Discrimination in Formation: Applying § 1981 to Instances of Preformation Discrimination in the Contractual Process

*Caitlin Albaugh**

I. INTRODUCTION

Section 1981 prohibits racial discrimination in making and enforcing contracts.[1] The statute provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts."[2] While the language of § 1981 is quite simple, and perhaps owing to its simplicity, courts have diverged from one another in their interpretations of the scope of the statute. Specifically, courts are divided on whether and to what extent § 1981 prohibits preformation discrimination in the contract formation process. Moreover, the Supreme Court of the United States has not offered any guidance to the lower courts on this issue.

The closest the Supreme Court came to addressing this question was in 2020; in *Comcast Corp. v. National Association of African American-Owned Media*, the Court held that the causation standard in § 1981 cases ought to be the traditional "but-for" standard, not the "motivating factor" standard applied in Title VII cases.[3] Lurking within the record, however, was an important question regarding the scope and applicability of § 1981 claims in general. Plaintiff ESN, argued that the motivating factor causation test ought to apply to claims brought under § 1981 because § 1981 protects the right "to an equivalent contracting *process*," not just a right to "equivalent contractual *outcomes*."[4] Contrastingly, defendant Comcast argued that the language and legislative intent of

* J.D. Candidate, 2023, University of Kansas School of Law; B.A. University of Kansas, 2021. I want to thank the *Kansas Law Review* staff, Professor Drahozal, and Katie Deutsch for their helpful feedback. I would also like to thank the "lunchtime crew," Sarah, Cayce, Jack, and my husband, for the distractions when I needed them most.

1. 42 U.S.C. § 1981(a).
2. *Id.*
3. 140 S. Ct. 1009, 1019 (2020).
4. *Id.* at 1018.

§ 1981 supports interpreting the statute to only protect contractual outcomes, not processes.[5] The Court, however, wrote off this debate as irrelevant to the issue at hand,[6] rendering the issues surrounding § 1981's scope unresolved. In her concurrence, however, Justice Ginsburg recognized the importance of resolving the issue, so as to make certain that § 1981 protects against discrimination in *all* phases of the contractual process, including discrimination that occurs before actual contract formation.[7]

Because the Supreme Court has not yet resolved this issue, many lower courts have construed § 1981 in an unduly narrow manner. Specifically, the Eleventh and Fifth Circuits have held that § 1981 does not provide a remedy for plaintiffs who endured discrimination before forming a contract, so long as they were ultimately able to form a contract with the defendants.[8] When the Supreme Court addresses this question, it should not adopt the interpretations set forth by the Eleventh and Fifth Circuits. Rather, an interpretation of § 1981 that prohibits preformation discrimination, regardless of any eventual contract formation, is one that best conforms with the text of the statute, the legislative intent and history underlying § 1981, and the principles and policy goals underlying antidiscrimination and contract law.

In furtherance of this argument, Section II of this Comment provides a brief overview of the text of § 1981 and its history, the fundamentals of contract law, and a series of lower courts' narrow and broad constructions of § 1981's scope and applicability. Moreover, Section III of this Comment analyzes § 1981's text, legislative history and intent, and how the tenets of antidiscrimination and contract law support an interpretation of § 1981 that protects against all forms of racial discrimination in the contractual process.

II. BACKGROUND

In many instances, victims of racial discrimination in contractual dealings lack any means to remediate their harms—particularly when the discrimination occurs before contract formation. A broader, more accurate interpretation of § 1981 would provide these victims with a

5. *Id.*

6. *Id.*

7. *Id.* at 1020–21 (Ginsburg, J., concurring).

8. Lopez v. Target Corp., 676 F.3d 1230, 1234 (11th Cir. 2012); Arguello v. Conoco, Inc., 330 F.3d 355, 359–60 (5th Cir. 2003).

pathway to justice—an opportunity to right the wrongs they had to endure. To fully understand why § 1981 could empower victims of discrimination, it is necessary to look to the broader context in which § 1981 exists. To do so, this Comment will examine the text and history of § 1981, how fundamental principles of contract law and antidiscrimination law intersect with the statute, and the jurisprudence regarding preformation conduct in § 1981 claims.

A. § 1981: Its Text and History

As with any statute, an inquiry into § 1981 necessitates that we begin with its text.[9] In addition, however, the unique legislative history of § 1981 means that it is nearly impossible to develop a complete understanding of the statute without also analyzing its original purpose and amendments.

Section 1981 packs a great deal of importance in very few words. The statute reads that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts."[10] The statute proceeds to define the operative phrase, "make and enforce contracts." It provides, "[f]or 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."[11]

Despite providing this elaboration, as this Comment will later discuss, courts have struggled with determining whether and to what extent the statute's text prohibits racial discrimination in the preformation stages of the contract formation process.

Examining the legislative intent and associated history of § 1981 tells us that the statute was designed to prohibit race discrimination in the stages preceding formal contract formation.[12] Congress originally

9. VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 22 (2018); *see also* Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 251 (2010) (noting that a majority of justices on the Roberts Court "referenced text/plain meaning . . . more frequently than any of the other interpretive tools").

10. 42 U.S.C. § 1981(a).

11. *Id.* § 1981(b).

12. Many judges interpret statutes by recognizing the importance of both the statute's text, as well as congressional intent, but for a much broader discussion on the ways in which judges vary in their statutory analyses, see Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the*

enacted § 1981 as part of the Civil Rights Act of 1866.[13] In its original form, § 1981 featured the exact language it has today, with the notable caveat that it lacked the language in subsections (b) and (c), which define and specify the scope of § 1981.[14] The Civil Rights Act of 1866 is recognized as being the first Civil Rights Act ratified in the United States.[15] After the Civil War and ratification of the Thirteenth Amendment, many former slave states began implementing laws known as the "Black Codes."[16] The Black Codes were intended to further subjugate black men and women and ensure that they were not granted the freedoms and liberties the Thirteenth Amendment promised.[17] In response to the Black Codes, Congress passed the Civil Rights Act of 1866.[18]

Though the passage of the Civil Rights Act was intended to effectuate broad and lasting change, statutory revisions quickly limited its scope. Specifically, the Revised Statutes of 1874 notably split § 1 of the Civil Rights Act of 1866 into two sections—the first section being § 1981 and the second § 1982.[19] This change, along with accompanying annotations, suggested that § 1981 was implemented under the Enforcement Act of 1870, which Congress enacted under its power from the Fourteenth Amendment,[20] and that § 1982 was enacted under the

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Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals, 131 HARV. L. REV. 1298 (2018). *See also* Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 309 (2006) (Breyer, J., dissenting) (arguing that interpreting the statutory phrase in the Individuals with Disabilities Education Act to "include the award of expert fees" would comport with both Congress's expressed intent and the text of the statute).

13. *See* Suja Thomas, *The Customer Caste: Lawful Discrimination by Public Businesses*, 109 CAL. L. REV. 141, 149 (2021) (explaining how the Civil Rights Act of 1866 gave all citizens an equal right to make and enforce contracts, and this is the same language used in § 1981 today).

14. *Id.* at 196 (noting how Congress amended § 1981 to include subsections (b) and (c) in 1991 after the Supreme Court in *Patterson v. McLean Credit Union* attempted to narrowly interpret the statute); *see also* Civil Rights Act of 1991, Pub. L. No. 102-116, 105 Stat. 1071, 1071–72 (1991) (amending § 1981 to include subsections (b) and (c)).

15. John Hope Franklin, *The Civil Rights Act of 1866 Revisited*, 41 HASTINGS L.J. 1135, 1135 (1990).

16. Abby Morrow Richardson, *Applying 42 U.S.C. § 1981 to Claims of Consumer Discrimination*, 39 U. MICH. J.L. REFORM 119, 122 (2005).

17. *Id.*

18. *Id.* at 123.

19. George Rutherglen, *The Improbable History of Section 1981: Clio Still Bemused and Confused*, 55 SUP. CT. REV. 303, 340 (2003); Barry L. Refsin, *The Lost Clauses of Section 1981: A Source of Greater Protection After* Patterson v. McLean Credit Union, 138 U. PA. L. REV. 1209, 1213–14 (1990).

20. For a deeper discussion regarding why construing § 1981 to have originated from the Fourteenth Amendment is so limiting, see Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 507–11 (1985) (explaining how the Fourteenth Amendment was enacted so as to apply

Civil Rights Act of 1866, which Congress enacted under its power from the Thirteenth Amendment.[21] This new conception of § 1981 as a product of the Fourteenth Amendment had significant potential consequences for the power and scope of § 1981. Namely, if § 1981 did not arise under the Civil Rights Act of 1866 and instead arose under the Enforcement Act of 1870, then § 1981 would only apply to state actors—not private conduct.[22]

Nearly a century later, however, the Supreme Court held in *Runyon v. McCrary* that, true to its real origin, the provisions of § 1981 applied to both state action and private conduct.[23] Justice Stevens, in his *Runyon* concurrence, wrote that imputing different interpretations to § 1981 and § 1982—regarding one as based under the Fourteenth Amendment and the other under the Thirteenth—lacked any practical sense.[24] Importantly, *Runyon*'s holding was later codified in the Civil Rights Act of 1991, wherein Congress amended § 1981 to explicitly reference its application to both private conduct and conduct under color of state law.[25] The decision in *Runyon* and Congress's corresponding amendment opened the door for a variety of claims under § 1981, claims that courts today continue to grapple with.

One such issue that courts encountered pertained to the proper scope of § 1981's "make and enforce" language. Before Congress amended § 1981 in 1991 to further describe what conduct constitutes making and enforcing contracts, the Supreme Court interpreted its operative term "enforce" quite narrowly.[26] Specifically, in *Patterson v. McLean Credit Union*, the majority held that § 1981 does not extend to discriminatory conduct between the parties after the contract had been formed.[27] The Court explained that "[s]uch postformation conduct does not involve the right to make a contract, but rather implicates the performance of established contract obligations."[28] Interpreting the scope of § 1981

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only to state action, not private conduct). Interpreting § 1981 to stem from the Fourteenth Amendment, as opposed to the Thirteenth, would have significantly limited § 1981's scope and applicability.

21. Rutherglen, *supra* note 19, at 340.

22. *Id.*

23. 427 U.S. 160, 173, 179 (1976).

24. *Id.* at 190 (Stevens, J., concurring) (7-2 decision).

25. Civil Rights Act of 1991, Pub. L. No. 102-116, 105 Stat. 1071, 1071–72 (1991) (amending § 1981 to include subsection (c)).

26. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 175–78 (1989).

27. *Id.*

28. *Id.* at 177.

narrowly, the Court ultimately determined that performance of a contract does not constitute enforcement of the contractual duties.[29]

In response to *Patterson* and other Supreme Court decisions that limited the scope of antidiscrimination laws,[30] Congress enacted the Civil Rights Act of 1991.[31] This Act amended § 1981 to include § 1981(b), wherein Congress expressly provides what making and enforcing contracts ought to include.[32] Specifically, it overruled *Patterson* by adding language that protects parties in *making* their contracts and in enjoying *all* "benefits, privileges, terms, and conditions" inherent within the contractual relationship.[33] It is this new language that has engendered disagreement among courts regarding whether and to what extent preformation discrimination is within the scope of § 1981.

B. § 1981: Jurisprudence Regarding Preformation Conduct Under § 1981

Although the United States Supreme Court has yet to address § 1981's applicability to preformation discrimination, several lower courts have. Accordingly, this subsection will summarize the varying decisions courts have reached on the matter. Importantly, courts also continue to grapple with whether subjecting persons of color to discriminatory conditions, as opposed to discriminatory terms, is violative of § 1981.[34]

Some courts construe § 1981 as inapplicable generally if a contract was formed and completed, regardless of whether the defendant subjected plaintiff to discriminatory conditions. This Comment will refer to such an interpretation as a "narrow" interpretation. Other courts treat the existence of preformation discrimination as violative of § 1981, despite whether plaintiff was ultimately able to form a contract or not. This Comment will refer to this interpretation as the "broad"

29. *See id.* at 177–78.

30. Roger Clegg, *Introduction: A Brief Legislative History of the Civil Rights Act of 1991*, 54 LA. L. REV. 1459, 1459–63 (1994). Other cases that triggered congressional action were *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754 (1989); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989). *Id.*

31. Rutherglen, *supra* note 19, at 344.

32. Civil Rights Act of 1991, Pub. L. No. 102-116, 105 Stat. 1071, 1071–72 (1991) (amending § 1981 to include subsection (b)).

33. *Id.*

34. *See infra* Section II.B.1.

interpretation.

1. Lower Courts' Narrow Interpretations

Several lower courts have interpreted § 1981 to be inapplicable to instances of preformation discrimination if the parties eventually formed a contract. The Eleventh Circuit in *Lopez v. Target Corp.* illustrates this narrow interpretation.[35] Lopez, a Hispanic male, was shopping at Target when he was repeatedly denied service from a white cashier, Winn.[36] Notably, Lopez waited in Winn's line for five minutes, but as soon as he arrived at the front of the line, Winn told Lopez that her line was closed.[37] Lopez exited the line, only to later notice Winn laughing at Lopez and gesturing to the next customer in line to step forward so she could serve them.[38] Moments later, a supervisor approached Lopez and informed him that Winn would check him out, so Lopez re-entered Winn's line.[39] When Lopez reached the front of Winn's line a second time, Winn yelled "Don't you listen? I'm closed!"[40] Winn continued to shout even louder, "Don't you understand? I'm closed to *YOU*!"[41] The supervisor eventually served Lopez, but Lopez left the store feeling embarrassed and distraught.[42]

The Eleventh Circuit ruled that Lopez did not state a claim under § 1981 because he was eventually served.[43] Specifically, the court noted, "Lopez was able to complete his transaction at the same Target store, buying his desired goods at the same price and using the same payment method as any other customer."[44] The court suggested that because Lopez was eventually able to purchase his goods, he did not suffer an actual contract interest; thus he was not denied the opportunity to make a contract.[45] Importantly, however, the Court neglected to address whether Winn's outright discrimination and failure to serve Lopez rendered him unable to enjoy all of the same *conditions* of the contractual relationship

35. 676 F.3d 1230 (11th Cir. 2012).
36. *Id.* at 1231.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 1232.
41. *Id.* (emphasis added).
42. *Id.*
43. *Id.* at 1234.
44. *Id.*
45. *Id.*

as his white counterparts enjoyed.

Similarly, the Fifth Circuit in *Arguello v. Conoco* refused to uphold a claim brought under § 1981 because the plaintiff was ultimately able to form a contract.[46] While purchasing items at Conoco, the cashier made racist remarks toward plaintiff Arguello and even initially refused her service simply because she had an out-of-state driver's license.[47] Eventually, however, Smith accepted the license, but as Arguello left the store, Smith continued to yell obscenities at her.[48] Like the court in *Lopez*, the *Arguello* court refused to recognize Arguello's § 1981 claim because Arguello's attempt to contract was not "'thwarted' by the defendant."[49] The court cited *Henderson v. Jewel Food Stores, Inc.*, to support its contention and noted that to bring a valid § 1981 claim, the plaintiff must be "'*actually prevented, and not merely deterred,'* from making a purchase or receiving service after attempting to do so."[50] As in *Lopez*, this court too failed to recognize whether the *contractual relationship* itself was affected in any way prohibited under § 1981. Instead, the court treated the eventual formation of a contract as a categorical limitation on § 1981's applicability.

2. Lower Courts' Broad Interpretations

Contrastingly, a number of courts have adopted comparatively broad interpretations of when preformation conduct constitutes discrimination prohibited by § 1981. The Sixth Circuit in *Christian v. Wal-Mart Stores, Inc.* illustrates the broad interpretation.[51] Christian, a black woman, and her friend Edens, a white woman, were shopping at Wal-Mart for toys when, on the basis of racial stereotyping, an employee followed Christian around the store.[52] Once Christian finished shopping, she was intercepted by the police at the check-out line before she could purchase her items.[53] The officers escorted Christian out of the store, forcing her to "leave behind her shopping cart of merchandise."[54] The Sixth Circuit upheld Christian's § 1981 claim because Christian and Wal-Mart entered

46. 330 F.3d 355, 361 (5th Cir. 2003).
47. *Id.* at 357.
48. *Id.*
49. *Id.* at 358–59.
50. *Id.* at 359.
51. 252 F.3d 862, 864–65 (6th Cir. 2001).
52. *Id.*
53. *Id.* at 865.
54. *Id.* at 866.

into a contractual relationship while Christian was shopping in the store.[55] Specifically, the Court held that Christian:

> made herself available to enter into a contractual relationship for services ordinarily provided by Wal-Mart: the record reflects that she had selected merchandise to purchase, had the means to complete the transaction, and would, in fact, have completed her purchase had she not been asked to leave the store.[56]

While plaintiff was unable to enter into a contract with Wal-Mart because of this discriminatory conduct, *Christian* distinguishes itself further from those courts who construe § 1981 as *only* applicable in instances where one is denied the right to contract. Specifically, it holds that to succeed on a § 1981 claim, plaintiff must show that "plaintiff was denied the right to enter into or enjoy the benefits or privileges of the contractual relationship" by showing that *either* "plaintiff was deprived of services while similarly situated persons outside the protected class were not" *or* that plaintiff was able to form a contract with the defendant but that "plaintiff received services in markedly hostile manner and in a manner which a reasonable person would find objectively discriminatory."[57] Here, due to discriminatory practices, plaintiff was unable to form a contract, but had plaintiff been able to purchase her items, the Sixth Circuit's test makes clear that she would still have a § 1981 claim if she had been treated in the same, markedly hostile manner.

It is important to recognize that, due to the facts provided, *Christian* does not directly conflict with the Eleventh and Fifth Circuit decisions. Notably, the Sixth Circuit was not directly prompted to address whether Christian would have had a viable claim under § 1981 had she been forced to endure the same discriminatory conditions but *did* contract with Wal-Mart. Nevertheless, the court did address the issue, noting that despite the eventual formation of a contract, Christian would have still had a claim under § 1981.[58] Several district courts have interpreted the issue similarly.

The Kansas District Court addressed this issue in *Kelly v. Bank Midwest, N.A.*[59] In *Kelly*, the plaintiff and his brother arrived at Bank

55. *Id.* at 874.
56. *Id.*
57. *Id.* at 872.
58. *Id.* at 874.
59. 161 F. Supp. 2d 1248, 1254 (D. Kan. 2001).

Midwest to obtain a loan.[60] Over multiple days and visits to the bank, the brothers were subjected to repeated acts of discriminatory conditions. Namely, the bank went out of its way to determine whether their checks were stolen, drove by the property plaintiff identified on his application for a loan, and called the police for "assistance."[61] Ultimately, however, after the bank representative admitted to plaintiff that it was not common practice to "drive by property listed on a loan application, to call the police, or to contact another bank's fraud department to determine whether checks had been stolen,"[62] plaintiff was able to secure the loan he applied for with the bank.[63]

Defendant Bank Midwest argued that because plaintiff was eventually approved for the loan, there was no "actual loss of a contract interest,"[64] and thus, plaintiff had no § 1981 claim. The court, however, held that a party may bring a § 1981 claim even if the party is eventually able to contract[65] because "[w]here 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."[66] Ultimately, in the Kansas District Court's view, the fact that the plaintiff was eventually approved for the loan he requested was irrelevant in determining whether Bank Midwest deprived him of the ability to contract on the *same conditions* plaintiff's white counterparts were afforded. Because the bank subjected plaintiff to conditions on securing a loan different than those it subjected white customers attempting to do business with the bank to,[67] relying on the statute's language in subsection (b), the court ultimately determined that, despite plaintiff eventually forming a contract with bank, he had a claim under § 1981.[68]

The aforementioned cases represent the various decisions courts have rendered on the issue surrounding the viability of a claim under § 1981 when persons are forced to endure discriminatory *conditions*. The North Carolina Western District Court's decision in *Bobbitt by*

60. *Id.* at 1251.
61. *Id.* at 1252.
62. *Id.* at 1254.
63. *Id.*
64. *Id.* at 1255.
65. *Id.* at 1256.
66. *Id.* at 1257.
67. *Id.* at 1254.
68. *Id.* at 1258.

Bobbitt v. Rage Inc., however, grapples with whether discriminatory *terms* amount to a violation of § 1981.[69] In *Bobbitt*, the plaintiffs entered Pizza Hut and placed their orders.[70] The plaintiffs waited nearly 40 minutes and in that time observed a white teenager order and leave with food.[71] Shortly thereafter, the restaurant manager and two police officers approached the plaintiffs and asked them to pre-pay for their food.[72] The officer explained that because the prior day three African American teenagers ordered food and ran out without paying, they are now asking some to pre-pay.[73] The plaintiffs complied and received their food, but only after paying first.[74] The plaintiffs then brought suit against the restaurant under § 1981, and the court upheld their claim.[75] The court held:

> [w]hen the manager, through the police, allegedly required the . . . Plaintiffs to prepay, he changed an essential term of the customer/restaurateur contract because of race. In making them prepay, the manager triggered subsection (b) of the statute. The Plaintiffs were denied the "enjoyment of all . . . *terms* and *conditions* of the contractual relationship" that were enjoyed by white citizens patronizing the restaurant.[76]

The court held that, regardless of the defendant eventually entering into a contract with plaintiffs, defendant still subjected plaintiffs to different terms than those they placed upon their white customers in asking them to pre-pay for their food.[77]

C. The Fundamentals of Contract Law and Its Intersection with § 1981

Broadly, § 1981 prohibits race discrimination under a myriad of circumstances—namely, in making and enforcing contracts. Because of its close connection to contract law, determining whether § 1981 supports a prohibition of race discrimination in the preformation stages of contract formation necessitates that we look at the fundamentals of

69. 19 F. Supp. 2d 512, 519 (W.D.N.C. 1998).
70. *Id.* at 514.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 519.
76. *Id.*
77. *Id.*

contract formation. Section 1981 explicitly separates its applicability into two distinct stages of contract formation—the stage where parties make their contracts and the stage where those contracts are then enforced.[78] Accordingly, in determining the extent of § 1981's applicability, it is important to look to what conduct constitutes "making" a contractual agreement and what conduct qualifies as enforcing one.

Contract law as we know it today is largely a product of legal changes made in response to the increased complexity and sophistication among commercial dealings.[79] As these dealings progressively required more time to complete, the ability to enforce one's promise became necessary in ensuring performance.[80]

Generally, in the United States, an enforceable contract requires mutual assent and consideration.[81] Though mutual assent is treated as an individual requirement, the existence of mutual assent is almost always evidenced through the parties' offers and acceptances.[82] Historically, there were two ways courts would interpret mutual assent—through an objective lens and a subjective one.[83] The former would look to what the parties outwardly expressed their intentions to be, while the latter would look at what the parties believed.[84] Today, most courts analyze contractual disputes through an objective lens, wherein the terms of the parties' offer and acceptance will govern the holding.[85]

Consideration is the other principle tenet of contract formation. To show the existence of consideration, and thus an enforceable contract, parties are generally required to show only that there was a bargained-for exchange.[86] The Restatement further provides that "[a] performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for

78. 42 U.S.C. § 1981(a).

79. *See* Morris Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 555 (1933).

80. *See id.*

81. RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (AM. L. INST. 1981).

82. *Id.* § 22(1); Richard Orsinger, *The Rise of Modern American Contract Law*, TEX. SUP. CT. HIST. SOC'Y & STATE BAR TEX. 1, at 82 (May 7, 2015), https://static1.squarespace.com/static/61c0fed79426ab21b8251441/t/61f1a3c53568033bfd9b21e9/1643226067825/The+Rise+of+Modern+American+Contract+Law [https://perma.cc/6YD5-6FVH].

83. Wayne Barnes, *Objective Theory of Contracts*, 76 U. CIN. L. REV. 1119, 1122 (2008).

84. *Id.*

85. *Id.* at 1125.

86. RESTATEMENT (SECOND) OF CONTRACTS § 71(1) (AM. L. INST. 1981).

that promise."[87]

Quickly, these doctrines became fixtures of contract law and are now almost universally required to form a contract. Of course, it is also important to note that despite the prime importance of offer, acceptance, and consideration, courts have acknowledged situations in which a contractual relationship may be formed, despite the absence of one or more of these requirements. The doctrines of promissory estoppel and quasi-contracts are prime examples of these developments.[88]

III. ANALYSIS

This Comment argues that the United States Supreme Court should interpret § 1981 to prohibit discrimination on the basis of race in the preformation stage of the contractual process, even when the parties ultimately enter into a contract. To demonstrate why adopting an interpretation of § 1981 that protects victims from discrimination through the contract formation process is necessary, this section proceeds in three parts. Section III.A. of this Comment analyzes the plain text of the statute. Section III.B. examines the legislative history of the statute. And Section III.C. analyzes both the varying interpretations' coherence with the fundamentals and policy goals of antidiscrimination and contract law. Absent such an interpretation, lower courts will continue to interpret § 1981 unduly narrowly, leaving countless victims of discrimination without a remedy.

A. Text

No matter the theory one subscribes to regarding statutory analysis, statutory text ought to be the first tool employed when determining a statute's meaning and scope.[89] The text of § 1981 provides a basis for individuals who seek to "make and enforce contracts" to bring claims against both private and public actors for discrimination.[90] Whether § 1981 applies to preformation discrimination even when the parties

87. *Id.* § 71(2).

88. For a deeper analysis on these new developments, as well as their relation to the subject matter in this Comment, see *infra* Section III.C.1.

89. *See generally* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016) (book review) (asserting that the first step in analyzing any statute is to look at the text and determine whether it is clear or ambiguous; if the text is ambiguous, then the court ought to look to the context surrounding the statute's enactment).

90. 42 U.S.C. § 1981(a).

eventually contract with one another, then, necessarily depends on whether the text of the statute supports such a conclusion. Ultimately, the use of the word "making," as well as the use of the phrase "enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship"[91] both contribute to an interpretation of § 1981 that protects individuals against preformation discrimination regardless of the eventual formation of a contract.

1. "Making"

Section 1981 explicitly serves to protect parties from discrimination in *making* their contracts. The legislature specifically used the word "making" to describe what the phrase "make and enforce contracts" in § 1981 entails.[92] Simply, the use of the present-progressive tense in "making" requires courts to examine preformation activities that comprise the process of forming a contract. Thus, this use of the word "making," compels an interpretation that preformation discrimination falls well within the scope of the statute, regardless of whether parties eventually form a contract. Due to the lack of legal definitions, this Comment resorts to using varying dictionary definitions to appropriately define the term, "making." Merriam-Webster's Dictionary, for example, defines "making" as, "the act or process of forming, causing, doing, or coming into being."[93] Similarly, the Cambridge Dictionary defines "making" as, "the process of doing or producing something."[94] As these dictionary definitions reflect, the -ing ending of "making" necessarily implies a process that takes time to come to fruition. Thus, the very definition of the word intended to describe § 1981's operative phrase indicates that § 1981's scope encompasses a process and series of acts that, over time, form or cause something to be created—not simply one, final act.

Both Merriam-Webster and the Cambridge Dictionary support interpreting the text to include not just the act of contractual formation,

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91. *Id.* § 1981(b).

92. *Id.* Further, it is important to note that while Black's Law Dictionary provides a definition of the term "make," it does not define make's present-progressive form, "making," present in the statute. Thus, in defining the term, this Comment will look at Merriam-Webster and the Cambridge Dictionary's definitions.

93. *Making*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/making [https://perma.cc/RJ52-STGJ].

94. *Making*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/making [https://perma.cc/2JKD-QFD4].

but the process of forming a contract as well. As such, it is essential to acknowledge that the process of forming a contract oftentimes includes a variety of actions and requirements beyond the actions and requirements necessary to form a legally binding contract. In many commercial dealings, negotiations, for example, are typically determinative of any final and enforceable agreement. Throughout this negotiation process, parties exchange offers and counteroffers, as well as rejections and acceptances.[95] In this stage, the parties begin to bargain with one another regarding the terms and conditions of the contract they seek to enter into.[96]

Moreover, even before parties necessarily enter into negotiations, there may be preformation requirements, particularly in commercial dealings.[97] Notably, recommendations, interviews, and information disclosures are all examples of requirements that parties may have to comply with to enter into a contract.[98] For example, these preformation requirements have particularly important implications in the context of large-scale development projects, where minority-owned contractors, subcontractors, and suppliers are particularly susceptible to discrimination by project owners and prime contractors.[99]

Typically, negotiations and other preformation requirements do not create an enforceable contract, but this does not mean that the parties have not begun the process of *making* their contract while engaged in these activities.[100] In negotiating terms and conditions of the agreement, parties are necessarily engaging in the process of forming their contract. Through these negotiations, the parties sift through the terms and conditions they are willing to be bound by and those they are not.[101] These terms and conditions form the basis of the contractual agreement and ultimately determine whether the parties will contract at all.[102] Moreover, a failure to comply with preformation requirements, such as

95. G. Richard Shell, *Opportunism and Trust in the Negotiation of Commercial Contracts: Toward a New Cause of Action*, 44 VAND. L. REV. 221, 232 (1991).

96. *See id.*

97. *See* Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media, 140 S. Ct. 1009, 1020 (2020) (Ginsburg, J., concurring).

98. *Id.*

99. Robert E. Suggs, *Racial Discrimination in Business Transactions*, 42 HASTINGS L.J. 1257, 1262–66 (1991).

100. Browning Jeffries, *Preliminary Negotiations or Binding Obligations? A Framework for Determining the Intent of the Parties*, 48 GONZ. L. REV. 1, 2 (2012).

101. *See id.* at 6–10.

102. *See id.*

sitting for an interview or providing a list of references, will nip a potential contractual relationship in the bud. Simply, then, negotiations and preformation requirements, as oftentimes necessary steps to the eventual formation of a contract, are themselves aspects of "making" a contract.

Thus, while negotiations or preformation requirements themselves may not bring about enforceable terms and conditions due to the lack of mutual assent inherent in negotiations, this preformation step nonetheless is regarded as the first step in *making* a contractual agreement.[103] It follows, then, that "making" a contract necessarily means, among other things, choosing whether to enter into a contract and negotiating terms of the agreement.[104] Thus, if the statute serves to protect parties from discrimination in making their contracts, the statute necessarily serves to protect parties from discrimination while negotiating the terms of the contract.

An interpretation aligned with the plain meaning of § 1981 would look simply at whether the party bringing the claim was discriminated against while in the process of *making* their contract in such a way that altered the benefits, privileges, terms, or conditions of the contractual relationship. Notably, in recognizing plaintiff's § 1981 claim, the Sixth Circuit in *Christian v. Wal-Mart Stores, Inc.*, by extension, recognized that preformation conduct—that is, placing items in a cart to purchase or undergoing other forms of negotiations—falls within the scope of § 1981.[105] Though plaintiff had not yet engaged in any formal offer and acceptance with the store when she was discriminated against, she still suffered from discriminatory conditions while engaged in the process of *making* her contract with Wal-Mart.[106]

Moreover, the Sixth Circuit recognized that *even if* plaintiff had not been prevented from purchasing her items, if plaintiff could show that the discrimination she was subjected to while *making* her contract—shopping at the store and placing items in her cart with the intention of purchasing them—was "markedly hostile,"[107] then she would have succeeded on her claim as well. This interpretation of § 1981 is

103. Shell, *supra* note 95, at 233.

104. 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, 186 (1994).

105. 252 F.3d 862, 874 (6th Cir. 2001).

106. *See id.*

107. *Id.* at 874.

fundamentally grounded in the progression language present in the text. Ultimately, the Sixth Circuit set a foundation for plaintiffs who were eventually able to contract with the defendants to still bring claims under § 1981 if they were discriminated against while *making* their contracts, notably through discriminatory conditions placed upon the contractual relationship. Nothing in the language of the statute limits § 1981 claims to instances where plaintiffs are unable to contract because of racial discrimination. Rather, § 1981 provides that discrimination plaintiffs are forced to endure while making their contracts is prohibited under the statute.[108]

Contrastingly, however, the court in *Arguello v. Conoco* failed to recognize the progression language in the statute that encompasses protections against preformation discrimination. By virtue of plaintiff entering the gas station, picking up items to purchase, and walking toward the counter to check out,[109] plaintiff began *making* a contract with Conoco, well before an enforceable contract was created by exchanging money for goods. If the text of the statute was only intended to apply narrowly to the moment of signing a contractual agreement or exchanging services, it would not have employed the word "making" to describe the protected conduct. Rather, the progression language indicates that the statute is intended to protect conduct inherent in leading to the formation of a contract. Thus, courts ought to interpret § 1981 to apply to the period where parties are *making* their contracts, as the Sixth Circuit did in *Christian*. If the *Arguello* court did this, it would have included the cashier's preformation discrimination in its analysis of whether the plaintiff had a viable § 1981 claim, and it would not have focused solely on whether a contract between the parties was eventually formed in determining whether plaintiff could prevail in her claim.[110] Rather, to comply with the text of § 1981, the court should have interpreted the cashier's preformation discrimination as inhibiting plaintiff's ability to *make* and *form* a contract under the same "benefits, privileges, terms, and conditions as enjoyed by white citizens."[111]

2. "Enjoyment of all Benefits, Privileges, Terms, and Conditions of the

108. *See* 42 U.S.C. § 1981(b).

109. Arguello v. Conoco, Inc., 330 F.3d 355, 356–57 (5th Cir. 2003).

110. *See id.* at 358–59.

111. 42 U.S.C. § 1981(b); *see also* Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media, 140 S. Ct. 1009, 1020 (2020) (Ginsburg, J., concurring) (arguing that the term "making" ought to be construed to "capture the entire *process* by which the contract is formed").

Contractual Relationship"

The statute's statement that all individuals shall have the same right to "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship," additionally supplies a basis for interpreting § 1981 to apply to preformation conduct.[112] For purposes of this Comment, it is sufficient to look at the plain meaning of "enjoyment," "benefits," "terms," and "conditions." Black's Law Dictionary defines "enjoyment" as the "[p]ossession and use, esp. of rights and property."[113] Moreover, the Cambridge Dictionary defines "benefit" as "a helpful or good effect,"[114] "terms" as "the conditions that are part of an agreement,"[115] and "condition" as "the particular state that something or someone is in."[116] As such, § 1981 requires courts to examine whether discriminatory conduct negatively affects the state one is left in by virtue of the contractual relationship, or whether one lost access to the positive effects of the contractual relationship. Altogether, then, the plain meaning of § 1981 covers the specific features of the contractual relationship, as well as the full range of effects that the relationship has on the contracting parties.

What the plain meaning does not do, however, is state that the eventual formation of a contract provides a defense against accusations of preformation discrimination in the process of making a contract. Thus, within the broader context of § 1981, the plain meaning of the statute is that § 1981 guarantees a right to identical terms and conditions within contractual relationships, regardless of one's race.[117] Importantly, particularly in light of the ongoing nature and meaning of "making," this guarantee is not tempered by any language that suggests the eventual formation of the contract is a defense against discriminatory terms or conditions.[118]

Perhaps the clearest explanation of this comes from *Bobbitt*. In *Bobbitt by Bobbitt v. Rage Inc.*, a Pizza Hut made African American

112. 42 U.S.C. § 1981(b).

113. *Enjoyment*, BLACK'S LAW DICTIONARY (9th ed. 2009).

114. *Benefit*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/benefit [https://perma.cc/KF7S-NQKC].

115. *Terms*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/terms [https://perma.cc/LW9S-J7E6].

116. *Condition*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/condition [https://perma.cc/YCQ8-XW5Q].

117. *See* 42 U.S.C. § 1981(a).

118. *See generally* 42 U.S.C. § 1981.

teenagers pre-pay for their food. The white customers, however, were not asked to pre-pay.[119] While the plaintiffs complied and were ultimately served,[120] the court correctly held that the defendant's discrimination violated § 1981. The requirement that African American patrons must pre-pay for their food, while white ones need not to, denies African Americans access to the same terms of the contractual relationship white customers regularly enjoy.[121] This interpretation comes directly from the text itself. Section 1981 protects those who are unable to enjoy the same terms of the contractual relationship as are their white counterparts, and here, the plaintiffs were explicitly subjected to a different term by being asked to pre-pay. Importantly, no language in the statute suggests that claims brought under § 1981 are reserved for *only* those plaintiffs who were barred from contracting because of discriminatory terms. Rather, the statute protects those individuals who were discriminated against within a contractual relationship by virtue of discriminatory terms and/or conduct.[122] As such, interpretating § 1981 as reserved for only those plaintiffs who were subjected to discriminatory terms and/or unable to form their desired contract is a narrow and simplistic approach that is not in any way supported by the text of the statute.

Courts have consistently struggled in determining whether to apply § 1981 to instances where plaintiffs are not subject to different *terms* but faced discriminatory *conditions* in the process of making their contracts, nonetheless. For example, in *Lopez*, the court recognized that because "Lopez was able to complete his transaction at the same Target store, buying his desired goods at the same price, and using the same payment method as any other customer"[123] he does not have a viable § 1981 claim. Essentially, while Lopez was not compelled to contract under discriminatory terms, this interpretation nonetheless fails to recognize that the statute extends to also protect individuals subject to otherwise discriminatory conditions.[124] Being refused service on the basis of race[125] automatically placed a different condition on Lopez's ability to

119. 19 F. Supp. 2d 512, 518–19 (W.D.N.C. 1998).

120. *Id.*

121. *Id.*

122. *See* 42 U.S.C. § 1981(b).

123. Lopez v. Target Corp., 676 F.3d 1230, 1234 (11th Cir. 2012); *see also* Arguello v. Conoco, Inc., 330 F.3d 355, 359–60 (5th Cir. 2003).

124. *See* 42 U.S.C. § 1981(b).

125. *See Lopez*, 676 F.3d at 1231–32.

contract with Target than it did with the white men and women the cashier continued to serve, regardless of whether Lopez was eventually served[126] and a contract was ultimately formed. The white customers at the store were served as soon as it was their turn in line. Contrastingly, Lopez was refused service, was publicly humiliated by the cashier as he attempted to purchase items, and was forced to re-enter the line only to be refused service a second time by the cashier because of his race.[127]

While Lopez was not subjected to different *terms* of the contract as the plaintiffs were in *Bobbitt* by being required to pre-pay for their food, the discrimination Lopez was forced to endure excluded Lopez from contracting in the same manner as others at the store. The text of § 1981 unambiguously extends its protections beyond just discriminatory terms and to instances where one is excluded from enjoying the same "conditions"[128] of the contractual relationship as well. If congress intended to limit § 1981 to apply only to protecting individuals from discriminatory terms, it would have made so clear. Instead, however, the statute, in listing protected activities, explicitly lists out protections against discriminatory terms *and* conditions.[129] Thus, it makes no practical sense to treat the two—terms and conditions—differently. The language of the text compels courts to interpret § 1981 to protect individuals subjected to discriminatory conditions throughout the contract formation process, not simply those subjected to discriminatory terms on the basis of race.

B. Legislative History

The legislative history and intent of § 1981 further support applying the statute broadly to incorporate protections against discriminatory terms and conditions throughout the entire contract formation process. Specifically, the legislative history and endorsements by congresspersons in enacting the Civil Rights Act of 1866, as well as the timing and purpose of § 1981's 1991 amendment both support a finding that Congress intended for § 1981 to be interpreted to apply throughout the process of making and enforcing a contract.

126. *See id.* at 1235 (explaining how Lopez was eventually able to make his purchase).
127. *Id.* at 1231–32.
128. 42 U.S.C. § 1981(b).
129. *Id.*

1. History and Endorsements—The Civil Rights Act of 1866

The timing of the Civil Rights Act of 1866's ratification presents a clear indication of congressional intent that the purpose of the Act was to seek racial equality. The Civil Rights Act of 1866, now codified in part under § 1981, was the first federal Civil Rights Act enacted in the United States.[130] Congress passed the Act just after the Civil War ended, wherein Congress began an effort to remediate the harms of slavery, a process that continues to this day.[131] Enacting the Act as the country began undergoing reconstruction is no coincidence—rather, the conclusion of the Civil War, the abolition of slavery, and the rise of the Black Codes[132] are all considerations that help to understand the Act's overarching purpose. It sought to end racial discrimination in a variety of forms and to provide a path for those who continued to be discriminated against to seek justice.[133] Thus, in construing § 1981 as Congress intended, courts ought to remember why § 1981, in its original form, was first enacted—to provide for equal treatment under the law.

The endorsements congresspersons made in advocating for the Act also make clear what the portion of the Act now codified under § 1981 sought to accomplish. Specifically, the endorsements present a clear indication of Congress's intention to end discrimination and allow all persons in the United States to enjoy the same freedoms. Senator Trumbull, the author of the Act, regarded it as:

> the most important measure that has been under its consideration since the adoption of the constitutional amendment abolishing slavery. That amendment declared that all persons in the United States should be free. This measure is intended to give effect to that declaration and secure to all persons within the United States practical freedom.[134]

While some certainly opposed the bill, such opposition generally stemmed not from the articulated purposes of the bill, but from debate

130. Franklin, *supra* note 15, at 1135.

131. For a long-form description on the Civil Rights Act of 1866, particularly as it pertains to its continuing influence modern jurisprudence today, see Robert Longley, *The Civil Rights Act of 1866: History and Impact*, THOUGHTCO. (March 1, 2021), https://www.thoughtco.com/civil-rights-act-of-1866-4164345 [https://perma.cc/9Y7Z-MHWY].

132. Richardson, *supra* note 16, at 122.

133. *Id.* at 123.

134. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866). A number of scholars rely heavily on Senator Trumbull's words in showing congressional intent. *See generally* Rutherglen, *supra* note 19; Robert J. Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187 (2005).

over whether Congress had the power to enact it.[135] President Andrew Johnson vetoed the bill articulating that the Constitution empowered the states with setting the scope of its citizens' civil rights, not Congress.[136] Importantly, however, due to widespread congressional approval, Congress voted to override President Johnson's veto, and the Civil Rights Act of 1866 was born.[137] Enacted under authority from the Thirteenth Amendment,[138] the Civil Rights Act of 1866 served to counteract the effects of the Black Codes and re-enforce the promises granted in Thirteenth Amendment.[139]

Senator Trumbull not only regarded it as the most important measure in protecting the freedoms of *all* citizens,[140] he also asserted that "the very object of the bill is to break down all discrimination between black men and white men."[141] Senator Trumbull thus makes it clear that the intended purpose of the Act in 1866 was to afford black and white men the same liberties and freedoms articulated in the act, namely, the right to make and enforce contracts. If Trumbull and other proponents of the Act intended to limit its applicability, the "object of the bill" would not have been to break down "all" discrimination.[142] Rather, in articulating this purpose, Trumbull makes clear that the bill was intended to apply broadly to all instances of discrimination in making and enforcing contracts. Thus, because the purpose of this clause was to eradicate *all* instances of discrimination in making contracts, and because preformation conduct is an inextricable aspect of "making" contracts, Congress intended to provide protections against the full range of preformation discrimination in the contract formation process, regardless of whether the parties form a contract with one another.

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135. *See* CONG. GLOBE, 39th Cong., 1st Sess. 476 (1866); *see also* Jean R. Sternlight, *Compelling Arbitration of Claims Under the Civil Rights Act of 1866: What Congress Could Not Have Intended*, 47 U. KAN. L. REV. 273, 298–99 (1999).

136. Harry Searles, *Civil Rights Act of 1866*, AM. HIST. CENT. (Apr. 26, 2022), https://www.americanhistorycentral.com/entries/civil-rights-act-of-1866/ [https://perma.cc/TXP9-DU5U].

137. Michael P. O'Connor, *Time Out of Mind: Our Collective Amnesia About the History of the Privileges or Immunities Clause*, 93 KY. L.J. 659, 691 (2005).

138. Section 1 of the Thirteenth Amendment reads, "[n]either slavery not 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." U.S. CONST. amend. XIII, § 1. Section 2 provides that "[c]ongress shall have the power to enforce this article by appropriate legislation." *Id.* § 2.

139. Richardson, *supra* note 16, at 123.

140. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (emphasis added).

141. *Id.* at 599.

142. *See id.*

2. 1991 Amendment

As a further indication of Congress's intent to interpret § 1981 so as to apply to preformation discrimination, one ought to look toward Congress's 1991 amendment to § 1981 made in response to the Supreme Court's narrow holding in *Patterson v. McLean Credit Union* in 1989.[143] As a response to the Court's decision to restrict § 1981's applicability to only the initial formation of contracts,[144] Congress added the equal "enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship" clause to the statute found in subsection (b).[145] Originally, Congress attempted to amend § 1981, along with other anti-discrimination statutes, just one year after the Court's holding in *Patterson*, but President Bush vetoed the amendment.[146] The language from the attempted amendment in 1990 is no different from the language in the successful one in 1991.[147] Ultimately, Congress was successful in 1991, just two (2) years after the Supreme Court's holding in *Patterson*. Congress's persistence further shows just how important Congress found explicitly broadening the scope of § 1981 to be—there were two separate efforts, and the text expanding § 1981 remained unchanged throughout.[148] The efficient response further evidences Congress's intention to broaden § 1981 by supplementing § 1981(b). As soon as the Supreme Court attempted to narrowly apply § 1981, Congress directly responded by expanding its scope and applicability. Thus, this was a conscious effort by Congress to signify to courts through subsection (b) that § 1981 is intended to apply to the entirety of the process of making and enforcing a contract, so as to remediate discrimination in a variety of contexts.[149]

Moreover, the House Report to the 1991 amendment further indicates congressional intent that § 1981 be construed and applied broadly. It provides that "subsection (b) is intended to be illustrative

143. Rutherglen, *supra* note 19, at 344; 491 U.S. 164 (1989). The Civil Rights Act of 1991's intended purpose was to "respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(4), 105 Stat. 1071, 1071 (1991).

144. *Patterson*, 491 U.S. at 180.

145. 42 U.S.C. § 1981(b).

146. Ann Devroy, *Bush Vetoes Civil Rights Bill*, WASH. POST (Oct. 23, 1990), https://www.washingtonpost.com/archive/politics/1990/10/23/bush-vetoes-civil-rights-bill/cd68a6c4-8529-471a-b4f7-08c26cf65ac0/ [https://perma.cc/8J9Q-33QM].

147. S. 2104, 101st Cong. (2d Sess. 1990).

148. *Id.*

149. Thomas, *supra* note 13, at 196.

rather than exhaustive."[150] In doing so, Congress expressly declared that what constitutes the "benefits, privileges, terms, and conditions of the contractual relationship"[151] ought to be interpreted broadly, as well as the conduct that constitutes "making" a contract. Congressional intent indicates that § 1981 ought to apply broadly to *all* forms of discrimination in *all* phases of the contractual relationship. Accordingly, a failure to construe § 1981 broadly is inconsistent with Congress's express intent and leaves marginalized individuals unprotected from discriminatory acts.

This 1991 amendment was not specific to § 1981. In fact, one articulated purpose of the amendment was to "amend the Civil Rights Act of 1964 to *strengthen* and improve Federal civil rights laws" generally.[152] Not only did Congress use the 1991 amendment to respond to *Patterson*, it used it to respond to several of the Supreme Court's attempts at narrowly applying Title VII as well.[153] In *Price Waterhouse v. Hopkins*, for example, the Supreme Court held that so long as the defendant employer can assert *any* nondiscriminatory reason for adverse treatment, the employee will be unable to win damages.[154] In 1991, however, Congress amended Section 703 of Title VII to provide that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[155] Ultimately, in amending both § 1981 and Title VII shortly after the Supreme Court narrowly construed their scope and applicability, Congress indicated to courts that anti-discrimination law is one area of law that it intends to have a broad reach.[156] As such, consistent across the 1991 amendment is an indication that § 1981, and anti-discrimination statutes altogether, are not to be narrowed by the courts.

150. H.R. REP. NO. 102-40(I), at 92 (1991).

151. 42 U.S.C. § 1981(b).

152. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1071 (1991) (emphasis added).

153. Clegg, *supra* note 30, at 1459; *see also* Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(3), 105 Stat. 1071, 1071 (1991).

154. 490 U.S. 228, 243–44 (1989).

155. 42 U.S.C. §§ 2000e-2, 2000e-2(m). This is just one example of Congress's efforts to counter the Supreme Court's limiting of anti-discrimination statutes. For a broader look at the Supreme Court's actions and Congress's reaction, see Clegg, *supra* note 30, at 1459–63.

156. Clegg, *supra* note 30, at 1463.

C. Coherence with Antidiscrimination Statutes and Principles of Contract Law

Section 1981 operates at the intersection between contract and antidiscrimination law. A narrow interpretation of § 1981 is inconsistent with the principles and policy goals underlying both contract and antidiscrimination law. Courts ought to interpret § 1981 to best preserve justice and equal protection—to provide a remedy for all forms of discrimination in the preformation stage of the contractual process.

1. Coherence with the Purpose of Antidiscrimination Statutes

Though § 1981 interacts with contract law, it is, at its core, a piece of antidiscrimination legislation. Consequently, while § 1981 largely governs contractual dealings, courts ought to draw upon more than just the principles and policies underlying contract law. Specifically, courts ought to draw upon the principles and policy goals underlying antidiscrimination law because § 1981 has been central to antidiscrimination law since reconstruction.[157] Accordingly, courts ought to situate their interpretations of § 1981 within the broader context of American antidiscrimination law and jurisprudence.

Regrettably, the courts who have narrowly interpreted § 1981 focused almost exclusively on traditional principles of contract law in reaching their decisions. Traditionally, contract law jurisprudence has been rooted in "laissez-faire capitalism, individual autonomy, and freedom from state interference with economic activities."[158] Conversely, the key principles and policy goals underlying antidiscrimination law revolve around promoting fairness and equality and deterring discrimination.[159] Naturally, then, courts that singularly focus their § 1981 analyses from lens' colored by the principles and policy goals underlying contract law typically emphasize enabling freedom to contract and a hands-off approach to contractual relationships. This narrow interpretation of § 1981 leads to undesirable results. If parties ultimately form a contract, despite preformation discrimination, § 1981 is not implicated. The court's reasoning in

157. *See supra* Section II.A.2.

158. Richardson, *supra* note 16, at 143.

159. For a broader discussion on the principles and policies underlying antidiscrimination laws, see generally Hillel J. Bavil, *Cause and Effect in Antidiscrimination Law*, 106 IOWA L. REV. 483, 536–44 (2021).

Arguello illustrates this conclusion; inherent in its holding is the sentiment that because the parties were able to form a contract, there was no harm done, regardless of whether the plaintiff was discriminated against.[160]

On the other hand, if courts balance their perspectives with the principles and policy goals underlying *both* contract law and antidiscrimination law, they will acknowledge the importance of the freedom to contract without ignoring the intrinsically harmful nature of discrimination. While there is tension between the principles and policy goals of contract and antidiscrimination law, a proper balancing of the two can be seen in many aspects of modern employment discrimination law.[161] For example, under Title VII, a plaintiff suffering from harassment is not required to show the harassment prevented her from contracting with the defendant or caused her to terminate her contract with the defendant to recover.[162] In so doing, Title VII upholds the freedom to contract while still strongly disincentivizing individuals and entities from engaging in discriminatory conduct—within the context of an at-will employment contract, at least, the victimized party is free to do what she wants regarding her employment contract.[163] Balancing the principles and policy goals of antidiscrimination and contract law protect against the intrinsic harm of discriminatory conduct and provide a path for victims to remediate their harms without unduly impairing individuals' freedom to contract.

This balance of perspectives is inherent in an interpretation of § 1981 that provides remedies for individuals subjected to all forms of discrimination in the preformation stage of the contractual process,

160. Arguello v. Conoco, Inc., 330 F.3d 355, 358–59 (5th Cir. 2003) (holding that although plaintiff suffered from race discrimination while contracting with the defendant, because plaintiff was not "*actually prevented*" from forming a contract, plaintiff has no viable claim under § 1981).

161. It is important to note that this Comment is not suggesting that contract law is supreme over § 1981 and antidiscrimination law in general. Rather, it is simply showing how the two areas of law can be interpreted in harmony with one another.

162. Under Title VII, it is unlawful for employers to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). This language necessarily supports an interpretation that Title VII extends to instances where an employer discriminates against its employee on the basis of some protected identity.

163. Generally, in an at-will employment relationship, an employer may fire its employee for no cause, and the employee can terminate her own employment without cause; for a further discussion regarding the at-will employment doctrine and its entanglement with public policy, see generally *Note: Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983).

regardless of whether they eventually form a contract. For example, in *Kelly v. Bank Midwest, N.A.*, even though the plaintiff eventually was able to obtain a loan and enter into a contract with the bank,[164] the court still found it to be highly persuasive that he endured discrimination on the basis of his race in the process of obtaining the loan.[165] By refusing to accept the argument that forming a contract prevented the plaintiff from succeeding in his § 1981 claim,[166] the court acknowledged the importance of deterring discriminatory conduct and the intrinsic harm that discrimination has on individuals and society. In so doing, the *Kelly* court's interpretation affords plaintiffs the freedom to form contracts without said freedom impeding upon their ability to bring discrimination claims. Thus, this interpretation balances the principles and policy goals of the two major bodies of law in which § 1981 is rooted.

2. Coherence with Principles of Contract Law

Interpreting § 1981 so as to protect individuals from all forms of discrimination in the preformation stage of the contractual process, also accords with the evolving nature of contract law. Fundamental contract principles require that an enforceable contract consists of consideration and mutual assent.[167] These tenets have been in place for hundreds of years and continue to prevail as the general requirements for a valid contract throughout the country. Moreover, the formation of a contract is typically necessary for an individual to find a remedy under contract law.[168]

The Eleventh Circuit in *Lopez* and the Fifth Circuit in *Arguello* rely on an overly mechanical and traditional approach to determining when someone can recover under § 1981. Such interpretations are unsupported by the text and legislative history of the statute and are at odds with the principles and underlying policy goals of contract law.

The *Lopez* court, for example, recognized that the plaintiff and Target entered into a contract with one another.[169] In their exchange, Lopez offered to purchase items at Target, and Target accepted by taking

164. 161 F. Supp. 2d. 1248, 1254 (D. Kan. 2001).

165. *Id.* at 1255.

166. *Id.*

167. RESTATEMENT (SECOND) OF CONTRACTS §§ 17(1), 22, 33, 50 (AM. L. INST. 1981).

168. TRACEY E. GEORGE & RUSSELL KOROBKIN, K: A COMMON LAW APPROACH TO CONTRACTS 481 (Rachel E. Barkow et al. eds., 2d ed. 2017) (explaining how, "[w]hen a breach occurs, the non-breaching party is entitled to a remedy").

169. Lopez v. Target Corp., 676 F.3d 1230, 1235 (11th Cir. 2012).

Lopez's money in exchange for the goods.[170] Because the parties ultimately formed a contract, the court held that Lopez did not have a viable claim under § 1981, despite the court's acknowledgment that Target discriminated against Lopez on the basis of his race while contracting.[171] Consequently, the *Lopez* court has embraced a narrow interpretation of § 1981 with an initial binary question of fundamental contract law, where the formation of an enforceable contract functions as a near-categorical bar on claims of discriminatory conditions under § 1981.[172]

Moreover, courts that narrowly interpret § 1981, by focusing on the mere question of contract formation, ignore principles of justice and fairness that have increasingly played a role in contract law jurisprudence over the last several decades.[173] This is particularly problematic considering that the text of § 1981 requires courts to look *beyond* the existence of mere contract formation, pursuant to § 1981(b).[174] As Professor Abby Richardson argues in her article, *Applying 42 U.S.C. § 1981 to Claims of Consumer Discrimination*, contract law has developed with a particular emphasis on ensuring that plaintiffs have access to just and fair pathways to remediation.[175] While Professor Richardson acknowledges the important roles that offer, acceptance, consideration, and, by extension, contract formation, play in contract law, she notes that they are not always necessary aspects of a claim under contract law.[176] For instance, the doctrines of promissory estoppel[177] and quasi-contract, provide remedies for individuals, regardless of whether they can show the existence of consideration and offer and acceptance,

170. *Id.*

171. *Id.* (holding that "Winn's discriminatory conduct did not impair Lopez's right to make contracts under § 1981").

172. It is worth nothing that the *Lopez* court suggested that, if the plaintiff had received terms in his contract that differed from terms a white customer would have received, then there would potentially be a viable § 1981 claim.

173. Richardson, *supra* note 16, at 146. For a longform discussion on the ubiquity of considerations of distributive justice in contract law/contract law jurisprudence, see generally Marco Jimenez, *Distributive Justice and Contract Law: A Hohfeldian Analysis*, 43 FLA. ST. U. L. REV. 1265 (2017).

174. 42 U.S.C. § 1981(b).

175. Richardson, *supra* note 16, at 146 (arguing that "[t]he 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").

176. *Id.* at 143–46.

177. *See id.* at 144 (explaining that promissory estoppel is an "illustrative example" of how modern contract law has evolved from a strict interpretation of what constitutes a valid contract to one more aligned with principles of fairness).

respectively.[178] While this Comment is not suggesting that just because contract law has evolved, interpretations of § 1981 ought to evolve too, it is important to recognize that correctly interpreting § 1981 aligns with how contract law has evolved. Notably, these doctrines circumvent the need for contract formation to ensure just and fair outcomes.[179] With this information in mind, the narrow interpretation courts' fixation on whether or not the parties formed a contract makes little sense in the broader context of contract law doctrine.

Conversely, courts that broadly interpret § 1981 fall more in line with the principles and policy goals of contract law. The Kansas District Court in *Kelly v. Bank Midwest, N.A.*, for example, held that, while the bank ultimately granted the plaintiff a loan, because the plaintiff endured disparate treatment in the process, plaintiff had a viable § 1981 claim.[180] By conceiving of the issue in a manner that looked beyond the existence of a formed contract, the *Kelly* court approached the plaintiff's § 1981 claim holistically, with a particular emphasis on the effect the discriminatory conditions had on the plaintiff.[181] This holistic approach, as can be easily contrasted to the mechanical approach of courts on the other side of the issue, situates § 1981 claims within the broader context of societal goals and norms, the context contractual disputes are increasingly situated within today. Accordingly, a narrow interpretation of § 1981 (i.e., treating the eventual formation of a contract to preclude a discrimination claim under § 1981) is incoherent with more than just the

178. Professor Williston, in proposing the doctrine of promissory estoppel to the American Law Institute, asserted that there needs to be a section in the Restatement that "covers a case where there is a promise to give and the promisor knows that the promisee will rely upon the proposed gift in certain definite ways." Eric Alden, *Rethinking Promissory Estoppel*, 16 NEV. L.J. 659, 684 (2016) (quoting Samuel Williston, *Discussion of the Tentative Draft, Contracts Restatement No. 2*, 4 A.L.I. Proc. app. at 90 (1926) (remarks of Prof. Williston, reporter)). Thus, in instances where one has reasonably relied on another's promise, regardless of whether the parties have exchanged adequate consideration, in an effort to avoid the injustice that would ensue if the court failed to recognize an enforceable agreement between the parties, the doctrine of promissory estoppel may apply to remediate the harm the plaintiff suffered. For a more in-depth discussion on the origins of the doctrine of promissory estoppel, see Orsinger, *supra* note 82, at 100. Furthermore, for a deeper analysis on the ways in which promissory estoppel is grounded in principles of fairness, as opposed to traditional principles of contract law, see Williams, *supra* note 104, at 195–97. Under the doctrine of quasi-contract, if the plaintiff can show that she reasonably conveyed some benefit to the defendant and that it would be *unjust* for the court not to compensate her in return; then, regardless of whether there is evidence of an offer and acceptance between the parties, the court will enforce the agreement. *See generally* GEORGE & KOROBKIN, *supra* note 168, at 695–709.

179. Richardson, *supra* note 16, at 147 (arguing that when contract law recognized that a strict coherence with contract formation left many without recourse for their harms, it adapted).

180. 161 F. Supp. 2d. 1248, 1257–58 (D. Kan. 2001).

181. *See id.* at 1256–57.

text of the statute and its history; it stands in stark contrast to the principles and policy goals of modern contract law.

IV. CONCLUSION

Lower courts' narrow interpretations of § 1981 have left countless individuals without recourse for discrimination they endured before forming contracts. Specifically, the Eleventh and Fifth Circuits' treatment of the eventual formation of a contract as a bar to claims under § 1981 leaves plaintiffs who were nonetheless forced to endure discriminatory conditions while contracting helpless. These narrow interpretations go unsupported by the text of the statute itself, the statute's legislative history and intent, and the principles and policy goals underlying modern contract and antidiscrimination laws. In light of this, the United States Supreme Court ought to interpret § 1981 in a manner that protects individuals from preformation discrimination, regardless of whether they ultimately form a contract. To do any less lacks any strong legal or policy justification.