, in fact, be applied to private conduct.[39] The African-American Plaintiffs in *Jones* had attempted to buy a home in a private subdivision in Missouri, and the Defendant had refused to sell to them solely because of their race.[40] The Plaintiffs claimed their 42 U.S.C. § 1982 rights

[38] The Court had considered the provisions of the Act before in various cases. *See, e.g.,* Shelley v. Kraemer, 334 U.S. 1 (1948); Hurd v. Hodge, 334 U.S. 24 (1948) (both holding that section 1981 and the Fourteenth Amendment prohibit state enforcement of racially restrictive covenants, though as privately enforced the covenants are constitutional); City of Richmond v. Deans, 281 U.S. 704 (1930) (Ordinance prohibiting use as residence of building in block occupied mainly by those with whom intermarriage is forbidden held invalid); Harmon v. Tyler, 273 U.S. 668 (1927) (municipal ordinance in New Orleans requiring racially segregated neighborhoods held unconstitutional and in violation of section 1981); and Buchanan v. Warley, 245 U.S. 60 (1917) (Municipal ordinance forbidding person from occupying house in a block upon which a greater number of houses are occupied by persons of the opposite race held invalid and in violation of section 1981). All of these cases arose in the context of state-sanctioned or mandated discrimination, not especially pertinent to our discussion here.

[39] 392 U.S. 409 (1968).

[40] *Id.* at 412.

had been violated.[41] The Supreme Court acknowledged that when Congress passed the 1866 Civil Rights Act, it did so on the basic assumption that "it was approving a comprehensive statute forbidding *all* racial discrimination affecting the basic civil rights enumerated in the Act."[42] The plain language of the statute forbids discrimination by not only "state or local law," but also "custom or prejudice."[43] Therefore it was clear to the *Jones* Court that section 1 of the 1866 Act "was meant to prohibit all racially motivated deprivations of those rights enumerated in the statute . . . ,"[44] not just those embodied in the law. The Court further found that Congress exercised proper power, granted to it by the Thirteenth Amendment's Enabling Clause,[45] in forbidding private acts of racial discrimination in the 1866 Act.[46]

This decision was a direct reversal of the holding in the *Civil Rights Cases*, at least in terms of its applicability to the 1866 Act. While *Jones* specifically interpreted what is now 42

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[41] 42 U.S.C. § 1982 (2000) ("All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.").

[42] *Jones*, 392 U.S. at 435 (emphasis added).

[43] *See id.* at 423-24.

[44] *Id.* at 426. See *Jones* also for an extensive review of the legislative history of the Civil Rights Act of 1866 and its drafters' intent that its provisions apply to private conduct. *Id.* at 421-37.

[45] U.S. CONST. amend. XIII. ("Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation.").

[46] *Jones*, 392 U.S. at 426.

U.S.C § 1982, the provision granting equal property rights to all citizens,[47] its legislative intent and history have been held to be identical to that of 42 U.S.C § 1981, its sister statute.[48] After the Court thus clarified that the Civil Rights Act of 1866 did apply to private acts of discrimination, plaintiffs began to invoke 42 U.S.C. § 1981 to remedy racially discriminatory employment practices.

[47] 42 U.S.C. § 1982 (2000) ("All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.").

[48] *See e.g.* Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 410 U.S. 431, 439-440 (1973) ("The operative language of both s. 1981 and s. 1982 is traceable to the Act of April 9, 1866, . 31, s 1, 14 Stat. 27. In light of the historical interrelationship between s. 1981 and s. 1982, we see no reason to construe these sections differently when applied, on these facts . . ."); Runyon v. McCrary, 427 U.S. 160, 170 (1976) (stating that the holding in *Jones* "necessarily implied that the portion of s. 1 of the 1866 Act present codified as 42 U.S.C. § 1981 likewise reaches purely private acts of racial discrimination. . . The statutory holding in *Jones* was that the '(1866) Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerate therein,' . . . One of the 'rights enumerated' in section 1 is 'the same right . . . to make and enforce contracts . . .'") (internal citations omitted); Goodman v. Lukens Steel Co., 482 U.S. 656, 676 (1987) ("Both §§ 1981 and 1982 were derived from § 1 of the Civil Rights Act of 1866; their wording and their identical legislative history have led the Court to construe them similarly.").

In the mid-1970s, the Supreme Court repeatedly held that section 1981 affords a federal remedy against racial discrimination in private employment.[49] Additionally, it held that a private school's denial of admission to prospective students on the basis of their race was also a form of illegal contract discrimination, proscribed by section 1981.[50] These and other cases during the 1970s and 80s affirmed that section 1981's protections reached various private acts of discrimination, including those in a private employment context.[51] The Court would next be tasked with defining, within those contexts, what it meant to "make and enforce contracts."

In *Goodman v. Lukens Steel Co.,* the Court attempted to define which rights were protected by section 1981's prohibition against discrimination in the making and enforcement of contracts.[52] In *Goodman*, at issue was which statute of limitations should apply to the plaintiffs' section 1981 claim of racial discrimination in employment.[53] The Court decided that states' statute of limitations for personal injury actions, and not state statutes of limitations governing

[49] *See e.g.* Johnson v. Railway Express Agency, 421 U.S. 454 (1975) (holding an individual may bring claims of racial discrimination in employment under both the Civil Rights Act of 1964 and the Civil Rights Act of 1866).

[50] Runyon v. McCrary, 427 U.S. 160 (1976).

[51] The Supreme Court also established that section 1981 applied to contract discrimination based on national origin discrimination (Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987)), and to discrimination against white people, based on their race (McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976)).

[52] 482 U.S. 656 (1987).

[53] *Id.*

interference with contractual relations, should apply.[54] Justice Brennan, joined by Justices Blackmun and Marshall, strongly disagreed and emphasized in his dissent section 1981's interrelation with contract rights.[55] Explaining the scope of those contract rights, Justice Brennan stated:

> clearly, the 'full and equal benefit' and 'punishment' clauses guarantee numerous rights other than equal treatment in the execution, administration, and the enforcement of contracts. In this sense, § 1981 . . . is broadly concerned with 'the equal status of every *person.* But § 1981 was primarily intended, and has been most frequently utilized, to remedy injury to a narrower category of contractual or economic rights.'[56] [It] is apparent that the primary thrust of the 1866 Congress was the provision of equal rights and *treatment* in the matrix of contractual and quasi-contractual relationships that form the economic sphere.[57]

Justices Brennan, Blackmun, and Marshall, therefore, recognized that section 1981 requires equal treatment for all citizens at all stages of economic transactions and contractual relationships.[58]

The majority in *Goodman* also recognized section 1981's broad scope, basing its conclusion that section 1981 claims were more properly classified as tort actions on a belief that tort claims encompassed the wider range of rights included in section 1981.[59] The majority described section 1981 as a protection of the "personal right to engage in

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[54] *Id.* at 661-62.

[55] *Id.* at 671 (Brennan, J., dissenting).

[56] *Id.* (quoting 42 U.S.C. § 1981 and Wilson v. Garcia, 471 U.S. 261, 277 (1985) (applying an analogous analysis to 42 U.S.C. § 1983) (emphasis in original)).

[57] *Id.* at 676 (emphasis added).

[58] *Goodman,* 482 U.S. at 669.

[59] *Id.* at 661.

economically significant activity free from racially discriminatory interference."[60] It is noteworthy that the Court described the statute as creating the right to be free from interference with economic activity, and not strictly a prohibition of racially-motivated refusals to contract.

Following this series of decisions that incorporated an expanded view of the economic rights and activities protected by section 1981, in 1989, the Supreme Court retreated to a restrictive definition of the section's use of the terms "make and enforce" contracts.[61] In *Patterson v. McLean Credit Union*, the Court was faced with a challenge to its 1976 decision in *Runyon v. McCrary,* which held that section 1981 prohibited racial discrimination in the making and enforcing of private contracts.[62] The plaintiff in *Patterson* alleged that her employer, the McLean Credit Union, harassed her, failed to promote her and ultimately fired her because of her race, in violation of section 1981.[63] The Court considered whether the petitioner's claim of racial harassment in her employment was actionable under section 1981, and whether the *Runyon* interpretation of section 1981 should be overruled.[64]

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[60] *Id.*

[61] Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

[62] *Id.; Runyon*, 427 U.S. 160 (a private school's denial of admission to prospective students on the basis of their race was also a form of illegal contract discrimination, proscribed by section 1981).

[63] *Patterson*, 491 U.S. at 169.

[64] *Id.* at 170-71.

After reargument and reconsideration, the Court reaffirmed its decision in *Runyon* that § 1981 prohibits racial discrimination in the making and enforcement of private contracts.[65] It stated that "*Runyon* is entirely consistent with our society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin."[66] However, despite the asserted commitment to combat racial discrimination, the Court further held that section 1981 was not applicable to actions in which the actual "making" or "enforcing" of contracts was not impaired.[67] It found that, in the employment context, "postformation" conduct of the employer affecting the terms of the contract, such as the "imposition of discriminatory working conditions," does not involve "the right to make a contract . . . ."[68] It further reasoned that the

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[65] *Id.* at 171.

[66] *Id.* at 174. The Court also cited many of its own proclamations which support this contention: Bob Jones University v. United States, 461 U.S. 574, 593 (1983) ("Every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination"); Brown v. Bd. Of Educ., 347 U.S. 483 (1954); Plessy v. Ferguson, 163 U.S. 537, 559 (1896)(Harlan, J., dissenting) ("The law regards man as man, and takes no account of his ... color when his civil rights as guaranteed by the supreme law of the land are involved"). Later in the opinion, the court states "The law now reflects society's consensus that discrimination based on the color of one's skin is a profound wrong of tragic dimension. Neither our words nor our decisions should be interpreted as signaling one inch of retreat from Congress's policy to forbid racial discrimination in the private, as well as the public, sphere." *Id.* at 188.

[67] *Patterson*, 491 U.S. at 176.

[68] *Id.* at 177.

right to enforce a contract was only limited to "conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights."[69] The petitioner's claim of racial harassment, therefore, was held not to be actionable under section 1981.[70]

Congress responded to the Court's narrow construction of one of the nation's oldest and most important civil rights statutes with the Civil Rights Act of 1991.[71] The 1991 Act specifically revised the wording of section 1981 to clarify that post-formation conduct in the employment context would be covered by section 1981.[72] Congress added sections (b) and (c) to the provision, which now reads:

> (a) Statement of equal rights
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) "Make and enforce contracts" defined
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) Protection against impairment

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[69] *Id*. at 177-78.

[70] *Id*. at 178.

[71] 42 U.S.C. § 1981 (2000).

[72] *Id.*

> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.[73]

Further, in the legislative history of the Act, Congress wrote: "H.R. 1, the Civil Rights Act of 1991, has two primary purposes. The first is to respond to recent Supreme Court decisions by restoring the civil rights protections that were dramatically limited by those decisions. The second is to strengthen existing protections and remedies available under federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination."[74] The 1991 Act, therefore, was a swift and complete interment of the holding in *Patterson v. McLean*.

III. Section 1981's Application to Consumer Discrimination: Discrepancies in Interpretation Among Federal Courts

Although the 1991 Act clarified that the "make and enforce" language of section 1981 applied to post contract formation conduct in an employment setting, the application of the statute's new language to consumer contract formations was less clear. Consequently, courts are struggling with its proper interpretation. The courts are wrestling with how exactly to define the parameters of the contractual relationship that exists between a commercial establishment and its customers. Perhaps fearful of creating a generalized cause of action for all instances of racial discrimination occurring anywhere near a retail establishment, many courts have erred on the side of extreme caution.[75]

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[73] *Id.*

[74] H.R. Rep. No. 40 (II), 102nd Cong., 1st Sess. 1991, 1991 U.S.C.C.A.N. 549, 1991.

[75] *See* discussion *infra*, s. III (A).

These courts find that as long as the actual ability to purchase (and therefore complete the contract) has not been prevented, section 1981 rights are not implicated.[76]

Unfortunately, the subtleties of today's manifestations of racial discrimination escape their model, as does redress for millions of American consumers who are followed, harassed, verbally and physically assaulted, or simply required to endure painfully substandard service so that they may be able to purchase their items.[77]

Other courts have endeavored to apply a broader understanding of § 1981 and its protections to the retail context.[78] These courts recognize that the imposition of additional, discriminatory conditions into a purchase, such as requiring pre-payment or subjecting customers to discriminatory behavior during the time surrounding their purchase, whether before, during, or after, can interfere with the contractual rights protected by section 1981.[79]

The latter line of decisions would appear to be in accord with section 1981's legislative and interpretive history indicating that it was meant to be read broadly in order to combat "*all* racial discrimination affecting the basic civil rights enumerated in the Act."[80] Additionally, these cases give fuller meaning to the 1991 amendment's expanded

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[76] *See* discussion *infra,* s. III (A).

[77] *See generally* Anne-Marie G. Harris, *Shopping While Black: Applying 42 U.S.C. § 1981 To Cases of Consumer Racial Profiling*, 23 B.C. THIRD WORLD L.J. 1 (2003).

[78] *See* discussion *infra*, s. III (B).

[79] *See* discussion *infra*, s. III (B).

[80] *Jones*, 392 U.S. at 435 (emphasis added).

definition of "make and enforce" contracts, which now expressly includes the "enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[81]

A. Courts Narrowly Interpreting Section 1981

Consumer discrimination cases that restrict causes of action under section 1981 to those in which the purchase was actually thwarted restrictively interpret the language of section 1981 and seemingly ignore the additional language of the 1991 amendment.[82] The Fifth Circuit's decision in *Arguello v. Conoco* is an illustrative example.[83] The court in *Arguello*, citing section 1981, first stated that at issue in that case was "plaintiffs' ability 'to make and enforce contracts' on nondiscriminatory terms."[84] The court decided because Ms. Arguello "successfully completed the transaction" and "received all she was entitled to under the retail-sales contract," her claim must fail.[85] The racial harassment she encountered before, during and after the moment in time when payment exchanged hands was not determined by this court to affect the benefits, terms, conditions or privileges of that transaction. That "single, discrete transaction – the purchase of goods" was the starting and ending point of the court's analysis.[86]

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[81] 42 U.S.C § 1981 (b) (2000).

[82] 42 U.S.C. 1981 (b-c) (2000), excerpted *supra* at p.16.

[83] 330 F.3d 355, 358-60 (5th Cir. 2003).

[84] *Id.* at 358 (citing 42 U.S.C. § 1981(a)).

[85] *Id.* at 359.

[86] *Id.* at 360.

The *Arguello* court, in reaching this conclusion, relied heavily on the Fifth Circuit decision in *Morris v. Dillard Dep't Stores,* the Circuit's first attempt to apply section 1981 in the retail context.[87] In *Dillard*, the plaintiff filed a section 1981 claim against Dillard Department Store after a security guard at the store followed her around while shopping and to her car after she left the store, where he took down her license plate number.[88] The plaintiff then re-entered the store to confront the security guard about his actions.[89] At that point, the security guard handcuffed the plaintiff, had a female officer search her, and then transported her to the police station where she was booked for shoplifting.[90] After this incident, the plaintiff was banned from entering the store for a period of time.[91]

The Fifth Circuit *Dillard* court first reviewed the elements of a prima facie case of § 1981 discrimination that the Plaintiff Morris had to establish: "(1) that she is a member of a racial minority; (2) that Dillard's had intent to discriminate on the basis of race; and (3) that the discrimination concerned one or more of the activities enumerated in the statute, in this instance, the making and enforcement of a contract."[92] This three part test

[87] 277 F.3d 743, 752 (5th Cir. 2001).

[88] *Id.* at 746.

[89] *Id.*

[90] *Id.* at 747.

[91] *Id.* at 751.

[92] *Id.* (citing Bellows v. Amoco Oil Co., 118 F.3d 268, 274 (5th Cir. 1997) (applying the cited three-part test first adopted by the Fifth Circuit in Green v. State Bar of Texas, 27 F.3d 1083 (5th Cir. 1994)).

was adopted in Fifth Circuit in 1994[93] and, at that time, had also been used in the Second Circuit and by a Florida district court.[94]

In applying part three of this test, the court considered the plaintiff's claim that the store's decision to ban her shopping there for a specific period of time interfered with her § 1981 right to be free from discrimination in contracting.[95] The court disagreed with the plaintiff and decided the ban did not interfere with her section 1981 rights.[96]

The court stated that there was "no evidence in the record indicating that she made any tangible attempt . . . to enter any . . . contractual agreement with Dillard's, at any time during the course of the ban."[97] Therefore, her allegations of loss of contract rights were deemed "too speculative to establish loss of any actual contractual interest owed to her by Dillard's."[98] The court concluded that "to raise a material issue of fact as to her § 1981 claim, Morris must offer evidence of some tangible attempt to contract with Dillard's during the course of the ban, which could give rise to a contractual duty between her and the merchant, and which was in some way thwarted."[99]

In reaching its conclusion that tangible efforts to contract must be actually thwarted by

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[93] *Green*, 27 F.3d at 1086.

[94] Mian v. Donaldson, Lufkin & Jenrette Securities Corp., 7 F.3d 1085 (2d Cir. 1993), *cited in Green*, 27 F.3d at 1086; Baker v. McDonald's Corp., 686 F. Supp. 1474 (S.D. Fla. 1987).

[95] *Dillard*, 277 F.3d at 752.

[96] *Id.* at 753.

[97] *Id.* at 752.

[98] *Id.*

[99] *Id*.

the defendant in order to sustain a § 1981 claim, the *Dillard* court cited a series of decisions from its own and other circuits that support the proposition that loss of speculative contract interests do not interfere with § 1981 contract rights.[100] The essence of this line of cases is that they require plaintiffs to establish "the loss of an actual, not speculative or prospective, contract interest."[101] These cases included the Seventh Circuit decision in *Morris v. Office Max, Inc*., which rejected a plaintiff's § 1981 claim asserting that a merchant interfered with his "prospective contractual relations" where the plaintiff had completed a purchase prior to being detained by police officers who suspected him of shoplifting, despite the fact that the plaintiff was examining additional goods with intent to purchase at the time he was detained.[102]

The court also cited the Eighth Circuit's *Youngblood v. Hy-Vee Food Stores, Inc.*, which found that where a plaintiff purchased some beef jerky and was then arrested for concealing other goods, the merchant "cannot be said to have deprived [the plaintiff] of any benefit of any contractual relationship, as no such relationship existed" at the time of the arrest because "nothing that happened after the sale created any further contractual duty on [the merchant's]

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[100] *Id.*

[101] *Id.* at 751-52 (citing Youngblood v. Hy-Vee Food Stores, Inc., 266 F.3d 851, 853-55 (8th Cir. 2001); Hickerson v. Macy's Dep't Store at Esplanade Mall, No. CIV. A. 98-3170, 1999 WL 144461, at *2 (E.D. La. Mar. 16, 1999); *Bellows*, 118 F.3d at 275 (denying recover under § 1981 to a plaintiff who failed to present any evidence that the defendant "did in fact interfere with the contract"); Morris v. Office Max, Inc., 89 F.3d 411, 414-15 (7th Cir. 1996); Phelps v. Wichita Eagle-Beacon, 886 F.2d 1262, 1267 (10th Cir. 1989) (affirming dismissal of a § 1981 claim where a plaintiff alleged "possible loss of future opportunities" to contract).

[102] 89 F.3d 411, 414-15 (7th Cir. 1996).

part."[103] The court also cited a Louisiana District Court decision, *Hickerson v. Macy's Dep't Store at Esplanade Mall,* where a plaintiff was not "prevented from making a particular purchase, or from returning [goods] he had previously bought" and thus the court granted summary judgment in favor of a merchant because "[t]here is no generalized right under section 1981 to have access to opportunities to make prospective contracts."[104]

The *Dillard* court contrasted what it deemed "prospective" contractual interests with actual contractual interference by the merchant, which it deemed could properly give rise to a cognizable § 1981 claim.[105] For example, the court cites the Sixth Circuit decision in *Christian v. Wal-Mart Stores, Inc.,* which held that a plaintiff, who had gathered her intended purchases and was proceeding to check out when asked to leave the store, could bring a § 1981 for interference with her right to contract.[106] Another example the court references is *Henderson v. Jewel Food Stores, Inc.,* an Illinois district court case holding that "a § 1981 claim must allege that the plaintiff was actually prevented, and not merely deterred, from making a purchase or receiving service after attempting to do so," and finding a plaintiff's allegation sufficient to sustain a § 1981 claim where the "plaintiff was midstream in the process of making a contract for

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[103] 266 F.3d 851, 853-55 (8th Cir. 2001).

[104] No. CIV. A. 98-3170, 1999 WL 144461, at *2 (E.D. La. Mar.16, 1999).

[105] *Dillard*, 277 F.3d at 752.

[106] 252 F.3d 862, 874 (6th Cir. 2001). Interestingly, the *Dillard* court fails to mention the Christian court's adoption of the "markedly hostile" prima facie test for § 1981 claims that would have allowed the plaintiff's claim to proceed even if she had not been asked to leave the store while en route to purchase her items. *See id.* at 872-73; *see also* discussion *infra* pp. 33-35.

[a] goods purchase" at a cashier at the time an officer arrested him.[107]

Thus, the Fifth Circuit's decision in *Arguello* and the cases on which it relies illustrate these courts' view that a section 1981 claim only lies where one physically attempts to contract with a merchant and is physically restrained from doing so, either by arrest or refusal to contract. These courts have determined that contractual rights accrue only at the point money is exchanging hands, or when a customer is directly en route to the purchase point. This narrow definition of § 1981's "make and enforce contracts" language does not attempt to incorporate the 1991 amendment's expanded definition of the phrase, which is now defined as "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship," into the retail context.[108]

In fact, none of the above-referenced decisions seem to seriously consider Congress's intent to broaden the protections of § 1981 with the 1991 Amendment.[109] In *Youngblood*, for example, the court stated that Congress had amended § 1981 to "include the right to 'the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship,'" but then decided that after the purchase was completed, no contractual relationship remains.[110] In *Dillard*, the court does not even reference the 1991

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[107] No. 96 C 3666, 1996 WL 617165, at *3-4 (N.D. Ill. Oct.23, 1996).

[108] 42 U.S.C. § 1981 (a-b) (2000).

[109] *See generally Youngblood*, 266 F.3d at 856-859 (Arnold, J., dissenting).

[110] *Youngblood*, 266 F.3d at 854 (citing Lewis v. J.C. Penney Co., Inc., 948 F. Supp. 367, 372 (D. Del. 1996) (holding that where plaintiff was detained and her bags searched after her purchase was completed, there was no contractual relationship remaining between her and the

amendment or its language regarding the contractual relationship in its application of § 1981.[111] In *Morris v. Office Max*, the court cites the language of the amended § 1981 (b), but then goes on to base its conclusion denying the § 1981 claim largely on pre-amendment precedent.[112]

These courts have failed to apply the broadened interpretation of § 1981, mandated by the 1991 amendment, to the retail contract. They do not distinguish between the discrete retail transaction and the benefits, terms, conditions, or privileges of the contractual relationship. The contract and the contractual relationship seem to appear to these courts as one in the same, an interpretation which would seem render the additional language of the 1991 amendment - the entirety of section 1981 (b) - redundant and unnecessary.

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department store); Rogers v. Elliot, 135 F. Supp. 2d 1312, 1315 (N.D. Ga. 2001) (holding, similarly, that even though plaintiff was verbally and physically assaulted by an employee while in the store, because she had already paid for her purchases, there was no actionable § 1981 claim)).

[111] *Dillard*, 277 F.3d at 751-52.

[112] *Office Max*, 89 F.3d at 413 (citing, as the basis for its decision, cases where customers were either refused service, Washington v. Duty Free Shoppers, Ltd., 710 F. Supp. 1288 (N.D. Cal.1988); Shen v. A & P Food Stores, No. 93 CV 1184(FB), 1995 WL 728416 (E.D. N.Y. Nov. 21, 1995); removed from the store, Flowers v. The TJX Companies, No. 91-CV-1339, 1994 WL 382515 (N.D. N.Y. July 15, 1994); or for a store practice of recording the race of all customers paying by check, Roberts v. Wal-Mart Stores, Inc., 769 F. Supp. 1086 (E.D. Mo.1991).

As courts wrestle with the applicability of § 1981 to the retail context, they should re-examine what is, in fact, a contractual "relationship" in the retail setting, based on § 1981's legislative and interpretive history, the intent of the 1991 amendment, and general principles of contract law. These sources indicate that the conclusion is likely that the benefits, privileges, terms, and conditions of a retail contract include a variety of activities and cover a broader frame of time than a simple, momentary, exchange of consideration. Retail shoppers enter stores, browse around, examine items, perhaps ask employees for assistance, and finally proceed to pay for their items. Even after the purchase is complete, the customer often has the option to return or exchange the items, and thus the contractual relationship continues. Each step in this shopping experience affects the final outcome: if, what, and how much the customer will purchase. It is also during these pre-purchase activities that most discrimination is suffered.[113] The entirety of the retail experience deserves analysis and consideration in determining the parameters of the retail contractual relationship -- its terms, privileges, conditions, and benefits. The decisions discussed below illustrate a growing recognition of this expanded view of the contractual relationship in the retail setting.

B. Moving Toward an Expanded Vision of Section 1981 Protections in the Commercial Context

A broader interpretation of § 1981's applicability to the retail context has been incorporated into the reasoning of several district courts in North Carolina, Kansas, New

[113] *See* Harris, *supra* note 77.

York, Illinois, and Ohio, and by the Third and Sixth Circuit Courts of Appeals.[114] Unlike the cases reviewed above, these courts do not require a denial of the right to contract in order to invoke § 1981. Instead, they examine the facts to determine whether the terms of the contractual relationship change with the race of the customer. For example, a Kansas district court applied the same prima facie standard as used in the Fifth and Seventh Circuits,[115] but found that plaintiffs may state a claim of 1981 discrimination by showing that their "contractual relationship" was burdened with additional conditions or treatment that were not applied to dealings with white customers.[116]

The analysis, and the applicability of § 1981, in the cases below hinges on whether the discriminatory treatment of the minority customers is determined to change

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[114] *See e.g*. Christian v. Wal-Mart, 252 F.3d 862 (6th Cir. 2001) ; Hall v. Pennsylvania State Police, 570 F.2d 86 (3d Cir. 1978); Leach v. Heyman, 233 F. Supp. 2d 906 (N.D. Ohio 2002); Kelly v. Bank Midwest, 161 F. Supp.2d 1248 (D. Kan. 2001); Joseph v. New York Yankees Partnership, No. 00 Civ. 2275(SHS), 2000 WL 1559019 (S.D.N.Y. Oct. 19, 2000); Hill v. Shell Oil Company, 78 F. Supp. 2d 764 (N.D. Ill. 1999); Bobbitt v. Rage, 19 F. Supp. 2d 512 (W.D. N.C. 1998).

[115] *See* Kelly v. Bank Midwest, 161 F. Supp.2d 1248, 1255-57 (D. Kan. 2001) (employing the prima facie test used in the Tenth, Fifth, and Seventh Circuits: 1) the plaintiff is a member of a protected class, 2) the defendant had the intent to discriminate on the basis of race, and 3) the discrimination interfered with a protected activity as defined in § 1981); *see also Bellows*, 118 F.3d at 274 (employing the same prima facie test); *Morris v. Office Max, Inc.*, 89 F.3d 411, 413 (7th Cir.1996) (applying the test to a retail transaction).

[116] *Kelly*, 161 F. Supp.2d at 1255-57.

the terms and/or conditions of their contract with the commercial establishment. These courts are stepping beyond the moment when consideration is exchanged in an attempt to explore and define the parameters of the retail contract, and, in doing so, are paying special attention to the additional language of the 1991 amendment, which requires freedom from discrimination in contracting to include the "enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[117] The courts particularly focus on the "terms and conditions" of the relationship, and whether the discriminatory treatment can be said to have altered these terms and conditions.

Some of the first cases to step in this direction arose within the context of a restaurant service contract. For example, in *Bobbitt v. Rage*, the Western District of North Carolina court held that the African-American plaintiffs had established a prima facie section 1981 claim because although they were eventually served by the defendants' restaurant, they, unlike the white customers eating there, were required to prepay for their food.[118] The court found that the prepay requirement altered "an essential term of the customer/restaurateur contract because of race."[119] Consequently, the court found the defendant had denied the plaintiffs of the "enjoyment of all . . . terms and conditions of the contractual relationship" that were enjoyed by white customers.[120] That the plaintiffs had eventually been served did not change the court's analysis.[121]

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[117] 42 U.S.C § 1981 (b) (2000).

[118] *Bobbitt*, 19 F. Supp. 2d at 518-19.

[119] *Id.*

[120] *Id.* (quoting 42 U.S.C. § 1981).

[121] *See id.*

Additionally, a district court in New York found that when an African-American woman was required to change clothes before entering a restaurant, when other white patrons who were wearing similar or identical apparel were not asked to change, her section 1981 contract rights were violated despite the fact that she ultimately received service and completed her contract.[122] That court clarified, "[I]mposing an additional condition upon minority customers that is not imposed upon non-minorities states a section 1981 claim for discrimination concerning the making and enforcing of contracts. Where additional conditions are placed on minorities entering the contractual relationship, those minorities have been denied the right to contract on the same terms and conditions as is enjoyed by white citizens."[123]

This reasoning is equally applicable in the retail context. In *Hill v. Shell Oil Company*, for example, the Northern District of Illinois court held that requiring black customers to prepay for their gas inserted an additional, discriminatory term in their retail contract and therefore "directly implicat[ed] plaintiffs' right to contract and to enjoy 'all benefits, privileges, terms, and conditions of the contractual relationship.'" [124] The court rejected the defendant's assertion that because the contracts were completed that § 1981 did not apply.[125] The court held that because the terms of the plaintiffs' purchase were different from those of white customers – the black plaintiffs were required to pre-pay

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[122] Joseph v. New York Yankees Partnership, No. 00 Civ. 2275(SHS), 2000 WL 1559019, at *4 (S.D.N.Y. Oct. 19, 2000).

[123] *Id.* at *4.

[124] 78 F. Supp. 2d 764, 778 (N.D. Ill. 1999) (quoting 42 U.S.C. § 1981(b)).

[125] *Id*. at 777-78.

while white customers could pay after pumping their gas – that they sufficiently stated a § 1981 claim.[126]

The plaintiffs in *Bobbitt*, *Joseph*, and *Hill* were required to submit to conditions not imposed on white customers in order to complete their contracts. The courts found, even though the contract was not prevented, the additional conditions changed the terms of their contracts on the basis of race, and therefore violated § 1981. These courts stepped beyond an understanding of the commercial contract as an instantaneous exchange of consideration, toward a realization that the consumer contract has terms and conditions like any other contract. The terms and conditions identified by these courts included the time of payment and requirements for entering the premises. When commercial establishments changed these conditions on the basis of race, then § 1981 rights were transgressed.

The question remained, however, as to when discriminatory treatment, as opposed to altered terms, impacted the conditions of the contractual relationship described in § 1981. In Ms. Arguello's case, for example, could the verbal assault she underwent change the conditions or terms of her contractual relationship with the gas station?[127] The following cases illustrate that discriminatory treatment can, indeed, impact the conditions of the contractual relationship, and that the language of § 1981 clearly protects minority customers from such discriminatory behavior.

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[126] *Id.* at 777.

[127] *Arguello,* 2001 WL 1442340, at *1.

One case that began to blur the line between discriminatory treatment and discriminatory terms was *Kelly v. Bank Midwest*.[128] In *Kelly*, the Kansas district court reviewed the holdings in *Bobbitt, Joseph*, and *Hill*, and held that a bank customer who was subjected to discriminatory treatment during the application for a loan stated a prima facie case of § 1981 discrimination, despite the fact that the loan was eventually granted.[129] The plaintiff's check was investigated to determine whether it was stolen; an agent of the bank drove by the property identified on the plaintiff's application to assess the representation of it on the application; and the bank called the police for "assistance" upon learning of what it considered suspicious information in the plaintiff's background.[130]

The court applied the reasoning of *Bobbitt*, *Washington*, and *Joseph* to determine that the treatment of the plaintiff imposed additional terms and conditions on his contract that were "less favorable than those enjoyed by white customers."[131] The court found the bank's alteration of these conditions was "the essence of a section 1981 claim" and therefore denied defendant's motion for summary judgment.[132] Important in this analysis is that the court identified as discriminatory the treatment of the plaintiff's application, rather than additional actions that the plaintiff might have been required to perform. This treatment was the basis for the court's affirmation of the § 1981 claim.

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[128] 161 F. Supp. 2d 1248 (D. Kan. 2001).

[129] *Id.* at 1257-58.

[130] *Id.*

[131] *Id.* at 1258.

[132] *Id.*

The recognition that discriminatory treatment can implicate the terms and conditions of a contractual relationship and trigger § 1981 protections is not necessarily a recent development. As long ago as 1978, long before the broadening language of the 1991 Civil Rights Act was added to section 1981, the Third Circuit Court of Appeals held that that a section 1981 claim lay in the implementation of a discriminatory picture-taking policy in a bank.[133] The bank, at the direction of the state police, had begun to photograph all "suspicious black males or females" who entered the bank.[134] The Court of Appeals found that even though the plaintiff, a black male customer, was not prevented from completing his transaction, because he was photographed during it his section 1981 rights were implicated.[135] The Court stated "Section 1981 obligates commercial enterprises to extend the same *treatment* to contractual customers as is enjoyed by white citizens."[136]

In 1990, also prior to the amended version of § 1981, the Sixth Circuit Court of Appeals similarly found, in *Watson v. Fraternal Order of Eagles*, "the fact that the [plaintiffs] were never refused service in this case is not controlling."[137] This case involved discrimination against African-American plaintiffs by a private social club conducting a social gathering open to all invited guests.[138] Even applying the restrictive

[133] Hall v. Pennsylvania State Police, 570 F.2d 86, 92 (3d Cir. 1978).

[134] *Id.* at 88.

[135] *Id.* at 92.

[136] *Id.* (emphasis added).

[137] 915 F.2d 235, 243 (6th Cir. 1990).

[138] *Id.* at 238.

definition of "make and enforce" contracts promulgated by *Patterson*, the court found that because at least one of the plaintiffs was asked to leave the premises, rather than being refused service, they were denied "'the same right to make contracts . . . as is enjoyed by white citizens.'"[139] The plaintiffs were not forced to leave, nor was there an outright refusal to contract. Nevertheless, the court found that the conduct of the employees toward the plaintiffs effectively prevented them from contracting, and therefore section 1981 contract rights were violated.[140]

The *Hall*, *Watson*, and *Kelly* courts found that that actual physical prevention of the contract should not be required in order to state a § 1981 claim, and nor should the imposition of additional affirmative requirements (such as the pre-pay requirement) be essential to a finding of discriminatory conditions – discriminatory *treatment* can suffice. This expanded understanding of § 1981's protections was adopted by the Sixth Circuit Court of Appeals in 2001. In *Christian v. Wal-Mart*, the Court of Appeals announced a new prima facie test of a § 1981 claim.[141] The plaintiff, under the *Christian* rule, must establish 1) that s/he is a member of a protected class; 2) that s/he "sought to make or enforce a contract for services ordinarily provided by the defendant"; and 3) that s/he was "denied the right to enter into or enjoy the benefits or privileges of the contractual

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[139] *Id.* at 243 (quoting 42 U.S.C. § 1981).

[140] *Id.*

[141] Christian v. Wal-Mart, 252 F.3d 862, 868-69, 872-73 (6th Cir. 2001) (rejecting the four-part test used in the Second and Fifth Circuits and adopting that introduced in Callwood v. Dave and Busters, 98 F. Supp. 2d 694, 705 (D. Md. 2000) (applying the prima facie test to a claim of racial discrimination arising in the restaurant context).

relationship" by either a) she was "deprived of services while similarly situated persons outside the protected class were not" and/or b) "she received services in a markedly hostile manner and in a manner which a reasonable person would find objectively discriminatory."[142] Thus, part 3(b) of this test explicitly recognizes that discriminatory treatment can alter the terms, conditions, and privileges of the contractual relationship protected by § 1981. This test moves the legal standard toward a truer application of the intent of both the original § 1981 and its 1991 amendment.

"Racial animus can offend a customer equally whether he gets no service at all or is served in a manner that marks him with the badge of slavery that the Civil Rights Acts were enacted to remove."[143] So stated a Sixth Circuit district court in *Leach v. Heyman*, applying the "markedly hostile" standard set forth in *Christian v. Wal-Mart*.[144] The facts in *Leach* closely mirrored those of *Arguello*.[145] The plaintiff, an African-American customer in a convenience store, brought his items to the counter and asked the retail clerk for a pack of cigarettes.[146] After a terse exchange of remarks during which the plaintiff completed his purchase, the clerk began to should at him racial epithets.[147] The clerk then proceeded to jump over the counter and assault him.[148] Although the plaintiff,

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[142] *Id.* at 872.

[143] Leach v. Heyman, 233 F. Supp. 2d 906, 909 (N.D. Ohio 2002).

[144] *Id.*; *see also Christian*, 252 F.3d 862.

[145] *Leach*, 233 F. Supp. 2d at 908-09.

[146] *Id.*

[147] *Id.*

[148] *Id.*

just like Ms. Arguello, was able to complete his purchase, he was subjected to harassment and conditions not imposed on the other non-minority customers in the store.[149] The court concluded that a jury could find that the clerk's "treatment of plaintiff was continuous, and manifested animus during the entire period that he was in the store," and therefore satisfied the elements of the prima facie case. [150]

This result stands in stark contrast to the decisions in the Fifth and Seventh Circuits which have stated both that any contractual relationship that once may have existed ceases to exist after the purchase is complete, and that any discriminatory treatment that does not prevent the purchase does not affect the contractual relationship.[151] This court found not only that the actions of the clerk after the purchase was completed constituted illegal section 1981 discrimination, but also seems to imply that the obvious animus affected this contractual relationship from the moment he entered the store.[152]

The courts that restrictively read the scope of section 1981 to the exclusion of both pre- and post- contract formation conduct in the retail setting were wary of creating causes of action that are based on prospective contract interests.[153] In *Leach*, however,

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[149] *Id.* (In the store at the same time was the plaintiff's white companion.)

[150] *Id.* at 910.

[151] *See, e.g.,* Arguello v. Conoco, 330 F.3d 355, 358-60 (5th Cir. 2003); Morris v. Office Max, Inc., 89 F.3d 411, 414-15 (7th Cir. 1996).

[152] *Leach*, 233 F. Supp. 2d at 910.

[153] *See e.g. Dillard*, 277 F.3d at 751-52 (requiring loss of "actual" contract interests, not those that are "speculative" or "prospective); *see also* discussion *supra* s. III(A).

the court carefully explained that not all instances of poor, slow, or substandard service would support a section 1981 claim.[154] By carefully observing the requirements of the "markedly hostile" standard, courts can guard against opening the floodgates to an influx of illegitimate racial discrimination claims invoking section 1981. The standard requires that, in order to state a claim, a customer must either be denied services or receive "services in a markedly hostile manner and in a manner which a reasonable person would find objectively discriminatory."[155] The objective standard weeds out behavior that does not rise to a sufficient level to infer a discriminatory intent.

The standard also creates a flexibility that will necessarily adapt to different commercial settings: the "services" one receives in a department store will differ from those of a gas station. This adaptability moves toward a more generalized conception of what the "contractual relationship" means in a commercial retail setting – it is one where services are offered and tendered; not one where the entirety of the contract begins and ends at the instant consideration changes hands. This conception of the retail contract better incorporates the amended language of section 1981(b)'s definition of "make and enforce contracts," and offers a judicial remedy for victims of discrimination envisioned

[154] *Leach*, 233 F. Supp. 2d at 910-11. The court compares its facts to those in several restaurant-industry cases, where although the plaintiffs received rude, slow, or substandard service, the service was not indicative of racial animus and therefore no § 1981 claim was stated: Lizardo v. Denny's, Inc., 270 F.3d 94 (2d Cir. 2001); Callwood v. Dave and Buster's, Inc., 98 F. Supp. 2d 694, 706 (D. Md. 2000); Bobbitt by Bobbitt v. Rage, 19 F. Supp. 2d 512, 514 (W.D.N.C. 1998); and Robertson v. Burger King, Inc., 848 F. Supp. 78, 81 (E.D. La. 1994).

[155] *Leach*, 233 F. Supp. at 909.

by the 1866 Civil Rights Act – one that "prohibit[s] *all* racially motivated deprivations of those rights enumerated in the statute . . . ;"[156] as well as one that protects the "personal right to engage in economically significant activity free from racially discriminatory interference."[157]

IV. Some Interpretive Guidance from Common Law Contract Theory

Section 1981 is a provision that governs contractual relations. As courts struggle with how broadly or narrowly to apply its prohibition against racial discrimination in retail contracting, guidance can be found not only in the statute's legislative and interpretive history, but also in the evolving common law of contracts. Section 1981 references the ability to "make and enforce contracts . . . as is enjoyed by white citizens."[158] It does not create a new federal contract right for minorities, rather it seeks to level the contractual playing field; it aims to eliminate racial discrimination in the contracting process, so that minorities and whites may contract on the same terms.[159] Therefore, a look at the law that defines those terms is helpful.[160]

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[156] *Jones*, 392 U.S. 409.

[157] *Goodman*, 482 U.S. at 661.

[158] 42 U.S.C. 1981 (b) (2000).

[159] *See* Steven J. Burton, *Racial Discrimination in Contract Performance:* Patterson *and a State Law Alternative*, 25 HARV. C.R.-C.L. L. REV. 431, 446 (1990).

[160] *See id.*

Classical contract theory, which emerged in the nineteenth century, was grounded in the ideology of the freedom of contract.[161] The ideals associated with freedom of contract include an exaltation of laissez-faire capitalism, individual autonomy, and freedom from state interference with economic activities.[162] Each actor in a contractual relationship dealt at her own risk: the bargaining, the agreement, and the duties and consequences flowing therefrom were solely up to the parties. The terms of the contract were only those explicitly defined within its four corners. Courts did not inquire into the adequacy of consideration or the fairness of the bargain struck, and the parties therefore were bound only by the law and terms of their contract.[163] As a result, as Professor Ira Nerken remarked in 1977, consumers were not protected from "harmful merchandise, employees from harm, travelers from collision, or blacks from abject discrimination. The law was too busy protecting the private actor to protect private individual victims from

[161] *See, e.g.,* Grant Gilmore, The Death of Contract 6 (1974); Comment: The Many Theories of Contract, in Edward J. Murphy & Richard E. Speidel, Studies in Contract Law 88-89 (4th ed. 1991).

[162] Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1012 (1985). *See also* discussion in Neil G. Williams, *Offer, Acceptance, and Improper Considerations: A Common-Law Model for the Prohibition of Racial Discrimination in the Contracting Process*, 62 GEO. WASH. L. REV. 183, 191 (Jan. 1994).

[163] *See, e.g.,* E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 1.1, at 4 (1990).

the antisocial byproducts of the actor's activity. The law was too busy limiting social duty to account for social costs."[164]

As contract and social theory evolved, recognition of social duty and societal interdependence crept into the jurisprudence of contracts.[165] The modern neoclassical contract model imports community standards of decency and fairness into contractual obligations.[166] These obligations insert themselves as implied terms of any contract. While the freedom to contract still exists, it now exists within certain legal and moral boundaries.[167] Examples of some of the many common law contract developments that form these boundaries include the doctrines of promissory estoppel, the implied covenant of good faith and fair dealing, and the duty to serve.[168]

Promissory estoppel is an illustrative example of how contract theory has evolved from a strict interpretation of the agreed-upon terms of the contract to one that encompasses moral and social norms of what is just and fair. Promissory estoppel is defined in Section 90 of the Restatement (Second) of Contracts: "A promise which the

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[164] Ira Nerken, *A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of the Civil Rights Cases and State Action Theory*, 12 HARV. C.R.-C.L. L. REV. 297, 332 (1977), *quoted in* Williams, *supra* note 162, at 194.

[165] Williams, *supra* note 162, at 194.

[166] *Id.*

[167] Burton, *supra* note 159, at 447-48.

[168] *See* Burton, *supra* note 159; Williams, *supra* note 162. Other relevant developments include the recognition of unilateral mistake, unconscionability, and the lawful performance doctrine. Burton, *supra* note 159, at 448-49.

promisor should expect to induce action or forbearance on the part of the promise or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."[169] The foundation of the doctrine of promissory estoppel is that community norms require that an individual be held responsible for the foreseeable harm to another caused by her conduct.[170] The theory of promissory estoppel imports equitable estoppel, tort, and agency doctrines of personal responsibility for misrepresentations that induce reliance and/or cause harm to another.[171]

Whereas classical contract theory emphasized consideration as the hallmark of the contract – the bargained-for exchange, promissory estoppel allows a contract and its term to be implied from the circumstances, without a meeting of the minds and with no delineated terms for which consideration is offered and accepted.[172] Some have called the promissory estoppel theory that of a "quasi-contract," a "contract implied in law," or even "a legal fiction necessary to promote the ends of justice."[173] Nevertheless, promissory estoppel has become widely accepted as a basic tenet of modern contract law.[174]

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[169] RESTATEMENT (SECOND) OF CONTRACTS § 90 (1) (1981).

[170] Williams, *supra* note 162, at 195 (citing E. ALLAN FARNSWORTH. FARNSWORTH ON CONTRACTS, 2.19, at 146-47 (1990)).

[171] RESTATEMENT (SECOND) OF CONTRACTS § 90 (1), cmt. (1981).

[172] Gilmore, *supra* note 161, at 76.

[173] *Id.* at 73-74.

[174] Williams, *supra* note 162, at 195 (citing Farnsworth, *supra* note 163).

The duty of good faith and fair dealing is another tenet of modern contract law which imports implicit terms and conditions into a contract. Although classical contract theory was loathe to recognize a generalized duty to act in good faith,[175] good faith in contracting is now required by the Uniform Commercial Code,[176] the Restatement of Contracts,[177] and a majority of the states.[178] The Second Restatement of Contracts states in section 205: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."[179] Although good faith is not specifically defined by the Restatement, the Comments to section 205 indicate that it is generally a prohibition against bad-faith behavior, as defined by community standards of fairness and decency.[180] Good faith requires adherence to an agreed common purpose,

[175] Eric M. Holmes, *A Contextual Study of Commercial Good Faith: Good-Faith Disclosure in Contract Formation*, 39 U. PITT. L. REV. 381, 384 (1978). *See also* Robert S. Adler and Richard A. Mann, *Good Faith: A New Look at an Old Doctrine*, 28 AKRON L. REV. 31, 42 (1994).

[176] U.C.C. § 1-203 (1992).

[177] RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979).

[178] Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 369 & n.1 (1980).

[179] RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979).

[180] *Id.* at cmt. a. *See also* Williams, *supra* note 162, at 206; Adler and Mann, *supra* note 175, at 44; Robert S. Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 262 (1968).

consistency with the justified expectations of the other party,[181] and according to the UCC, "honesty in fact in the conduct or transaction concerned."[182] Therefore, the expectations of the parties that the other will act in good faith are protected by contract law, even though this term is not written explicitly into their contract.

The duty to serve doctrine is yet another tenet of contract law that places obligations on the contracting parties that may not be written into the four corners of the contract.[183] The duty to serve doctrine is not in itself a recent jurisprudential development. Its origins date back to the fifteenth century, when English business, whether by holding a monopoly on a particular service or by holding itself as open to the general public, such as a common carrier or inn, was required by contract law to serve all unless a reasonable reason existed not to do so.[184]

The duty to serve doctrine in early American jurisprudence was implemented through an analysis of whether the business in question was one considered "public."[185] These included innkeepers and common carriers such as railroads; restaurants, racetracks, and places of amusement were considered private and not bound by the duty to serve.[186]

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[181] RESTATEMENT (SECOND OF CONTRACTS § 205 (1979). *See also* discussion in Adler and Mann, *supra* note 175, at 43-44.

[182] U.C.C. § 1-201(19) (1992).

[183] *See* Note, *The Antidiscrimination Principle in the Common Law*, 102 HARV. L. REV. 1993, 1995-96 (1989).

[184] *Id.*

[185] *Id.* at 96.

[186] *Id.*

Although essentially contrary to the revered concept of freedom of contract and, therefore, the freedom to choose with whom one contracted, even in classical contract theory there existed this obligation on certain service providers not to discriminate in the terms or treatment of their customers.[187] Recent American interpretations of the duty to serve has expanded its reach to businesses that were once considered private, including restaurants, gas stations, hospitals and home builders.[188] Generally, the analysis focuses on the extent to which the business holds itself out to serve the general public.[189] This expansion is consistent with the general evolution of contract law to impose obligations of good faith, fair dealing, and faithfulness to justified expectations of the contracting parties, discussed above.

The doctrines of promissory estoppel, the duty of good faith and fair dealing, and the duty to serve illustrate the common law's recognition of the totality of the contractual relationship. The contract is not formed in a vacuum of social and moral obligation or responsibility, and it does not consist of split-second moment in time when consideration changes hands, even in the retail setting. Standards of morality, fairness, and decency are always terms of the contract and are required for the duration of the contracting process. Businesses open to the public often have pre-contract formation duties to their customers not to discriminate against them. Contractual terms now incorporate many obligations that may not be delineated in their language.

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[187] *See id.*

[188] *Id.* at 1997-98.

[189] *Id.* at 1998-99.

It is troubling, therefore, that in light of the common law's ever-expanding definition of what a contract is and what its terms and responsibilities include, that many federal courts would retreat to a narrow, restrictive reading of the civil rights statute that governs contractual relationships. Ironically, common law's almost mythic attachment to the classical conception of the bargained-for contract is declining. The four corners of a contract are dissolving as the duties and obligations of contracting parties become more fluid, subjective, and dependent on context, norms, and ideals of social responsibility. At the same, statutory civil rights protections, whose primary purpose is ostensibly to eradicate all forms discrimination in the economic sphere, are being applied by some courts using an extremely restrictive, narrow, and regressive definition of both the contract and the contractual relationship surrounding it. Courts interpreting section 1981 in the retail context should follow the common law's lead and recognize that no longer can contracts or their obligations be so simply defined, particularly when the result is to leave statutory rights without protection.

V. Conclusion

Section 1981 prohibits racial discrimination in the making and enforcement of contracts. The 1991 amendment to section 1981 clarified that the right to make and enforce contracts includes making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.[190] In a retail setting, the interpretation of section 1981 protections should necessarily allow causes of actions when customers have been

[190] 42 U.S.C. § 1981 (b) (2000).

harassed, followed, verbally abused, or otherwise treated in a "markedly hostile" manner, as well as when they refused or deprived of service. The legislative intent of section 1981, its various interpretations and applications by the Supreme Court, and the common law evolution of contract theory itself all instruct that section 1981 should be broadly construed so as to both deter and remedy consumer racial discrimination. The discrepancies in the federal courts' application of § 1981 to the consumer retail contract should be eradicated and a uniform, broad standard, such as the Sixth Circuit's "markedly hostile" test, should be adopted. Only then will the purpose of the § 1981 be fully realized.