SECTION 1981 AS CONTRACT LAW

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A civil rights secret hides in plain sight: a federal antidiscrimination statute, 42 U.S.C. § 1981, expresses foundational rules of contract law in the United States. Originating in the Civil Rights Act of 1866 and amended by the Civil Rights Act of 1991, Section 1981 prohibits racially discriminatory formation, performance, modification, termination, and enforcement of contracts. The statute thus forbids parties from racially discriminating in nearly every phase of every contractual relationship.

Despite Section 1981's evident concern for contracts, comprehensive summaries of contract law—including Restatements, treatises, and casebooks—usually ignore the statute. This omission might make sense if Section 1981 does not count as contract law, a tempting view given its status as federal antidiscrimination law. But this Article argues that, for conceptual and normative reasons, Section 1981 already counts as an important part of contract law and should be recognized as such. Apart from aspiring to guarantee equal citizenship regardless of race, the statute's importance as contract law *is hard to overstate given that it governs nearly every aspect of every contract—indeed, even every attempted contract—in the United States.*

These claims have theoretical and practical implications. Contract law theories must respond to the possibility that antidiscrimination rules

* Professor of Law, The University of Texas at Austin School of Law. For comments, conversations, and encouragement, I would like to thank the law faculties at Texas Law and Washington University in St. Louis. I also thank participants in the Yale-Toronto Private Law Theory Discussion Group. In particular, I thank Clara Altfeld, Scott Baker, Steve Bero, Bob Bone, Faisal Bhabha, Oren Bracha, Charles Calleros, Nico Cornell, Danielle D'Onfro, Adrienne Davis, Alma Diamond, Mechele Dickerson, Brittany Farr, Willy Forbath, Trevor Gardner, Tara Grove, David Hoffman, Annalee Jeffress, Felipe Jiménez, Morgan Johnson, Hila Keren, Arthur Lau, Ben Levin, Sandy Levinson, Tim Lovelace, Dick Markovits, Crescente Molina, Jennifer Nadler, Shaun Ossei-Owusu, Larry Sager, Anthony Sangiuliano, Cosim Sayid, Steve Schaus, Matthew Shapiro, Joe Singer, Amit Singh, James Spindler, Becca Stone, Jordan Steiker, Michael Sturley, Cristina Tilley, Van Tran, Melissa Wasserman, Abe Wickelgren, Sean Williams, and Patrick Woolley. A special thanks to K-Sue Park, Josh Sellers, Liz Sepper, and Martin Sybblis for providing detailed, written feedback on earlier drafts. Finally, a debt of gratitude is owed to the editors of the *Virginia Law Review* for their meticulous work.

reinforce contract law's most basic values rather than thwarting them. Practically, editors of treatises and other comprehensive doctrinal summaries should include some nontrivial discussion of Section 1981's origins and contemporary applications. Applying doctrines like good faith and fair dealing may require assessing whether contracts are performed without racial discrimination. And law professors should consider revising their syllabi to include Section 1981 in their courses on contract law.

Contract law needs antidiscrimination law to realize its animating values, including economic freedom and basic transactional fairness. Rather than undermining the values embodied in contract law, sound antidiscrimination laws like Section 1981 are essential to facilitate and express them. The possibility that some antidiscrimination rules form part of contract law rather than merely constraining its operation from the outside should therefore come as no surprise.

INTRODUCTION

A civil rights secret hides in plain sight: a federal antidiscrimination statute, which has been on the books in one form or another since 1866, expresses foundational rules of contract law in the United States. This claim should be surprising. Contract law, after all, is traditionally understood to be indifferent to invidious discrimination,[1] independent of antidiscrimination law,[2] and perhaps even antithetical to it.[3] Concerning racial discrimination specifically, one can teach contract law, learn it, and wield it expertly without discussing or knowing much about whether or

[1] See Bowlin v. Lyon, 25 N.W. 766, 767–68 (Iowa 1885) (holding that a "colored man" who was denied entry into a skating rink solely because of his race was not entitled to admission given the rink's discretion to contract with, or grant entry to, whomever it pleased); Noah D. Zatz, A Law and Political Economy Approach to Race, Gender, and Power in Contracts, *in* Integrating Doctrine and Diversity: Inclusion and Equity in the Law School Classroom 129, 133 (Nicole P. Dyszlewski, Raquel J. Gabriel, Suzanne Harrington-Steppen, Anna Russell & Genevieve B. Tung eds., 2021) (observing that "[i]n the classic common-law cases of refusal-to-contract, discrimination appears as purely private preference," which courts treated on par with any other personal preference in the name of "evenhandedness"); Hila Keren, "We Insist! Freedom Now": Does Contract Doctrine Have Anything Constitutional to Say?, 11 Mich. J. Race & L. 133, 142 (2005) [hereinafter Keren, We Insist! Freedom Now]; see also Orit Gan, Contract Law, Equality and the State, 72 Clev. St. L. Rev. 889, 892 (2024) ("[C]onventional wisdom holds that contract law has nothing to do with social equality."); Deborah Zalesne, Racial Inequality in Contracting: Teaching Race as a Core Value, 3 Colum. J. Race & L. 23, 25 (2013) [hereinafter Zalesne, Racial Inequality in Contracting] ("Neoclassical contract theory embraces the idea of formal legal color blindness in assessing the validity of a contract, assuming that an individual's race or ethnicity played no role in a contract's formation or content.").

[2] Zatz, supra note 1, at 132–33 (describing antidiscrimination law's "startling omission from" and "neglect within contracts curricula"); Allan H. Macurdy, Classical Nostalgia: Racism, Contract Ideology, and Formalist Legal Reasoning in *Patterson v. McLean Credit Union*, 18 N.Y.U. Rev. L. & Soc. Change 987, 1024–25 (1990) (asserting that, although contract law monitors valid contractual relationships through a variety of doctrines, the ostensibly "private" nature of contract law makes "[a]ntidiscrimination principles . . . seem irrelevant to the business of conducting business, and are thus of low priority"); Gan, supra note 1, at 892 (describing, without endorsing, the claim that "[c]ontract law is private law and has nothing to do with anti-discrimination law").

[3] Richard A. Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws 3 (1992) (describing antidiscrimination law as the "antithesis of freedom of contract"); Kirsten L. McCaw, Comment, Freedom of Contract Versus the Antidiscrimination Principle: A Critical Look at the Tension Between Contractual Freedom and Antidiscrimination Provisions, 7 Seton Hall Const. L.J. 195, 202–03 (1996).

how race has shaped its current form,[4] how racial bias impacts contractual transactions,[5] or how contract law has affected the distribution of wealth among racial groups.[6] After all, neither doctrines nor statutes widely recognized as part of contract law refer to race or outwardly concern

[4] Dylan C. Penningroth, Race in Contract Law, 170 U. Pa. L. Rev. 1199, 1298–1300 (2022); see also Jeremiah A. Ho, Uncovering Bias: Teaching Contracts Critically, *in* Integrating Doctrine and Diversity: Inclusion and Equity in the Law School Classroom, supra note 1, at 121, 121–22.

[5] See, e.g., Patricia J. Williams, The Alchemy of Race and Rights 146–48 (1991); Meirav Furth-Matzkin, Discrimination in Contractual Performance: Theory, Evidence, and Preliminary Policy Prescriptions, 99 Wash. L. Rev. 1165, 1177–84 (2024) (summarizing evidence of selective enforcement of consumer contract terms). See generally, e.g., Ian Ayres, Pervasive Prejudice? Unconventional Evidence of Race and Gender Discrimination (2001) (arguing, with empirical support, that race and gender discrimination is not uncommon in retail markets); Shaun L. Gabbidon & George E. Higgins, Shopping While Black: Consumer Racial Profiling in America (2020) (describing the pervasiveness of racial discrimination in everyday retail transactions); Michelle R. Dunlap, Retail Racism: Shopping While Black and Brown in America (2021) (explaining that racial profiling and inequality are prevalent in "every marketplace imaginable"); Anne-Marie G. Harris, Shopping While Black: Applying 42 U.S.C. § 1981 to Cases of Consumer Racial Profiling, 23 B.C. Third World L.J. 1 (2003) (analyzing the frequency and causes of consumer racial profiling and identifying Section 1981 claims as a possible recourse for people who experience discrimination in the marketplace); Marianne Bertrand & Sendhil Mullainathan, Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination, 94 Am. Econ. Rev. 991 (2004) (examining racial discrimination in employment contracts by demonstrating that the labor market favors individuals with "white-sounding" names over individuals with "African-American-sounding" names).

[6] See, e.g., Zalesne, Racial Inequality in Contracting, supra note 1, at 25 ("The apparent neutrality of contract law masks the distributive effects of legal rules."). See generally, e.g., Keeanga-Yamahtta Taylor, Race for Profit: How Banks and the Real Estate Industry Undermined Black Homeownership (2019) (arguing that the public-private partnership between the real estate industry and the federal government in the late twentieth century exacerbated racial discrimination and residential segregation); Danielle Kie Hart, Contract Law & Racial Inequality: A Primer, 95 St. John's L. Rev. 449 (2021) (arguing that, due to unequal bargaining power, contract law tends to increase material inequality in general, leading to material harm to marginalized groups). Discrimination in real estate appraisals, for example, straightforwardly impacts the wealth of Black homeowners. Jonathan Rothwell & Andre M. Perry, How Racial Bias in Appraisals Affects the Devaluation of Homes in Majority-Black Neighborhoods, Brookings Inst. (Dec. 5, 2022), https://www.brookings.edu/articles/how-racial-bias-in-appraisals-affects-the-devaluation-of-homes-in-majority-black-neighborhoods/ [https://perma.cc/A5HQ-43L8]; Heather R. Abraham, Appraisal Discrimination: Five Lessons for Litigators, 76 SMU L. Rev. 205, 215–19 (2023) (explaining some historic and modern mechanisms in the valuation process that lead to appraisal discrimination). For more on banking, see generally Mehrsa Baradaran, The Color of Money: Black Banks and the Racial Wealth Gap (2017) (explaining how the history of racial segregation in banking contributed to the racial wealth gap).

themselves with racial discrimination.[7] Even *Williams v. Walker-Thomas Furniture Co.*—a case famous for recognizing modern unconscionability doctrine and for highlighting issues about predatory market behavior in communities of color[8]—never mentions race explicitly.[9] Contract law's formal doctrines ignore race.

Critical scholars have also taken for granted contract law's indifference to race,[10] arguing that contract law's formal doctrines help courts and contracting parties mask racial biases in contractual relationships[11] and render race-based contracting decisions irrelevant to the legal analysis of contract issues,[12] at least outside of certain important but circumscribed

[7] Steven J. Burton, Racial Discrimination in Contract Performance: *Patterson* and a State Law Alternative, 25 Harv. C.R.-C.L. L. Rev. 431, 458–59 (1990) [hereinafter Burton, Racial Discrimination in Contract Performance]; Blake D. Morant, The Relevance of Race and Disparity in Discussions of Contract Law, 31 New Eng. L. Rev. 889, 897 (1997) (noting the existence of "contract law's objective facade" which can obscure the role that "issues of disparity," like racial discrimination, play in the contract process); Deborah Zalesne, The (In)Visibility of Race in Contracts: Thoughts for Teachers, ContractsProf Blog (July 8, 2020) [hereinafter Zalesne, The (In)Visibility of Race in Contracts], https://www.contractsprofblog.com/2020/07/deborah-zalesne-the-invisibility-of-race-in-contracts-thoughts-for-teachers/ [https://perma.cc/TTW3-4HPL].

[8] See Duncan Kennedy, The Bitter Ironies of *Williams v. Walker-Thomas Furniture Co.* in the First Year Law School Curriculum, 71 Buff. L. Rev. 225, 236 (2023).

[9] Id. at 236–37; see also Zalesne, Racial Inequality in Contracting, supra note 1, at 34; Amy H. Kastely, Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law, 63 U. Cin. L. Rev. 269, 307 (1994). See generally Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).

[10] ContractsProf Blog devotes several posts to the question of how to raise the topics of race and racism in first-year courses in contract law. See, e.g., Charles Calleros, Talking About Race in the Contracts Course: Interface with Civil Rights Laws, Part I—Mutual Assent, ContractsProf Blog (June 15, 2020), https://www.contractsprofblog.com/2020/06/guest-post-by-charles-calleros-talking-about-race-in-the-contracts-course-interface-with-civil-right/ [https://perma.cc/XL9Y-HYYD]; Charles Calleros, Talking About Race in the Contracts Course: Interface with Civil Rights Laws, Part II—Consideration, ContractsProf Blog (June 16, 2020), https://www.contractsprofblog.com/2020/06/guest-post-by-charles-calleros-talking-about-race-in-the-contracts-course-interface-with-civil-right-1/ [https://perma.cc/P39Q-CNTQ]; Zalesne, The (In)Visibility of Race in Contracts, supra note 7.

[11] See Zalesne, Racial Inequality in Contracting, supra note 1, at 25–26; Chaumtoli Huq, Integrating a Racial Capitalism Framework into First-Year Contracts: A Pathway to Anti-Capitalist Lawyering, 35 J.C.R. & Econ. Dev. 181, 195 (2022) (asserting that "neutral discussions of core contracts principles, such as the unenforceability of gratuitous promises, consideration, and reliance, obscure how law maintains racial and economic subordination"); Marissa Jackson Sow, Whiteness as Contract, 78 Wash. & Lee L. Rev. 1803, 1829 (2022).

[12] Zalesne, Racial Inequality in Contracting, supra note 1, at 25–26 (asserting that assumptions of legal reasoning in contract law doctrine conceal bias); Huq, supra note 11, at 195–97 (citing Kirksey v. Kirksey, 8 Ala. 131 (1845)) (arguing that the traditional analysis of the formal contract doctrines presented in the classic *Kirksey* case conceals background "ploys

areas of economic life like employment,[13] housing,[14] education,[15] and commercial lending.[16] Contract law's race-free facade has also been criticized for obscuring how minorities have used contract law to exercise their agency successfully in the world.[17] If formalists and critical race theorists share any scholarly views about contract law, foremost is their assumption that it ignores race and racial discrimination.[18]

This Article challenges that assumption. Race is directly relevant to contract law because a federal statute prohibiting racial discrimination in contracting, 42 U.S.C. § 1981, also expresses important rules of contract law. Section 1981 guarantees everyone the same right "to make and enforce contracts . . . as is enjoyed by white citizens" and prohibits both private and public actors from racially discriminating in "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[19] This language—originating in the Civil Rights Act of 1866 and updated by the Civil Rights Act of 1991[20]—

of power and racial subordination"); see also Kastely, supra note 9, at 306 (arguing that *Williams v. Walker-Thomas Furniture Co.*, a classic unconscionability case, fails to make explicit in its unconscionability analysis that the predatory contracts at issue involved "exploitation of low-income people of color . . . enabled in part by racist barriers").

[13] See generally 42 U.S.C. §§ 2000e–2000e-17 (prohibiting various types of employment discrimination).

[14] See generally id. §§ 3601–3619, 3631 (prohibiting housing discrimination).

[15] See, e.g., Brown v. Bd. of Educ., 347 U.S. 483, 492–94 (1954) (holding that the racial segregation of children in public schools is unconstitutional).

[16] 15 U.S.C. §§ 1691–1691f (prohibiting lending discrimination).

[17] Penningroth, supra note 4, at 1211–16, 1273; Brittany Farr, Breach by Violence: The Forgotten History of Sharecropper Litigation in the Post-Slavery South, 69 UCLA L. Rev. 674, 681–82 (2022).

[18] Professor Deborah Zalesne, however, does seem to challenge the assumption that contract law ignores race and racial discrimination in Zalesne, Racial Inequality in Contracting, supra note 1, at 24–25 ("[A] complete understanding of contract disputes routinely requires an analysis of the effects of inequality, including race dynamics, on parties' bargaining choices."). Although Zalesne correctly observes that courts have raised the issue of inequality of bargaining power in the context of applying the unconscionability doctrine, she does not show that courts routinely appeal to underlying racial dynamics in their legal reasoning. See generally id. See also Justin Driver, Recognizing Race, 112 Colum. L. Rev. 404, 449 (2012) (arguing that applying unconscionability in the *Williams v. Walker-Thomas Furniture Co.* case does not require reckoning with race). For one unconscionability case that notes racial disparities without disclosing the racial identities of the litigants, see State ex rel. King v. B & B Inv. Grp., Inc., 2014-NMSC-024, ¶¶ 13–17, 329 P.3d 658, 665–66.

[19] 42 U.S.C. § 1981(a)–(c).

[20] Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. §§ 1981–1982, 1988–1989); Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1071–72 (codified as amended at 42 U.S.C. § 1981).

generates three reasons to treat Section 1981 as part of contract law in the United States.

The first traces back to the 1866 Act. Among other things, the Civil Rights Act of 1866 reformed the law of contract formation in the United States in response to the Black Codes adopted by Southern states after the Civil War.[21] The Black Codes represented a systematic effort by Southern states to socially and economically subordinate formerly enslaved persons, including by affording legal powers to make and enforce contracts to white citizens that it denied to people of color.[22] Congress rejected the Black Codes via the 1866 Act and thereby eliminated, at least as a formal matter, the two-tiered system of contractual freedoms they had established.[23] Insofar as the rules defining the legal power to contract are quintessentially rules of contract law, the redefinition of that power Section 1981 inherited from the 1866 Act counts as contract law.[24]

The second reason Section 1981 counts as part of contract law finds a foothold in the Civil Rights Act of 1991. In the 1991 Act, Congress explicitly prohibited racial discrimination in several distinctively contractual activities, including contract formation, performance, enforcement, modification, and termination.[25] I argue that these are *protective rules* and thus count as part of contract law. Briefly, just like rules against fouling in basketball count as part of basketball's rules and the Fourth Amendment exclusionary rule counts as a rule of constitutional law, Section 1981 expresses a rule that protects both the integrity of the practice of contracting (as opposed to basketball or government investigations), as well as the participants in the practice *qua* contracting parties (as opposed to basketball players or citizens). Because protective rules are partially constitutive of the system of rules they protect, Section 1981 counts as part of contract law and should be recognized as such.[26]

These formal and conceptual considerations are reinforced, third, by substantive principles of contract law itself. More specifically, contract law's core doctrines embody principles of fair play that cannot be easily reconciled with pernicious racial discrimination in contracting practices. Although common law courts have largely failed to recognize this point,

[21] See infra Part I.
[22] See infra Part I.
[23] See infra Part I.
[24] See infra Part II.
[25] 42 U.S.C. § 1981(b).
[26] See infra Part II.

and although they probably should, courts need not go that far: they need only recognize that Section 1981 already counts as part of contract law. Congress, after all, has already recognized the importance of antidiscrimination law in facilitating contractual fair play, and not just in some discrete economic realms such as employment or housing, but also in acts and practices of contracting *as such*. Common law courts should follow Congress's lead.

Classifying Section 1981 as part of contract law is a taxonomical task. But taxonomy has far-reaching implications in this case. If Section 1981 is a foundational part of contract law, then theories of contract law that assume the power to contract confers unfettered discretion on parties to contract regardless of motive, for example, will have difficulty accounting for Section 1981.[27] Because most comprehensive summaries of contract law fail to cite, let alone discuss, Section 1981,[28] curators of these works should discuss Section 1981's significance or rethink why they omit the statute. Recognizing Section 1981 as part of contract law also undercuts the impulse to treat discrimination as extrinsic to doctrines such as good faith and fair dealing. Finally, if Section 1981 is an important part of contract law, then choosing not to teach it requires a justification. Although good reasons not to teach Section 1981 may exist—not every important subject can be covered in one semester—the bare fact that the statute expresses rules of antidiscrimination law cannot be one of those reasons. Section 1981 also states rules of contract law.

With that preview in mind, this Article is structured as follows. Part I gives a brief history of Section 1981 and discusses the controversies that surrounded its meaning, at least until Congress altered the statute via the Civil Rights Act of 1991. Chief among these controversies was whether it applied only to state action or whether Section 1981 also prohibited private discrimination. Although other interpretive controversies remain, both the U.S. Supreme Court and Congress have settled the question by extending the statute to private contracting practices. The Civil Rights Act of 1991 also clarified that Section 1981 bars racial discrimination in the formation, performance, modification, termination, and enforcement of every contract by public and private actors.

Part II turns to the main argument: Section 1981 already is, and should be understood to be, a part of contract law in the United States. Section

[27] See infra Section V.A.
[28] See infra Part IV.

II.A explains that the Civil Rights Act of 1866 reconstituted the law of contract formation in response to the Black Codes adopted by Southern states after the Civil War. Because the laws of contract formation are quintessentially part of contract law, the Civil Rights Act of 1866 inescapably became part of contract law in the United States. Section II.A further argues that the nature of Section 1981's antidiscrimination rules suffices to show that it is part of contract law. Because Section 1981 protects participants in the practice of contracting *as such*, Section 1981 thereby generates rules of contract law. Section II.B takes a substantive and normative turn, arguing that Section 1981's rule against racial discrimination should be recognized as an expression of contract law's most basic principles rather than as a deviation from them. That is, because contract law's doctrines already disfavor contractual unreasonableness in contracting, courts and commentators should likewise recognize that contract law disfavors invidious racial discrimination in contracting because it is also contractually unreasonable.[29]

Part III argues that Section 1981's antidiscrimination rule not only counts as part of contract law, but also counts as an *important* part of it. Section III.A reemphasizes Section 1981's historical significance, as well as its formal importance given that it applies to all contracts (i.e., it has universal breadth) and regulates significant stages of any given contractual relationship (i.e., it has profound depth). Section III.B argues, in the alternative, that the very same reasons to treat Section 1981 as important justify revising our comprehensive summaries of contract law regardless of whether it counts as contract law.

Part IV shows that despite its status as contract law, despite applying to nearly every phase of every contractual relationship, and despite its importance, Section 1981 has been almost wholly ignored by leading repositories of contract law in the United States, including Restatements, casebooks, and major contract law treatises. Some of these omissions are not surprising. The *Restatement (Second) of Contracts*, for example, emphasizes the common law and was finalized by the American Law Institute in 1979—shortly after the U.S. Supreme Court recognized in *Runyon v. McCrary* that the statute applies to private contracting practices.[30] Still, seventy-four percent of contract law casebooks—which

[29] See infra Section III.B.

[30] See infra Part I; Runyon v. McCrary, 427 U.S. 160, 168 (1976); Restatement (Second) of Conts. (Am. L. Inst. 1981).

often stray beyond the common law and are frequently updated—do not cite the statute.[31] Many of those that do largely fail to discuss the statute's history or contemporary applications.[32]

Finally, Part V addresses why taxonomy matters. Section V.A shows that Section 1981's antidiscrimination rule has important implications for contract law theorists. Understanding Section 1981's antidiscrimination mandate as part of contract law challenges libertarian and libertarian-adjacent views that treat the freedom to choose one's contracting partners as sacrosanct, while favoring justice-oriented theories that treat equality and fairness as central to the domain. Understanding the statute as generating contract law also raises practical issues concerning how we maintain and impart knowledge about contract law's content. Section V.B discusses these issues, arguing, first, that the comprehensive doctrinal summaries of contract law discussed in Part IV should be revised to reflect Section 1981's rules against racial discrimination, and second, that law professors who teach contract law should consider incorporating a discussion of Section 1981 into their curriculum. Although this second recommendation is offered more tentatively,[33] there is little reason to justify excluding Section 1981 from the legal community's comprehensive doctrinal summaries of contract law—e.g., our casebooks, treatises, and Restatements—if Section 1981 indeed counts as an important part of contract law in the United States. Finally, Section V.B briefly discusses how understanding Section 1981 as part of contract law should impact how courts apply doctrines like unconscionability, the duty of good faith and fair dealing, and voidness as a matter of public policy. Once racial discrimination is understood as part of contract law's purview, evaluating racial discrimination as relevant to doctrinal analysis elsewhere seems less far-fetched.

As noted above, scholars have long worried that contract law's apparent indifference to race masks how our current commercial realities have been shaped by slavery and Jim Crow. That same indifference also obscures how racial bias continues to harm communities of color seeking to navigate modern markets. By the same token, if contract law does not take race into account formally, discussing race fruitfully while learning about and teaching contract law will remain an uphill battle because the conversation will seem forced. But reconceiving Section 1981 as a

[31] See infra Section IV.B.
[32] See infra Section IV.B.
[33] See infra Section V.B.

foundational part of contract law not only presents a more accurate picture of contract law in the United States, but it also connects our understandings of past racial injustices to present ones, as well as highlights the interface between "traditional" doctrines of contract law and those injustices. Recognizing Section 1981 as a foundational part of contract law will not eliminate racial biases or frictions in the market or undo persistently unequal bargaining power and wealth, which trace to this country's sordid history of Black subordination.[34] But it may help lawyers better appreciate the ubiquity of the problem, as well as give them a more complete view of contract law's content and a richer understanding of its ideals.

I. A BRIEF HISTORY OF SECTION 1981

A. The Thirteenth Amendment and the Black Codes

We begin with the Thirteenth Amendment to the United States Constitution, ratified in 1865 after the Civil War.[35] The Amendment formally bans slavery and involuntary servitude, with a loophole that allows enslavement as punishment for crimes.[36] Outlawing slavery left open the question of whether Black persons would have all legal rights associated with full citizenship. One possibility is that the Thirteenth Amendment automatically conferred full citizenship and all such rights.[37] But this view was not a foregone legal conclusion. Before the Civil War,

[34] See generally Carliss Chatman, 1981, 82 Wash. & Lee L. Rev. (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4998718 [https://perma.cc/M8ZD-3TKN].

[35] U.S. Const. amend. XIII. The following discussion of the Civil Rights Act of 1866 is indebted to George Rutherglen, The Improbable History of Section 1981: Clio Still Bemused and Confused, 2003 Sup. Ct. Rev. 303 [hereinafter Rutherglen, The Improbable History of Section 1981].

[36] U.S. Const. amend. XIII.

[37] Representative Martin Thayer of Pennsylvania suggested that citizenship for formerly enslaved persons followed emancipation under the Thirteenth Amendment, and that later legislation and the Fourteenth Amendment were merely declaratory of a legal status that they already possessed. See Cong. Globe, 39th Cong., 1st Sess. 1152 (1866) (statement of Rep. Thayer) (asserting that "by the act of emancipation and the [Thirteenth] amendment of the Constitution" formerly enslaved persons "were made freemen, and who in becoming freemen became citizens," adding that Congress had the authority to recognize formerly enslaved persons as citizens even if others doubted his view that formerly enslaved persons, "having become free have by law become also citizens"); see also Henry L. Chambers, Jr., Slavery, Free Blacks and Citizenship, 43 Rutgers L.J. 487, 504 (2013) ("The outlawing of slavery by the Thirteenth Amendment was, for some, all that was required to create African American citizenship.").

several states offered free Black men only limited legal rights, or in some cases, no rights at all. Oregon, for example, denied entry to free Black persons, refused to recognize their right to hold property, and denied them the right to make contracts.[38] Freedom from enslavement did not ensure equal legal status.

Southern states filled the void by offering a degraded set of rights to Black persons. Unwilling to embrace formerly enslaved men as full and equal citizens,[39] they adopted the so-called Black Codes, which W.E.B. Du Bois characterized as a "plain and indisputable attempt on the part of the Southern states to make [formerly enslaved persons] slaves in everything but name," and which were "deliberately designed to take advantage of [their] every misfortune."[40] Some of these laws required newly freed persons to obtain employment, criminalized "vagrancy," and punished employees for breaching employment agreements.[41] Ramping up punishment for vagrancy and idleness was a common theme in the various Black Codes.[42] After all, the Thirteenth Amendment permits involuntary servitude as criminal punishment.[43] States used this loophole to, in effect, conscript Black laborers back into slavery.[44]

The Black Codes additionally regulated the contractual freedoms of formerly enslaved persons. As for the freedom *to* contract, the Codes often imposed special requirements of contract formation on contracts involving Black persons while declining to impose those same

[38] George Rutherglen, Civil Rights in the Shadow of Slavery: The Constitution, Common Law, and the Civil Rights Act of 1866, at 46 (2013) [hereinafter Rutherglen, Civil Rights in the Shadow of Slavery].

[39] See Douglas A. Blackmon, Slavery by Another Name: The Re-Enslavement of Black People in America from the Civil War to World War II, at 41–42 (2008). I write "men" deliberately because the question of equal citizenship for women was not up for serious discussion at the time. See Amy Dru Stanley, From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation 58 (1998).

[40] W.E. Burghardt Du Bois, Black Reconstruction: An Essay Toward a History of the Part Which Black Folk Played in the Attempt to Reconstruct Democracy in America, 1860–1880, at 167 (1935); see also Rutherglen, Civil Rights in the Shadow of Slavery, supra note 38, at 6. As Rutherglen observes, it was not only Southern states that adopted laws inimical to equal citizenship; as already noted, Oregon forbade free Black persons from holding real estate or making contracts. Id. at 46.

[41] See Du Bois, supra note 40, at 167–68; Stanley, supra note 39, at 55, 125–26.

[42] Stanley, supra note 39, at 99–100, 108–09, 125–26; Du Bois, supra note 40, at 167–68; Blackmon, supra note 39, at 1, 53–54.

[43] U.S. Const. amend. XIII.

[44] See Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 31–32 (2010).

requirements on contracts involving white men only. Mississippi, for example, required labor contracts lasting longer than one month to "be in writing and in duplicate" if they involved "freedmen, free negroes, and mulattos," and further required that such contracts be witnessed by an official or two white persons.[45] Virginia imposed similar writing requirements on labor contracts between Black and white men.[46] Florida followed suit.[47]

The Black Codes also assaulted the freedom *from* contract, like the right to avoid abusive contractual relationships. Leaving labor contracts early in Mississippi could have caused Black persons, but not white persons, to forfeit their entire wages.[48] Louisiana fined laborers for "disobedience," defined as "[f]ailing to obey reasonable orders, neglect of duty, and leaving home without permission," as well as "impudence, swearing, or indecent language to or in the presence of the employer, his family or agent, or quarrelling and fighting with one another."[49] Unemployment risked criminal prosecution under vagrancy laws.[50] The definition of criminal vagrancy in Virginia, for example, included those who "not having wherewith[al] to maintain themselves and their families, live idly and without employment, and refuse to work for the usual and common wages given to other laborers in the like work in the place where they then are."[51] Vagrancy laws also made it difficult for laborers to drive hard bargains; a laborer could not refuse to work for unsatisfactory wages in Virginia without risking criminal liability. Regarding the Virginia Vagrancy Act specifically, former Union General Alfred H. Terry observed that Virginia employers held "combinations"—i.e., cartels—to set labor prices, thereby "depressing the wages of the freedmen below the real value of their labor, far below the prices formerly paid to masters for labor performed by their slaves."[52]

Formerly enslaved persons thus faced a Hobson's choice in Southern states like Virginia: either accept wages that would permanently condemn them to grinding and inescapable poverty—as Terry described,

[45] Edward McPherson, Hand Book of Politics for 1868, at 29–31 (Washington, Philp & Solomons 1868).
[46] Id. at 41.
[47] See id. at 38–39.
[48] Id. at 31.
[49] Id. at 43.
[50] See, e.g., id. at 30 (describing Mississippi's vagrancy statute).
[51] Act of Jan. 15, 1866, ch. 28, § 2, 1866 Va. Acts 91, 92–93 (repealed 1904).
[52] McPherson, supra note 45, at 42.

"condition[s] of servitude worse than that from which they have been emancipated"[53]—or face criminal liability for idleness and vagrancy, in which case they would once again be enslaved, but this time as punishment consistent with the Thirteenth Amendment.[54]

Although many of these laws took the form of detailed labor regulations and criminal sanctions, it is worth emphasizing, first, that discriminatory laws of contract often extended to contracts more generally, and second, that such laws were not confined to Southern states. To illustrate the first point, Florida rewrote its contract law as such—not just its labor contracts. In a piece of legislation titled "An Act in Relation to Contracts of Persons of Color, January 12, 1866," the state of Florida enacted the following statute, which imposed new writing, filing, and witness requirements on all contracts involving "persons of color":

> [T]hat all contracts with persons of color shall be made in writing and fully explained to them before two credible witnesses, which contract shall be in duplicate, one copy to be retained by the employer and the other filed with some judicial officer of the State and county in which the parties may be residing at the date of the contract, with the affidavit of one or both witnesses, setting forth that the terms and effect of such contract were fully explained to the colored person, and that he, she, or they had voluntarily entered into and signed the contract and no contract shall be of any validity against any person of color unless so executed and filed: Provided, That contracts for service or labor may be made for less time than thirty days by parol.[55]

Under this statute, except for contracts for labor to be performed within thirty days, all contracts involving "persons of color"—but only some of them involving white persons—needed to be in writing to be enforceable.[56]

North Carolina's statute imposed similar writing requirements on exchanges involving Black men:

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[53] Id.

[54] See, e.g., Blackmon, supra note 39, at 53–57; Alexander, supra note 44, at 31.

[55] McPherson, supra note 45, at 39 (emphasis omitted).

[56] The language refers to an "employer," suggesting that the statute applied only to labor contracts despite its reference to "all contracts with persons of color." The statute tacitly assumes that all contracts with persons of color would be employment agreements. This Article assumes that the special formation requirements would apply to other types of contracts while acknowledging that a more restrictive reading is available.

> All contracts between any persons whatever, whereof one or more of them shall be a person of color . . . between such persons for the payment of money of the value of ten dollars or more, shall be void as to all persons whatever, unless the same be put in writing and signed by the vendors or debtors, and witnessed by a white person who can read and write.[57]

The dire consequences of allowing states virtually free rein over the design of contractual freedoms extended beyond the South. Recall that Oregon had prohibited free Black persons from even entering the state, further denying them the right to "hold any real estate, or make any contracts, or maintain any suit therein."[58] Not only did free Black persons face two-tiered systems of contract law, but they also faced the prospect of not having the legal power to form any contracts.

In sum, white persons had the legal power—and "persons of color" lacked the same power—to form certain enforceable contracts. By codifying a two-tiered law of contracts and enforcing its provisions, often through criminal sanctions, the South—but not just the South—sought to ensure the continued economic domination of Black workers by white landowners.

B. The Civil Rights Act of 1866

Recognizing that the Black Codes replicated slavery in all but name, Congress responded by enacting the Civil Rights Act of 1866.[59] Introduced by Senator Lyman Trumbull of Illinois and serving as the precursor of today's Section 1981, the 1866 Act sought broad equality protections for the civil rights of Black persons, including by recognizing their citizenship.[60] The final version of the 1866 Act provided in relevant part:

> That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without

[57] McPherson, supra note 45, at 29.

[58] Rutherglen, Civil Rights in the Shadow of Slavery, supra note 38, at 46 (quoting Or. Const. art. I, § 35 (repealed 1926)).

[59] Stanley, supra note 39, at 55.

[60] Robert J. Kaczorowski, The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of *Runyon v. McCrary*, 98 Yale L.J. 565, 565, 570 (1989); Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1986).

> regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, 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, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.[61]

The language sweeps broadly. Not only does it confer citizenship on all natural-born citizens—and hence every Black person born on U.S. soil—it uses language foreshadowing the Equal Protection Clause of the Fourteenth Amendment, guaranteeing "full and equal benefit of all laws and proceedings for the security of person and property."[62]

What citizenship entailed was disputed among Republicans. Some Republicans envisioned an expansive conception of equality, as Eric Foner observes, governing "nearly every phase of public life."[63] Others focused on "those rights essential for blacks to enter the world of contract, to compete on equal terms as free laborers."[64] The 1866 Act would in effect define citizenship to guarantee, as Trumbull elaborated, "the right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property"—i.e., "the very rights that are set forth in this bill as appertaining to every freeman."[65] This short list of "civil" rights would not strike a typical Republican legislator as unusual. As Joseph Fishkin and William Forbath remark, the Civil Rights Act of 1866 "encapsulates the outlook of the Republican mainstream at this moment," which envisioned a world of "Black free laborers making contracts, owning or

[61] Act of Apr. 9, 1866, ch. 31, 14 Stat. 27.

[62] Id.

[63] Eric Foner, Reconstruction: America's Unfinished Revolution 1863–1877, at 244 (1988) [hereinafter Foner, Reconstruction].

[64] Id.

[65] Cong. Globe, 39th Cong., 1st Sess. 475 (1866) (statement of Sen. Trumbull); see also id. at 476 (explaining that the bill aimed to secure civil rights, which Trumbull understood to include rights to make and enforce contracts, sue and be sued, inherit, sell, lease and hold property; and equal benefit of all laws for the protection of property).

leasing land, and meeting white employers, merchants, and landlords on a plane of legal equality."[66]

Although the 1866 Act aimed to secure rights beyond the right to contract, congressional Republicans viewed the right to contract as essential for economic freedom for formerly enslaved people and their descendants.[67] "Slavery's antithesis, agreed legislators from both sides of the Mason-Dixon line, was free contract," which, according to Amy Dru Stanley, included "the right of self-owning freedmen to sell their labor for wages and to marry and maintain a household."[68] Indeed, Stanley continues, "Perhaps the only feature of freedom not in dispute among members of Congress was the ex-slave's right to enter into contracts."[69] Representative William Windom, for example, understood the 1866 Act "to secure to a poor, weak class of laborers the right to make contracts for their labor, the power to enforce the payment of their wages, and the means of holding and enjoying the proceeds of their toil."[70] Representative William Lawrence concurred, adding, "It is a mockery to say that a citizen may have a right to live, and yet deny him the right to make a contract to secure the privilege and the rewards of labor."[71]

Members of Congress who opposed the 1866 Act also regarded it as an attempt to reform state common law—including contract law—and opposed it for that reason.[72] Thomas Hendricks, a Democratic senator from Indiana, was concerned that Congress lacked the constitutional authority to enact civil rights legislation under the Thirteenth Amendment, which, to his mind, should have been narrowly construed to outlaw the institution of slavery as a specific domestic relation, while empowering Congress only to enact laws to enforce that specific prohibition so construed.[73] Hendricks singled out the traditional authority

[66] Joseph Fishkin & William E. Forbath, The Anti-Oligarchy Constitution: Reconstructing the Economic Foundations of American Democracy 117, 119 (2022); see also Richard L. Aynes, The Civil Rights Act of 1866 and the Right to Contract, *in* The Greatest and the Grandest Act: The Civil Rights Act of 1866 from Reconstruction to Today 188, 189–90 (Christian G. Samito ed., 2018) (explaining that many legislators saw the Civil Rights Act as securing rights for newly freed persons that were ordinarily taken for granted by free men).

[67] Kaczorowski, supra note 60, at 570.

[68] Stanley, supra note 39, at 56.

[69] Id.

[70] Cong. Globe, 39th Cong., 1st Sess. 1159 (1866) (statement of Rep. Windom).

[71] Id. at 1832–33 (statement of Rep. Lawrence).

[72] Rutherglen, Civil Rights in the Shadow of Slavery, supra note 38, at 55.

[73] See Cong. Globe, 39th Cong., 1st Sess. 318 (1866) (statement of Rep. Hendricks).

of states to establish and maintain their own laws regarding "domestic" matters of contract, remarking,

> [T]o make a contract is a civil right which has ordinarily been regulated by the States. The form of that contract and the ceremonies that shall attend it are not to be regulated by Congress, but by the States. Suppose that it becomes the judgment of the State that a contract between a colored man and a white man shall be evidenced by other solemnities and instruments than are required between two white men, shall [the State not] be allowed to make such a provision?[74]

Under the 1866 Act, the answer would be an emphatic "no." But others joined Hendricks in arguing that the 1866 Act unconstitutionally exceeded the authority granted to Congress by the Thirteenth Amendment.[75]

An analogous argument surfaced to challenge Congress's authority to enact the bill. Even granting that the Thirteenth Amendment empowered Congress to secure the freedom of contract for the recently enslaved, some congressmen denied that securing such freedom required that Black citizens have the same rights as those guaranteed to white citizens.[76] As Willard Saulsbury, Sr.—a Democratic senator from Delaware—put the point, "A man may be a free man and not possess the same civil rights as other men."[77] Ohio Representative Columbus Delano—despite ultimately voting in favor of the 1866 Act[78]—doubted whether certain civil rights enumerated in the Act, like the right to inherit property, were truly essential to realize freedom.[79] Freedom seemed conceptually possible, according to these objections, without securing the same civil rights for Black men as held by white ones. A fortiori, securing *some* freedom of contract did not seem to require securing *equal* freedom of contract.

Mainstream Republicans understood that second-class contractual rights left Black workers vulnerable to de facto re-enslavement.[80] The Black Codes presupposed that Southern states could simultaneously grant

[74] Id.

[75] See id. at 623 (statement of Rep. Kerr) (observing that the proposed civil rights legislation implicated "a local and merely municipal character to control his contracts").

[76] Id. at 477 (statement of Sen. Saulsbury).

[77] Id.

[78] See id. at 1367.

[79] Id. app. at 158 (statement of Rep. Delano).

[80] Rebecca E. Zietlow, Slavery, Liberty, and the Right to Contract, 19 Nev. L.J. 447, 450, 468 (2018).

some formal contracting "freedoms" to formerly enslaved persons without thereby threatening white subordination of Black laborers. The two-tiered legal system created by the Black Codes relied on a two-tiered set of contractual freedoms, one that governed contracts formed exclusively by white citizens (who would remain comparatively unencumbered by stringent formation requirements or highly punitive enforcement mechanisms) and a degraded version of that power for Black citizens (a version which included, for instance, punitive enforcement mechanisms applicable only to Black laborers).[81]

Congressional Republicans understood all of this. "[T]he equal right of contract," observes Stanley, "was the nub of the legislation."[82] For the right to contract to operate as a genuine engine of self-determination, formerly enslaved persons required, at a minimum, contractual rights and powers that were formally equal to those of white citizens. Economic freedom would not be possible without at least formal equality.[83]

What more was required would remain disputed.[84] And—to be sure—formal racial equality fell far short of guaranteeing meaningful freedom and equality without equality in *enforcement*.[85] But historians widely agree about this much: Congress intended, in passing the Civil Rights Act of 1866, to at least ensure that Black citizens would have the same rights to make and enforce contracts as white citizens (as the text indicates).[86] Both proponents of the Act and its opponents understood this point.

C. The Civil Rights Act of 1991

Although the Civil Rights Act of 1866 is the origin of Section 1981,[87] controversies about the 1866 Act continued after it became law. As

[81] See, e.g., McPherson, supra note 45, at 39.

[82] Stanley, supra note 39, at 55.

[83] There is a sad irony that this view was not extended to its logical conclusion to the extent that it did not extend to women in marital relations. See id. at 57–58.

[84] See infra Section I.C; see also Aynes, supra note 66, at 197–98 (observing that some scholars argue that the 1866 Act supports *Lochner*-era views of freedom of contract while criticizing the same argument).

[85] Criminal vagrancy statutes, for example, did not refer to race but were enforced primarily, if not exclusively, against Black men. See Blackmon, supra note 39, at 53.

[86] Indeed, forty-eight prominent historians have gone further, arguing that the Civil Rights Act of 1866 also protects against retaliation for filing lawsuits under the Act. Motion for Leave to File Amicus Curiae Brief & Brief of Historians Mary Frances Berry et al. Supporting Respondent at 1, CBOCS W., Inc. v. Humphries, 553 U.S. 442 (2008) (No. 06-1431).

[87] Goodman v. Lukens Steel Co., 482 U.S. 656, 671 (1987) (Brennan, J., concurring in part and dissenting in part); John Hope Franklin, The Civil Rights Act of 1866 Revisited, 41

already noted, officials debated whether the Thirteenth Amendment's enforcement power authorized the Act.[88] The Fourteenth Amendment was ratified and enacted partly in response to this constitutional concern, with the 1866 Act reenacted as part of the Enforcement Act of 1870.[89] Invoking the authority of the Fourteenth Amendment placed the 1866 Act on firmer constitutional ground.

Section 1 of the Civil Rights Act of 1866 remains the foundational text on which the modern version of Section 1981 is based.[90] Section 1981(a) reads as follows:

> 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.[91]

Substantively, this statute seeks to ensure that non-white persons within the United States receive the same legal power to, among other things, "make and enforce contracts . . . as is enjoyed by white citizens."[92] The statute's concern for protecting the "security of persons and property" overlaps with tort law's preoccupation with protecting bodily integrity and the integrity of property.[93] Procedurally, Congress sought to nullify parts of the Black Codes that prevented Black people from suing or testifying, sometimes allowing such testimony only if a Black witness testified against another Black person.[94] For freedom to be meaningful,

Hastings L.J. 1135, 1136 (1990) (explaining that the main provisions of the 1866 Act "became [S]ection 1981 of the Revised United States Code").

[88] Rutherglen, The Improbable History of Section 1981, supra note 35, at 304, 308–09.

[89] See U.S. Const. amend. XIV; Enforcement Act of 1870, ch. 114, 16 Stat. 140; Rutherglen, The Improbable History of Section 1981, supra note 35, at 304, 312.

[90] See *Goodman*, 482 U.S. at 671 (Brennan, J., concurring in part and dissenting in part).

[91] 42 U.S.C. § 1981(a).

[92] Id. For a discussion of the significance of naming "white" citizens as the baseline holders of rights against which others would be measured, see Nancy Leong, Enjoyed by White Citizens, 109 Geo. L.J. 1421, 1437–39 (2021).

[93] 42 U.S.C. § 1981(a); see, e.g., Sapp v. Ford Motor Co., 687 S.E.2d 47, 49 (S.C. 2009); Gen. Elec. Co. v. Drake, 535 N.E.2d 156, 159 (Ind. Ct. App. 1989); Star Furniture Co. v. Pulaski Furniture Co., 297 S.E.2d 854, 859 (W. Va. 1982).

[94] Alfred Avins, The Right to Be a Witness and the Fourteenth Amendment, 31 Mo. L. Rev. 471, 473–75 (1966); Eric Foner, The Second Founding: How the Civil War and Reconstruction Remade the Constitution 47–48 (2019).

Congress recognized that at a minimum certain private law rights of Black citizens could not be formally subordinated to those of white citizens.[95]

Despite Section 1981's wide-ranging civil guarantees, the statute was for many years overlooked by litigants seeking to protect their civil rights.[96] Some of this neglect traces to controversies about its constitutionality and scope, which provided a fragile foundation on which to initiate legal action.[97] One question was whether the statute's substantive guarantees simply replicated the protections of the Fourteenth Amendment.[98] That is, the ratification of the Fourteenth Amendment arguably made the Civil Rights Act of 1866 redundant, at least given the then-common assumption that the 1866 Act applied to state action only, since it aimed to nullify the Black Codes.[99]

It was not until more than one hundred years after the original Civil Rights Act of 1866 that the Supreme Court rejected that conclusion in *Jones v. Alfred H. Mayer Co*.[100] Joseph Lee Jones sued the Alfred H. Mayer Company and other private defendants, arguing that they had refused, in violation of 42 U.S.C. § 1982, to sell him a home solely because Jones was Black.[101] The statute, a companion to Section 1981 that also traces its origin to the 1866 Act, guarantees that all citizens "shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property."[102]

A federal district court had dismissed Jones's claim, concluding that Section 1982 applied only to state action, and an appellate panel affirmed.[103] But the Supreme Court reversed, holding that the prohibition on racial discrimination also applied to private action.[104] The Court found that the statute's plain meaning, structure, legislative history, and purpose

[95] For elaboration, see supra Section I.B.

[96] Doe v. Kamehameha Schs., 416 F.3d 1025, 1032 (9th Cir. 2005), *aff'd in part, rev'd in part en banc*, 470 F.3d 827 (9th Cir. 2006); Danielle Tarantolo, Note, From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce, 116 Yale L.J. 170, 184 (2006); see also Rutherglen, The Improbable History of Section 1981, supra note 35, at 303 (describing Section 1981 as the "often neglected . . . predecessor of the Equal Protection Clause").

[97] *Kamehameha Schs.*, 416 F.3d at 1032.

[98] See Rutherglen, The Improbable History of Section 1981, supra note 35, at 305.

[99] For a discussion of the competing interpretive arguments, see id. at 309–11.

[100] 392 U.S. 409, 409–10 (1968).

[101] Id. at 412.

[102] 42 U.S.C. § 1982.

[103] *Jones*, 392 U.S. at 412 (first citing Jones v. Alfred H. Mayer Co., 255 F. Supp. 115 (E.D. Mo. 1966); and then citing Jones v. Alfred H. Mayer Co., 379 F.2d 33 (8th Cir. 1967)).

[104] Id. at 422–26.

all pointed in the same direction: the statute prohibited private discrimination in property transactions, especially given Congress's evident concern that local "custom" would prevent enslaved persons from protecting and exercising property rights as they saw fit.[105] Given that Sections 1981 and 1982 shared their origins in the Civil Rights Act of 1866,[106] and given their similar language (guaranteeing "the same right . . . as is enjoyed by white citizens"),[107] post-*Jones* decisions signaled that the Supreme Court would likewise construe Section 1981 to apply to private behavior.[108]

Runyon v. McCrary made this prediction a reality.[109] *Runyon* concerned two racially exclusionary private schools that opened their doors after *Brown v. Board of Education*.[110] Seeking damages, attorney's fees, and declaratory and injunctive relief, a class of plaintiffs argued that the schools violated Section 1981 because their respective admissions procedures racially discriminated against Black applicants in the "making and enforcement" of contracts, even though the schools were privately owned and operated.[111] The Supreme Court agreed, relying on *Jones* and later cases that had emphasized that the Civil Rights Act of 1866 "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."[112] Such rights included, as the Court observed, "the same right . . . to make and enforce contracts" as afforded to white citizens and as later codified in Section 1981.[113] And because the schools refused to enter contractual relationships with the members of the plaintiff class based on race—i.e., the plaintiffs sought educational

[105] Id. at 422–26, 424 n.31.

[106] Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 439 (1973).

[107] 42 U.S.C. §§ 1981–1982; Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1016 (2020) (observing that "§ 1982 was also first enacted as part of the Civil Rights Act of 1866 and uses nearly identical language as § 1981").

[108] See *Tillman*, 410 U.S. at 439–40 (discussing primarily Section 1982 but refusing to hold that Section 1981 governs state action only); Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 459–60 (1975) (explaining that Section 1981 applied to certain private employers beyond those covered by Title VII).

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

[110] Bobbe's School opened in 1958, and the Fairfax-Brewster School opened in 1955. Id. at 164–65; Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[111] See *Runyon*, 427 U.S. at 164–65, 167–68.

[112] Id. at 168–70 (quoting Jones v. Alfred H. Mayer Co., 392 U.S. 409, 436 (1968)).

[113] Id. at 170 (alteration in original) (quoting Civil Rights Act of 1866, ch. 31, 14 Stat. 27).

services in exchange for money—the Court concluded that the schools' behavior, albeit private, amounted to "a classic violation of § 1981."[114]

The *Jones* and *Runyon* decisions did not end the interpretive controversies over Sections 1981 or 1982. "The *Jones* case is a glaring example of the Court's habit of effecting constitutional revision by judicial fiat," railed Senator Sam J. Ervin, Jr., of North Carolina, accusing the Court of engaging in "a transparent exercise of rewriting history and g[iving] an ancient and limited civil rights statute an interpretation that not even ardent defenders of the Court's activism thought warranted."[115] The basic interpretive argument had still not changed: the Civil Rights Act of 1866 sought only to eliminate the Black Codes and hence targeted state rather than private discrimination.[116]

Nor were these continuing protests inert. After oral arguments in *Patterson v. McLean Credit Union*—a case addressing whether racial harassment in employment was actionable under Section 1981—the Supreme Court requested briefing on whether to overrule *Runyon*.[117] The Court ultimately held that racial harassment in employment was not actionable under the statute, observing that the statute protected (at the time) only rights to make and enforce contracts.[118] Harassment occurring during the parties' contractual performances, the Court reasoned, arose "after the contract relation ha[d] been established" but before it had been enforced via the legal process.[119] Yet the Court declined to overturn *Runyon* out of respect for stare decisis, leaving in place its holding that Section 1981 applied to private conduct.[120]

Patterson v. McLean Credit Union still cast doubt on the Court's future willingness to enforce civil rights legislation.[121] As Steven J. Burton remarked in 1990, "The Court's spontaneous decision to reconsider *Runyon* turned *Patterson* into a cause [célèbre] because it seemed to

[114] Id. at 172.

[115] Sam J. Ervin, Jr., Jones v. Alfred H. Mayer Co.: Judicial Activism Run Riot, 22 Vand. L. Rev. 485, 485 (1969).

[116] See id. at 489–90. Ervin argued that although Congress prohibited racial discrimination by "custom," this did not thereby prohibit private discrimination; "custom," he argued, was "generally considered to be behavior legitimated by state or community sanction, something more than general prejudice." Id. at 489.

[117] Patterson v. McLean Credit Union, 491 U.S. 164, 170–71 (1989); Patterson v. McLean Credit Union, 485 U.S. 617, 617 (1988) (per curiam).

[118] *Patterson*, 491 U.S. at 171.

[119] Id. at 177–78.

[120] Id. at 171–72.

[121] See Burton, Racial Discrimination in Contract Performance, supra note 7, at 437.

signal a new willingness by the Court to overrule important civil rights decisions."[122] The *Patterson* decision itself also created odd loopholes. An employer could not refuse to hire an employee based on race consistent with Section 1981. But the same employer could lawfully fire her based on race, as long as the employer had few enough employees to fall outside Title VII's protections against employment discrimination.[123] This is because hiring an employee would pertain to "making" a contract, but terminating an employment agreement would not have been considered "making" or "enforcing" it under *Patterson*.

Not just commentators were alarmed. *Patterson* motivated Congress to shore up Section 1981, especially given concerns that the Supreme Court's narrow construal of the statute inadequately protected employees against racial discrimination.[124] The result was the Civil Rights Act of 1991, which in effect settled two important interpretive controversies. First, Congress clarified in a new subsection (b) of Section 1981 that "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."[125] This effectively overruled *Patterson*'s narrow reading of "make and enforce contracts," which allowed discriminatory performance.[126] Second, in a new subsection (c), the 1991 legislation clarified that Section 1981's ban on racial discrimination in contracting practices applies to private contracting behavior as well as state action.[127] This put *Runyon* on firmer ground by codifying its holding explicitly.[128] In short, in 1991, well over one hundred years after the original Civil Rights Act of 1866, Congress ensured that Section 1981 would prohibit private racial discrimination (as well as discrimination by state actors), and that this prohibition would extend to nearly every important stage in

[122] Id.

[123] Id. at 431–32 (listing other examples of lawful racial discrimination made possible by *Patterson*).

[124] See Rodriguez v. Gen. Motors Corp., 27 F.3d 396, 397 (9th Cir. 1994) ("Section 101 of the [Civil Rights Act of 1991], codified at 42 U.S.C. § 1981(b), explicitly rejected *Patterson*'s restrictive reading of § 1981."); Arendale v. City of Memphis, 519 F.3d 587, 598 (6th Cir. 2008) ("Section 1981(b) expressly overruled *Patterson II*'s interpretation of the words 'make and enforce' . . . .").

[125] 42 U.S.C. § 1981(b).

[126] *Rodriguez*, 27 F.3d at 397; *Arendale*, 519 F.3d at 598.

[127] 42 U.S.C. § 1981(c).

[128] *Arendale*, 519 F.3d at 598; McGovern v. City of Philadelphia, 554 F.3d 114, 120 (3d Cir. 2009).

every contractual relationship (not merely to the making and enforcing of contractual obligations).

Important interpretive issues remain. The extent to which the statute covers commercial behavior preceding contractual formation, especially in retail settings, is not settled.[129] There are compelling reasons to think that courts continue to under-enforce the broad protections suggested by the statute's language.[130] And although courts have previously permitted race-based affirmative action programs in the face of Section 1981 challenges,[131] whether such programs by private employers will survive the current Supreme Court remains to be seen.[132] Still, the Civil Rights Act of 1991 put to rest two core questions, subject only to further congressional revision: (1) whether Section 1981 extends to private behavior—seemingly the statute's most radical implication—and (2) what major types of contracting behavior were prohibited.

[129] See, e.g., Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1020 (2020) (Ginsburg, J., concurring in part and concurring in the judgment) (criticizing the view that "§ 1981 countenances racial discrimination so long as it occurs in advance of the final contract-formation decision," in favor of the position that "the language of the statute covers the entirety of the contracting process"); Charlotte H. Sanders, Come Down and Make Bargains in Good Faith: The Application of 42 U.S.C. § 1981 to Race and National Origin Discrimination in Retail Stores, 4 Hastings Race & Poverty L.J. 281, 292–94 (2007) (discussing courts' narrowing of the Civil Rights Act of 1991 to cover retail transactions only after the "point of purchase"); Caitlin Albaugh, Note, Discrimination in Formation: Applying § 1981 to Instances of Preformation Discrimination in the Contractual Process, 71 U. Kan. L. Rev. 349, 349 (2022) (discussing courts' diverging interpretations of whether Section 1981 prohibits preformation discrimination).

[130] See Suja A. Thomas, The Customer Caste: Lawful Discrimination by Public Businesses, 109 Calif. L. Rev. 141, 197–204 (2021).

[131] Setser v. Novack Inv. Co., 657 F.2d 962, 966 (8th Cir. 1981) (en banc) ("It would indeed be more ironic if the Civil Rights Act of 1866 was used now to prohibit the only effective remedy for past discriminatory employment practices against blacks and other minorities, when the Act was virtually useless to prevent the occurrence of such discrimination for more than a century."); Loc. Union No. 35 of Int'l Bhd. of Elec. Workers v. City of Hartford, 625 F.2d 416, 416, 425 (2d Cir. 1980); United States v. City of Miami, 614 F.2d 1322, 1326 (5th Cir. 1980), *aff'd in part, vacated and remanded in part*, 664 F.2d 435 (5th Cir. 1981) (en banc) (per curiam); Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 691–92 (6th Cir. 1979); Baker v. City of Detroit, 483 F. Supp. 930, 980 (E.D. Mich. 1979), *aff'd sub nom.* Bratton v. City of Detroit, 704 F.2d 878 (6th Cir. 1983).

[132] See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2166 (2023) (holding that the admissions policies of the University of North Carolina at Chapel Hill and Harvard College ran afoul of the Equal Protection Clause and Title VI).

Section 1981's utility in civil rights litigation, even after its 1991 revision, may be doubted.[133] Other federal and state antidiscrimination legislation has played a more salient role in generating litigation and facilitating social change, chief among them being protections against discrimination in employment,[134] housing,[135] education,[136] and commercial lending.[137] One decades-old attempt to measure the impact of Section 1981, by reviewing court filings in three prominent districts, found that Section 1981 claims were frequently brought in civil rights cases. But this study did not make any conclusions about how often the statute played a determinative role in cases.[138] Modern civil rights statutes like Title VII, again, may have performed more work than Section 1981 in seeking to root out racial and other types of employment discrimination.[139] Still, the fact remains: by the statute's terms, it is unlawful to "make and enforce" racially discriminatory contracts.[140] And, at least since 1991, this edict has extended to every contract—indeed, almost every attempted contract in the United States—and has prohibited all racially discriminatory formations, performances, enforcements, modifications, and terminations of contracts.[141]

[133] For skepticism about the Civil Rights Act of 1991, see Jerome McCristal Culp, Jr., Neutrality, the Race Question, and the 1991 Civil Rights Act: The "Impossibility" of Permanent Reform, 45 Rutgers L. Rev. 965, 1007 (1993).

[134] See 42 U.S.C. §§ 2000e–2000e-17 (defining and providing for equal employment opportunities).

[135] See id. §§ 3601–3619, 3631 (defining and providing for fair housing throughout the United States and providing for violations and penalties).

[136] See 20 U.S.C. §§ 1681–1688 (providing for prohibitions against discrimination in education).

[137] See 15 U.S.C. §§ 1691–1691f (defining and providing for equal credit opportunity).

[138] See Theodore Eisenberg & Stewart Schwab, The Importance of Section 1981, 73 Cornell L. Rev. 596, 599 (1988).

[139] See Rutherglen, The Improbable History of Section 1981, supra note 35, at 351 (contrasting "modern civil rights statutes" with Section 1981, while suggesting that the former may have "proved to be more effective in eliminating discrimination in episodic rather than continuous fashion, through concentrated efforts over a few years rather than routine enforcement over several decades").

[140] 42 U.S.C. § 1981(a).

[141] See Rivers v. Roadway Express, Inc., 511 U.S. 298, 302 (1994) (describing Section 1981's bar against racial discrimination as applicable to "*all phases and incidents* of the contractual relationship" (emphasis added)); Morris v. Dillard Dep't Stores, Inc., 277 F.3d 743, 752 (5th Cir. 2001) ("[W]here a customer has engaged in an actual attempt to contract that was thwarted by the merchant, courts have been willing to recognize a § 1981 claim."); Christian v. Wal-Mart Stores, Inc., 252 F.3d 862, 872–74 (6th Cir. 2001). But see *Morris*, 277 F.3d at 752 (refusing to permit a Section 1981 claim where the plaintiff failed to proffer sufficient evidence that he was attempting to contract with the retailer); Youngblood v. Hy-

II. SECTION 1981 AS CONTRACT LAW

Section 1981 is uncontroversially a part of antidiscrimination law. But the statute also emphasizes contractual freedoms. And it is not limited to just a subset of contractual relationships, like employment contracts or credit agreements: it applies universally, to all contractual relationships.[142] And its regulation of the making, performing, modification, termination, and enforcement of contracts reaches deeply to every "phase[] and incident[] of the contractual relationship."[143] Despite this wide and deep regulation of contractual rights and responsibilities, no courts or commentators have explicitly recognized that Section 1981 counts as part of contract law.

This Part makes that argument—that Section 1981 already counts as part of contract law (for conceptual reasons) and should be recognized as such (for normative ones). The main conceptual arguments supporting this claim, advanced in Section II.A, observe that Section 1981 altered the preexisting and racially discriminatory law of contract formation that Southern states attempted to enact via the Black Codes. Because the law of contract formation is quintessentially part of contract law, Section 1981's reform of that law counts as part of contract law. Section II.A also argues that Section 1981's attempt to regulate distinctively contractual activities articulates what I call a "protective rule," which seeks to protect participants in contracting practices and those practices themselves. I argue that such protective rules are parts of the systems of rules that they protect, and hence Section 1981 is a part of the system of rules constituting contract law.

Section II.B takes a normative turn, arguing that antidiscrimination rules like the one expressed in Section 1981 should be recognized as a rule of contract law. A principle of contractual reasonableness is already embodied in several core doctrines of contract law, including the objective view of contract formation, unconscionability doctrine, and the duty of good faith and fair dealing. Section II.B argues that rules against invidious racial discrimination in contracting are straightforward implications of that principle. Courts and commentators should therefore recognize Section 1981's rule against racially discriminatory

Vee Food Stores, Inc., 266 F.3d 851, 853–55 (8th Cir. 2001) (holding that Section 1981 does not necessarily bar post-sale discrimination).

[142] *Rivers*, 511 U.S. at 302–04.

[143] Id. at 302.

performances as just one more expression of the demand for reasonable conduct in the commercial arena.

A. Conceptual Arguments

Section 1981 targets two different agents: governments that establish and maintain the laws of contract and contracting parties. This fact establishes two independent routes to the conclusion that Section 1981 expresses rules of contract law.

1. Reconstituting the Law of Contract Formation

One category of rules should uncontroversially count as part of contract law: the rules for making an enforceable contract. Contract law requires such rules even if the rules for contract formation may differ in the details in each jurisdiction. A typical contract law course explains the requirements of enforceability, which include, for example, mutual assent,[144] consideration,[145] and writing requirements for certain types of contracts.[146] Comprehensive summaries of contract law also include rules governing the capacity to contract,[147] including the rule that contracts with minors are voidable by them.[148]

Recall that Southern states tried to enact racially discriminatory contract formation requirements in the Black Codes.[149] These burdensome requirements were part of contract law in the South, and they applied only to contracts involving persons of color.[150] Contracts between persons of color and white men required witnesses; contracts between white men did not.[151] This not only imposed greater burdens on Black persons, but it also added transaction costs that lowered the incentive of white citizens to contract with Black persons in the first place. The law of contracts under the Black Codes diminished the capacity of Black persons to contract.[152]

[144] Restatement (Second) of Conts. § 17(1) (Am. L. Inst. 1981).
[145] Id.
[146] Id. § 110.
[147] Id. §§ 12–16.
[148] Id. § 14.
[149] See supra Section I.A.
[150] See supra Section I.A.
[151] See supra Section I.A.
[152] See supra Section I.A.

The Civil Rights Act of 1866, however, sought to ensure that Black contractors would enjoy the same right to "make and enforce contracts . . . as is enjoyed by white citizens."[153] Again, the Civil Rights Act of 1866 explicitly sought to nullify the discriminatory law of contract embodied in the Black Codes by redefining the formal rights to make and enforce contracts held by Black citizens in terms of those held by their white counterparts.[154] Because the 1866 Act ensured that white citizens and Black persons would have the same right "to make" contracts, the 1866 Act thereby established the rules of contract formation and contracting capacity applicable to people of color. And because such rules are quintessentially rules of contract law, the 1866 Act—and consequently, Section 1981—expresses a rule of contract law.

Consider an objection. Notice that the Equal Protection Clause of the Fourteenth Amendment, by implication, likewise prohibits rules of contract law that classify invidiously based on race.[155] But this would not thereby establish that equal protection doctrine now counts as part of contract law. Section 1981 similarly stands outside looking in, the objection concludes, constraining contract law but not counting as part of it.

This objection ignores an important distinction. A legal rule can, by its terms, regulate contractual rights and obligations as such by referring to the distinctively contractual concepts or activities that it seeks to regulate. Section 1981 does precisely this, referring by name to the rights to make and enforce contracts and mandating that all citizens shall have the same rights to make and enforce contracts as those held by white citizens. Section 1981, in other words, specifically targeted contract law under the Black Codes for reform. By contrast, the Equal Protection Clause does not regulate contract law directly. Instead, to the extent that the equal protection jurisprudence regulates contract law, it does so only indirectly by virtue of contract law counting as state action more generally. The regulation of contract law by equal protection doctrine is accidental rather than essential, as in the case of Section 1981.[156] The first argument's

[153] 42 U.S.C. § 1981(a); Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

[154] See supra Section I.B.

[155] See U.S. Const. amend. XIV; see also Shelley v. Kraemer, 334 U.S. 1, 11–12 (1948) (observing that statutes or ordinances that restrict the purchase or sale of property based on race would violate the Fourteenth Amendment).

[156] This distinction makes a practical difference. For example, the conditions for success differ depending on the manner of regulation. The contract-specific language of Section 1981

conclusion remains: Section 1981's rule against contract laws that discriminate based on race—including the racially discriminatory formation doctrines embodied in the Black Codes—counts as part of contract law.

2. Incorporating Section 1981's Protective Rule into Contract Law

Another argument explains why Section 1981's antidiscrimination rules count as part of contract law. The key premise is that authoritative rules that serve the dual functions of protecting the practice of contracting as such and protecting individuals engaged in that practice count, as a conceptual matter, as part of contract law. Rules governing contract law's remedies fall into that category. So does Section 1981. The statute's antidiscrimination rule therefore counts as part of contract law.

But before we turn to contract law specifically, let me justify the key premise based on independently motivated philosophical observations about rules and the practices that they constitute. To that end, it is helpful to compare contract law to another complex, rule-governed activity: basketball. Relying on an extralegal example like basketball illustrates that Section 1981's antidiscrimination rules are part of contract law based on general philosophical claims about rules and social practices.

Playing basketball is an activity defined by a complex set of sub-activities. Those sub-activities are in turn constituted and regulated by certain rules.[157] Take the activities of dribbling or shooting a free throw. Certain rules determine whether one successfully dribbles, shoots a free throw, executes a layup, or engages in any number of other sub-activities

would fail to regulate anything if contract law did not exist; the Fourteenth Amendment, by contrast, could still succeed in its regulatory aims without a contract law.

[157] See John R. Searle, Constitutive Rules, 4 Argumenta 51, 51–52 (2018); see also Andrei Marmor, Social Conventions: From Language to Law 31–33 (2009) (discussing the distinction between regulative rules and constitutive rules). Introducing the notion of a regulative rule will, I think, do more to distract than illuminate, especially given my attempt to distinguish types of rules based on their functions. This functions-based distinction does not track the constitutive/regulative one cleanly. See Corrado Roversi, In Defence of Constitutive Rules, 199 Synthese 14349, 14355, 14460 (2021) (discussing philosophical criticisms of the constitutive/regulative distinction). For an explicitly functions-based attempt to account for institutional rules that eschews Searle's attempt to distinguish constitutive and regulative rules, see Andrei Marmor, Foundations of Institutional Reality 63–77 (2023).

that together constitute the complex activity of playing basketball.[158] We can call these types of rules, following John Searle, constitutive rules.[159]

But not all basketball rules function primarily to define sub-activities that together constitute successful play. Some rules protect those who play the game—not just as persons, but as players of the game—while also protecting the integrity of the game itself. Examples include basketball's rules against fouling opponents or fighting.[160] Although these rules also help define activities—what counts as a "foul" is not self-evident without the rules defining fouls—defining those activities is not the primary function of the rules. And we can understand that because the rules defining activities like fouling prohibit those proscribed activities because they disrupt rather than facilitate play. Importantly, the rules prohibiting fouls and fights are no less part of the rules of basketball simply because their role involves protecting the participants in the game and the game's integrity rather than defining the sub-activities constitutive of a successfully played game of basketball.[161]

Consider a legal example. Constitutional law contains rules that constitute the United States and its institutions—like the Senate,[162] the House of Representatives,[163] and official roles like the presidency[164]—as well as describe their official powers and the conditions under which they are lawfully exercised.[165] Constitutional law, in other words, contains power-conferring rules just like contract law does: each describes the conditions under which those powers may be properly exercised to change the legal rights, obligations, and powers of others.[166] But constitutional law is not just devoted to constituting the political system. John Searle observes that some rules of constitutional law operate primarily to regulate the participants in our constitutional practices.[167] The First Amendment's rule prohibiting abridgments of free speech is one

[158] See, e.g., Official Rules, Rule No. 4, §§ II, IV, Nat'l Basketball Ass'n, https://official.nba.com/rule-no-4-definitions/ [https://perma.cc/B93W-HW24] (last visited Oct. 9, 2025).

[159] Searle, supra note 157, at 51–52.

[160] Official Rules, Rule No. 12, Nat'l Basketball Ass'n, https://official.nba.com/rule-no-12-fouls-and-penalties/ [https://perma.cc/8MK4-UCBV] (last visited Oct. 9, 2025).

[161] See id.

[162] U.S. Const. art. I, §§ 1, 3.

[163] Id. art. I, §§ 1–2.

[164] Id. art. II, § 1.

[165] See id. arts. I–II.

[166] See H.L.A. Hart, The Concept of Law 33 (3d ed. 2012) (describing power-conferring rules).

[167] Searle, supra note 157, at 52.

example.[168] Other examples include the exclusionary rule under the Fourth Amendment and antidiscrimination rules under the Fourteenth Amendment.[169]

Going beyond Searle's point, these rules do not function merely to constitute a system of government (though they certainly contribute to that system, as all legal rules do), but they also operate primarily to prohibit state actors from behaving in certain ways and thereby protect the participants in the system of government (i.e., citizens and others subject to government power) and the integrity of the system itself (e.g., by ensuring that searches and seizures do not extend beyond the authority granted by the Constitution). Constitutional law is thus a composite of both constitutive rules that make up the complex activity of constitutional government and protective rules, the latter of which establish standards for properly undertaking activities defined primarily by the former.

Contract law also contains rules that serve these protective functions. Felipe Jiménez argues that contract remedies play this dual role.[170] The fact that the law provides nonbreaching parties with remedies against breaching parties protects the very interests that contracting parties seek to pursue by making a contract in the first place.[171] But the protection afforded to participants is not simply as persons, full stop, but as participants in contracting practices. As Jiménez explains, "[O]nce the legal system provides that contracts ought to be performed, citizens have an expectation that that will happen—and that, if contracts are breached, they will be protected."[172] Once individuals seek to pursue their interests by making legally enforceable agreements, those agreements must actually be legally enforceable. Beyond protecting individual interests made possible by the institution of contract, Jiménez continues, providing remedies for breach of contract protects the integrity of the system of contract law itself.[173] Whatever else contract law accomplishes, it sets up

[168] Id.

[169] See United States v. Calandra, 414 U.S. 338, 347 (1974) ("The exclusionary rule was adopted to effectuate the Fourth Amendment right of all citizens 'to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . .'" (alteration in original) (quoting U.S. Const. amend. IV)); Plyler v. Doe, 457 U.S. 202, 213 (1982) ("The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation.").

[170] Felipe Jiménez, Rethinking Contract Remedies, 53 Ariz. St. L.J. 1153 (2021).

[171] See id. at 1193.

[172] Id.

[173] Id. at 1193, 1197.

rules for parties to form legally binding agreements, delegating to the parties themselves the power to define their legal obligations to each other.[174] Failing to provide remedies for breach of contract would undermine this system. By the same token, providing remedies for breach reinforces that system, "support[ing] the practice of contracting" by "upholding the rules that establish primary [contractual] rights."[175]

By identifying these two functions of contract remedies, Jiménez is not concerned primarily with announcing criteria sufficient for identifying a legal rule as part of contract law. But I propose to do precisely that: when a legal rule protects individuals who participate in a practice *qua* participants, and also protects the practice itself, that rule counts as part of the practice. By analogy, just like protective rules against fouling and fighting count as rules of basketball, just like the exclusionary rule against unlawful searches counts as part of constitutional law, and just like the rules specifying remedies for breach of contract protect contracting parties and contract law itself, Section 1981's rule against racially discriminatory contracting practices is a protective rule that counts as part of contract law.[176] All of these protective rules seek to protect the integrity of valuable activities defined in part by a complex system of rules, whether that activity is basketball, constitutional government, or contracting. But because their protective rules (e.g., flagrant-foul rules, exclusionary rules, remedial rules, and rules against discriminatory contract formations) protect the participants in the many activities made possible by that complex system (e.g., basketball players, individuals subject to state power, and contracting parties), as well as the valuable practices made possible by those participants (e.g., basketball, democratic government, and contracts), these protective rules are in each case properly housed within the institution they protect (e.g., the rules of basketball, constitutional law, and contract law).[177]

[174] See id. at 1193.

[175] Id. at 1197.

[176] For an explicit description of the Civil Rights Act of 1866 in terms of its protective function, see Zietlow, supra note 80, at 473.

[177] Joseph Raz similarly claimed that the purpose of contract law should be "to protect both the practice of undertaking voluntary obligations and the individuals who rely on that practice." Joseph Raz, Promises in Morality and Law, 95 Harv. L. Rev. 916, 933 (1982) (book review). My claim differs. First, contract law's protective rules seek to protect the institution of contracting and its participants, not necessarily pre-institutional practices involving undertaking voluntary commitments; second, my argument does not commit to Raz's thesis about what "the" purpose of contract law should be.

In sum, Section 1981's rule against discriminatory contracting—which prohibits private actors from racially discriminating when making, performing, modifying, terminating, and enforcing contracts[178]—aims to protect the participants in contracting *qua* contracting parties against conduct that potentially harms them in that very capacity, as well as to protect the integrity of the institution of contracting itself. The heart is both part of the body and regulates it. Section 1981 is likewise part of the body of contract law that it regulates.

3. Two Objections

For the preceding conceptual reasons, Section 1981's rule against racial discrimination in contracting is already part of contract law. But consider two objections. The first is that my argument entails that far too many legal rules will count as rules of contract law. The second maintains that Section 1981's rule cannot count as part of contract law already because a different criterion—a conventionalist one—determines whether a legal rule is included or excluded in that category.

i. Too Much Contract Law?

Many legal rules arguably protect those who participate in contracting and the institution of contract itself. The rule against tortious interference with contracts is one such rule.[179] Most consumer protection laws arguably serve the same purpose. Antitrust law prohibits anticompetitive activities to (arguably) protect participants in contracting practices as well as the system of contracting.[180] Insurance law regulates insurance policies which are, in turn, regarded as contracts.[181] Indeed, virtually all economic regulation can be characterized in terms of protecting participants in contracting practices, as well as protecting the institution of contracting itself. If so, my argument implies that contract law includes an ocean of legal rules that do not seem like part of contract law. My argument, therefore, must rest on mistaken and overly broad criteria for inclusion within the category of contract law.

[178] See supra Section I.C; 42 U.S.C. § 1981(a)–(b).

[179] See, e.g., Fred Siegel Co., L.P.A. v. Arter & Hadden, 707 N.E.2d 853, 855 (Ohio 1999) (defining the elements of tortious interference with contract).

[180] See, e.g., United States v. Falstaff Brewing Corp., 410 U.S. 526, 531 (1973).

[181] See, e.g., Titan Ins. Co. v. Hyten, 817 N.W.2d 562, 567 (Mich. 2012).

This concern is overstated. Some putative counterexamples are not counterexamples. Tortious interference with contract doctrine is not, for example, an obvious counterexample; it quite plausibly counts as part of contract law, and given that areas of law overlap, the doctrine can be part of both contract law and tort law.[182] Indeed, tortious-interference doctrine already appears in the most recent *Restatement of Contracts*,[183] which incorporates by reference the *Restatement of Torts*'s formulation of the claim.[184] Antitrust law is a more difficult case. It is not obvious whether it is accurate to construe its goals as protecting participants in the practice of contracting or protecting the institution of contract law. Courts routinely assert, for example, that antitrust law does not protect competitors but rather competition.[185] That said, the goal of resisting anticompetitive contracting already finds voice in the common law of contract.[186] So, some aspects of competition law have a home in contract law. The laws governing insurance contracts seem no less a subset of the laws governing contracts more generally, albeit subject to special industry-specific regulations. Finally, consumer protection law and contract law do partly overlap. Federal law prohibiting noncompete clauses would surely count as contract law to the extent it overrides the existing common law rules governing the topic.[187]

But assume that my argument entails that many legal rules may well count as rules of contract law even though they might not initially seem to be part of it. It is not obvious that this is a problem. Areas of law may be vast. It seems more of a problem if attempts to summarize contract law must include every single doctrinal wrinkle or variation; it would be a problem if the Williston treatise also had to contain a full treatise on insurance regulation to count as complete. But works summarizing contract law need not contain every single proposition of contract law.

[182] See Tarunabh Khaitan & Sandy Steel, Areas of Law: Three Questions in Special Jurisprudence, 43 Oxford J. Legal Stud. 76, 83 (2023) (observing that different areas of law can "overlap").

[183] Restatement (Second) of Conts. § 194 (Am. L. Inst. 1981); see also Restatement (First) of Conts. § 576 (Am. L. Inst. 1932) (prohibiting bargains that involve a breach of contract with a third party).

[184] Restatement (Second) of Conts. § 194 cmt. a (Am. L. Inst. 1981).

[185] See, e.g., Seacoast Motors of Salisbury, Inc. v. DaimlerChrysler Motors Corp., 271 F.3d 6, 10 (1st Cir. 2001) ("Antitrust law protects competition, not competitors." (citing Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962))).

[186] Restatement (First) of Conts. § 513 (Am. L. Inst. 1932); Restatement (Second) of Conts. § 186 (Am. L. Inst. 1981).

[187] See 16 C.F.R. § 910.2 (2024).

Summaries are, after all, summaries. A rule's status as part of contract law does not suffice to warrant inclusion in them. What matters is also whether it is somehow an *important* part of contract law *qua* contract law. And opinions may reasonably differ about whether, say, the FTC's privacy regulations count as important *qua* contract law, even though they undoubtedly count as important, full stop. As this Article argues below, however, there are several reasons to regard Section 1981 as an important part of contract law—reasons that might not apply to other legal rules that are borderline instances of contract law.[188]

ii. A Conventionalist Objection

Conventionalism holds that a legal rule counts as part of an area of law only if the legal community at a given time understands that a norm counts as part of that area of law.[189] As applied to contract law, this would entail that some legal rule—say, Section 1981—counts as contract law only if the legal community at a given time—e.g., lawyers, judges, treatise writers, legal scholars, and so on—consider it to be part of contract law at that time.[190] But not only is there no conventional belief that Section 1981 counts as part of contract law[191]; the evidence arguably suggests that Section 1981 is conventionally understood *not* to count as contract law.[192]

This objection is not persuasive, even if we grant the stronger claim that the legal community conventionally believes that Section 1981 is not part of contract law. It is a mistake to treat consensus as decisive. Disagreements about classification are not empirical disagreements involving counting the heads of experts.[193] Opinion polling of this type thus would not be decisive on the underlying theoretical questions. Theoretical debates about the criteria for inclusion must be undertaken on

[188] See infra Part III.

[189] See Stephen A. Smith, Contract Theory 8–9 (2004) (arguing that norms are legal norms only to the extent that they are recognized by the legal authorities). Contrast this with conventionalism about whether an area of law exists. See Khaitan & Steel, supra note 182, at 78.

[190] See Smith, supra note 189, at 8–9.

[191] See infra Part IV.

[192] In *Goodman v. Lukens Steel Co.*, for example, the U.S. Supreme Court characterized Section 1981 claims as akin to personal injury actions in tort rather than breach-of-contract claims. See 482 U.S. 656, 661–62 (1987). Moreover, in Part IV, I show that leading summaries of contract law fail to cite Section 1981, let alone discuss its origin or contemporary applications. See infra Part IV.

[193] Cf. Ronald Dworkin, Law's Empire 5–7 (1986) (distinguishing between empirical and theoretical disagreements about law).

theoretical grounds, as illustrated by the main argument above. Although consensus is relevant—there must be fixed points of agreement for disagreement to be meaningful[194]—relying solely on consensus would beg the question, given that the correctness of that very consensus is at issue. Similarly, if the very question is the theoretical one of whether Section 1981 counts as part of contract law, an alleged consensus about that very issue cannot suffice to shut down that theoretical dispute, at least not without begging the question.

B. A Normative Argument

The conceptual arguments in Section II.A—which conclude that Section 1981 is already part of contract law—have a normative implication. If Section 1981's antidiscrimination rule already counts as a rule of contract law, then presumably the legal community should recognize it as such. The arguments are "conceptual" insofar as they emphasize that Section 1981's formal features suffice to qualify it as part of contract law. But another family of arguments available is substantive rather than formal. This group invokes normative premises about contract law rather than conceptual ones.

One type of argument in this family presupposes global normative theories. Uncompromising versions of libertarianism, for example, hold that justice in holdings is determined solely by voluntary and uncoerced transfers of holdings that were themselves justly acquired.[195] Antidiscrimination law, according to this picture, potentially interferes with such transfers by, in effect, requiring parties to transact with individuals with whom they would prefer to avoid transacting.[196] Because Section 1981 likewise limits private ordering in ways anathema to uncompromising libertarian views, they entail that Section 1981 should not count as part of law generally, let alone contract law specifically.[197]

[194] See id. at 5.

[195] Robert Nozick, Anarchy, State, and Utopia 150–53 (1974).

[196] See id. (describing a principle of justice in transfers, which includes "*voluntary* exchanges" of holdings (emphasis added)); Epstein, supra note 3, at 3–4 ("[A]ntidiscrimination law is the antithesis of freedom of contract."); Javier Portillo & Walter E. Block, Anti-Discrimination Laws: Undermining Our Rights, 109 J. Bus. Ethics 209, 212–13 (2012). For a libertarian defense of at least some antidiscrimination law, see generally William Kline, A Libertarian Defense of Title II of the 1964 Civil Rights Act, 185 J. Bus. Ethics 75 (2022).

[197] See Epstein, supra note 3, at 3–4 (discussing the implications of antidiscrimination law for freedom of contract).

Other views of political morality are less hostile to antidiscrimination law. Some writers argue that antidiscrimination rules should be recognized as part of private law generally and contract law specifically, emphasizing that antidiscrimination rules help to realize liberal values of autonomy and equality.[198] These positions see antidiscrimination laws as natural allies and antidiscrimination norms as instantiations of private law's liberal values rather than external constraints on them. Other comprehensive normative theories like welfarist consequentialism might, depending on contingent facts, approve or disapprove of recognizing antidiscrimination law generally or as part of contract law specifically.[199]

The argument below, however, aspires to avoid presupposing a comprehensive vision of political morality or private law.[200] Doing so risks begging the question and assuming the very conclusion to be argued for as a premise: private law's institutions should (or should not) recognize antidiscrimination norms. Although a fully uncontroversial understanding of contract law's aspirational principles is not possible, a more ecumenical normative approach exists. Rather than operating from the top down by committing to a grand normative vision of contract law, we can argue from the bottom up by invoking the doctrines of contract law and the principles embodied in them.[201]

There are several routes to the conclusion that basic principles of contract law disfavor racial discrimination. The argument advanced here depends on two key premises. First, contract law disfavors contractually

[198] For an account based on political republicanism understood as nondomination, see generally Gillian Demeyere, Discrimination, Freedom, and the Limits of Contract, 10 Int'l J. Discrimination & L. 219 (2009). For an account relying on the liberal values of self-determination and substantive equality, see Hanoch Dagan & Avihay Dorfman, Relational Justice: A Theory of Private Law 177–89 (2024) (arguing that wrongful discrimination flouts private law principles of self-determination and substantive equality). For an argument that private law should recognize an anti-humiliation principle that entails antidiscrimination norms, see Hila Keren, Beyond Discrimination: Market Humiliation and Private Law, 95 U. Colo. L. Rev. 87, 141 (2024).

[199] Epstein defends repealing antidiscrimination laws partly on welfarist grounds. See Epstein, supra note 3, at 42, 65–67, 75–76. But see Samantha A. Besson, Discrimination and Freedom of Contract: Philosophical and Economic Foundations of the Law Against Racial Discrimination in Employment, 3 Int'l J. Discrimination & L. 269, 274 (1999) (criticizing Epstein's arguments against antidiscrimination law on welfarist and other grounds).

[200] The present author's sympathies rest with global accounts that see antidiscrimination law and contract law as allies. See generally Erik Encarnacion, Discrimination, Mandatory Arbitration, and Courts, 108 Geo. L.J. 855 (2020) (arguing that antidiscrimination law instantiates the political value of equal status).

[201] Or from the middle out, depending on one's point of view. See id. at 868–69.

unreasonable behavior and protects reasonable expectations of contracting parties. The second premise is that invidious racial discrimination counts as contractually unreasonable and that parties can reasonably expect not to be racially discriminated against. Therefore, contract law disfavors racially discriminatory behavior and protects parties against it.

Although common law courts should have explicitly recognized this conclusion long ago—as Neil G. Williams has argued[202]—Congress already expressed this idea in Section 1981. So, to avoid normative incoherence, courts and commentators should follow Congress's lead and recognize its prohibition on racially discriminatory contracting as part of contract law. This argument is discussed in more detail below.

1. The Principle of Contractual Reasonableness

The first premise is a principle of contract law: that contract law protects parties' reasonable expectations and disfavors commercially unreasonable behavior.[203] Call this ideal the principle of contractual reasonableness. This legal principle, like any other, does not necessarily play a decisive role in deciding outcomes in concrete cases.[204] And like many principles, it resists more precise formulations.[205] Still, several core doctrines of contract law illustrate and reflect the principle, which serves to justify them in turn.

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[202] 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, 207–17 (1994).

[203] Commercially Reasonable, Black's Law Dictionary (11th ed. 2019); see also Commercially Reasonable, Merriam-Webster Dictionary, https://www.merriam-webster.com/legal/commercially%20reasonable [https://perma.cc/244B-ENB3] (last visited Oct. 9, 2025) (defining commercially reasonable as "fair, done in good faith, and *corresponding to commonly accepted commercial practices*" (emphasis added)). The phrase "commercially reasonable" and its cognates are associated with the Uniform Commercial Code ("UCC"), though the present author does not intend to treat the UCC's elaborations as decisive. See Imad D. Abyad, Note, Commercial Reasonableness in Karl Llewellyn's Uniform Commercial Code Jurisprudence, 83 Va. L. Rev. 429, 429, 449–50 (1997); E. Allan Farnsworth, Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code, 30 U. Chi. L. Rev. 666, 667 (1963) (citing U.C.C. § 2-311(1) (Am. L. Inst. & Nat'l Conf. of Comm'rs on Unif. State L. 1958)).

[204] For a classic discussion, see Ronald M. Dworkin, The Model of Rules, 35 U. Chi. L. Rev. 14, 22–40 (1967) (distinguishing between rules and principles based on their distinctive roles in legal reasoning).

[205] See id.

Consider certain doctrines governing contract formation. The dominant objective theory holds that, in general, whether a contract exists depends on external, public, or "objective" expressions of parties' intentions rather than their internal, private, or "subjective" mental states.[206] This theory protects the reasonable expectations of contracting parties and protects against commercially unreasonable behavior. Contracting parties' expectations are protected because formation depends on accessible and hence verifiable communications rather than inaccessible and comparatively unverifiable thoughts.[207] Objective theory also protects against commercially unreasonable behavior. If contracts depended on subjective mental states, fraudulent contracting parties could readily avoid liability for breach of contract by showing that they had no intention of keeping their apparent agreements. The objective theory, by contrast, protects the victim's breach claim and thereby disfavors the fraudulent conduct.[208]

Doctrines of contractual avoidance likewise manifest the principle of contractual reasonableness. If one party induces another to assent to a contractual exchange via fraud,[209] duress,[210] or undue influence,[211] the duped party is empowered to void the contract.[212] The fact that contracts are voidable, not automatically void, empowers victims of material misrepresentations to choose whether to hold deceiving parties to their fraudulently induced bargains in line with victims' contractual expectations.[213] Fraud, duress, and undue influence are also paradigm

[206] See, e.g., Quality Truck & Auto Sales, Inc. v. Yassine, 730 So. 2d 1164, 1168 (Ala. 1999).

[207] P & C Constr. Co. v. Am. Diversified, 789 P.2d 688, 692 (Or. Ct. App. 1990) ("[O]ne of [contract law's] chief purposes is to secure the realization of expectations reasonably induced by the expressions of agreement, when that can be done without running counter to other expectations also reasonably induced." (alterations in original) (quoting 3 Arthur Linton Corbin, Corbin on Contracts § 537, at 45 (1960))).

[208] Exceptions to the objective rule exist. But even the exceptions demand, rather than depart from, contractual reasonableness insofar as neglecting subjective intentions entirely would facilitate unscrupulous opportunism or would thwart parties' reasonable expectations. See Nick Sage, Reconciling Contract Law's Objective and Subjective Standards, 86 Mod. L. Rev. 1422, 1423–25 (2023) (stating the point in terms of "fair play" and "commercial decency").

[209] Restatement (Second) of Conts. § 162 (Am. L. Inst. 1981).

[210] Id. §§ 174–175.

[211] Id. § 177.

[212] Id. § 164 (fraudulent misrepresentation); id. § 177 (undue influence); id. § 175 (duress).

[213] See, e.g., Am. Soc'y of Contemp. Med., Surgery & Ophthalmology v. Murray Commc'ns, Inc., 547 F. Supp. 462, 466 n.8 (N.D. Ill. 1982) ("The principle is clear in Illinois

forms of commercially unreasonable behavior. Contract law thus disfavors parties who engage in such behavior by undermining their ability to enforce the putative contracts they have obtained using that behavior.

Doctrines governing contractual performance also disfavor contractually unreasonable behavior. Consider the duty of good faith and fair dealing.[214] This doctrine, a mandatory rule attaching to every contract, requires each party to perform contractual obligations without seeking to exploit contractual gaps to undermine the value of the contract for the other party.[215] Or, as comment *a* to Section 205 of the *Restatement* elaborates,

> Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving "bad faith" because they violate community standards of decency, fairness or reasonableness.[216]

A typical failure of good faith involves a party unreasonably exercising discretion either explicitly afforded to her or left open to her via a gap in the contract's terms.[217] Such discretion must be exercised to conform with the reasonable expectations of the parties, rather than as an opportunity for gain at the other party's expense.[218] In any event, to the extent that a

that a party which has been fraudulently induced to enter into a contract is entitled to the benefit of its bargain.").

[214] Restatement (Second) of Conts. § 205 (Am. L. Inst. 1981); U.C.C. § 1-203 (Am. L. Inst. & Nat'l Conf. of Comm'rs on Unif. State L. 2001); Kirke La Shelle Co. v. Paul Armstrong Co., 188 N.E. 163, 167 (N.Y. 1933).

[215] See, e.g., Serpa v. Cal. Sur. Investigations, Inc., 155 Cal. Rptr. 3d 506, 514 (Cal. Ct. App. 2013) (applying the implied covenant of good faith to prevent one contracting party from "unfairly frustrating the other party's right to receive the benefits of the agreement actually made" (quoting Guz v. Bechtel Nat'l, Inc., 8 P.3d 1089, 1110 (Cal. 2000))); Filner v. Shapiro, 633 F.2d 139, 143 (2d Cir. 1980) (similarly applying the covenant of good faith to prevent one party from depriving the other of the bargained-for benefits); *Kirke La Shelle Co.*, 188 N.E. at 167 (same).

[216] Restatement (Second) of Conts. § 205 cmt. a (Am. L. Inst. 1981); see also R.J. Gaydos Ins. Agency v. Nat'l Consumer Ins. Co., 773 A.2d 1132, 1146 (N.J. 2001) (citing the *Restatement* comment quoted above as giving the meaning of the implied covenant of good faith in every contract).

[217] See, e.g., Wilson v. Amerada Hess Corp., 773 A.2d 1121, 1128 (N.J. 2001) ("[V]arious courts have stated that a party must exercise discretion reasonably and with proper motive when that party is vested with the exercise of discretion under a contract.").

[218] See, e.g., Young Living Essential Oils, LC v. Marin, 2011 UT 64, ¶ 9, 266 P.3d 814, 817 (elaborating that the duty of good faith assumes that nobody would "reasonably accede to a

party performs in bad faith—or, to the extent that they perform at odds with "community standards of decency, fairness or reasonableness"—a party might find themselves liable to a claim for breach of contract for violating the duty of good faith.[219] Contract law thus polices contractual reasonableness, this time in the context of the performance of contractual obligations.[220]

Unconscionability doctrine also disfavors contractually unreasonable conduct. Under the doctrine, courts will not enforce contracts that are both procedurally unconscionable (i.e., when the bargaining process was defective) and substantively unconscionable (i.e., containing excessively one-sided terms).[221] Determining whether contracts are substantively unconscionable involves "determining whether the contract terms are commercially reasonable or lie outside the limits of what is reasonable and acceptable."[222] Ohio courts are explicit about understanding unconscionable conduct in terms of commercially unreasonable behavior.[223] So not only does contract law police contractual relations through its doctrines of contract formation and performance, but it also governs them via substantive defenses against enforcement.

contract that left him vulnerable to another's opportunistic interference with the contract's fulfillment").

[219] Drummond Coal Sales, Inc. v. Norfolk S. Ry. Co., 3 F.4th 605, 611 (4th Cir. 2021) (citing 23 Williston on Contracts § 63:22 (4th ed. 2021)); Restatement (Second) of Conts. § 205 cmt. a (Am. L. Inst. 1981).

[220] This discussion glosses over a debate about how capaciously to understand good faith doctrine. For a narrow view, see Daniel Markovits, Good Faith as Contract's Core Value, *in* Philosophical Foundations of Contract Law 272, 280 (Gregory Klass, George Letsas & Prince Saprai eds., 2014). For an argument that narrow views cannot avoid normative judgments that go beyond parties' expectations, see Richard R.W. Brooks, Good Faith in Contractual Exchanges, *in* The Oxford Handbook of the New Private Law 497, 506–07 (Andrew S. Gold, John C.P. Goldberg, Daniel B. Kelly, Emily Sherwin & Henry E. Smith eds., 2020).

[221] See, e.g., U.S. Home Corp. v. Michael Ballesteros Tr., 415 P.3d 32, 40 (Nev. 2018) (en banc) (explaining that courts generally will not enforce agreements that are both procedurally and substantively unconscionable). Some jurisdictions require establishing procedural or substantive unconscionability, not necessarily both. See, e.g., Gaylord v. Presence Pain Care, No. 3-21-0572, 2023 WL 5233402, at *4 (Ill. App. Ct. Aug. 15, 2023) (asserting that a contract can be invalid as unconscionable based on *either* procedural or substantive unconscionability).

[222] Brant v. Schneider Nat'l, Inc., 43 F.4th 656, 676 (7th Cir. 2022); see also Eastham v. Chesapeake Appalachia, L.L.C., 754 F.3d 356, 366 (6th Cir. 2014) (explaining that assessing substantive unconscionability requires considering whether the contract terms are commercially reasonable).

[223] Price v. Taylor, 575 F. Supp. 2d 845, 852 (N.D. Ohio 2008); C4 Polymers, Inc. v. Huntington Nat'l Bank, 41 N.E.3d 788, 799 (Ohio Ct. App. 2015); Martin v. ManorCare Health Servs., LLC, 246 N.E.3d 598, 603 (Ohio Ct. App. 2024).

Finally, contract law's remedies seek commercial reasonableness. Expectation damages and specific performance explicitly seek to protect the expectations of some parties against breach by other ones.[224] Reliance damages likewise protect the interests of parties that reasonably rely to their detriment on the promises of others.[225] But even breaching parties are protected against commercial unreasonableness to the extent that only reasonably foreseeable damages will be recovered.[226] And, under the mitigation doctrine, breaching parties cannot obtain monetary relief for damages that might have been reasonably avoided.[227] Nonbreaching parties may not use the breach as a money pump.

This discussion is not exhaustive. It nevertheless illustrates how contract law embodies a principle of contractual reasonableness, which disfavors commercially unreasonable behavior while protecting parties' reasonable expectations. Importantly, the principle does not grant courts a free-floating power to rewrite or invalidate contracts simply because they seem unfair.[228] The general principle is typically effectuated through more rule-like doctrines. But notions of fair play are not abandoned altogether. The doctrines express ideals of contractual reasonableness while being justified by them in a mutually constitutive way. Because multiple contract law doctrines embody a principle of contractual reasonableness, it is part of contract law.

2. Racial Discrimination as Contractually Unreasonable

This brings us to the second premise. This premise assumes that invidious racial discrimination is unreasonable.[229] What remains is the further question of whether it is *contractually* unreasonable. Is racially

[224] Makovi v. Sherwin-Williams Co., 561 A.2d 179, 183 (Md. 1989) (damages); Snyder v. Sullivan, 705 P.2d 510, 513 (Colo. 1985) (en banc) (specific performance).

[225] Harmon v. State, 62 A.3d 1198, 1202 (Del. 2013) (en banc).

[226] Hadley v. Baxendale (1854) 156 Eng. Rep. 145, 145; 9 Ex. 341, 341.

[227] Cal. Sch. Emps. Ass'n v. Pers. Comm'n, 106 Cal. Rptr. 283, 288 (Cal. Ct. App. 1973).

[228] See, e.g., Shoney's LLC v. MAC E., LLC, 27 So. 3d 1216, 1223 (Ala. 2009) ("Where the parties to a contract use language that is inconsistent with a commercial-reasonableness standard, the terms of such contract will not be altered by an implied covenant of good faith.").

[229] See, e.g., Brown v. Sumner, 701 F. Supp. 762, 766 (D. Nev. 1988) ("Racial discrimination clearly is repugnant to our society's current standards of decency."); Honegger v. O'Connell, 222 N.Y.S.2d 655, 657 (N.Y. Sup. Ct. 1961) ("When a labor organization causes an employer to discriminate against an employee, it commits an unfair labor practice."); Isbister v. Boys' Club of Santa Cruz, Inc., 707 P.2d 212, 222 n.15 (Cal. 1985) ("[D]iscrimination against a racial minority is always invidious, and where such discrimination is prohibited, it is prohibited absolutely.").

discriminating, in other words, commercially unreasonable? And do contracting parties have reasonable expectations not to be invidiously discriminated against because of their race? If the answer to either question is yes, then it follows that invidious racial discrimination in contracting flouts a basic principle of contract law: the principle of contractual reasonableness. Recognizing that a basic principle of contract law is incompatible with racial discrimination should, in turn, remove a barrier to recognizing Section 1981 as part of contract law. After all, Section 1981 would simply codify a logical extension of basic contract law principles.

The claims that it is commercially unreasonable to engage in invidious racial discrimination in one's contracting practices and that individuals can reasonably expect to contract free from invidious racial discrimination should require little argument. Although racial bias remains widespread in a variety of markets, firms that exhibit this pattern of behavior do not generally seek to justify these practices; rather, they seek to *explain them away* as not exhibiting invidious racial discrimination. Put differently, firms publicly decry invidious racial discrimination, while denying that racial disparities in their ranks—where they exist—reflect invidious racial discrimination.[230]

What about reasonable expectations? Parties and would-be parties to contracts can reasonably expect that their contracts will be performed in a nondiscriminatory way and that contracts that they wish to form will likewise be available without regard to race. Now, certain markets rife with racial discrimination may make such expectations difficult to sustain as a matter of *epistemic* rationality. But that is not relevant. Judgments about reasonableness are not solely judgments about whether certain behavior conforms to existing conventions or widespread patterns of behavior.[231] Judgments about reasonableness also—even primarily—involve normative matters about whether behavior or expectations are justified notwithstanding such conventions and patterns. If so, it is

[230] At the extreme, firms appear to trumpet their support for racial diversity to mask the internal lack thereof. See Andrew C. Baker, David F. Larcker, Charles G. McClure, Durgesh Saraph & Edward M. Watts, Diversity Washing, 62 J. Acct. Rsch. 1661, 1663 (2024) (finding that recent increases in firms' public-facing statements about their DEI programs have far outstripped any actual growth in diversity and that public-facing statements about DEI commitments are at best weakly correlated with actual diversity).

[231] Kevin P. Tobia, How People Judge What Is Reasonable, 70 Ala. L. Rev. 293, 297 (2018) (arguing that the concept of reasonableness is, and should be understood to be, a hybrid judgment reflecting both judgments of descriptive regularities and prescriptive desirability).

difficult to justify the claim that parties should not reasonably expect to form and obtain contractual performance free from racial discrimination. Accordingly, racial discrimination flouts the principles of contractual reasonableness.

The argument that racial discrimination flouts contract law's basic principles should be straightforward. Versions of this argument already exist in the academic literature. Neil G. Williams, for example, has argued forcefully that common law courts should recognize a principle against racial discrimination in contract law,[232] largely because the common law reflects prevailing moral attitudes.[233] Hila Keren has argued against the analytical separation between "public" antidiscrimination rules and "private" contract law doctrines.[234] And she has argued that principles of precontractual liability should be extended to prohibit racial discrimination during contract formation.[235] But Congress can include antidiscrimination norms in contract law, too, and arguably did so by enacting the Civil Rights Act of 1991. What remains for courts and commentators is not necessarily to update the common law. Courts might instead recognize that existing antidiscrimination law, in the form of Section 1981, counts as part of contract law.

But it remains puzzling why courts have declined to recognize antidiscrimination norms as part of contract law. Keren has speculated, plausibly, that traditional categories of legal thought invite this analytical separation.[236] Antidiscrimination law is understood to be "public" law, for example, while contract law is quintessentially "private."[237] Discrimination is a "social" phenomenon, while contracting is an "economic" one.[238] This analysis helps to explain why courts and commentators presuppose narrow conceptions of reasonableness in contract law. Noah Zatz similarly opines that omitting antidiscrimination law from the contract law curriculum "partly reflects the anachronistic distinction between the common law of contracts and various specialized statutory domains that sound in contract."[239]

[232] Williams, supra note 202, at 207–17.
[233] Id.
[234] Keren, We Insist! Freedom Now, supra note 1, at 159; see Zatz, supra note 1, at 132–33.
[235] Keren, We Insist! Freedom Now, supra note 1, at 179–83.
[236] Id. at 159–61.
[237] Id.
[238] Id. at 161.
[239] Zatz, supra note 1, at 132.

Regardless, one might object that the argument that racial discrimination is inconsistent with contractual reasonableness depends on an overly broad conception of reasonableness. In the contractual domain, reasonableness requires only self-serving economic rationality or justifiability in terms of prevailing commercial practices. If economic rationality or commercial practices permit discrimination, it would follow that discrimination is contractually reasonable.

To bolster this objection, notice that even scholars who agree that racial discrimination and contract law's fundamental goals are at odds have voiced versions of this view. Sabine Tsuruda has argued, for example, that modern unconscionability doctrine, while embodying norms of commercial fairness, requires only that each party has sufficient mental capacities to legally bind themselves to an agreement and that each party does not interfere with those capacities or take advantage of extremely unequal bargaining power.[240] These requirements are compatible with racially discriminatory contracting behavior.[241] She therefore argues that unconscionability doctrine must be reformed.[242] Similarly, good faith and fair dealing may concern only fidelity to the terms agreed to and their underlying commercial purposes, leading Steven J. Burton to conclude (contrary to Neil Williams and Emily Houh) that good faith performances can be compatible with racially discriminatory ones.[243] And some courts deny that racially discriminatory contracts can be voidable as a matter of

[240] Sabine Tsuruda, Race, Unconscionability, and Contractual Equality, 60 Harv. C.R.-C.L. L. Rev. 159, 169–70 (2025).

[241] Id. at 174. Tsuruda cites *Contract Buyers League v. F & F Investment*, in which plaintiffs succeeded in stating a claim of racially discriminatory real estate transactions but failed, on the same facts, to state a claim for unconscionability. 300 F. Supp. 210, 216, 228 (N.D. Ill. 1969), *aff'd sub nom.* Baker v. F & F Inv., 420 F.2d 1191 (7th Cir. 1970). But see Dorothy A. Brown, Critical Race Theory: Cases, Materials, and Problems 179, 212 (4th ed. 2022); Zalesne, Racial Inequality in Contracting, supra note 1, at 32–35 (arguing that racial bias is already relevant to unconscionability doctrine).

[242] Tsuruda, supra note 240, at 203–11 (advocating a "basic interests" approach to unconscionability analysis).

[243] Burton, Racial Discrimination in Contract Performance, supra note 7, at 450–54, 454 n.83, 463–64, 464 n.116. But see Williams, supra note 202, at 207–17; Mitchell v. Teck Cominco Alaska Inc., 193 P.3d 751, 761 (Alaska 2008) (recognizing that racially disparate treatment in employment can ground claims of violating good faith and fair dealing); Emily M.S. Houh, Critical Interventions: Toward an Expansive Equality Approach to the Doctrine of Good Faith in Contract Law, 88 Cornell L. Rev. 1025, 1088 (2003) (arguing that by considering racial discrimination and subordination when analyzing good faith and fair dealing, courts can mitigate racial discrimination); Walton v. Interstate Warehousing, Inc., No. 17-cv-01324, 2020 WL 1640440, at *10 (M.D. Tenn. Apr. 2, 2020) (holding that sex-based discrimination can violate the duty of good faith and fair dealing).

public policy.[244] The concerns of these courts and commentators may ultimately trace back to the fundamental question of whether fairness considerations have a legitimate normative role to play in the design of contract law more generally,[245] or whether contractual fairness extends beyond a narrow conception of procedural fairness satisfied whenever parties validly consent to a contractual exchange.[246]

This Article cannot settle these debates. For present purposes, a capacious version of contractual reasonableness is assumed to be plausibly grounded in case law and commentary. More robust defenses must be—and have been—undertaken elsewhere.[247] The main point remains: *if* contract law seeks to protect individuals' capacity to contract against fundamentally unfair attempts to harm that capacity, then invidious racial discrimination should be recognized as a central concern of contract law, not merely a concern peripheral to it. Section 1981 recognizes precisely this point.

* * *

Section 1981's rule against racial discrimination already is (for conceptual reasons) and should be recognized (for normative reasons already embodied in contract law) as part of contract law. Conceptually, Section 1981 reconstituted the law of contract formation and articulates protective rules fully at home in the law of contract.[248] Normatively, the

[244] Compare McKnight v. Gen. Motors Corp., 908 F.2d 104, 112 (7th Cir. 1990) ("If what McKnight is trying to argue is that public policy reads into every such contract a contractual duty not to discriminate on racial grounds, this would imply that every victim of racial discrimination in employment has a claim for breach of contract as well as a claim under the statutes forbidding such discrimination. That would be extravagant . . . ." (emphasis omitted)), with Burton v. Exam Ctr. Indus. & Gen. Med. Clinic, Inc., 2000 UT 18, ¶ 26, 994 P.2d 1261, 1269 (Durham, J., dissenting) ("It seems strange indeed that this court should declare that it is not a violation of public policy to discriminate against someone in employment because of race, sex, religion, disability, or age, no matter the size of the employer." (emphasis omitted)), and Molesworth v. Brandon, 672 A.2d 608, 616 (Md. 1996) (holding that violations of public policy can be grounded in antidiscrimination statutes). For critical commentary, see Keren, We Insist! Freedom Now, supra note 1, at 153.

[245] Louis Kaplow & Steven Shavell, Fairness Versus Welfare 155, 182–83 (2002).

[246] See Aditi Bagchi, Contract as Procedural Justice, 7 Juris. 47, 50–51 (2016) (describing a "pure" procedural justice theory of contract law according to which "there are no exogenous criteria to bring to bear in assessment of the outcome," assuming "the process is appropriate to the end for which it is used and executed fairly").

[247] For an argument against a narrow construal of commercial reasonableness, see Brooks, supra note 220, at 505–10.

[248] See supra Section II.A.

legal community should recognize Section 1981's rule against racially discriminatory contracting as part of contract law, given the conceptual arguments and because such a rule is a natural extension of principles of contractual reasonableness.[249] Section 1981, far from being at odds with contract law and its animating values, should be understood as a part of contract law that aims to realize those values.

III. THE IMPORTANCE OF SECTION 1981

Even if Section 1981 counts as part of contract law or should be recognized as such, what follows? Not every doctrinal wrinkle must be captured by theories of contract law, treatises, or other comprehensive doctrinal summaries. Still, important parts of contract law should be included. Section III.A explains what makes Section 1981 important and thus worthy of inclusion. Section III.B argues in the alternative: even if ultimately the reader is not persuaded that Section 1981 (conceptually) counts as contract law or (normatively) should so count, compelling reasons remain for these summaries to address Section 1981. In short, Section III.A below responds to the worry that Section 1981's status as contract law might not suffice to justify rewriting our theories and treatises, while Section III.B suggests that its status as part of contract law is not necessary to justify including it in doctrinal summaries.

A. What Makes a Doctrine Important?

This Article claims that we should rewrite our comprehensive summaries of contract law to include Section 1981's antidiscrimination rule because it is already an important part of contract law. The taxonomic point—i.e., that Section 1981's antidiscrimination rule is part of contract law—is only part of this claim. What remains is the evaluative part—i.e., that the rule represents an important part of contract law.

At least four reasons exist for including Section 1981 in doctrinal summaries of contract law. The first is historical. Just like understanding the basic features of English common law provides context for understanding modern contract law and its evolution, understanding the Civil Rights Act of 1866 and the Civil Rights Act of 1991 provides context for understanding modern contract law and practice. Indeed, understanding the history of Section 1981 might be more relevant insofar

[249] See supra Section II.B.

as it highlights both the historical horrors that contributed to the modern commercial sphere and the lingering legacies of those horrors. Antidiscrimination law squarely aims to address those legacies in contracting practices everywhere, not just specifically with respect to a circumscribed corner of contracting practice like employment discrimination law.

A second reason is Section 1981's normative significance. Section 1981 formally guarantees that each person has, in making and enforcing contracts, a right not to be discriminated against because of race.[250] As discussed in Section II.B, Section 1981 expresses a rule that protects each of us as participants in the practice of contract as such, as well as the integrity of the practice itself. No commercial sphere is presumptively entitled to engage in invidious racial discrimination. Knowing this can be empowering.

There are also two formal reasons to treat Section 1981 as an important part of contract law, both of which this Article addresses above. The first concerns the universal range of contractual relationships to which the statute applies, while the second concerns the depth of application. As for range, Section 1981 applies to all contractual relationships formed—indeed, "all phases and incidents of the contractual relationship,"[251] including some preformation conduct.[252] Few, if any, rules of contract law apply to every single contract, except perhaps the requirement of mutual assent.[253] As for depth, the statute applies to nearly every stage in the contractual relationship,[254] from certain preformation behavior to enforcement of valid contracts.[255] It is difficult to think of a rule that applies to every stage of a contractual relationship. A rule that is both universal in breadth and profound in depth does not exist, except perhaps the principle of contractual reasonableness discussed above.[256] Any such rule would plausibly be considered important, insofar as contracting

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

[251] Rivers v. Roadway Express, Inc., 511 U.S. 298, 302 (1994).

[252] Barfield v. Com. Bank, N.A., 484 F.3d 1276, 1278–79 (10th Cir. 2007) (applying Section 1981 to a failed attempt to form a contract).

[253] See, e.g., Zurn Constructors, Inc. v. B.F. Goodrich Co., 685 F. Supp. 1172, 1185 (D. Kan. 1988) (asserting that mutual assent is required in "all contracts").

[254] *Rivers*, 511 U.S. at 302.

[255] See Gregory v. Dillard's, Inc., 494 F.3d 694, 703–04 (8th Cir. 2007) (pre-contractual activity); 42 U.S.C. § 1981(a) (enforcement).

[256] See supra Section II.B.

parties should be at least dimly aware of it when engaging in their contracting practices.

Scholars of contract law may differ on whether a particular rule counts as important. They may also seek to restrict the scope of coverage based on some other limiting principle, such as choosing to present contracts as primarily a common law subject, with statutory sources taking a backseat to judicial decision-making.[257] But the more comprehensive a doctrinal summary is—for example, online treatises that go into often painstaking detail about the law of contract, or Restatements of Contract—the less justifiable it seems to exclude Section 1981 from its ambit. And given its universal breadth of coverage and profundity of depth, even less comprehensive summaries like casebooks ought to explain the statute's historical and contemporary significance.

B. Arguing in the Alternative

This Article's core argument thus far is that Section 1981's antidiscrimination rule counts as an important part of contract law. An implication of this conclusion, if true, is that scholars of contract law have a compelling reason to rewrite comprehensive doctrinal summaries like treatises, given that these repositories presumably seek to include all important features of the law of contracts. But even if Section 1981 were not part of contract law, it would still be sufficiently important, and sufficiently adjacent to contract law, to warrant serious consideration.

Some of the reasons have already been discussed in various parts of this Article. The statute reflects historically important developments for modern contract law, including why it has the shape it has today, as opposed to the shape pursued under the Black Codes (as discussed in Part I). It is also normatively and formally important (as discussed immediately above and in Sections II.A and II.B). And at least one other federal statute—the Federal Arbitration Act—is already routinely discussed at length in comprehensive summaries of contract law,[258] even though the Federal Arbitration Act does not apply to every contract,[259] or

[257] See, e.g., Tracey E. George & Russell Korobkin, K: A Common Law Approach to Contracts (3d ed. 2021).

[258] See, e.g., Randy E. Barnett & Nathan B. Oman, Contracts: Cases and Doctrine 947–66 (8th ed. 2025).

[259] State ex rel. City Holding Co. v. Kaufman, 609 S.E.2d 855, 859 (W. Va. 2004) (per curiam).

every stage of contract formation. Section 1981, by contrast, does.[260] For these reasons, even if Section 1981 does not count as part of contract law, our comprehensive doctrinal summaries should nevertheless contain nontrivial discussions of the statute.

IV. THE EXCLUSION OF SECTION 1981 FROM CONTRACT LAW

Part I showed that Congress sought to protect contractual freedoms by prohibiting racial discrimination in making and enforcing contracts. Parts II and III argued that Section 1981 counts as not only a part of contract law, but an important part of it. This Part shows, however, that scholars of contract law have almost entirely ignored the statute.[261] More specifically, many of the most important compilations of contract law in the United States—including the *Restatement (Second) of Contracts*, the forthcoming *Restatement of Consumer Contracts*, Article 2 of the Uniform Commercial Code, leading treatises (Corbin, Farnsworth, and Williston), and contract law casebooks currently sold by three major academic publishers—ignore Section 1981. With some recent exceptions,[262] we see that the community of American lawyers and scholars that play a large role in defining the field of contract law does not consider Section 1981 to be a part of contract law in the United States, or at least not an important part of it. Indeed, they do not even consider it to be a contract-law-adjacent subject matter worthy of sustained discussion.

A. Restatements, the UCC, and Treatises

We start with some major summaries of contract law, often understood by lawyers, scholars, and courts as the primary repository of "black letter" contract law in the United States: the *Restatement (Second) of Contracts*, Tentative Draft Number 2 of the *Restatement of Consumer Contracts*, and

[260] Rivers v. Roadway Express, Inc., 511 U.S. 298, 302 (1994).

[261] Exceptions include Williams, supra note 202, at 207–13; Burton, Racial Discrimination in Contract Law Performance, supra note 7, at 436–37; Zatz, supra note 1, at 132. Williams's contribution is discussed *supra* Section II.B. Section 1981 is also discussed in detail and characterized as a source of contract law in the United States in Ian Ayres, Gregory Klass & Rebecca Stone, Studies in Contract Law 10, 752–53 (10th ed. 2024). Finally, one treatise on contract law devotes a full section to Section 1981. See Howard O. Hunter, Modern Law of Contracts § 1:7 (last updated Mar. 2025). More familiar treatises cite Section 1981 only in passing, if at all. See infra Section IV.A.

[262] Those exceptions include the sources collected *supra* note 261.

Article 2 of the Uniform Commercial Code ("UCC"). The first two aspire to "restate" the common law of contracts in the United States, as well as certain important statutory provisions governing contracts (like the Statute of Frauds).[263] Although Restatements do not have the status of law, many jurisdictions take their pronouncements seriously as persuasive authority.[264] Article 2 of the UCC has been adopted in statutory form by most jurisdictions in the United States and governs contracts concerning the purchase and sale of goods.[265]

None of these repositories of "contract law" cite Section 1981 or include the substance of its prohibitions on racial discrimination.[266] Section 1981's exclusion from the Restatements is, to some extent, unsurprising. The *Restatement (Second)* was published by the American Law Institute in 1981, ten years before the Civil Rights Act of 1991 ended the debate about whether Section 1981 applied to private actors.[267] Perhaps more importantly, the Restatements aspire to summarize the common law of contract as state courts have articulated it. This limited scope excludes federal statutes by definition. The UCC is older than the *Restatement (Second) of Contracts* and was written when the interpretation of Section 1981 was no less uncertain.[268] And the most recent draft of the *Restatement of Consumer Contracts*, by design, has a relatively narrow mission statement, seeking to capture trends in state common law since the rise of standard term contracts in e-commerce.[269]

[263] Restatement of the L.: Consumer Conts., at x–xi (Am. L. Inst., Tentative Draft No. 2, 2022).

[264] For more on the relationship between the Restatements and law, see generally Frederick Schauer, The Restatements as Law, *in* The American Law Institute: A Centennial History 425 (Andrew S. Gold & Robert W. Gordon eds., 2023).

[265] Ayres et al., supra note 261, at 9 ("Today, forty-nine states, plus the District of Columbia and the Virgin Islands, have enacted the UCC.").

[266] See Restatement of the L.: Consumer Conts. (Am. L. Inst., Tentative Draft No. 2, 2022); Restatement (Second) of Conts. (Am. L. Inst. 1981); U.C.C. art. 2 (Am. L. Inst. & Nat'l Conf. of Comm'rs on Unif. State L. 2023); Keren, We Insist! Freedom Now, supra note 1, at 153 (describing null search results in the Restatement and UCC for antidiscrimination rules).

[267] See generally Restatement (Second) of Conts. (Am. L. Inst. 1981); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of the U.S. Code).

[268] Uniform Commercial Code, Unif. L. Comm'n, https://www.uniformlaws.org/acts/ucc [https://perma.cc/7T5W-2GY3] (last visited Oct. 9, 2025) (indicating that the Uniform Law Commission and American Law Institute submitted the UCC to the states in 1951).

[269] Richard L. Revesz, Foreword, *in* Restatement of the L.: Consumer Conts., at xiv, xiv (Am. L. Inst., Tentative Draft No. 2, 2022).

But the leading treatises on contract law—Corbin, Farnsworth, and Williston—are continuously updated in electronic form. And although all of them discuss discrimination in a piecemeal way, none contain more than a fleeting reference to Section 1981.

The Corbin treatise is maintained in electronic form by LexisNexis. A text search for the terms "42 U.S.C.A 1981," "42 U.S.C. 1981," or "Section 1981" yields six citations.[270] One of them has nothing to do with the relevant statute.[271] The treatise contains no standalone elaboration of Section 1981's history or contemporary applications. References to Section 1981 are incidental. The treatise cites, for example, *Barfield v. Commerce Bank, N.A.*, in which a Black man claimed that a bank discriminated against him on account of race because a teller refused to break a fifty-dollar bill into smaller ones, even though the bank was willing to do so for white customers.[272] Apart from noting that the plaintiff's claim was brought under the authority of Section 1981, the treatise cites the case to elaborate on the doctrine of consideration.[273] The issue in the case was whether the plaintiff's attempt to exchange the larger bill for smaller notes represented an attempt to make a contract.[274] The bank argued that the proposed exchange was gratuitous and thus not a bargained-for exchange normally required for contract formation.[275] In an opinion authored by Judge Michael McConnell, the court concluded—citing a case that relied on an earlier edition of the Corbin treatise—that the plaintiff's proposed exchange was a genuine offer for an exchange of value under prevailing contract law.[276] For our purposes, however, the important point is that Corbin's discussion focused on the bargain theory of consideration and its application in the *Barfield* case, not the history and requirements of Section 1981 itself.[277]

[270] Lexis, Corbin on Contracts, "Section 1981" OR "42 U.S.C. 1981" OR "42 U.S.C.A 1981", 6 results (July 3, 2025) (on file with the *Virginia Law Review*). As of July 3, 2025: 1 Timothy Murray, Corbin on Contracts § 4.2 (rev. ed. 2025) [hereinafter Corbin on Contracts] (discussing at will employment); 2 id. § 5.20 (discussing consideration); id. § 6.1 (discussing mutuality of obligation and consideration); 4 id. § 17.8 (mortgages and liens); 11 id. § 59.1 (damages for mental distress); 15 id. § 83.5 (discussing a waiver of a right to arbitrate).

[271] 4 id. § 17.8 (mortgages and liens).

[272] 2 id. § 5.20 (citing Barfield v. Com. Bank, N.A., 484 F.3d 1276 (10th Cir. 2007)).

[273] Id.

[274] *Barfield*, 484 F.3d at 1278.

[275] Id. at 1279.

[276] Id. at 1278–79 (quoting Varney Bus. Servs., Inc. v. Pottroff, 59 P.3d 1003, 1014 (Kan. 2002)).

[277] See 2 Corbin on Contracts, supra note 270, § 5.20.

The latest edition of *Farnsworth on Contracts* likewise discusses Section 1981 briefly and in passing.[278] There is, to the best of the author's knowledge, no standalone discussion of the statute or its history.

Finally, an updated version of the Williston treatise contains four passing references to Section 1981.[279] Three appear in sections discussing the availability of courts to pursue federal antidiscrimination claims despite concerns about preemption, collective bargaining agreements, and arbitration.[280] The final reference appears in a section discussing statutes of limitations, where the Section 1981 claim is similarly incidental.[281]

Not all contract treatises have sidelined Section 1981. *Modern Law of Contracts*, edited by Howard O. Hunter and maintained by Westlaw, is an exception.[282] In its first chapter, "Contract Theory, Remedial Choices, and Relationships," Hunter devotes four sections to discussing racial discrimination and freedom of contract,[283] the Civil Rights Act of 1866,[284] the *Jones v. Alfred H. Mayer Co.* decision and Section 1982,[285] and Section 1981.[286] Regarding Section 1981 specifically, Hunter discusses doctrinal developments including the meaning of racial discrimination and controversies about Section 1981's applicability to pre-contractual negotiations.[287]

The Hunter treatise remains an exception. Section 1981's omission from other leading treatises is more surprising. Unlike the Restatements and the UCC, treatises have been updated since the Civil Rights Act of 1991.[288] The digital treatises maintained by the Westlaw and LexisNexis databases have been updated repeatedly.[289] And all contain extensive

[278] See, e.g., 3 E. Allan Farnsworth & Zachary Wolfe, Farnsworth on Contracts §§ 7.20, 10.01 (4th ed. 2019).

[279] 20 Williston on Contracts §§ 55:30, 55:58, 56:20 (4th ed. 2025) (last updated May 2025); 31 id. § 79:1.

[280] 20 id. §§ 55:30, 55:58, 56:20.

[281] 31 id. § 79:1 (citing Edward T. Ellis, The Statute of Limitations for 42 U.S.C. § 1981, *in* Current Developments in Employment Law 683, 683 (ALI-ABA Course of Study 1997)).

[282] Hunter, supra note 261, § 1:4–1:7.

[283] Id. § 1:4.

[284] Id. § 1:5.

[285] Id. § 1:6 (quoting Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440–41 (1968)).

[286] Id. § 1:7.

[287] Id.

[288] Compare, e.g., 20 Williston on Contracts, supra note 279, § 55:30, with Hunter, supra note 261, § 1:7.

[289] See, e.g., 4 Corbin on Contracts, supra note 270, § 17.8; 20 Williston on Contracts, supra note 279, § 55:30; Hunter, supra note 261, § 1:7.

commentary on contract formation,[290] performance,[291] modification,[292] and termination of contracts[293]—i.e., the major activities regulated by name by Section 1981.[294] Apart from the Hunter treatise, none of these field-defining treatises explains Section 1981's history or contemporary application in any detail.

B. Casebooks

The reading diet of first-year law students largely consists of legal decisions authored by courts. For virtually all doctrinal courses taken during that first year, contract law included, edited versions of these decisions are found in casebooks. Because they serve a limited pedagogical purpose, casebooks do not purport to be as comprehensive as the aforementioned treatises, the Restatements, or the UCC. Still, casebooks play a role in defining the metes and bounds of areas of law, as well as framing the way certain categories of law are conceptualized for generations of lawyers.[295] And although no semester-long course in contracts could cover every topic included in a casebook, what casebook editors choose to include in and exclude from those works reflects judgments about what is prima facie pedagogically appropriate or useful for first-year students to know about the law of contracts.[296] As K-Sue Park observes, "[E]lite legal scholars have used the casebook to identify a field's most important frameworks, its representative doctrines and illustrative cases, and the background needed to understand its development."[297] We can assess whether the scholarly community regards

[290] 1 Corbin on Contracts, supra note 270, §§ 1.1–4.14; 1 Farnsworth & Wolfe, supra note 278, §§ 2.02–3.39; 1–3 Williston on Contracts, supra note 279, §§ 4:1–7:54; Hunter, supra note 261, §§ 1–4.

[291] 1 Corbin on Contracts, supra note 270, §§ 31.1–37.13; 2 Farnsworth & Wolfe, supra note 278, §§ 8.01–9.12; 15 Williston on Contracts, supra note 279, §§ 46:1–47:7; Hunter, supra note 261, §§ 18–19.

[292] 1 Farnsworth & Wolfe, supra note 278, §§ 4.21–4.26; 2 Corbin on Contracts, supra note 270, § 5.2; 3 Williston on Contracts, supra note 279, §§ 7:38–7:39; Hunter, supra note 261, §§ 5:20–5:21.

[293] 2 Farnsworth & Wolfe, supra note 278, §§ 8.16–8.22; 3 Corbin on Contracts, supra note 270, §§ 11.6, 11.9; 12 Williston on Contracts, supra note 279, § 35:30; 20 id. § 55:37; 30 id. § 77:6; Hunter, supra note 261, § 24:12.

[294] 42 U.S.C. § 1981.

[295] Cf. K-Sue Park, The History Wars and Property Law: Conquest and Slavery as Foundational to the Field, 131 Yale L.J. 1062, 1071–72 (2022).

[296] Id. (discussing the role of casebooks in propagating knowledge of property law).

[297] Id.; see Anthony R. Chase, Race, Culture, and Contract Law: From the Cottonfield to the Courtroom, 28 Conn. L. Rev. 1, 61 (1995).

Section 1981 as an important part of the doctrinal framework governing contracts by determining whether authors of leading contract law casebooks include Section 1981 in their volumes.

To that end, this Article evaluates the latest editions of the casebooks currently sold by three of the leading publishers of casebooks in the United States: West Academic Publishing ("West"), Aspen Publishing ("Aspen"), and Carolina Academic Press ("Carolina"). A survey of West's current offerings turns up eighteen available contracts casebooks.[298] Having reviewed all eighteen of these casebooks, the author could identify only four (twenty-two percent) that cited the statute.[299] Aspen currently sells ten contracts casebooks.[300] But, per the author's

[298] West Academic, Casebooks, 23 results (Nov. 4, 2025) (on file with the *Virginia Law Review*) (filtered by "Subject: Contracts"), https://www.westacademic.com/casebooks-category/subject/Contracts. See generally Ayres et al., supra note 261; Carter G. Bishop, Daniel D. Barnhizer & George A. Mocsary, Contracts: Cases and Theory of Contractual Obligation (3d ed. 2021); Steven J. Burton & Christopher R. Drahozal, Principles of Contract Law (5th ed. 2018); Daniel J. Bussel, Contract Law and Its Application (10th ed. 2023); John D. Calamari, Joseph M. Perillo, Helen Hadjiyannakis Bender & Michael P. Malloy, Cases and Problems on Contracts (8th ed. 2023); Miriam A. Cherry, Contracts: A Real World Casebook (2d ed. 2021); John P. Dawson, William Burnett Harvey, Stanley D. Henderson, Douglas G. Baird & Robert K. Rasmussen, Contracts: Cases and Comments (12th ed. 2025); David G. Epstein, Bruce A. Markell & Lawrence Ponoroff, Cases and Materials on Contracts: Making and Doing Deals (6th ed. 2022); Martha M. Ertman, William K. Sjostrom, Jr. & Debora L. Threedy, Contract Law: An Integrated Approach (2d ed. 2023); E. Allan Farnsworth, Carol Sanger, Neil B. Cohen, Richard R.W. Brooks & Larry T. Garvin, Contracts: Cases and Materials (10th ed. 2023); Bruce W. Frier & James J. White, The Modern Law of Contracts (4th ed. 2019); Lon L. Fuller, Melvin Aron Eisenberg & Mark P. Gergen, Basic Contract Law (11th ed. 2023); Jack Graves & Henry Allen Blair, Learning Contracts (3d ed. 2022); George W. Kuney & Robert M. Lloyd, Contracts: Transactions and Litigation (5th ed. 2020); Carol L. Chomsky, Christina L. Kunz, Jennifer S. Martin & Elizabeth R. Schiltz, Contracts: A Contemporary Approach (3d ed. 2018); Daniel Markovits & Gabriel Rauterberg, Contracts: Law, Theory, and Practice (2018); James Steven Rogers & Katharine G. Young, The Law of Contracts: Cases and Materials (2017); Robert S. Summers, Robert A. Hillman & David A. Hoffman, Contract and Related Obligation: Theory, Doctrine, and Practice (8th ed. 2021).

[299] See Ayres et al., supra note 261, at 747–68; Calamari et al., supra note 298, at 227–31; Farnsworth et al., supra note 298, at 236–38; Summers et al., supra note 298, at 61–66.

[300] Aspen Publishing, Contract Law Textbooks, 13 results (Nov. 4, 2025) (on file with the *Virginia Law Review*) (filtered by "Product Type: Casebook"), https://aspenpublishing.com/collections/contract-law-textbooks? pf_pt_product_type=Casebook. See generally Barnett & Oman, supra note 258; Brian A. Blum & Amy C. Bushaw, Contracts: Cases, Discussion, and Problems (5th ed. 2022); George & Korobkin, supra note 257; Nadelle Grossman & Eric A. Zacks, Contracts in Context: From Transaction to Litigation (2d ed. 2023); Marco J. Jimenez, Contract Law: A Case & Problem-Based Approach (2d ed. 2021); Michael B. Kelly & Lucille M. Ponte, Contract Law in Focus (2017); Charles L. Knapp, Nathan M. Crystal, Harry G. Prince, Danielle Kie Hart & Joshua M. Silverstein, Problems in Contract Law: Cases and Materials (10th ed. 2023); Ben Templin & David H. Spratt, Contracts: A Modern Coursebook

review, only three (thirty percent) cite the statute.[301] And Carolina currently offers ten casebooks,[302] three of which cite the statute (thirty percent).[303] Combined, and examining only the latest available editions,[304] only twenty-six percent of casebooks—ten out of thirty-eight—cite Section 1981. Put differently, seventy-four percent of the most recent editions of their casebooks ignore the statute. And this omission occurs even though a typical contracts casebook addresses legal doctrines and statutes governing the formation,[305] enforcement,[306] modification,[307] performance,[308] and termination of contracts[309]—quintessentially contractual activities that Section 1981 names explicitly.[310]

Four of the ten casebooks citing Section 1981 do so only incidentally. That is, they cite cases to highlight some other issue in contract law, and

(3d ed. 2023); Douglas J. Whaley & David Horton, Cases, Problems, and Materials on Contracts (9th ed. 2023); David Zarfes & Michael L. Bloom, Contracts and Commercial Transactions (2011).

[301] See Grossman & Zacks, supra note 300, at 468–72; Jimenez, supra note 300, at 337–42; Templin & Spratt, supra note 300, at 835–40.

[302] See Contracts Titles, Carolina Academic Press, https://cap-press.com/ms/24/Contracts (last visited Nov. 4, 2025). See generally Gerald E. Berendt, Rebecca A. Cochran, Doris Estelle Long, Robert J. Nye & John H. Scheid, Contract Law and Practice (2d rev. ed. 2009); Charles Calleros & Stephen Gerst, Contracts: Cases, Text, and Problems (3d ed. 2023); Stewart Macaulay, William Whitford, Jonathan Lipson, Wendy Netter Epstein & Rachel Rebouché, Contracts: Law in Action (5th ed. 2024); William McGovern, Lary Lawrence & Bryan D. Hull, Contracts and Sales: Contemporary Cases and Problems (3d ed. 2013); John Edward Murray, Jr., Contracts: Cases and Materials (7th ed. 2015); Daniel P. O'Gorman, Contracts: The Law of Promises (2d ed. 2024); Seth C. Oranburg, Contract Law: Rules, Cases, and Problems (2023); Deborah Waire Post, Thomas W. Joo, Deborah Zalesne & Nancy Ota, Contracting Law (6th ed. 2023); Michael Hunter Schwartz & Adrian J. Walters, Contracts: A Context and Practice Casebook (3d ed. 2020); Robert E. Scott & Jody P. Kraus, Contract Law and Theory (6th ed. 2023).

[303] Calleros & Gerst, supra note 302, at 122–24; Murray, supra note 302, at 150, 227; Post et al., supra note 302, at 380–89.

[304] As of March 28, 2025.

[305] See, e.g., Fuller et al., supra note 298, at 452–83 (discussing offer and revocation); id. at 487–529 (discussing acceptance).

[306] Assuming that "enforcement" includes remedies, see, e.g., id. at 197 (naming five remedies for breach of contract).

[307] See, e.g., id. at 51–81, 1156–57 (discussing modification).

[308] See, e.g., id. at 327–42 (discussing the remedy of specific performance); id. at 697–720 (discussing good faith performances); id. at 1044–95 (discussing substantial performance, material breach, and related doctrines in the Uniform Commercial Code).

[309] See, e.g., id. at 1049–63 (explaining that material breach can effectively terminate further contractual obligations of the nonbreaching party).

[310] 42 U.S.C. § 1981.

those cases in turn cite Section 1981. To illustrate, the most recent editions of the Calamari and Summers casebooks include excerpts from *Barfield v. Commerce Bank, N.A.*,[311] the case described in the Corbin treatise, as noted above.[312] For present purposes the important point is that the Calamari and Summers casebooks do not appear to have included *Barfield* to discuss or highlight the import of Section 1981 for modern contracting.[313] Like the Corbin treatise, they include *Barfield* primarily to illustrate a point about the bargain theory of consideration.[314] And here Calamari and Summers are not alone. Two other casebooks—the Grossman and Templin volumes—likewise include cases in which Section 1981 is relevant. But these volumes appear to be using these cases primarily to underscore other issues in contract law like legal capacity and third-party beneficiaries.[315] So, although ten casebooks reviewed cite the statute, four of those ten do so without providing an in-depth discussion of the statute.

The remaining six casebooks, by contrast, contain more detailed discussions of the statute.[316] Three of these six contain the most in-depth discussions of Section 1981: *Contracts: Cases and Materials* (edited by E. Allan Farnsworth, Carol Sanger, Neil B. Cohen, Richard R.W. Brooks, and Larry T. Garvin),[317] *Contracting Law* (edited by Deborah Waire Post, Thomas W. Joo, Deborah Zalesne, and Nancy Ota),[318] and the most recent edition of *Studies in Contract Law* (edited by Ian Ayres, Gregory Klass, and Rebecca Stone).[319] Although these casebooks regard Section 1981 as an important limitation on the power to contract, the Ayres, Klass, and Stone volume contains the most extensive discussion of Section 1981, and

[311] 484 F.3d 1276 (10th Cir. 2007); Calamari et al., supra note 298, at 227–31; Summers et al., supra note 298, at 61–66.

[312] See supra Section IV.A.

[313] See Calamari et al., supra note 298, at 227–31; see also Summers et al., supra note 298, at 61–66.

[314] Calamari et al., supra note 298, at 227–31; see also Summers et al., supra note 298, at 61–66.

[315] Grossman & Zacks, supra note 300, at 468–72; Templin & Spratt, supra note 300, at 835–40.

[316] Ayres et al., supra note 261, at 752–54; Calleros & Gerst, supra note 302, at 122–24; Farnsworth et al., supra note 298, at 236–38; Jimenez, supra note 300, at 337–41; Murray, supra note 302, at 150, 227; Post et al., supra note 302, at 380–89.

[317] Farnsworth et al., supra note 298, at 236–38.

[318] Post et al., supra note 302, at 380–89.

[319] Ayres et al., supra note 261, at 746–67.

comes closest to regarding the statute not just as a constraint on the power to contract,[320] but also as a part of contract law.

In its chapter on contractual performance, the Ayres casebook devotes twenty pages to the topic of discrimination law, observing that—like the duty of good faith and fair dealing in performance—antidiscrimination law and public accommodations law function as mandatory rules that cannot be waived or altered by contracting parties.[321] Although nestled in a chapter about performing contracts, the section discussing discrimination acknowledges that women and minorities are disfavored in certain markets where prices for goods and services are negotiated, as well as the more equivocal evidence that such discrimination exists in markets for fixed-price goods and services.[322] Roughly two pages discuss the "nature of the problem"—i.e., the continuing existence of a variety of forms of market discrimination.[323] Another comment, two and one-half pages long, explains how the common law of public accommodation provided some limited protection against some forms of discrimination.[324] And roughly two more pages are devoted to a comment discussing various sources of antidiscrimination law other than Section 1981.[325]

More relevant to present purposes is the casebook's treatment of Section 1981. The casebook discusses a brief history of the statute[326] and addresses the changing case law governing the scope of conduct covered by it,[327] the codification of the more expansive understanding of the statute under the Civil Rights Act of 1991,[328] and the remedies available for its violation.[329] The casebook also includes excerpts from cases that test the outer bounds of the already expansive understanding of "make and enforce" contracts added by Congress.[330] Also discussed is the provocative suggestion that Section 1981 prohibits gender discrimination in contracting.[331] Because succeeding on a Section 1981 claim requires plaintiffs to establish that they have been intentionally discriminated

[320] Id. at 752–53.
[321] Id. at 747.
[322] Id. at 748–49.
[323] Id.
[324] Id. at 750–52.
[325] Id. at 766–68.
[326] Id. at 752–53.
[327] Id. at 753–54.
[328] Id. at 754–56.
[329] Id. at 754.
[330] Id. at 754–60.
[331] Id. at 761–62.

against, the casebook devotes several pages to discussing the difficulty of establishing this factual predicate.[332]

Aspen Publishing, Carolina Academic Press, and West Academic Publishing are three leading publishers of contracts casebooks in the United States. But only twenty-six percent of their contracts casebooks cite, let alone discuss, Section 1981. Fewer still explain the statute's origins and contemporary relevance. This is lamentable.[333] Not only is Section 1981's antidiscrimination rule a part of contract law (as shown in Part II), but there are several senses in which it is an important and even foundational part of contract law (as argued in Part III).

V. WHY RECLASSIFICATION MATTERS: THEORY AND PRACTICE

Having argued that there are compelling reasons to include Section 1981 in comprehensive summaries, a natural question is why reclassification matters. In other words, why does it matter whether Section 1981 counts as an important part of contract law, as much of this Article argues in Part III?

A. Theoretical Implications

Contract law theory is a vast and growing field.[334] The meta-question of what qualifies as a theory of contract law is itself a large undertaking because theories have various intellectual aims.[335] Certain critical theories of contract law engage in debunking projects that seek to undermine the role of formal categories of contract law in legal reasoning.[336] Historical theories might seek the origins of contract law's doctrines. Normative

[332] Id. at 762–66.

[333] Circumstances do seem better than those described by Professor Hila Keren, who attempted two decades ago to search prominent casebooks for the word "discrimination" and found only one book to have "discrimination" as a primary entry. Keren, We Insist! Freedom Now, supra note 1, at 153–55.

[334] A partial catalog of recent monographs about contract law theory include Brian H. Bix, Advanced Introduction to Contract Law and Theory (2023); David Campbell, Contractual Relations: A Contribution to the Critique of the Classical Law of Contract (2022); Peter Benson, Justice in Transactions: A Theory of Contract Law (2019); Prince Saprai, Contract Law Without Foundations: Toward a Republican Theory of Contract Law (2019); Hanoch Dagan & Michael Heller, The Choice Theory of Contracts (2017); Lyn K.L. Tjon Soei Len, Minimum Contract Justice: A Capabilities Perspective on Sweatshops and Consumer Contracts (2017); Nathan B. Oman, The Dignity of Commerce: Markets and the Moral Foundations of Contract Law (2017).

[335] See Stephen A. Smith, Contract Theory 3–6 (2004).

[336] Bix, supra note 334, at 99–100.

theories of contract law might start from first principles—e.g., by asserting that contract law's main goal should be to facilitate economic efficiency—and try to work out the best contract law possible given such principles.[337] And so on.

This Article does not engage with the many varieties of contract law theory that exist to determine how those theories would adjust, if at all, to the fact that Section 1981's antidiscrimination rule counts as part of contract law. Instead, this Section observes that both interpretive theories and normative theories of contract law take the law's content as a given, to varying degrees. Interpretive theories explain contract law by identifying the values that best fit and justify it.[338] But this requires treating a subset of legal norms as central to contract law or as fixed data points that their theories must explain. Normative theories are less beholden to the law as it exists; if their theories don't "fit" the doctrinal facts, normative theorists favor reforming the doctrine.[339] But insofar as normative theories presuppose concepts that render a body of law recognizable as *contract law* (as opposed to something else), even normative theories must presuppose legal norms as fixed *as* contract law; they must take for granted something they are evaluating.

If these observations are correct, then understanding Section 1981 as an important part of contract law should impact the way scholars theorize about contract law, regardless of whether the theory is interpretive or normative. Section 1981's theoretical import becomes more salient to non-consequentialist theories of contract law (interpretive or normative), theories for which optimizing outputs of certain goods is not the sole goal of contract law. Certain libertarian views in political morality, for example, hold that contract law's primary or exclusive aim is to facilitate voluntary exchanges of property between consenting adults, such that external regulatory impediments on such transactions are inherently suspect or even morally prohibited. In this vein, Richard Epstein argues against antidiscrimination law because it interferes with freedom of contract, understood as one's right to contract with anyone on any terms,

[337] Avery W. Katz, Economic Foundations of Contract Law, *in* Philosophical Foundations of Contract Law, supra note 220, at 171, 171, 177–79.

[338] Dworkin, supra note 193, at 65–68 (describing constructive interpretation as involving identifying values that both fit and justify practices). A view in this vicinity is sometimes labeled "rational reconstruction." See Bix, supra note 334, at 86.

[339] Cf. Bix, supra note 334, at 98 (observing that the failure of efficiency theories of contract to account for features of the common law of contract are not failings of such theories if they seek to reform the extant contract law).

so long as parties consent to those terms.[340] Kantian views, which do not reject wealth redistribution like libertarianism does,[341] still view contract law itself in roughly libertarian terms, according to which freely consenting parties must be allowed to merge their wills.[342] External constraints on such transactions remain suspect. And some have suggested that Rawlsian theorists should endorse a wealth-maximizing conception of contract law to maximize the size of the "pie" redistributed through a tax-and-transfer system.[343]

But if we understand Section 1981 as a fundamental part of contract law in the United States, one that is at the heart of securing whatever goods that contract law ought to be understood to secure, then libertarian and "libertarian-lite" views have less appeal, or at least incur explanatory burdens that they would otherwise lack. Contract law, best understood, would not be solely about ensuring that exchanges are uncoerced and voluntary; the subjective reasons that people enter into contracts or refuse to enter into contracts would matter, too, and contracting that reflects invidious racial discrimination would be at odds with contract law and disfavored accordingly.[344]

[340] Epstein, supra note 3. For a careful summary of Epstein's argument, efficiency arguments against antidiscrimination law more generally, and critical responses to them, see Michael J. Trebilcock, The Limits of Freedom of Contract 197–200 (1993); Cass R. Sunstein, Free Markets and Social Justice 152–62 (1997) (arguing that markets will not likely end discrimination by themselves).

[341] For a Kant-inspired view of contract law that rejects Nozick's attack on redistribution despite finding libertarianism's account of contract law "appealing," see Martín Hevia, Reasonableness and Responsibility: A Theory of Contract Law 33, 42–44 (2013).

[342] Arthur Ripstein, Force and Freedom: Kant's Legal and Political Philosophy 109–13 (2009).

[343] For work articulating, without endorsing, such a view, see Kevin A. Kordana & David H. Tabachnick, Rawls and Contract Law, 73 Geo. Wash. L. Rev. 598, 599–600 (2005) [hereinafter Kordana & Tabachnick, Rawls and Contract Law]; David Blankfein-Tabachnick & Kevin A. Kordana, On Rawlsian Contractualism and the Private Law, 108 Va. L. Rev. 1657, 1658 (2022) [hereinafter Blankfein-Tabachnick & Kordana, On Rawlsian Contractualism and the Private Law].

[344] The law of public accommodations, situated at the interface of contract and property, likewise presents a difficulty for libertarian pictures of the private sphere. Samuel R. Bagenstos, The Unrelenting Libertarian Challenge to Public Accommodations Law, 66 Stan. L. Rev. 1205, 1220–28 (2014); Elizabeth Sepper, A Missing Piece of the Puzzle of the Dignitary Torts, 104 Cornell L. Rev. Online 70, 81–86 (2019) (arguing that public accommodations law vindicates dignitary interests). For a compelling normative defense of expanding "discrimination-free zones," see generally Scott Altman, Discrimination-Free Zones and Free-to-Discriminate Zones: Where Should Discrimination Laws Apply?, Mich. St. L. Rev. Online F. (Mar. 27, 2025), https://www.michiganstatelawreview.org/forum-

By contrast, theories of contract law that view social justice as central to contract would have greater appeal. Hanoch Dagan and Avihay Dorfman, for example, have argued that private law should be understood to contain antidiscrimination norms as a matter of relational justice.[345] Lyn K.L. Tjon Soei Len argues that certain types of contractual exchanges that thwart basic human capabilities, in Martha Nussbaum's sense, should not be enforced as a matter of minimum contract justice.[346] Hila Keren claims that the underappreciated freedom *to* contract supports recognizing antidiscrimination norms as part of contract law.[347] Rebecca Stone argues that contract law is answerable to matters of justice at a foundational level, such that seeming "restrictions" on consensual exchanges are readily defensible.[348] David Blankfein-Tabachnick, Samuel Freeman, Samuel Scheffler, and Kevin Kordana interpret Rawls's principles of justice to apply to contract law, including arguably principles against unjust discrimination.[349] And Nathan Oman's market-based theory of contract law explicitly discusses the Civil Rights Act of 1866 and subsequent civil

1/2025/3/18/discrimination-free-zones-and-free-to-discriminate-zones-where-should-discrimination-laws-apply [https://perma.cc/37PK-RSGG].

[345] See Dagan & Dorfman, supra note 198, at 177–99 (arguing that courts should recognize a tort of private discrimination); cf. Hanoch Dagan & Avihay Dorfman, Justice in Contracts, 67 Am. J. Juris. 1, 13 (2022) ("Once we appreciate that reciprocal respect for self-determination and substantive equality is the premise of contract's own legitimacy, it becomes evident that the doctrines that aim at preventing attempts to invoke the normative power to contract for purposes or in ways that undermine relational justice need not rely on any external, public or other, normative commitments, as they immediately follow the innermost commitments of liberal contract itself."). The present author presupposes a more ecumenical principle of contractual reasonableness already latent in contemporary contract law, rather than relying more ambitiously on robust liberal principles advocated by Dagan and Dorfman. Martha Chamallas has named in a similar spirit a scholarly disposition that she calls "social justice tort theory," but we might generalize the term to capture private law theory more generally. Martha Chamallas, Social Justice Tort Theory, 14 J. Tort L. 309, 315 (2021) (asserting that "one important goal of tort law must be to identify, address, and ameliorate the effects of these systemic inequalities and disparities").

[346] Len, supra note 334, at 28–34, 53–56.

[347] Keren, We Insist! Freedom Now, supra note 1, at 168–72.

[348] Rebecca Stone, Putting Freedom of Contract in Its Place, 16 J. Legal Analysis 94, 94 (2024).

[349] Kordana & Tabachnick, Rawls and Contract Law, supra note 343, at 598; Samuel Scheffler, Distributive Justice, the Basic Structure and the Place of Private Law, 35 Oxford J. Legal Stud. 213, 233 (2015); Samuel Freeman, Liberalism and Distributive Justice 167–68 (2018); Blankfein-Tabachnick & Kordana, On Rawlsian Contractualism and the Private Law, supra note 343, at 1657–58; Samuel Freeman, A Response to David Blankfein-Tabachnick & Kevin A. Kordana, *On Rawlsian Contractualism and the Private Law*, 110 Va. L. Rev. 815, 817 (2024).

rights legislation, suggesting that antidiscrimination law might be necessary to ensure that markets generate the social goods that justify contract law in the first place.[350]

None of these theories are proven true by the arguments that Section 1981 counts as part of contract law any more than the libertarian and libertarian-adjacent views are disproven by that argument. But if my conceptual claims are correct, some non-consequentialist views are better situated than others in explaining and justifying extant contract law in the United States. And libertarian understandings of contract law incur greater explanatory costs—or call for even more radical reform—with respect to the same.

B. Practical Implications

Recognizing Section 1981 as an important part of contract law also carries practical implications for three activities: editing contract law summaries, applying select doctrines, and teaching first-year courses. What follows does not purport to discuss exhaustively the topic of practical implications. Instead, this Section aims to prompt further discussion and research, some of which will inevitably grapple with the question of why the common law of contract does not already incorporate antidiscrimination principles as a matter of course.

The first practical upshot is the most obvious. Those who edit and draft comprehensive summaries of contract law doctrine—including the Restatements, treatises, and casebooks discussed in Part IV, should revise those summaries to include some nontrivial discussion of the statute's history and contemporary applications. As noted, the statute applies to nearly all phases of every contractual relationship. Excluding the statute seems difficult to justify. For similar reasons, and to the extent that they do not already do so, bar examinations should likewise consider testing Section 1981.

There are also potential analytical implications. We have already seen, albeit briefly, how understanding the antidiscrimination rule might influence how courts apply doctrines like unconscionability, the duty of good faith and fair dealing, and voidness as a matter of public policy.[351]

[350] Oman, supra note 334, at 23–26 (discussing the Civil Rights Act of 1866). For a similar market-based view of contract law amenable to concerns about justice in commodification, see generally Erik Encarnacion, Contract as Commodified Promise, 71 Vand. L. Rev. 61 (2018).

[351] See supra Section II.B.

Concerning the duty of good faith specifically, racially discriminatory contractual performances might suffice to constitute a breach of contract, making breach-of-contract remedies available. More generally (though, admittedly, speculatively), legal thinkers might come to recognize that invidious discrimination is not compatible with the demands of contractual reasonableness and that antidiscrimination norms are not alien to those demands, but rather a product of them.

A more fraught question is whether professors of contract law should teach Section 1981. This question is embedded in larger debates about whether and how to discuss race, class, and its history in the United States while teaching doctrinal classes, whether in first-year courses or upper-level electives. Carliss Chatman, for example, argues that the role slavery played in generating wealth and developing commercial law makes including a discussion of slavery all but essential for having an accurate perspective on the law's development.[352] Chatman was preceded by Blake D. Morant, who urged "that those who teach, research, or practice contract law should broaden their perspective to ensure that the dynamics of human perception and disparity based upon race, gender, and class are explored in case analyses when these issues play a role in the analysis of legal rules."[353] And there are ongoing debates, some of which have become political lightning rods,[354] about whether and how to incorporate themes implicating racial justice into the law school curriculum.[355]

But teaching and discussing Section 1981 in contract law courses is different. Discussing race when the doctrine itself seems indifferent to it

[352] Carliss N. Chatman, Teaching Slavery in Commercial Law, 28 Mich. J. Race & L. 1, 38 (2023).

[353] Morant, supra note 7, at 896–97 (footnote omitted); see also Benjamin M. Gerzik, Comment, Reforging the Master's Tools: Critical Race Theory in the First-Year Curriculum, 76 S.M.U. L. Rev. F. 34, 36–39 (2023) (arguing that law professors must incorporate discussion of race into their curricula in order to teach the law accurately).

[354] See, e.g., Ryan Mills, University of Wisconsin Law School Mandates 'Re-Orientation' DEI Training for First-Year Students, Nat'l Rev. (Jan. 22, 2024, 3:37 PM), https://www.nationalreview.com/news/university-of-wisconsin-law-school-mandates-re-orientation-dei-training-for-first-year-students/ [https://perma.cc/4ZLU-D6EF].

[355] See Nicole P. Dyszlewski, Introduction, *in* Integrating Doctrine and Diversity: Inclusion and Equity in the Law School Classroom, supra note 1, at xi, xii (describing the book's collection of essays as providing strategies for incorporating themes of diversity and inclusion in the first-year curriculum); Okianer Christian Dark, Incorporating Issues of Race, Gender, Class, Sexual Orientation, and Disability into Law School Teaching, 32 Willamette L. Rev. 541, 557–60 (1996). For a classic reflection on the erasure of race in legal education, see Kimberlé Williams Crenshaw, Foreword: Toward a Race-Conscious Pedagogy in Legal Education, 11 Nat'l Black L.J. 1, 2–3 (1988).

makes the conversation seem forced. And raising race when it is not explicitly part of the legal norms under review yields uncertain pedagogical benefits if not handled properly. Section 1981, however, explicitly concerns race. It is thus amenable to the same kind of doctrinal discussions that law professors undertake routinely. Section 1981, moreover, expresses a rule that applies to all contracts and governs nearly every phase of the contractual relationship. The way it saturates contractual transactions makes failing to teach the statute difficult to justify, even if one resists calls for instructors to lecture in depth on the social or historical context in which legal rules arise and in which they are applied.

That said, law professors face choices. Rarely do semester-long courses on contract law suffice to cover everything important about matters of contract formation, let alone contract formation, modification, performance, interpretation, and remedies. Law professors must choose not merely what doctrinal categories are worth discussing, but also which of the many important issues they will omit. Reasonable minds will disagree about whether to discuss Section 1981, especially considering the fraught issues of race that must be discussed carefully.[356] But if Section 1981 represents an important part of contract law, law professors can no longer omit the statute based on the idea that it is outside the scope of discussion.

CONCLUSION

Contract law is presented—in treatises, Restatements, casebooks, and classrooms—as indifferent to race. Learning contract law in this traditional sense does not seem to require knowing much about how race historically impacted the law's development or how racial bias continues to impact wealth distribution among racial groups. Including discussions of race may nevertheless be important. But doing so seems more difficult to justify to the extent that the pedagogical goals of contracts courses are to understand and apply contract law's core doctrines.

This Article argues, however, that contract law is not formally indifferent to racial discrimination. Properly understood, American

[356] See, e.g., Muriel Morisey Spence, Teaching *Williams v. Walker-Thomas Furniture Co.*, 3 Temp. Pol. & C.R. L. Rev. 89, 89, 98 (1994) (expressing worry that discussing racial dimensions of legal problems "may perpetuate assumptions and stereotypes about the people whose perspectives we seek to incorporate"); see also Dark, supra note 355, at 557–60.

contract law prohibits racial discrimination in virtually every phase of every contractual relationship via 42 U.S.C. § 1981.[357] And, as this Article shows, Section 1981's antidiscrimination rule counts as part of contract law because it (1) replaced the discriminatory rules of contract formation codified by the South in the Black Codes, and (2) expresses a rule that protects both participants in contractual relationships and the institution of contract law itself. Because antidiscrimination rules implied by the demands of commercial fairness are already embodied in other contract law doctrines (like good faith and fair dealing), we should recognize Section 1981 as part of contract law.

What changes? Treatise writers, casebook editors, and future drafters of the *Restatement of Contracts* should revise their works to include the substance of Section 1981 as it pertains to contracts. Theorists should respond to the possibility that contract law includes antidiscrimination rules, as opposed to being regulated externally by them. Applying "traditional" doctrines of contract law correctly might require addressing evidence of discrimination. And the legal profession should understand that contract law prohibits racial discrimination in contracting.

More fundamentally, it is important to understand not only that antidiscrimination values are compatible with the values associated with freedom of contract but that they are mutually constitutive. Contract law needs antidiscrimination law to realize its basic values, including economic freedom and minimally respectful commercial exchange. Rather than undermining contractual freedoms, sound antidiscrimination laws like Section 1981 play an essential role in facilitating them. Contract law, in its best light, embodies a fundamentally collaborative ideal that seeks to bring people together for mutual benefit,[358] rather than to reinforce social silos like racially exclusive communities. Fully realizing this ideal requires more than formal equality of contract, but doing so requires at least that much. Understanding Section 1981's ban on racially discriminatory contracting is thus essential for understanding norms of commercial reasonableness as embodied in American contract law.

[357] See 42 U.S.C. § 1981(a)–(b).

[358] Daniel Markovits, Contract and Collaboration, 113 Yale L.J. 1417, 1444 (2004) (emphasizing the nature of contractual relations in building communities of respect).