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

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APPLYING 42 U.S.C. § 1981 TO CLAIMS OF CONSUMER DISCRIMINATION

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This Note explores several interesting legal questions regarding the proper interpretation of 42 U.S.C. § 1981, which prohibits racial discrimination in contracting, when discrimination arises in the context of a consumer retail contract. The Note further explores how the Fifth Circuit's and other federal courts' narrow interpretation of § 1981's application in a retail setting (which allows plaintiffs to invoke the statute only when they have been prevented from completing their purchases) is contrary to the statute's express language, congressional intent, and to evolving concepts of contract theory, all of which reflect a commitment to the 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.

The Note 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 Note argues that, 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, this Note urges an adoption of the Sixth Circuit's "markedly hostile" test.

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] Ms. Arguello approached the counter with her items and attempted to pay for them with a credit card. The sales clerk, Cindy

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

Smith, was instantly rude.[2] Ms. Smith 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]

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 § 1981 claim because she was not prevented from making her purchase, despite the "offensive" and "egregious" conduct to which she was subjected.[9] The United States 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

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2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* (Ms. Arguello is Hispanic).
6. *Id.*
7. 42 U.S.C. § 1981 (2000) ("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 § 1981 claim as part of the same suit. *Id.* This Note will explore only the merits of Ms. Arguello's claim.
9. Arguello v. Conoco, Inc., 330 F.3d 355, 361 (5th Cir. 2003), *cert. denied*, 540 U.S. 1035 (2003).
10. *Id.*

jurisprudence.[11] This Note explores how the Fifth Circuit's and other federal courts' narrow interpretation of § 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 evince a deep commitment to combating racial discrimination through strict enforcement of civil rights protections.[12] Part II of this Note 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 § 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, where "markedly hostile" discriminatory conduct affecting the contractual relationship establishes a cause of action under § 1981. 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 § 1981 in a retail setting, specifically encouraging universal adoption of the Sixth Circuit's "markedly hostile" test.

II. LEGISLATIVE AND INTERPRETIVE HISTORY OF § 1981

The Thirteenth Amendment to the United States Constitution, ratified in 1865, abolished the institution of slavery.[13] It states: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist

11. *See* Brief for Lawyers' Committee for Civil Rights Under Law et al. as Amici Curiae in Support of Petitioners, Arguello v. Conoco, 540 U.S. 1035 (2003) (No. 03-342), *available at* http://www.lawyerscomm.org/2005website/projects/employment/employmentpics/emp100903.pdf [hereinafter Amicus Brief]. This amicus brief was the starting point and the inspiration for this Note.

12. *Id.* at 6–10.

13. U.S. CONST. amend. XIII, §§ 1–2.

within the United States, or any place subject to its jurisdiction. Congress shall have power to enforce this article by appropriate legislation."[14] 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.[15] 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, "imposed upon the colored race onerous disabilities and burdens, and curtailed their rights . . . to such an extent that their freedom was of little value . . . ."[16]

The *Slaughter-House Cases* brought before the Supreme Court the question of whether the Thirteenth and Fourteenth Amendments forbade the state of Louisiana from creating a state-sanctioned monopoly in the slaughter house business in New Orleans.[17] The Court reasoned that Louisiana's conduct, however unwise, was not unconstitutional because the intent of the 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.[18] 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 entering as menial servants.[19] They were required to live and work on land that they were not allowed to buy; could only enter certain occupations; and were not permitted to give testimony in courts in any case where a White man was a party.[20] 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."[21] Thus, the *Slaughter-House Cases* clarified that the primary purpose of the Thirteenth, Fourteenth, and Fifteenth Amendments was to combat slavery's legacy of discrimination, such as that embedded in the Black Codes.

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14. *Id.*

15. *See* Jones v. Alfred H. Mayer, Co., 392 U.S. 409, 426 (1968) (reviewing the history of the time preceding the passage of the Civil Rights Act of 1866); *see also infra* notes 16, 19–21 and accompanying text.

16. Slaughter-House Cases, 83 U.S. 36, 70 (1872).

17. *Id.* at 49.

18. *Id.* at 72.

19. *Id.* at 70.

20. *Id.*

21. *Id.*

In the same year that Congress passed the Fourteenth Amendment,[22] it passed the Civil Rights Act of 1866,[23] also in an effort to combat the Black Codes and other laws and practices limiting the freedom guaranteed by the Thirteenth Amendment.[24] Congress passed the Civil Rights Act of 1866 pursuant to its authority under the Thirteenth Amendment to pass laws to enforce the abolition of the institution of slavery.[25] 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 benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens . . . ."[26] The Civil Rights Act of 1866's overarching purpose was to give "real content to the freedom guaranteed by the Thirteenth Amendment."[27] The lofty aspirations of the Civil Rights Act of 1866, however, were soon grounded by the Supreme Court.

In 1883, the Supreme Court heard a conglomeration of appeals known as *The Civil Rights Cases*.[28] *The Civil Rights Cases* challenged the constitutionality of the Civil Rights Act of 1875,[29] which forbade discrimination in places of public accommodation and provided criminal penalties for those who denied to persons of color "the full and equal enjoyment of the accommodations" covered by the section.[30] 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 justly

22. The Fourteenth Amendment was passed by Congress in 1866, though not ratified until 1868. *See* CONG. GLOBE, 39th Cong., 1st Sess. 3042, 3148–49 (1866); *see also* Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 384–85 (1982) (discussing the common historical roots of the Civil Rights Act of 1866 and the Fourteenth Amendment).

23. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1982 (2000)).

24. CONG. GLOBE, 39th Cong., 1st Sess. 1809, 1861 (1866); *see also Gen. Bldg. Contractors Ass'n*, 458 U.S. at 384–85; Jones v. Alfred H. Mayer, Co., 392 U.S. 409, 422–36 (1968).

25. *Jones*, 392 U.S. at 433.

26. Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

27. *Jones*, 392 U.S. at 433.

28. The Civil Rights Cases, 109 U.S. 3 (1883).

29. Act of Mar. 1, 1875, ch. 114, 18 Stat. 336 (1875).

30. The Civil Rights Cases, 109 U.S. at 9 (citing Act of Mar. 1, 1875, ch. 114, 18 Stat. 336 (1875)).

regarded as imposing any badge of slavery or servitude upon the applicant . . . ."[31] The Court continued:

> [A]n 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 theatre, or deal with in other matters of intercourse or business.[32]

The Court distinguished between what it deemed were the prohibitions of state interference with "fundamental rights" in the Civil Rights Act of 1866, of which it approved, and the Civil Rights Act of 1875's attempt to regulate "social rights" and private interactions between individual citizens, which it found unacceptable.[33] In conclusion, the Court asserted that because Congress had attempted to regulate such "social rights" with the Civil Rights Act of 1875, it had exceeded its authority under the Thirteenth Amendment, and therefore found the Civil Rights Act of 1875 unconstitutional.[34]

As a result of *The Civil Rights Cases,* the Civil Rights Act of 1875 was defunct, and the Civil Rights Act of 1866, which also ostensibly prohibited racially-motivated refusals to contract or serve, was in many ways delegitimized.[35] The Court decided that such outright contract discrimination was not illegal unless perpetrated by state law or custom.[36] Individuals could refuse to contract with each other—the state was only prohibited from passing laws interfering with, on the basis of race, a citizen's "fundamental" contractual

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31. The Civil Rights Cases, 109 U.S. at 20, 24.

32. *Id.* at 24–25.

33. *Id.* at 25–28.

34. *Id.* at 25.

35. *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 (1990). Although the Court did not explicitly state that its holding specifically affected the scope of the Civil Rights Act of 1866, its discussions of the nature of the Civil Rights Act of 1866 versus the nature of the Civil Rights Act of 1875 indicated its intent to clarify the reach of both enactments. The Civil Rights Cases, 109 U.S. at 16–25; *see also* Smith, *supra* note 35, at 809–10. In addition, Justice Harlan, writing for the dissent, states that these "badges and incidents" of slavery, which the majority misconstrued, "lie at the foundation of the Civil Rights Act of 1866." The Civil Rights Cases, 109 U.S. at 35 (Harlan, J., dissenting). Therefore there is little doubt that the restrictive holding in this case was equally applicable to the Civil Rights Act of 1866.

36. The Civil Rights Cases, 109 U.S. at 16–17.

rights.[37] 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.[38] Consequently, the goal of infusing "real content" into the freedom guaranteed by the Thirteenth Amendment was severely and suddenly halted.[39]

The Supreme Court returned to the issue of the Civil Rights Act of 1866's applicability to private conduct in 1968.[40] Its decision in *Jones v. Alfred H. Mayer Co.* revisited the legislative history and intent of the Civil Rights Act of 1866 and concluded that its prohibitions against discrimination should, in fact, be applied to private conduct.[41] The African American plaintiffs in *Jones* attempted to buy a home in a private subdivision in Missouri, and the defendant refused to sell to them solely because of their race.[42] The plaintiffs claimed their 42 U.S.C. § 1982 rights had been violated.[43] The Supreme Court acknowledged that when Congress passed the Civil Rights Act of 1866, 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."[44] The plain language of the statute forbids discrimination by not only "[s]tate or local law," but also "custom or prejudice."[45] Therefore it was clear to the *Jones* Court that section 1 of the Civil Rights Act of 1866 "was meant to prohibit *all* racially motivated deprivations of

37. *Id.*

38. *See* Smith, *supra* note 35, at 809–10.

39. *Id.*

40. The Court had considered the provisions of the Civil Rights Act of 1866 before in various cases. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948); Hurd v. Hodge, 334 U.S. 24 (1948) (holding that the 1866 Civil Rights Act 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) (finding local ordinance prohibiting transfer of property to a person married to a person of a different race in violation of the Fourteenth Amendment); Harmon v. Tyler, 273 U.S. 668 (1927) (holding municipal ordinance in New Orleans requiring racially segregated neighborhoods unconstitutional and in violation of the Civil Rights Act of 1866); Buchanan v. Warley, 245 U.S. 60 (1917) (holding 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 in violation of the Civil Rights Act of 1866 and the Fourteenth Amendment). All of these cases arose in the context of state-sanctioned or mandated discrimination, not especially pertinent to our discussion here.

41. *Jones*, 392 U.S. 409 (1968).

42. *Id.* at 412.

43. 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.").

44. *Jones*, 392 U.S. at 435 (emphasis added).

45. *See id.* at 423–24.

those rights enumerated in the statute,"[46] not just those embodied in state or local law. The Court further found that Congress exercised proper power, granted to it by the Thirteenth Amendment's Enabling Clause,[47] in forbidding private acts of racial discrimination in the Civil Rights Act of 1866.[48]

This decision was a direct reversal of the holding in *The Civil Rights Cases*, at least in terms of its applicability to the Civil Rights Act of 1866. While *Jones* specifically interpreted what is now 42 U.S.C § 1982, the provision granting equal property rights to all citizens,[49] its legislative intent and history have been held to be identical to that of 42 U.S.C § 1981, its sister statute.[50] After the Court thus clarified that the Civil Rights Act of 1866 did, after all, apply to private acts of discrimination, plaintiffs began to invoke 42 U.S.C. § 1981 to remedy racially discriminatory employment practices.

In the mid-1970s, the Supreme Court repeatedly held that § 1981 affords a federal remedy against racial discrimination in private employment.[51] 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 § 1981.[52] These and other cases during the 1970s and 1980s af-

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46. *Id.* at 426 (emphasis added); *see also id.* at 421–37 (providing 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).

47. 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.").

48. *Jones*, 392 U.S. at 426.

49. 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.").

50. *See, e.g.*, 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."); Runyon v. McCrary, 427 U.S. 160, 170 (1976) ("[*Jones*] necessarily implied that the portion of § 1 of the 1866 Act presently 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 enumerated therein . . . .' One of the 'rights enumerated' in § 1 is 'the same right . . . to make and enforce contracts . . . .'" (internal citations omitted)); Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 439–40 (1973) ("The operative language of both § 1981 and § 1982 is traceable to the Act of April 9, 1866, c. 31, § 1, 14 Stat. 27. In light of the historical interrelationship between § 1981 and § 1982, we see no reason to construe these sections differently when applied, on these facts . . . .").

51. *See, e.g.*, Johnson v. Ry. Express Agency, 421 U.S. 454 (1975) (holding that 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).

52. *Runyon*, 427 U.S. 160.

firmed that § 1981's protections reached various private acts of discrimination, including those in a private employment context.[53] The Court would next be tasked with defining, within those contexts, what it meant to "make and enforce contracts."[54]

In *Goodman v. Lukens Steel Co.*, the Court attempted to define which rights were protected by § 1981's prohibition against discrimination in the making and enforcement of contracts.[55] In *Goodman*, at issue was which statute of limitations should apply to the plaintiffs' § 1981 claim of racial discrimination in employment.[56] The Court decided that states' statutes of limitations for personal injury actions, and not state's statutes of limitations governing interference with contractual relations, should apply.[57] Justice Brennan, joined by Justices Blackmun and Marshall, strongly disagreed and emphasized in his dissent § 1981's interrelation with contract rights.[58] Explaining the scope of those contract rights, Justice Brennan noted that the import of the Civil Rights Act of 1866 was to regulate "economic rights and relations," and thus "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."[59] Justices Brennan, Blackmun, and Marshall, therefore, recognized that § 1981 requires equal treatment for all citizens at all stages of economic transactions and contractual relationships.[60]

The majority in *Goodman* also recognized § 1981's broad scope, basing its conclusion that § 1981 claims were more properly classified as tort actions on a belief that tort claims encompassed the wider range of rights included in § 1981.[61] The majority described § 1981 as a protection of the "personal right to engage in economically significant activity free from racially discriminatory interference."[62] It is noteworthy that the Court described the statute as creating the right to be free from interference with

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

54. 42 U.S.C. § 1981 (2000).

55. *Goodman*, 482 U.S. 656.

56. *Id.*

57. *Id.* at 661–62.

58. *Id.* at 670–90 (Brennan, J., dissenting).

59. *Id.* at 676 (emphasis added).

60. *Id.* at 669.

61. *Id.* at 661 (majority opinion).

62. *Id.* at 662.

economic activity, and not strictly as 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 § 1981, in 1989, the Supreme Court retreated to a restrictive definition of § 1981's use of the terms "make and enforce" contracts.[63] In *Patterson v. McLean Credit Union*, the Court was faced with a challenge to its 1976 decision in *Runyon v. McCrary*, which held that § 1981 prohibited racial discrimination in the making and enforcing of private contracts.[64] 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 § 1981.[65] The Court considered whether the petitioner's claim of racial harassment in her employment was actionable under § 1981, and whether the *Runyon* interpretation of § 1981 should be overruled.[66]

After reargument and reconsideration, the Court reaffirmed its decision in *Runyon* that § 1981 prohibits racial discrimination in the making and enforcement of private contracts.[67] 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."[68] However, despite the asserted commitment to combat racial discrimination, the Court further held that § 1981 was not applicable to actions in which the actual "making" or "enforcing" of contracts was not impaired.[69] 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

63. Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

64. *Id.*; *Runyon v. McCrary*, 427 U.S. 160 (holding 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 § 1981).

65. *Patterson*, 491 U.S. at 169.

66. *Id.* at 170–71.

67. *Id.* at 172.

68. *Id.* at 174. Additionally, the Court cited many of its own proclamations which support this contention. *See id.* (citing Bob Jones Univ. v. United States, 461 U.S. 574, 593 (1983) ("[E]very 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.")); *see also Patterson*, 491 U.S. at 188 ("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.").

69. *Patterson*, 491 U.S. at 176; *see also* Amicus Brief, *supra* note 11, at 6.

make a contract . . . ."[70] It further reasoned that the 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."[71] The petitioner's claim of racial harassment, therefore, was held not to be actionable under § 1981.[72]

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.[73] The Civil Rights Act of 1991 specifically revised the wording of § 1981 to clarify that post-formation conduct in the employment context would be covered by § 1981.[74] Congress added subsections (b) and (c) to § 1981, 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
> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.[75]

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

70. *Patterson*, 491 U.S. at 177; *see also* Amicus Brief, *supra* note 11, at 6.
71. *Patterson*, 491 U.S. at 177–78; *see also* Amicus Brief, *supra* note 11, at 6.
72. *Patterson*, 491 U.S. at 178; *see also* Amicus Brief, *supra* note 11, at 6.
73. 42 U.S.C. § 1981 (2000); *see also* Amicus Brief, *supra* note 11, at 6.
74. 42 U.S.C. § 1981 (2000).
75. *Id.*

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.[76]

The Civil Rights Act of 1991, 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 Civil Rights Act of 1991 clarified that the "make and enforce" language of § 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.[77] These courts find that as long as the actual ability to purchase (and therefore complete the contract) has not been prevented, § 1981 rights are not implicated.[78]

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.[79]

Other courts have endeavored to apply a broader understanding of § 1981 and its protections to the retail context.[80] 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

76. H.R. REP. No. 102-40(II), at 1 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 549, 694.

77. *See* discussion *infra* Part III.A; *see also* Amicus Brief, *supra* note 11, at 6–7, 9–10.

78. *See* discussion *infra* Part III.A; *see also* Amicus Brief, *supra* note 11, at 6–7, 9–10.

79. Amicus Brief, *supra* note 11, at 10–12. *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, 5–8 (2003) (discussing the widespread nature of consumer discrimination).

80. Amicus Brief, *supra* note 11, at 7–9; *see* discussion *infra* Part III.B.

their purchase, whether before, during, or after, can interfere with the contractual rights protected by § 1981.[81]

The latter line of decisions would appear to be in accord with § 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."[82] Additionally, these cases give fuller meaning to the 1991 amendment's expanded definition of "make and enforce" contracts, which now expressly includes the "enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[83]

A. Courts Narrowly Interpreting § 1981

Consumer discrimination cases that restrict causes of action under § 1981 to those in which the purchase was actually thwarted restrictively interpret the language of § 1981 and seemingly ignore the additional language of the 1991 amendment. The Fifth Circuit's decision in *Arguello v. Conoco, Inc.* is an illustrative example.[84] The court in *Arguello*, citing § 1981, first stated that at issue in that case was "plaintiffs' ability 'to make and enforce contracts' on nondiscriminatory terms."[85] The court decided that because Ms. Arguello "successfully completed the transaction" and "received all she was entitled to under the retail-sales contract," her claim must fail.[86] 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.[87] That "single, discrete transaction—the purchase of goods" was the starting and ending point of the court's analysis.[88]

The *Arguello* court, in reaching this conclusion, relied heavily on the Fifth Circuit decision in *Morris v. Dillard Department Stores*, the Circuit's first attempt to apply § 1981 in the retail context.[89] In *Dillard*, the plaintiff filed a § 1981 claim against Dillard Department

81. Amicus Brief, *supra* note 11, at 7–9; *see* discussion *infra* Part III.B.

82. Jones v. Alfred H. Mayer, Co., 392 U.S. 409, 435 (1968) (emphasis added); *see also* Amicus Brief, *supra* note 11, at 6, 10.

83. 42 U.S.C § 1981(b) (2000); *see also* Amicus Brief, *supra* note 11, at 6.

84. 330 F.3d 355 (5th Cir. 2003); *see also* Amicus Brief, *supra* note 11, at 6.

85. *Arguello*, 330 F.3d at 358 (citing 42 U.S.C. § 1981(a)).

86. *Id.* at 359.

87. *Id.* at 361.

88. *Id.* at 360.

89. *Id.* at 358 (citing Morris v. Dillard Dep't Stores, 277 F.3d 743, 752 (5th Cir. 2001)).

Store after a security guard followed plaintiff around while shopping and to plaintiff's car after she left the store, where the security guard took down her license plate number.[90] The plaintiff then reentered the store to confront the security guard about his actions.[91] 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.[92] After this incident, the plaintiff was banned from entering the store for a period of time.[93]

In *Dillard*, the Fifth Circuit first reviewed the elements of a prima facie case of § 1981 discrimination that plaintiff 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 enforcing of a contract."[94] This three-part test was adopted by the Fifth Circuit in 1994[95] and, at that time, had also been used in the Second Circuit and by a Florida district court.[96]

In applying part three of this test, the court considered the plaintiff's claim that the store's decision to ban her from shopping there for a specific period of time interfered with her § 1981 right to be free from discrimination in contracting.[97] The court disagreed with the plaintiff and decided the ban did not interfere with her § 1981 rights.[98]

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."[99] 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."[100] 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 Dil-

90. *Dillard*, 277 F.3d at 746.
91. *Id.*
92. *Id.* at 747.
93. *Id.* at 751.
94. *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, 1086 (5th Cir. 1994))).
95. *Green*, 27 F.3d at 1086.
96. *See* Mian v. Donaldson, Lufkin & Jenrette Sec. Corp., 7 F.3d 1085 (2d Cir. 1993); Baker v. McDonald's Corp., 686 F. Supp. 1474, 1481 (S.D. Fla. 1987).
97. *Dillard*, 277 F.3d at 752–53.
98. *Id.* at 753.
99. *Id.*
100. *Id.*

lard'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."[101]

In reaching its conclusion that tangible efforts to contract must be actually thwarted by the defendant in order to sustain a § 1981 claim, the *Dillard* court cited a series of decisions from its own circuit and other circuits that support the proposition that loss of speculative contract interests do not interfere with § 1981 contract rights.[102] 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."[103] These cases included the Seventh Circuit's 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.[104]

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] part."[105] The court also cited a Louisiana district court decision, *Hickerson v. Macy's Department 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."[106]

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101. *Id.* at 752.

102. *Id.*

103. *Id.* at 752; *see also* Youngblood v. Hy-Vee Food Stores, Inc., 266 F.3d 851, 854–55 (8th Cir. 2001); Bellows v. Amoco Oil, Co., 118 F.3d 268, 275 (5th Cir. 1997) (holding that plaintiff could not recover under § 1981 because he 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 the district court's dismissal of a § 1981 claim where a plaintiff alleged "possible loss of future opportunities" to contract); 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).

104. Morris v. Office Max, Inc., 89 F.3d at 414–15.

105. *Youngblood*, 266 F.3d 851, 853–55, *quoted in Dillard*, 277 F.3d at 752; *see also* Amicus Brief, *supra* note 11, at 9.

106. *Hickerson*, 1999 WL 144461, at *2, *quoted in Dillard*, 277 F.3d at 752.

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.[107] 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.[108] 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 [a] goods purchase" at a cashier at the time an officer arrested him.[109]

Thus, the Fifth Circuit's decision in *Arguello* and the cases on which it relies illustrate these courts' view that a § 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.[110]

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.[111] In *Youngblood*, for example, the court stated that Congress had amended § 1981 to "include the right to

107. *Dillard*, 277 F.3d at 751–52.

108. Christian v. Wal-Mart Stores, Inc., 252 F.3d 862, 874 (6th Cir. 2001), *construed in Dillard*, 277 F.3d at 752. 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* Part III.B.

109. Henderson v. Jewel Food Stores, Inc., No. 96 C 3666, 1996 WL 617165, at *3–4 (N.D. Ill. Oct. 23, 1996), *quoted in Dillard*, 277 F.3d at 752.

110. 42 U.S.C. § 1981(b) (2000).

111. *See generally Youngblood*, 266 F.3d 851, 856–59 (8th Cir. 2001) (Arnold, J., dissenting) (opining that the broadening intent of the 1991 amendment does not comport with a narrow reading of the term "make and enforce contracts").

'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.[112] In *Dillard*, the court does not even reference the 1991 amendment or its language regarding the contractual relationship in its application of § 1981.[113] In *Morris v. Office Max, Inc.*, 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.[114]

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 § 1981(b)—redundant and unnecessary.

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. Based on these sources, the likely conclusion is that the benefits, privileges, terms, and conditions of a retail contract include a variety of activities and cover a broader timeframe 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

112. *Id.* at 854 (majority opinion) (citing Lewis v. J.C. Penney Co., 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 department store)); *see also* Rogers v. Elliot, 135 F. Supp. 2d 1312, 1315 (N.D. Ga. 2001) (holding that even though plaintiff was verbally and physically assaulted by an employee while in the store, there was no actionable § 1981 claim because she had already paid for her purchases).

113. Morris v. Dillard Dep't Stores, 277 F.3d 743, 751–52 (5th Cir. 2001).

114. Morris v. Office Max, Inc., 89 F.3d 411, 413 (7th Cir. 1996) (citing Shen v. A & P Food Stores, No. 93 CV 1184(FB), 1995 WL 728416 (E.D.N.Y. Nov. 21, 1995) (customer refused service); Flowers v. The TJX Cos., No. 91-CV-1339, 1994 WL 382515 (N.D.N.Y. July 15, 1994) (customer removed from store); Roberts v. Wal-Mart Stores, Inc., 769 F. Supp. 1086 (E.D. Mo. 1991) (store recorded race of all customers paying by check); Washington v. Duty Free Shoppers, Ltd., 710 F. Supp. 1288 (N.D. Cal. 1988) (customer refused service)).

customer will purchase. 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.[115] 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 § 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 York, Illinois, and Ohio, and by the Third and Sixth Circuit Courts of Appeals.[116] 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,[117] 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.[118]

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 the terms and/or conditions of their contract with the commercial establishment. These courts are stepping beyond the moment when consideration is exchanged in

115. *See* Harris, *supra* note 79, at 47–48 (discussing the need for a broad interpretation of § 1981 that protects all stages of the consumer shopping experience).

116. Amicus Brief, *supra* note 11, at 7–9; *see, e.g.*, Christian v. Wal-Mart Stores, Inc., 252 F.3d 862 (6th Cir. 2001); Hall v. Pa. 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, N.A., 161 F. Supp. 2d 1248 (D. Kan. 2001); Joseph v. N.Y. Yankees P'ship, No. 00 Civ. 2275(SHS), 2000 WL 1559019 (S.D.N.Y. Oct. 19, 2000); Hill v. Shell Oil Co., 78 F. Supp. 2d 764 (N.D. Ill. 1999); Bobbitt by Bobbitt v. Rage, Inc., 19 F. Supp. 2d 512 (W.D.N.C. 1998).

117. *See Kelly*, 161 F. Supp. 2d at 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 v. Amoco Oil Co., 118 F.3d 268, 274 (5th Cir. 1997) (employing the same prima facie test); Morris v. Office Max, Inc., 89 F.3d at 413 (applying the test to a retail transaction).

118. *Kelly*, 161 F. Supp. 2d at 1255–57.

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."[119] 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 § 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.[120] The court found that the prepay requirement altered "an essential term of the customer/restaurateur contract because of race."[121] 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.[122] That the plaintiffs were eventually served did not change the court's analysis.[123]

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 § 1981 contract rights were violated despite the fact that she ultimately received service and completed her contract.[124] 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.[125]

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119. 42 U.S.C § 1981(b) (2000).

120. *Bobbitt*, 19 F. Supp. 2d at 518–20.

121. *Id.* at 519.

122. *Id.* (quoting 42 U.S.C. § 1981).

123. *See id.*

124. Joseph v. N.Y. Yankees P'ship, No. 00 Civ. 2275(SHS), 2000 WL 1559019, at *4 (S.D.N.Y. Oct. 19, 2000); *see also* Amicus Brief, *supra* note 11, at 8.

125. *Joseph*, 2000 WL 1559019, at *4.

This reasoning is equally applicable in the retail context. In *Hill v. Shell Oil Company*, for example, a district court in Illinois held that requiring African American 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.'"[126] The court rejected the defendant's assertion that because the contracts were completed that § 1981 did not apply.[127] The court held that because the terms of the plaintiffs' purchase were different from those of White customers—the African American plaintiffs were required to prepay while White customers could pay after pumping their gas—that they sufficiently stated a § 1981 claim.[128]

The plaintiffs in *Bobbitt*, *Joseph*, and *Hill* were required to submit to conditions not imposed on White customers in order to complete their contracts.[129] 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.[130] 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 remains, however, as to when discriminatory treatment, as opposed to altered terms, impacts the conditions of the contractual relationship described in § 1981. In Ms. Arguello's case, for example, could the verbal assault she endured change the conditions or terms of her contractual relationship with the gas station?[131] 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. Hill v. Shell Oil Co., 78 F. Supp. 2d 764, 777 (N.D. Ill. 1999) (quoting 42 U.S.C. § 1981(b)).

127. *Id.*

128. *Id.*

129. Bobbitt by Bobbitt v. Rage, Inc., 19 F. Supp. 2d 512 (W.D.N.C. 1998); *Hill*, 78 F. Supp. 2d at 777; *Joseph*, 2000 WL 1559019, at *4.

130. Amicus Brief, *supra* note 11, at 8–10.

131. Arguello v. Conoco, Inc., No. 397CV0638-H, 2001 WL 1442340, at *1–2 (N.D. Tex. Nov. 9, 2001).

One case that began to blur the line between discriminatory treatment and discriminatory terms was *Kelly v. Bank Midwest N.A.*[132] In *Kelly*, a 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.[133] 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.[134]

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."[135] 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.[136] 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.

The recognition that discriminatory treatment can implicate the terms and conditions of a contractual relationship and trigger § 1981 protections is not a recent development. As long ago as 1978, long before the broadening language of the Civil Rights Act of 1991 was added to § 1981, the Third Circuit Court of Appeals held that that a § 1981 claim lay in the implementation of a discriminatory picture-taking policy in a bank.[137] The bank, at the direction of the state police, had begun to photograph all "suspicious black males or females" who entered the bank.[138] The Court of Appeals found that even though the plaintiff, an African American male customer, was not prevented from completing his transaction because he was photographed during it, his § 1981

132. Kelly v. Bank Midwest, N.A., 161 F. Supp. 2d 1248 (D. Kan. 2001).

133. *Id.* at 1257–58.

134. *Id.*

135. *Id.* at 1258.

136. *Id.*; *see also* Amicus Brief, *supra* note 11, at 8.

137. Hall v. Pa. State Police, 570 F.2d 86, 92 (3d Cir. 1978); *see also* Amicus Brief, *supra* note 11, at 7.

138. *Hall*, 570 F.2d at 88.

rights were still implicated.[139] The Court stated that "[s]ection 1981 obligates commercial enterprises to extend the same *treatment* to contractual customers 'as is enjoyed by white citizens.'"[140]

The *Hall* and *Kelly* courts found that that actual physical prevention of the contract should not be required in order to state a § 1981 claim, nor should the imposition of additional affirmative requirements (such as the prepay requirement) be essential to a finding of discriminatory conditions—discriminatory *treatment* can suffice. The Sixth Circuit Court of Appeals adopted this expanded understanding of § 1981's protections in 2001.

In *Christian v. Wal-Mart Stores, Inc.*, the Court of Appeals announced a new prima facie test for a § 1981 claim.[141] The plaintiff, under the *Christian* rule, must establish (1) that she is a member of a protected class; (2) that she "sought to make or enforce a contract for services ordinarily provided by the defendant"; and (3) that she was "denied the right to enter into or enjoy the benefits or privileges of the contractual relationship" by either (a) being "deprived of services while similarly situated persons outside the protected class were not" and/or (b) receiving 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

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139. *Id.* at 92.

140. *Id.* (emphasis added) (quoting 42 U.S.C. § 1981 (2000)); *see also* Amicus Brief, *supra* note 11, at 7.

141. Christian v. Wal-Mart Stores, Inc., 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 the test introduced in Callwood v. Dave & 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)).

142. *Id.* at 872.

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

144. *Id.*

145. *Id.* at 908–09.

for a pack of cigarettes.[146] After a terse exchange of remarks during which the plaintiff completed his purchase, the clerk began to shout at him racial epithets.[147] The clerk then proceeded to jump over the counter and assault him.[148] Although the plaintiff, 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 that (1) any contractual relationship that once may have existed ceases to exist after the purchase is complete; and (2) any discriminatory treatment that does not prevent the purchase does not affect the contractual relationship.[151] The *Leach* court found not only that the actions of the clerk after the purchase was completed constituted illegal § 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 § 1981 to the exclusion of both pre- and post-contract formation conduct in the retail setting were wary of creating causes of action based on prospective contract interests.[153] In *Leach*, however, the court carefully explained that not all instances of poor, slow, or substandard service would support a § 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

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* (plaintiff's White companion was in the store at the same time).

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 v. Heyman, 233 F. Supp. 2d 906, 910 (N.D. Ohio 2002).

153. *See, e.g.*, Morris v. Dillard Dep't Stores, Inc., 277 F.3d 743, 751–52 (requiring loss of "actual" contract interests, not those that are "speculative" or "prospective"); *see also* Amicus Brief, *supra* note 11, at 6–10; discussion *supra* Part III.A.

154. *Leach*, 233 F. Supp. 2d at 910–11. The *Leach* 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. *Id.* at 910–11 (citing Lizardo v. Denny's, Inc., 270 F.3d 94 (2d Cir. 2001); Callwood v. Dave & 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); Robertson v. Burger King, Inc., 848 F. Supp. 78, 81 (E.D. La. 1994)).

discrimination claims invoking § 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 § 1981(b)'s definition of "make and enforce contracts," and offers a judicial remedy for victims of discrimination envisioned by the Civil Rights Act of 1866—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 but rather seeks to level the contractual playing field. Section 1981 aims to eliminate racial discrimination in the contracting process so that minorities

155. *Id.* at 909.
156. Jones v. Alfred H. Mayer, Co., 392 U.S. 409, 426 (1968).
157. Goodman v. Lukens Steel Co., 482 U.S. 656, 662 (1987).
158. 42 U.S.C. § 1981(a) (2000).

and Whites may contract on the same terms.[159] Therefore, a look at the law that defines those terms is helpful.[160]

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.[163] The terms of the contract were only those explicitly defined within its four corners.[164] 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.[165] 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 the antisocial byproducts of the actor's activity. The law was too busy limiting social duty to account for social costs."[166]

As contract and social theory evolved, recognition of social duty and societal interdependence crept into the jurisprudence of contracts.[167] The modern neoclassical contract model imports community standards of decency and fairness into contractual obligations.[168] These obligations insert themselves as implied terms of any contract. While the freedom to contract still exists, it now exists

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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.*

161. *See, e.g.*, GRANT GILMORE, THE DEATH OF CONTRACT 67 (1974); EDWARD J. MURPHY & RICHARD E. SPEIDEL, STUDIES IN CONTRACT LAW 88–89 (4th ed. 1991).

162. *See* Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1012 (1985); *see also* 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 (1994).

163. *See* Dalton, *supra* note 162, at 1012–13 ("[T]he will theory of contract was equated with the absence of state regulation: The parties governed themselves; better yet, each party governed himself.").

164. *See id.* (discussing how the parties' contractual relationship was governed strictly by their expressed intent in the language of the contract).

165. *See, e.g.*, E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 1.1, at 4 (1990).

166. 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.

167. Williams, *supra* note 162, at 194.

168. *Id.*

within certain legal and moral boundaries.[169] 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.[170]

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 as "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee 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."[171] 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.[172] 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.[173]

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.[174] 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."[175] Nevertheless, promissory estoppel has become widely accepted as a basic tenet of modern contract law.[176]

The duty of good faith and fair dealing is another tenet of modern contract law which imports implicit terms and conditions into

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169. Burton, *supra* note 159, at 447–48.

170. *Id.* at 445–48; Williams, *supra* note 162, at 197–207. Other relevant developments include the recognition of unilateral mistake, unconscionability, and the lawful performance doctrine. Burton, *supra* note 159, at 448–49.

171. RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981).

172. Williams, *supra* note 162, at 195 (citing FARNSWORTH, *supra* note 165, § 2.19, at 146–47 (1990)).

173. *Id.* at 195–96; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 90, cmt. a (1981) (explaining the overlap of the promissory estoppel doctrine with agency, tort, and restitution principles).

174. GILMORE, *supra* note 161, at 76.

175. *Id.* at 73–74.

176. Williams, *supra* note 162, at 195 (citing FARNSWORTH, *supra* note 165, at 137–39).

a contract. Although classical contract theory was loathe to recognize a generalized duty to act in good faith,[177] good faith in contracting is now required by the Uniform Commercial Code,[178] the Restatement of Contracts,[179] and a majority of American jurisdictions.[180] 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."[181] 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.[182] Good faith requires adherence to an agreed common purpose, consistency with the justified expectations of the other party,[183] and according to the Uniform Commercial Code, "honesty in fact in the conduct or transaction concerned."[184] 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.[185] The duty to serve doctrine is not in itself a recent jurisprudential development. Its origins date back to the fifteenth century, when English businesses, whether by holding a monopoly on a particular service or by holding themselves out as open to the general public (such as a common carrier or inn) were required by contract law to serve all unless they could provide a reasonable reason for not serving a particular customer.[186]

The duty to serve doctrine in early American jurisprudence was implemented through an analysis of whether the business in

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177. 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 & Richard A. Mann, *Good Faith: A New Look at an Old Doctrine*, 28 AKRON L. REV. 31, 42 (1994).

178. U.C.C. § 1-203 (1992).

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

180. 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).

181. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979).

182. *Id.* at cmt. a; *see also* Adler & Mann, *supra* note 177, 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); Williams, *supra* note 162, at 206.

183. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979); *see also* Adler & Mann, *supra* note 177, at 43–44.

184. U.C.C. § 1-201(19) (1992).

185. *See* Note, *The Antidiscrimination Principle in the Common Law*, 102 HARV. L. REV. 1993, 1995–96 (1989).

186. *Id.*

question was one considered "public."[187] These included innkeepers and common carriers (such as railroads). However, restaurants, racetracks, and places of amusement were considered private and not bound by the duty to serve.[188] 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.[189] Recent American interpretations of the duty to serve have expanded its reach to businesses that were once considered private, including restaurants, gas stations, hospitals and home builders.[190] Generally, the analysis focuses on the extent to which the business holds itself out to serve the general public.[191] 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 a 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. Contractual terms, consequently, now incorporate these many obligations that may not be delineated in their language.

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. The 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. Ironically, at the same, statutory civil rights protections, whose primary purpose is ostensibly to eradicate all forms

187. *Id.* at 1996.
188. *Id.*
189. *See id.* at 1994–96.
190. *Id.* at 1997–98.
191. *Id.* at 1998–99.

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 § 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 § 1981 clarified that the right to 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."[192] In a retail setting, the interpretation of § 1981 protections should necessarily allow causes of actions when customers have been harassed, followed, verbally abused, or otherwise treated in a "markedly hostile" manner, as well as when they are refused or deprived of service. The legislative intent of § 1981, its various interpretations and applications by the Supreme Court, and the common law evolution of contract theory itself all instruct that § 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 § 1981 be fully realized.

192. 42 U.S.C. § 1981(b) (2000).