Section 1981 and the Alchemy of Race and Contract

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SECTION 1981 AND THE ALCHEMY OF RACE AND CONTRACT*

Many antidiscrimination laws regulate contract relations. They impose certain duties on contracting partners with the hope that the availability of legal sanctions would transform the nature of those market interactions. Yet these antidiscrimination statues, considered a staple of public law, are conceived by many first and foremost as a vehicle to fight racism, not design contracts. Little attention has so far been given to how antidiscrimination laws support a certain way for conducting contract relations. This article addresses this gap by putting forward the claim that antidiscrimination laws which pertain to contract relations do not only regulate the public sphere of racial relations, but also shape the scope and character of the private sphere of permissible contractual behavior. Antidiscrimination laws limit a person’s freedom to contract by imposing the duty to contract without regard to race. The challenge created by these laws is to draw the line between behavior that would be considered a legitimate refusal to contract with another person and behavior that would be a prohibited private discrimination based on the other person’s race. As a result, controversies over the proper interpretation of such antidiscrimination duties inevitably involve significant normative choices regarding what conception of contract relationships, or ideal type of contract, should be promoted by antidiscrimination law and policy.

The article focuses on a particular antidiscrimination doctrine – 42 U.S.C. §1981, which imposes a duty to contract without regard to race on all contract participants in all contracts of any kind and form. A close analysis of section 1981 case law reveals two strands of interpretation which reflect two contrasting images of contract making. These images can be captured through the concept of contractual scripts. A contractual script is a recognizable scenario of contract making, an archetypical dialogue, through which a judge or a commentator understands the acts performed by participants in contractual encounters and by which he or she frames the legal issue at hand. Two contractual scripts can be recognized in section 1981 interpretation: one conceives contract relations as organized around consent; the other sees contracts as rooted in relations of interdependence. Each of these scripts carries a normative force as it provides a roadmap for determining what constitutes a contractual relationship worthy of legal protection through the imposition of antidiscrimination remedy. Through an analysis of these opposite contractual scripts, the article traces the interplay between race and contract in the interpretation of the duty under section 1981.

# INTRODUCTION

<table>
<thead>
<tr>
<th>MAKING AND ENFORCING CONTRACTS</th>
<th>2</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. <strong>FROM STATE ACTION TO PRIVATE CONDUCT - SECTION 1981 IN THE JURISPRUDENCE OF THE SUPREME COURT</strong></td>
<td>4</td>
</tr>
<tr>
<td>2. <em>State Action, Private Discrimination</em></td>
<td>6</td>
</tr>
<tr>
<td>2. <strong>THE RISE OF RACISM</strong></td>
<td>10</td>
</tr>
<tr>
<td>4. <strong>THE SUSPENSION OF RACIAL IDENTITY AND CONTRACT IDENTITY POLITICS</strong></td>
<td>18</td>
</tr>
<tr>
<td>II. <strong>A QUESTION OF INTERPRETATION – CONTRACTUAL SCRIPTS AND CONSUMER CONTRACTS UNDER SECTION 1981</strong></td>
<td>21</td>
</tr>
<tr>
<td>A. <strong>FROM GENERAL DUTY TO PARTICULAR TRANSACTION</strong></td>
<td>21</td>
</tr>
<tr>
<td>2. <em>Suspicious Intentions</em></td>
<td>24</td>
</tr>
<tr>
<td>B. <strong>THE VALUE OF CONTRACT – CONTRACTUAL SCRIPTS IN THE INTERPRETATION OF SECTION 1981</strong></td>
<td>25</td>
</tr>
<tr>
<td>C. <strong>SCRIPT I - CONSENSUAL SCRIPT</strong></td>
<td>28</td>
</tr>
<tr>
<td>1. <em>The Cycle of Contract</em></td>
<td>30</td>
</tr>
<tr>
<td>(a) <em>No-Contract</em></td>
<td>31</td>
</tr>
<tr>
<td>(b) <em>Pre-Contract</em></td>
<td>31</td>
</tr>
<tr>
<td>(c) <em>Post-Contract</em></td>
<td>32</td>
</tr>
<tr>
<td>(d) <em>No-Contract</em></td>
<td>32</td>
</tr>
<tr>
<td>2. <em>Reasonable Expectations - Expanding and Shrinking the Contractual Periods</em></td>
<td>33</td>
</tr>
<tr>
<td>(a) <em>Pre-Contract – Contract Offer and Contract Value</em></td>
<td>33</td>
</tr>
<tr>
<td>(b) <em>Mutual Expectations - When Does Post-Contract End and No-Contract Begin?</em></td>
<td>36</td>
</tr>
<tr>
<td>3. <em>Summary</em></td>
<td>39</td>
</tr>
<tr>
<td>D. <strong>SCRIPT II - INTERDEPENDENT SCRIPT</strong></td>
<td>41</td>
</tr>
<tr>
<td>1. <em>The Christian Test</em></td>
<td>43</td>
</tr>
<tr>
<td>2. <em>Regulating Contracts</em></td>
<td>44</td>
</tr>
<tr>
<td>3. <em>The Interpretive Framework of the Interdependent Script</em></td>
<td>46</td>
</tr>
<tr>
<td>(a) <em>Gradual Accumulation of Contractual Obligation</em></td>
<td>48</td>
</tr>
<tr>
<td>(b) <em>Incomplete Freedom of Contract</em></td>
<td>49</td>
</tr>
<tr>
<td>5. <em>Trust and Power</em></td>
<td>51</td>
</tr>
<tr>
<td>E. <strong>RACIAL PREJUDICE, RACIAL HIERARCHIES, AND CONTRACTUAL SCRIPTS</strong></td>
<td>53</td>
</tr>
<tr>
<td><strong>CONCLUSION</strong></td>
<td>56</td>
</tr>
</tbody>
</table>
Many antidiscrimination laws are part of a series of modern statutes that regulate contract relations. They set certain duties on contracting partners in certain contexts with the hope that the availability of legal sanctions would transform the nature of those market interactions. Despite the effect antidiscrimination laws have on the legal regime that governs contract relations, little attention has so far been given to how the interpretation of antidiscrimination duties supports perceptions and arguments about contract relations. Antidiscrimination statutes, considered by many a staple of public law, are conceived first and foremost as a vehicle to fight racism, not design contracts. In this article I wish to address this scholarly gap. I put forward the claim that antidiscrimination laws which pertain to contract relations seek not only to eradicate racism, but also to promote a conception of contractual relationships and to perfect an ideal type of contract. When courts impose remedies against a contract participant who they believe acted in a discriminatory manner, they also try to restore and remedy what they see as a defective and flawed contractual relationship. As a result, their perception of what a well functioning contractual relationship may be strongly influences their understanding of the duty not to discriminate against one’s contract partner.

I focus here on a single doctrine – 42 U.S.C. §1981. This choice might seem peculiar given that the central stage section 1981, which originated in the Civil Rights Act of 1866, once enjoyed in the landscape of civil rights law has been dimmed over the years as the more modern antidiscrimination statutes of the second half of the 20th century arrived at the scene. However, I think that section 1981 presents a promising locus to begin the reexamination of the relations between race and contract in antidiscrimination law. As opposed to other antidiscrimination statutes, whose application is limited to specific transaction types, section 1981 provides a general antidiscrimination remedy for contract participants in all contracts of any kind and form. It grants “all persons within the jurisdiction of the United States” the same right “to make and enforce contracts… as is enjoyed by white citizens”. The statute is unique in the

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1 The full text of section 1981:

**Equal rights under the law**

(a) Statement of equal rights.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined.

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment.

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.
landscape of antidiscrimination law in its general language – bestowing a universal “right to make and enforce contracts” - and in the wide scope of its applicability, covering all contracts of any type and for any value. Since its amendment and expansion in the Civil Rights Act of 1991, which has made it clear that the statute covers not only the formation of contract but all aspects of a contractual relationship and its benefits, this unique quality of general applicability has invoked the filing of a growing numbers of section 1981 claims in a variety of contexts. As a result, section 1981 is increasingly regaining its old glory as a crucial site for the assessment of antidiscrimination theory and doctrine.

In what follows I claim that the interpretation of the legal duty under section 1981 presents significant normative choices regarding what the legal ordering of contract relations should be that have so far been obscured by the exclusive focus on racism in antidiscrimination jurisprudence. Section 1981 does not only regulate the public sphere of racial relations. Section 1981 also regulates the private sphere of contractual relations because it limits the freedom to contract enjoyed by individuals in contract making. By creating the duty to contract without regard to race, certain, but certainly not all, expression of one’s freedom to contract may result in the imposition of legal remedy under section 1981. From this perspective, the difficulty often is to distinguish between permissible and illegal utilization of one’s freedom to contract. The challenge for section 1981 interpretation is to determine what behavior would be considered a legitimate refusal to contract with another person and what behavior would be deemed a prohibited discrimination by a party to a contract based on the other party’s race. If the statute is understood as determining the scope and character of the private sphere of permissible contract behavior in this way, the role different organizing images of contract relations play in the statute’s interpretation becomes more apparent and accessible. Controversies over the statutory duty reflect deep divisions over fundamental and contested questions that have occupied students of contract law, such as what is a contract, how contract relations should be conducted and maintained, and what should be regarded as the value that is being produced by those contract relations. Answers to these questions affect our understanding of the legal remedy which section 1981 provides.

To examine how courts have answered those questions and others I conduct in Section II a close analysis of section 1981 cases involving consumer contracts, a context which has been one of the most expanding bodies of section 1981 case law in recent years. I identify two strands of interpretation of section 1981 in the case law and claim that they represent two contrasting images of contract making. To capture these images I develop the concept of contractual script. I argue that when judges and commentators think about contracts in the context of assigning legal liability they inevitably capture the contractual problem through ideal acts and expressions that fall into recognizable scripts of contract practice. A contractual script implies an interpretive frame for the process of making contracts. It sets an imagined scenario of contracting, an archetypical dialogue through which an analyst understands the acts performed by participants in contractual encounters. The two interpretive approaches to section 1981 represent two different contractual scripts: one script conceives contract relations as organized around consent and relates all legal duties to a moment of mutual consent between the participants in the contractual encounter; the other script sees contracts as rooted in relations of interdependence and associates legal duties with the promotion of trust and restraint of power among the contractual partners. Each of these scripts carries a normative force as
it provides the framework for determining what constitutes a contractual relationship in the marketplace that requires legal protection. I hope to show how a choice of one contractual script over another contributes to determining when the imposition of legal remedy under section 1981 is necessary. Through an analysis of the contractual scripts that have affected the interpretation of the duty imposed on contracting parties by section 1981, I hope to present the role alternative organizing visions of contract play in the drama of antidiscrimination law.

Before turning to the full discussion I wish to emphasize that while my argument here brings to the foreground normative choices that have so far been largely neglected, I do not mean to undermine the role racism should play in the interpretation of section 1981 or other antidiscrimination laws. Quite to the contrary, my purpose in this article is to suggest a discussion about antidiscrimination law such as section 1981 that reconnects rather than separates race and contract and emphasizes their interdependence in the interpretation of antidiscrimination duty. I believe that once our understanding of contract making in the interpretation of 1981 cases is properly fleshed out, we could also have a fuller understanding of the operation of racism in those cases and the way in which antidiscrimination doctrine can be devised to address its remedial purpose in eradicating racism.

I. MAKING AND ENFORCING CONTRACTS

A. From State Action to Private Conduct - Section 1981 in the Jurisprudence of the Supreme Court

Section 1981 carries a particular jurisprudential history. At its inception in Reconstruction, the statute granted the emancipated slaves the right to make and enforce contract as part of a bundle of rights that were conceived essential to the guarantee of equal citizenship and the transformation of the South into a free labor market. The goal was to redefine racial relations by redefining the economic relations that have made them possible. Though this vision was laden with ambiguities and contradictions from its initiation, it was clear that changing patterns of economic relations by securing an effective capacity to contract was perceived as intimately related to promoting racial equality. This basic idea has been gradually lost as the jurisprudence of section 1981 evolved. At the time of Reconstruction, the statutory duties were aimed mainly at formal state laws and state officials, as well as at lingering customs. However, as laws grew more formally equal, courts and commentators have begun to see section 1981 as targeting racism, manifested in private action and located in culture and society rather than in the formation of state laws and actions of state officials. Courts now see section 1981 as joining the effort of more modern antidiscrimination laws in eradicating racism from all aspects of social practice, be it in the making of contracts, casting of votes or participation in education. In this process, the tight connection between assigning a remedy under the statute and promoting a certain conception of contractual relationship, which was central at section 1981’s inception, has been downplayed to the point that today contract is seen as nothing but a accidental background to the operation of racism.
1. **Equal Citizenship Status - The Civil Rights Act of 1866**

Section 1981 was first enacted as part of the Civil Rights Act of 1866.² The principal aim of this Reconstruction era statute was to assist in the effective implementation of the Thirteenth Amendment in the South by securing the status of the emancipated slaves as equal and autonomous members in the American free market. In the aftermath of the Civil War, the most troubling question to which all important political questions were ultimately linked was how to make the newly freed slaves part of the American polity.³ Securing the rights listed in the 1866 Act was a direct response to conditions in the South. In face of “Black Codes” enacted by Southern states to severely burden and curtail the rights of the emancipated slaves, continuing practices of denial of such rights, and an increase in acts of violence against the freedmen, leaders of the Republican party have become more and more convinced that a legislative action is needed to abolish all “badges and incidents” of slavery.⁴ But the 1866 Act was also an attempt to articulate the rights conceived as essential to political and economic freedom and individual autonomy that reflect a status of equal citizenship.⁵

The legal theory that affirmed the primacy of national civil rights enforcement authority was that the Thirteenth Amendment conferred upon all Americans the status of “freemen”. The main thrust of the statute is to define the new status of the emancipated slaves, equating the status of “freeman” with the status of “citizen”, and thus to establish

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² Section 1 of the Civil Rights Act of 1866 reads:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, … are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, …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.

Act of April 9, 1866, ch. 31, §1, 14 Stat. 27 (1866) (reenacted by the Voting Rights Act of 1870, ch. 114, §18, 16 Stat. 140, 144 (1870)) (codified in Revised Statutes of 1874, §§ 1977-1978). It was recodified at 42 U.S.C. §§1981-1982. Section 1982 grants to all citizens “the same right, in every State and Territory, as is enjoyed by white citizens thereof, to inherit, purchase, lease, sell, hold, and convey real and personal property.”

³ Randall Kennedy, *Reconstruction and the Politics of Scholarship*, 98 YALE L. J. 521, 529 (1989). To secure “freedom” to blacks, Congress first bestowed black men with a right to vote. The aim of the Civil Rights Act of 1866 was to secure the status of the newly freed slaves in the economic rather than the political arena.

⁴ Political terrorism, violence and fraud may have been as important factors in the later failure of Reconstruction as (lack of full and equal) economic status. *Id.* at , 534.

the primacy of national citizenship and national authority over the rights of citizens. It is “an absolute declaration of rights, rather than a mere prohibition of conduct”. The framers of the 1866 Act interpreted the Thirteenth Amendment’s negative prohibition of slavery as an affirmative guarantee of the fundamental rights listed in the new act: the economic rights to hold property and make contract, the means necessary to enforce those rights through appeal to courts, and the right to governmental protection of persons and property.

At the inception of the 1866 Act, having actual capacity to contract on equal terms was seen as a condition to reaching a status of equal citizenship and a precondition to an effective transition to free labor markets, the assumption being that these rights would enable the freedmen to “act as autonomous, productive workers”. As a practical matter, freedmen generally were able to make contracts but only on unfair and discriminatory terms. Former masters generally did not refuse to contract with their former slaves, but instead insisted on contract terms so onerous as to many times leave the freedmen no better, or even worse off than they had been under slavery. Being awarded the right to make contracts was thus intimately linked to the abolishment of the institution of slavery and the establishment of a new one.

2. State Action, Private Discrimination

The major controversy over the 1866 Act, which had concerned courts for much of the second half of the 20th century, was whether the statute covers private discrimination or only state action. Namely, the question was whether discrimination conducted by private individuals as opposed to officers of the state functioning under state law is actionable under the statute. The source for the controversy was the reenactment in 1870 of the 1866 Act under the Fourteenth Amendment. Since state action was a limit on congressional power under the Fourteenth Amendment, but not the Thirteenth Amendment, the dual enactment of section 1981 has created uncertainty and ambiguity over its scope: whether it reaches all forms of private discrimination relating to contracts in the same way that the Thirteenth Amendment reaches all forms of

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6 Robert J. Kaczorowski, The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866-1876, 4-7 (2005)


8 Id. at 550.

9 See Eric Foner, Reconstruction: America’s Unfinished Revolution, 1863-1877 128-142 (1988). However, Foner points out to ambiguities and contradictions in the Republicans’ free labor ideology itself, which undermines its supposedly revolutionary nature and commitment to economic egalitarianism. On the one hand, the ideology of free labor strongly opposed slavery and was the driving force behind the insistence that blacks be accorded basic civil rights, such as the right to hold property and make contracts. On the other hand, the ideology limited the willingness to use governmental power to support economically the new freedoms of blacks. Id. at 142-170. See also Kennedy, supra note 3, at 534.

10 The Voting Rights Act of 1870, supra note 2.
involuntary servitude; or whether, like the Fourteenth Amendment, its reach is limited to

Commentators have disagreed on whether the Republicans in Congress intended
to reach private acts when enacting the 1866 Act.\footnote{Kaczorowski claims that Congress members intended the statute to cover private discrimination; in fact, punishing individuals who violated federal law was the usual way of enforcing such law. What was considered extraordinary was requiring state officials to enforce federal law especially when it is in conflict with state law. In the Civil Rights Act of 1866 Congress expanded the scope of civil rights by adding state official to its scope. See Kaczorowski, \textit{supra} note 5, at 581-582, 586, 590; KACZOROWSKI, \textit{supra} note 6, at 8-11, 184-187. According to Foner there is no clear answer to this question as a historical matter. However, it seems that the Act of 1866 honored the tradition that law enforcement lay with the state and was directed against public, not private, acts of injustice. FONER, \textit{supra} note 9, at 243-246. For a survey of authorities that support both positions see Sullivan, \textit{supra} note 7, at 546, n. 36. Some commentators have questioned whether such a question had concerned Congress members at all when the statute was first enacted or even whether the distinction between state and private discrimination, or state and private actions, would have been meaningful to them at all. Rutherglen, \textit{Id.}, at 308-312; Sullivan, \textit{supra} note 7, at 559-560. The debate in Congress over the Civil Rights Act of 1866 primarily concerned issues of federalism. Congress sought to prevent the most widespread forms of racial discrimination of all kinds without, however, transforming federal power into a form of general government that threatened to take over all of state law. The dichotomy between the public and private spheres that has become a staple of the Fourteenth Amendment was yet to crystallize. Sullivan, \textit{supra} note 7, at 559-560. It seems that putting the questions in terms of private and public action tends to exaggerate the contrast between these alternatives, forcing the statute into the categories of debates over state action that arose in the latter half of the twentieth century rather than the issues Congress confronted in the middle of the nineteenth century. See Rutherglen, \textit{Id.}, at 308.} Whether the framers of the 1866 Act intended it to be applicable to private discrimination or not, early interpretation of the statute by the Supreme Court have stated that the statute only reaches state action. In the \textit{Civil Rights Cases} the Court held that the 1866 Act was restricted to state action.\footnote{Civil Rights Cases, 109 U.S. 3, 16-17, 23-25 (1883); see also State of Virginia v. Rives, 100 U.S. 313, 317-318 (1879). The Civil Rights Cases did not directly address the constitutionality of the 1866 Act. These cases held unconstitutional the provisions in the Civil Rights Act of 1875 prohibiting racial discrimination in public accommodations, defined as “inns, public conveyances on land or water, theaters, and other places of public amusement.” (Civil Rights Act of 1875, § 1, 18 Stat 335 (1875)). The Supreme Court held that they were beyond the power of Congress under the Fourteenth Amendment because they were not operated by the state and therefore did not involve any state action.} This interpretation of the statute was reinforced by later cases.\footnote{See e.g. Corrigan v. Buckley, 271 U.S. 323 (1926); Hurd v. Hodge, 334 U.S. 24 (1948).} The state action interpretation of the Fourteenth Amendment was read back into the statute and Section 1981 was soon completely overshadowed by the Fourteenth Amendment and fell into a long period in which it had virtually no independent significance.\footnote{Kaczorowski, \textit{supra} note 5, at 586-594.}

The statute enjoyed a revival only after the 1968 Supreme Court decision in \textit{Jones v. Alfred H. Mayer Co.}.\footnote{Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).} In that case the defendant, a private developer, refused to sell
the plaintiffs a home at one of its projects because they were blacks. The Court held for the plaintiffs ruling that Section 1982 “bars all racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment”. The right to purchase property “can be impaired as effectively by those who place property on the market as by the State itself”. The Court clearly understood this to be a deviation from the then common interpretation of the statute’s scope, yet claimed that such an interpretation is supported by the statutory language, the legislative history, and the accepted public norms of the time.

Decisions immediately after Jones v. Mayer reaffirmed its holding and extended it to section 1981 giving the decision the broadest scope imaginable, covering all market transactions. In Runyon v. McCrory the Court ruled that its decision in Jones v. Mayer applies to section 1981 as well since both originated in the 1866 Act. The importance of Runyon v. McCrory lies also in the fact that the case before the court involved racial discrimination in private schools, a contractual relationship not covered by the civil rights statutes then recently passed by Congress, such as the Civil Rights Act of 1968. The case concerned private, commercially operated, and generally open to the public schools that denied admission to prospective students who were blacks as a matter of general policy. The questions thus was whether Jones v. Mayer can indeed be taken at face value to hold that section 1981 applies to all private transactions of any type and kind. The Court held that it does. The schools’ actions violated section 1981.

In the aftermath of Runyon, courts considered other questions regarding the statute’s scope. Section 1981 was interpreted to support claims by whites as well as blacks, and claims by members of minority groups other than blacks. In addition,
courts held that as opposed to some of the more recent civil rights statutes, section 1981 was limited to claims of intentional discrimination, or disparate treatment, and was not expanded to support claims of disparate impact, that is to cover neutral practices with discriminatory effects.\textsuperscript{25}

The last major development in the Supreme Court jurisprudence of section 1981 was its ruling in \textit{Patterson v. McLean Credit Union}\textsuperscript{26} in which the court limited scope of section 1981 to claims of discrimination in the formation of contracts, as opposed to their performance. The petitioner, a black woman, claimed that her employer had harassed her, failed to promote her, and then discharged her, all because of her race. The Court reaffirmed the ruling in \textit{Runyon} that section 1981 prohibits racial discrimination in the making and enforcement of private contracts.\textsuperscript{27} The Court in \textit{Patterson} nevertheless offered a limited reading of the phrase “make and enforce contracts” under section 1981: the making of contracts refers only to the formation of a contract and not to problems that may arise later in the continuing contractual relationship. Such “postformation conduct does not involve the right to make a contract, but rather implicates the performance of established contract obligations”.\textsuperscript{28} The dissent in \textit{Patterson} strongly objected to this narrow construction of the statute, claiming that an employee may state a cause of action under section 1981 based upon allegations that her employer harassed her because of her race at any stage of the contractual relationship. The question should be whether the racial harassment was “sufficiently severe or pervasive as effectively to belie any claim that the contract was entered into in a racially neutral manner”.\textsuperscript{29}

The implications of \textit{Patterson} on the ability to bring claims under section 1981 were significant. However, shortly after the decision in \textit{Patterson}, Congress passed the Civil Rights Act of 1991, which amended section 1981 to effectively overturned \textit{Patterson’s} holding.\textsuperscript{30} After the 1991 Act, section 1981 defines “make and enforce contract” to include “the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship”.\textsuperscript{31} In addition, the amendment has settled any remaining doubt

\textsuperscript{24} Saint Francis College v Al-Khazraji, 481 U.S. 604, 609-13 (1987) (Arabs are a group protected by section 1981); Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617 (1987) (Jews are a group protected by section 1981); Shen v. A&P Food Stores, No. 93-CV 1184(FB), 1995 WL 728416, at *3 (E.D.N.Y. Nov. 21, 1995) (Chinese are a group protected by section 1981). Section 1981 was interpreted, however, not to support claims based on other group affiliations such as gender, sexual orientation, or disability. See \textit{Runyon}, 427 U.S. at 167.


\textsuperscript{26} \textit{Patterson v. McLean Credit Union}, 491 U.S. 164 (1989).

\textsuperscript{27} \textit{Id.} at p. 171-175.

\textsuperscript{28} \textit{Id.} at 176-177. The right to \textit{enforce} contracts refers only to any restraint on the ability to apply to a court to seek legal enforcement of a contract. \textit{Id.} at 177.

\textsuperscript{29} \textit{Id.} at 208 (Brennan J., dissenting).


as to the statute’s applicability to contracts made by private individuals. Subsection (c) declares the rights under section 1981 to be “protected against impairment by nongovernmental discrimination and impairment under color of State law”.

B. The Rise of Racism

The current state of section 1981 can be summarized as follows: section 1981 covers not only state but also private action. It pertains to all contracts, irrespective of who makes them, their subject matter, or the context of their making. It covers all conduct that occurs within a contractual relationship and not only its formation. Yet the process leading to, this understanding of section 1981 was also accompanied by a gradual shift in judicial understanding of the statute’s goal. Put on par with more recent civil rights legislation, the statute is now understood to be part of the effort at eradicating racial prejudice from all aspects of social life. At its inception, the 1866 Act was designed to abolish the “badges and incidents of slavery”, the then prevailing laws, custom, and common behavior intended to reinstitute de facto conditions of slavery. During Reconstruction those included formal state laws as well as acts by individuals, such as physical violence, refusal to contract with the freed slaves, and contracting with them but on onerous and discriminatory terms. Now racial discrimination is understood to no longer reside in formal law or established conduct. Current interpretation of section 1981 works under the assumption that the current stakes for section 1981 lie in private individual behavior.

This process reflects a subtle yet significant change in the jurisprudence of what the statue is designed to ban and eradicate. An element which was formerly part of the background is achieving central stage. This element is racism understood as a culture of lingering racial perceptions that individuals possess in their interaction with others. Justice Douglas articulated this position clearly in Jones:

The true curse of slavery is not what it did to the black man, but what it has done to the white man. For the existence of the institution produced the notion that the white man was of superior character, intelligence, and morality. The blacks were little more than livestock - to be fed and fattened for the economic benefits they could bestow through their labors, and to be subjected to authority, often with cruelty, to make clear who was master and who slave.

Some badges of slavery remain today. While the institution has been outlawed, it has remained in the minds and hearts of many white men.32

Roadway Express, Inc., 511 U.S. 298 (1994) (The 1991 Act “enlarged the category of conduct that is subject to §1981 liability”, at 303)

While different practices are being increasingly barred by civil rights laws, Douglas points out that “prejudices, once part and parcel of slavery, still persist”. The goal of antidiscrimination laws is to join the effort to correct this aspect of white consciousness.

Racial prejudice, of course, was always understood to be part of the legacy of slavery. However, for a long time section 1981 claims were directed against prejudicial practices, not the prejudice that may have motivated such practice. Though the mending of the hearts and the minds of the actors might have been a desired outcome, the ongoing practice itself, the act, was the target of the legal remedy. The most pervasive discriminatory practice by private individuals in the making of contracts that used to come under section 1981 was a simple outright refusal to contract on race-based grounds. In both Runyon v. McCrary and Jones v. Mayer the defendants refused to contract with blacks as a matter of general policy. Once the court has concluded that the defendant, as a private institution, is generally and in principle within the scope of section 1981, it has also ruled for all practical purposes that the defendant violated the statute. The manager of the school in Runyon v. McCrary may have been motivated by his own racial prejudice or he may have been simply reacting to the demand of his other customers. The exact motivation was immaterial since the practice of exclusion of black children from the school was itself a violation of the statute.

However, cases of outright refusal to contract have become scarce in recent decades in suits under section 1981. General customs and common habits of explicit exclusion of blacks have become less frequent in market practices. Patterson presents the more common situation in which the offender’s conduct cannot be construed as outright refusal to contract and is often labeled “racial harassment”. In such cases, even if section 1981 is considered to be applicable in principal, the question of whether the plaintiff is in fact liable still remains open. As a result, short of an express and general refusal to contract, defining the contours of intentional discrimination by private individuals in the making of contracts becomes a contested issue.

In this understanding lies the full meaning of what I take to be “private” discrimination. “Private” refers not only to acts conducted by individuals as opposed to act of state officials under the color of law. Since state-sponsored racial discrimination is no longer a staple of formal law, racism is relegated to the spheres of culture and society. Racial prejudice is no longer understood to manifest itself bluntly and explicitly, but tacitly, almost slyly, through acts of harassment whose origin in certain preferences, perceptions, beliefs and wants is no longer easily traceable. The challenge becomes to figure out the private motivations of an actor, to determine whether a specific contractual relationship involved conduct motivated by racism.

Recent scholarship on disparate treatment reflects this understanding of racism as a form of consciousness that legal doctrine aspires to mend. Traditionally, the racial

33 Id. at 449.
prejudice was seen as a personal “taste”- a preference, a tendency - held by those who engage in social interactions, in and out of markets.\footnote{This perception is regularly first attributed to GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION \textit{(1957)}.} As such, it affects the manner in which they conduct those interactions. Sometimes called “invidious” discrimination, it refers to situations in which, holding all other characteristics of potential contracting parties constant, a person would, if legally unconstrained, choose to discriminate in his contractual activity because of race.\footnote{MICHAEL TREBILCOCK, \textit{THE LIMITS OF FREEDOM OF CONTRACT} 188 \textit{(1993)}.} In recent decades scholars have dealt with the challenge of articulating a legal theory and a doctrinal model that will be capable of identifying and effectively combating phenomena of racism beyond such conscious acts of discrimination. These scholars point to stereotyping as the key problem which disparate treatment doctrine confronts because much discriminations stems from lingering perceptions about the qualities and abilities of different groups in society transmitted through cultural practices. Furthermore, a body of scholarship has pointed out that some of these beliefs may be held without the contracting party actually being aware of them. Because racism is so deeply ingrained in culture an individual may be unaware that the presence of racial stereotypes has influenced her perception of members of a certain group. It results in “unconscious racism”.\footnote{Charles R. Lawrence III, \textit{The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism}, 39 \textit{STAN. L. REV.} 317 \textit{(1987)}; Barbara J. Flagg, “Was Blind, But Now I Can See”: White Race Consciousness and the Requirement of Discriminatory Intent, 91 \textit{MICH. L. REV.} 953 \textit{(1993)}; David Benjamin Oppenheimer, Negligent Discrimination, 141 \textit{U. PA. L. REV.} 899, 900-917 \textit{(1993)}; Tristin K. Green, \textit{Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory}, 38 \textit{HARV. C.R-C.L. L. REV.} 91, 95-108 \textit{(2003)}.} Some scholars point out that disparate treatment discrimination is not only motivational but also cognitive in origin. A lot of the conduct now analyzed under disparate treatment theory results from categorization-related judgment errors characterizing normal human cognitive functioning.\footnote{Linda Hamilton Krieger, \textit{The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity}, 47 \textit{STAN L. REV.} 1161 \textit{(1995)}.} They examine the extent to which existing disparate treatment doctrines are equipped to deal with unconscious bias.\footnote{Amy L. Wax, \textit{Discrimination as Accident}, 74 \textit{IND. L.J.} 1129 \textit{(1999)}.} They often identify a lack of fit between the doctrinal model and the phenomenon it purports to represent and develop doctrinal models that are capable of addressing the more subtle, often unconscious, forms of bias.\footnote{Krieger, \textit{supra} note 39. To deal with these forms of bias some argue for a legal theory of disparate treatment that conceptualizes discrimination in terms of the discriminatory bias facilitated by organizational structures and institutional practices. E.g. Green, \textit{supra} note 38.}

This discussion over the nature of racism has two important implications to disparate treatment doctrines such as section 1981. First, it tends to blur the distinction between disparate treatment and disparate impact doctrine since it undermines the requirement for conscious \textit{intent} to discriminate in the context of a disparate treatment claim. If we take into account unconscious racism, racism presents itself not necessarily in intentional discriminatory acts but in acts that perpetuate existing patterns of...
perception and conduct along racial lines. What matters is not so much the intent behind the act as its consequences. The aim of the statute becomes fighting the persisting racial hierarchies that are reflected in a social practice more than the ill minded purpose behind the act.

Second, it calls for a renewed appreciation of the social practice within which the potentially racists acts are conducted. The race-based stereotypes, categories, perceptions, and patterns of behavior are understood to be part of a “race saturated culture”. However, what “culture” may mean depends on the context of action – the social practice in which individuals are performing acts that may potentially come under the anti-discrimination statute. In this article I embark on such an endeavor to connect our understanding of racism and our understanding of the social practice in which it operates. In the context of section 1981 this social practice is contract making.

C. Section 1981 and the Scope of the Private Sphere

In the second part of the twentieth century the Supreme Court has made section 1981 applicable to private individual conduct and not only public state action. Section 1981 consequently became a remedy that covers almost all contracts in the market place of any type and kind. However, this shift was not accompanied by a reexamination of how the statute may shape the private sphere of contract – how section 1981 defines a use of public power to carve out conceptions of the private ordering that will receive public reinforcement.

For the framers of the 1866 Act protecting the emancipated slaves’ right to make and enforce contracts was intimately linked to securing their status as equal citizens. The modern understanding of the statute’s goal as eradicating racism, understood as perceptions and beliefs that guide behavior, may seem to no longer necessarily relate to having the capacity to contract. Racism is an all encompassing “social illness”. It must be combated in all aspects of civil society, contract relations being only one of a series of other circumstances that require legal remedy. This understanding tends to produce the notion that section 1981 no longer addresses or affects the capacity to contract as such, but only prohibits lingering expressions of private racism that just happens to occur against a background of contract relations.

I wish to propose that any such an understanding of the statutory remedy, which reflects an aspiration to abstract race away from contract in the interpretation of section 1981, must fail. It cannot succeed because racism is never experienced in the abstract, but always against a background of some social context of action. Racial stereotypes and racial motivations are revealed through social action and interaction. The meaning of a “racist” act relies on the social activity - be it voting, providing and receiving education, or making a contract – within which the act is performed. Contract relations are the form of life within which meaning, including racist ones, are enacted. Our understanding of what might amount to a racist act is thus necessarily conditioned on a conception of how

42 The metaphor of social illness is frequently invoked. See e.g. Lawrence, supra note 38, at 321; Patterson v. McLean, 491 U.S. at 212 (Brennan J., dissenting).
acts and choices in general are and should be constructed and interpreted in contractual interactions. The meaning of racism can only be derived from its relation to this context of behavior – more accurately, from a deviation from the manner in which such behavior is or should regularly occur. A claim of racism in the making, enforcing, or performing of a contract is thus a claim that race-based perceptions disrupted the proper commencement, structuring, or completion of that encounter.

In what follow I claim that a position on how courts should construe and imagine contract relations is crucial to the interpretation of an antidiscrimination duty such as section 1981. Different position on how judges must organize this private sphere must necessarily affect different views of the duty under section 1981. The stakes are high in section 1981 interpretation for how we might want people to contract as much, if not more, as they are for how we might want them to relate to each other in a world dominated by racial identities. Questions of contract are intimately related to questions of race in the interpretation of section 1981. The two should be remarried, but on different terms than they were almost 150 years ago during Reconstruction.

In order to achieve this goal I see section 1981 as affecting a person’s capacity to contract. The statute imposes a duty on those who wish to contract to do so without regard to the other person’s race. By so doing it limits the scope of private ordering defined by the notion of freedom of contract. The statutory duty of section 1981 curtails the private sphere of free contracting and aspires to shape it in a certain way. As long been established, both the public and private spheres are creations of the state and are maintained by its power. The market is conditioned on and structured by legal

43 Several commentators have recently pointed out the limited role contract law plays in antidiscrimination analysis. See Emily M.S. Houh, Critical Race Realism: Reclaiming the Antidiscrimination Principle through the Doctrine of Good Faith in Contract Law, 66 U. Pitt. L. Rev. 455 (2005); 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 (2003); 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 (1994); Hila Keren, “We Insist! Freedom Now”: Does Contract Doctrine Has Anything Constitutional to Say? 11 Mich. J. Race & L. 133 (2005). These scholars suggest developing new remedy based in contract common law for claims of contract race discrimination, based on contract doctrine such as good faith. These suggestions confront many challenges, not the least of which is trying to fit an issue such as racial discrimination into an area of law that has traditionally been alien to it. The greatest difficulty is that conventional remedies of common law of contracts seem ill fitted to the type of claims brought under antidiscrimination doctrine (unless one allows the imposition of punitive damages). See Houh, Critical Race Realism, at 480-485. I believe that turning to “private law” doctrine does not elevate the need to ultimately confront the same hard questions presented by the current “public law” antidiscrimination doctrines – what is the extent to which the law should impose restrictions on the way in which individuals make contracts. Therefore, I take a different route by suggesting that we should think contractually about existing antidiscrimination doctrine and change the way in which we interpret it, rather than expand traditional contract law doctrines to cover claims which are now typically covered by antidiscrimination doctrine.

arrangements supported by the state. Any change in the market regime through antidiscrimination remedy such as section 1981’s is a change in the then existing legal arrangement which supports the market.\textsuperscript{45} Section 1981 participates in defining what is public and what is private. Controversies over such antidiscrimination laws are struggles over to what extent normative commitments for inclusion and equality can be extended while preserving freedom for individuals to define themselves and their actions.\textsuperscript{46}

Therefore, the central question I wish to examine is what the scope and character of the private ordering under section 1981 should be.\textsuperscript{47} Securing a broad definition to

\begin{footnotesize}

\textsuperscript{46} Minow, supra note 44, at 32.

\textsuperscript{47} My argument assumes that antidiscrimination remedies are deemed necessary, but the scope and character of their remedy is under debate. However, some scholars have questioned the desirability of antidiscrimination remedies in general. They claim that since racism is now located in social behavior and cultural patterns rather than formal legal doctrine, the need for legal remedy is no longer self evident. Rather, it relies on the effectiveness of this legal remedy compared to other vehicles for addressing the problem. And, in fact, they conclude, the market is much better vehicle to address the problem of racism than the legal remedy of antidiscrimination laws. This conclusion relies on the assumption that since prejudice is irrational those who hold such views will be ultimately pushed out of the competitive market. See Richard A. Epstein, \textit{Forbidden Grounds: The Case Against Employment Discrimination Laws} (1991); Richard A. Epstein, \textit{Equal Opportunity or More Opportunity? The Good Thing About Discrimination} 36 (2002). See also Richard Posner, \textit{An Economic Analysis of Sex Discrimination Laws}, 56 U. CHI. L. REV. 1311 (1989); Richard Posner, \textit{The Efficiency and Efficacy of Title VII}, 136 U. PENN. L. REV. 513 (1987). In response to this claim a continuing scholarly debate has evolved with respect to the relative propriety and efficacy of a “market” regime as opposed to “regulation” in reducing private contract discrimination. Supporters of regulation claim that the legal remedies of antidiscrimination laws are necessary because markets cannot eliminate or reduce racial contract discrimination and may actually systematically perpetuate such discrimination; while some racial discrimination may originate in “irrational” hostility and distaste rooted in prejudice and hatred, much discriminatory behavior is based on economically rational considerations and may actually be reinforced by marker forces. See e.g. Cass Sunstein, \textit{Why Markets Don’t Stop Discrimination}, in \textit{Free Markets and Social Change} 151, 153-157 (1997); Edward J. McCaffery, \textit{Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change}, 103 YALE L.J. 595, 602-615 (1993); George Rutherglen, \textit{Abolition in a Different Voice}, 78 VIRGINIA L. REV 1463 (1992); J. Houl Verkerke, \textit{Free to Search}, 105 HAR. L. REV. 2080 (1992); Richard Delgado, \textit{Rodrigo’s Roadmap: Is the Marketplace Theory for Eradicating Discrimination a Blind Ally?}, 93 NW. U. L. REV. 215 (1998); J. G. MacIntosh, \textit{Employment Discrimination: An Economic Perspective}, 19 OTTAWA L. REV. 275 (1987).

This debate also has a normative dimension. The two groups differ on whether as we device legal regimes the principle of private autonomy should always tramp other principles such as the advancement of racial equality or the redress of continuing practices of discrimination. Ultimately “Anti-interventionists” claim that the state should never interfere with individual autonomy and should protect an individual’s preferences with respect to his contracting partner even if the consequence of such a protection is an increase racial inequality. See Epstein, supra, at 3-4. “Interventionists” believe that state suppression of individual preferences based on a normative judgment about the quality of those preferences is legitimate in general and in particular when such preferences refer to deferential treatment based on race. Rutherglen, supra, at 1471; Trebilcock, supra note 37, at 188, 192-204; Sunstein, supra, at 161-162; Cass R. Sunstein, \textit{The Anticaste Principle}, 92 MICH. L. REV. 2410, 2411 -2412 (1994). Thus, ultimately, “Anti-
“make and enforce contract” in the 1991 Act has not resolved the controversy over the statute’s reach but rather expanded and redefined the discussion over the contours of the contractual relationship that would trigger legal liability. To assess claims under section 1981 we need now, more than ever, to grapple with questions such as what is a contract, what is the value in a contractual relationship, and what vision should be adopted for an ideal contract. To answer such questions one has to engage in the most fundamental questions of contract law and theory.

After all, all contracts involve discrimination of a type. Under a regime of freedom of contract individuals in general enjoy the freedom to contract and its counterpart, the freedom not to contract. Freedom of contract means that one may freely choose the subject of exchange, the contracting terms, and the contracting partner. It also means that one may choose not to contract with a certain partner, or under certain terms, or for a certain subject matter or amount. Thus, discrimination is an inevitable consequence of any act which manifests any person’s freedom to (not) contract. However, under a regime of complete freedom of contract, the motives for such discrimination are typically immaterial for imposing contract law liability; a certain individual may have any reason or motive to manifest an intention to contract (or an intent not to do so).

Section 1981 is one of many legal instances in which this image of complete freedom of contract regime is undermined. Section 1981 limits the freedom of contract,
or more accurately, the freedom not to contract. It intervenes with the protected territory of motivations to contract. It does so by establishing a duty to contract without regard to race. Under the statute, a person does not have the freedom not to contract on race-based grounds. Quite to the contrary, the statute places a duty on any person to contract without regard to race and imposes remedies when this duty is defied.\textsuperscript{50}

Courts do not regularly use such reasoning. Section 1981, like other antidiscrimination laws, is regularly interpreted to provide a duty “not to discriminate”.\textsuperscript{51} Courts are therefore more likely to plainly proscribe the conduct as “discriminatory”. However, such justification is empty without further qualifications. What a discriminatory acts means depends on how the duty to contract without regard to race is defined. An antidiscrimination statute such as section 1981 does not prohibit all discrimination in contracting. Contract discrimination is permissible prior to the imposition of a duty to contract without regard to race and much - indeed most - contract discrimination remains outside the scope of such duty and is not only permissible, but encouraged. It is considered a fundamental condition for the well functioning of a regime of private ordering. Rather than prohibiting all contract discrimination, section 1981 shrinks the scope of permissible contract discrimination. The statute makes some acts of contract discriminations permissible and others prohibited. The task for the interpretation of section 1981 is to tell the permissible discrimination from the prohibited one. Not selling your merchandise to a certain individual because of his race brings liability under the statute. Not selling to an individual because you believe the value he offers for the merchandise is too low is completely permissible. Demanding collateral from a person as a condition to enter a contractual relationship because of her race is prohibited. Demanding collateral from someone as a condition to enter a contractual relationship because of her bad credit history is permissible. Most cases do not present clear obvious


\textsuperscript{51} Krieger, \textit{supra} note 39, at 1166, 1245-1247.
answers. The challenge presented to the courts by the statute is to tell which motivation falls within the permissible category and which within the prohibited one.

D. The Suspension of Racial Identity and Contract Identity Politics

According to the common view of antidiscrimination policy, the goal of statutes such as section 1981 is to eradicate racism as a social phenomenon. I suggest that if we begin with the notion that antidiscrimination laws shape the private sphere of contracting, we can see these laws as reflecting also an aspiration to promote a vision of contractual relationships and to perfect an ideal type of contract. Controversies over the proper interpretation of antidiscrimination statutes such as section 1981 are disagreement over what such contractual vision should be – over how judges should imagine contract practice. The current approach to antidiscrimination statutes assumes a world saturated by racism in which individuals try to form meaningful contracts. I propose flipping this common assumption. Instead of examining how contracts function in a world of racist concepts and constructs, I examine how racism functions in a world of contractual concepts and constructs. Race and contract are interdependent in claims of contractual discrimination. To be complete, an analysis of contract antidiscrimination law must take both into account. However, one needs not necessarily start the analysis with race and then proceed to contract. Since each rely conceptually on the other, one may start the analysis from images of proper contracting and then explore how any particular vision may affect the understanding of racism.

Such an examination does not make racism irrelevant to the interpretation of contract antidiscrimination statutes such as section 1981. It does not entail an attempt to suspend racial identity, to imagine people outside of their racial identity. I wish to resist any such an inclination. In fact, the current common perception of antidiscrimination statutes as aiming at eradicating racism tends to imply such a position. According to this perception, the aspiration animating these statutes is to do away with racial identity in contractual relations, to achieve acts of contracting devoid of racial identity as far as choosing a contractual partner, negotiating, and executing the contract. In order to eradicate racial discrimination in contracting people should overcome their racial identity and become purely contractual individuals, naked of race. Contract can trump racism – we can all be just contracting individuals.

This argument for suspending racial identity with regards to one’s perception of the other contracting party carries the cost associated with any identity politics argument.\textsuperscript{52} Claims under section 1981 are claims made by a member of a racial group that the group as defined should not be a factor in people’s preferences in choosing a contract partner. They reflect the identity politics paradox of trying to make meaning through identities while enabling complete self-definition, free of the burden of identity. Such a claim ignores the difficulty of essentializing the racial category one wishes to eradicate. Essentialism is produced both by the reduction of an individual to one trait and

\textsuperscript{52} Another difficulty is, as mentioned earlier, that the aspiration to “color blindness”, may be impossible to achieve in face of phenomena such as unconscious racism. But even ignoring such cognitive limitations, the suspension of racial identity carries a political cost.
the flawed assumption that such trait determines experience, viewpoint and political interest. Such identity politics argument suggests a political orientation which is built around a pre-existing and readily discoverable social identity. Consequently, arguing only along group lines harbors the risk of forcing individual into particular roles based in pre-established traits; it suggests that identities are fixed, innate and clearly bounded, while they are actually instable, ambiguously bounded and constantly intersecting.53

My argument is informed by such critiques of the coherence of identity politics, but I wish to press another, related, point. The aspiration for contract to trump racism, for the formulation of an autonomous contracting self, assumes that the removal of all racial categories would produce the desired trusting contractual relationship. What this assumption ignores is that trust and mistrust in contractual relationships can take different forms and follow different paths. There is no one single way to create and maintain trust between contractual parties. And what a person experiences to be a trust provoking act in a contract relationship depends on that person’s own position and experience with respect to race. Therefore, the question I am interested in is not whether contract can trump racism, but how the experience of race affects the way in which one perceives the making and performance of contracts as trustworthy/untrustworthy, formal/informal, free/coerced. This is not a question of how whites see blacks while contracting, but of how one’s racial identity – of any color or shade – might affect her experience of what trust, solidarity, and respect may mean in contract practice.

Patricia Williams’s well known story about hers and Peter Gabel’s experience while they searched for apartments in New York may serve as an illustration. Gabel gave the owners of the apartment, complete strangers, a cash deposit without signing a formal contract or receiving any guarantee from them. He relied on a handshake and good vibes with the owners and consciously avoided the formalities of a signed lease. Williams, who found an apartment at a building owned by a friend, went through a quite different process in forming her lease contract. “In my rush to show good faith and trustworthiness, I signed a detailed, lengthily negotiated, finely printed lease firmly establishing me as the ideal arm’s-length transactor”. Williams reflects on their experiences:

As Peter and I discussed our experiences, I was struck by the similarity of what each of us was seeking, yet with such polar approaches. We both wanted to establish enduring relationships with people in whose houses we would be living; we both wanted to enhance trust of ourselves and to allow whatever closeness was possible. This similarity of desire, however, could not reconcile our very different relations to the tonalities of law. Peter, for example, appeared to be extremely self-conscious of his power potential (either real or imagistic) as white or male or lawyer authority figure. He therefore seemed to go to some lengths to overcome the wall that image might impose. The logical ways to establish some

measure of trust between strangers were an avoidance of power and a preference for informal processes generally.

On the other hand, I was raised to be acutely conscious of the likelihood that no matter what degree of professional I am, people will greet and dismiss my black femaleness as unreliable, untrustworthy, hostile, angry, powerless, irrational, and probably destitute. Futility and despair are very real parts of my response. So it helps me to clarify boundary; to show that I can speak the language of lease is my way of enhancing trust of me in my business affairs. As black, I have been given by this society a strong sense of myself as already too familiar, personal, subordinate to white people. I am still evolving from being treated as three-fifths of a human, a subpart of the white estate. I grew up in a neighborhood where landlords would not sign leases with their poor black tenants, and demanded that rent be paid in cash; although superficially resembling Peter's transaction, such informality in most white-on-black situations signals distrust, not trust. Unlike Peter, I am still engaged in a struggle to set up transactions at arm’s length, as legitimately commercial, and to portray myself as a bargainer of separate worth, distinct power, sufficient rights to manipulate commerce.  

Politics of contract are at work in the interpretation of section 1981, but they may be somewhat obscured by the politics of racial identity. Any particular understanding of the suspension of racial identity relies on a conception of the proper contractual individual; that is, on an image of how individual should in fact negotiate, make, and perform contracts. One may call such image an image of contractual identity. This is not an identity that claims any direct relations to a preexisting and well-defined social group. But it is an identity nevertheless in the sense that it prescribes certain behavior and not other, certain type of character and not another.

The claim that one can do away with her racial identity when contacting does not only assumes a capacity to imagine people outside of their racial identity; it also presumes a unified and clear image of a contracting person-without-race. However, contractual identity is much more fragile and internally divided than one may initially presume. It is hardly clear what perceiving the other as a contractual individual might entail. As I will show in the remainder of this article, what the image of contractual identity should be is a highly contested question the answers to which suggest a deep normative divide.

By following this path I wish to emphasize the co-existence of race and contract in claims of racial discrimination in contracting and try to see how they work against each other; or more specifically, how courts process conflict and harmony between race and contract through their interpretations of antidiscrimination doctrine. Perceiving the controversy through these lenses may offer a discussion over the issues that have animated discussions over anti-racism legislation while potentially not falling into the

essentialism trap of identity politics. Understanding the myriad connections in contemporary contract antidiscrimination doctrine between race and contract, between eradicating racial discrimination and promoting a certain conception of contract relations, may assist in better utilizing doctrine such as section 1981 in the quest for the social ideal reflected in it. To that effect, I now turn to examine the different approaches to section 1981 not only as different visions of ways to rooting out racism, but also, at the same time, as different conceptions of the way in which contracts, namely market exchange, should be made and carried out.

II. A Question of Interpretation — Contractual Scripts and Consumer Contracts under Section 1981

A. From General Duty to Particular Transaction

To examine how different organizing visions of contract relations formulate the duty to contract without regard to race in section 1981 case law, I focus on a particular type of contract relations in which section 1981 claims are now regularly made. Since the enactment of the 1991 Act a growing body of case law has dealt with section 1981 applicability in consumer contracts settings, especially retail store contracts. These cases typically involve claims brought by customers arguing that the vendor violated their right to make and enforce contracts. As opposed to section 1981 claims that are brought in contexts such as employment relations, consumer contracts in retail stores are unique because they are usually not covered by any other civil rights legislation. Therefore, section 1981 is often an exclusive avenue for remedy given its general applicability as it covers all contracts of all type and forms.

In the aftermath of the 1991 Act section 1981 specifically covers all stages of private contract relations. “Making and enforcing contract” now includes the making, performance, modification, and termination of contracts, as well as the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship. However, this extended scope has not so much solved the controversy over the statute’s reach, but opened a new discussion and controversy. Over the last two decades cases of express refusal to contract with a person because of her race have become less common. In the cases that now regularly come before the courts the intent of the vendor to discriminate and the intent of both parties to enter a contract are rarely made explicit and can only be inferred from the parties’ behavior. In order to decipher the intentions of the parties, courts have found it imperative to delve into the concrete transaction and interpret the particularities of the parties’ behavior. This shift in perspective has affected a change in the type of questions courts ask and has made the need to consider the proper normative position regarding the contours of the private sphere delineated by section 1981 as eminent as ever.

55 Retail stores are excluded from Title II. Claims relating to restaurant contracts are also regularly brought under section 1981, usually together with a Title II claim.
1. **Exclusionary Practices – Imposing an Additional Contract Term**

In the context of consumer contracts, some exclusory practices, short of outright refusal to contract, still occasionally come before the courts.\(^{56}\) Typically, such practices involve a policy of imposing additional conditions on customers who are members of a certain protected group, a condition not imposed on other customers. Courts have perceived such practices as a type of refusal to enter a contract. In other words, such an insistence on a condition to entering a contract is a prohibited exercise of the vendor’s freedom not to contract. When the exercise of that freedom is applied to certain individuals and not to others based on their membership in a racial group it is a violation of the duty to contract without regard to race and is therefore actionable under the section 1981.

Courts experience cases involving an imposition of an additional term as relatively easy cases for the customer to establish a section 1981 claim.\(^{57}\) In *Williams v. Staples, Inc.* Williams claimed that the store discriminated against him by accepting out-of-state checks of white customers as payment for goods, but refusing his out-of-state check because of his race.\(^{58}\) The court ruled that Williams had a section 1981 claim because the store refused to contract with him unless he fulfills a condition not imposed on other customers. He had sought to enter into contractual relationship with the store when he attempted to make a purchase, he met the store’s ordinary requirements for paying by out-of-state check, and he was denied opportunity to enter into contract with the store even though it afforded such opportunity to white customers.\(^{59}\)

In addition, courts have stated that whether the customer eventually decides to accept the additional term and enter the contract or not is immaterial, so long as a black customer was asked to follow contract terms different than those required from whites. In *Hill v. Shell Oil Company*, an action was brought by plaintiffs alleging a practice by gas stations of requiring African-American customers to prepay purchases while whites could pay after receiving gasoline. The court ruled that they had made a claim under section 1981 because such a pre-pay requirement “subjects African-American customers

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\(^{56}\) For relatively recent cases of outright refusal in the consumer contracts cases see e.g. Shen v. A&P Food Stores, No. 93 CV 1184 (FB), 1995 WL 728416 at *2 (E.D.N.Y. Nov. 21, 1995) (refusal to sell groceries because of customer’s race is covered by section 1981); Watson v. Fraternal Order of Eagles, 915 F.2d 235 (6th Cir. 1990) (African Americans were asked to leave a party at a private club in order to prevent them from purchasing soft drinks pursuant to a policy of only serving whites).

\(^{57}\) In consumer discrimination, courts had typically dealt with section 1981 in the context of motions to dismiss or to summary judgment, rather than in appeals on a jury trial. The courts therefore typically examine whether the plaintiff has established a prima facie case and the issue is whether, based on the facts as presented by the plaintiff, the plaintiff has a claim under section 1981 as a matter of law (in general, courts follow the burden shifting test adopted in *MacDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). Only a few courts have ever examined section 1981 claims in retail stores context beyond the prima facie phase. See Anne-Marie Harris, *Shopping While Black: Applying 42 U.S.C. §1981 to Cases of Consumer Discrimination*, 23 B.C. THIRD WORLD L.J. 1, 53-55 (2003).

\(^{58}\) Williams v. Staples, Inc., 372 F.3d 662 (4th Cir. 2004)

\(^{59}\) *Id.* at 668.
to different terms of purchase”. In another case the court ruled that a no-check policy implemented only in stores located in areas dominated by African-Americans constituted placing a special condition on plaintiffs’ right to contract; the fact that plaintiffs eventually were allowed to purchase and completed their purchase was considered immaterial.

Similarly, in *Joseph v. New York Yankees Partnership* Ms. Joseph visited Yankees Stadium to attend a game together with her two sons and her friend, who is white. Before the game they went to the Stadium Club – a restaurant located in the stadium that requires a separate pass, which they all had. Ms. Joseph claimed that she was stopped at the entrance and was told by the ticket taker that her tank top did not conform with the Stadium Club’s dress code (which was posted outside the club entrance as well as on the back of the club admission pass). Her friend, who also wore a tank top, was admitted to the club and other white women who were already sitting inside the club wore tank tops and even “skimpier” clothing. Ms. Joseph went back to her car, changed into t-shirt, returned to the club and was served. The court stated that Ms. Joseph’s allegation that, unlike non-minority patrons, she was required to observe the dress code in order to enter the Stadium Club, is sufficient to support a claim under section 1981 because it amounts to placing a different contractual condition on her.

Courts thus conceive vendors’ refusal to contract unless the customer agrees to an additional term as a violation of their duty to contract without regard to race. It is important to note for my purposes here that the practice itself is considered a violation of the statute. Courts see the store’s conduct as a violation of the statutory duty through a certain pattern of exclusionary behavior. It does not seem to matter at which point in the encounter the actionable conduct occurred. Furthermore, the question of whether the customer actually intended to buy anything specific at the store or suffered any actual monetary loss because of the refusal is immaterial. The customer needs have only *general intent* to enter a contract. The vendor needs have a *general intent not to* enter the contractual relations with the customer, unless she fulfills the additional condition, because of her race. Such general intent not to contract on the part of the vendor may be proven by an express refusal, but in the absence of direct evidence for such general intent it may be proved by reference to an exclusionary behavior of imposing additional contract terms based on race.

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60 See Hill v. Shell Oil Company, 78 F.Supp.2d 764, 777 (N.D. Ill. 1999). See also Bobbitt v. Rage Inc., 19 F.Supp.2d 512, 519 (W.D.N.C. 1998) (requiring African-American restaurant patrons to prepay for their order is actionable under section 1981); Washington v. Duty Free Shoppers, 710 F.Supp. 1288 (N.D. Cal. 1988) (the store required African-American to produce a passport or an airline ticket to shop at the store, while other customers were not).

61 Buchanan v. Consolidated Stores Corp., 125 F.Supp.2d 730, 735-736 (D. Maryland 2001); see also Perry v. Burger King Corp., 924 F.Supp. 548, 551-52 (S.D.N.Y. 1996) (restaurant provided plaintiff the food he purchased, but refused to let him use the bathroom that is ordinarily available to customers).


63 *Id.* at *4.
2. Suspicious Intentions

My concern in the remainder of the article is not with such cases of exclusionary practices which are gradually becoming a rarity in the case law. Consumer contract discrimination cases that have become more common and at the same time have presented the greatest challenge are not those that can be construed as involving a refusal to contract because of a person’s race. Rather, the cases that cause most judicial and scholarly concern are those which involve surveillance, search under suspicion of shoplifting, rude behavior, and similar conduct that may have been motivated by racist categorization. Consider *Hampton v. Dillard Department Stores, Inc.*\(^{64}\) in which Ms. Hampton was shopping with her niece, Ms. Cooper, at a Dillard department store. They are both African-American. While at the store they were under surveillance of a store security guard. At a certain point the guard suspected that Ms. Hampton might have stolen a certain item. Ms. Hampton then purchased an outfit for her niece’s son and both she and her niece received from the cashier a coupon for cologne samples, redeemable at the fragrance counter. They proceeded on to the fragrance counter which was located near the exit. While they were in conversation with the fragrance consultant they were approached by the security guard who interrupted them and then searched the plaintiff’s bag under suspicion of shoplifting. Ms. Hampton emptied her bag on the fragrance counter but no stolen items were found. Both Ms. Hampton and Ms. Cooper filed a section 1981 claim against the store.

In another case, *Garrett v. Tandy Corporation*,\(^{65}\) Mr. Garrett, an African-American, entered a Radio Shack store to buy a police scanner. While in the store he was followed by a few of the store’s employees. He was told the scanner is not in stock. He bought a few other items and gave the store’s manager his name and address so that they can inform him if they get the scanner. After Mr. Garrett left the store the store’s manager realized that a laptop computer was stolen. The manager called the police and told them he suspected Mr. Garrett. He reported only Mr. Garrett’s name to the police and made no other effort to locate the computer. Police officers came to Mr. Garrett’s home and searched it, failing to find the computer. Mr. Garrett filed a section 1981 claim.

Courts experience this type of cases as unclear with respect to the intentions of the parties. The obscuring relates both to the intention to discriminate and the intention to contract. Both the refusal to contract and the racial prejudice that motivates it are no longer expressly made, nor can they be easily inferred from the practice. The transition from the express to the implied marks a transition from the objective to the subjective, from public speech to private preferences, motives, and desires. If a vendor expressly utters her refusal to contract based on a desire to racially exclude, she is liable for discriminatingly employing her general right not to contract based on race. Racial prejudice and lack of contractual intent can be directly linked. However, when racial prejudice is neither explicitly expressed nor directly linked to a lack of intent to contract, the intentions of the contracting party are much harder to decipher.

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\(^{64}\) 247 F.3d 1091 (10th Cir. 2001).

\(^{65}\) 295 F.3d 94 (1st Cir. 2002).
The outcome of the shift in focus to “implied intent” is that contractual intention can only be judged through the lenses of the particular unfolding of a certain contractual relationship. As we will see, the question is no longer whether the vendor had a general intent not to contract with the customer. The question becomes what the particular intents of both parties to enter, maintain, and perform a specific contract were and how and when a vendor’s conduct interferes with an otherwise well functioning contractual relationship. Searching for the mysteries of racism in the particularities of a single market transaction, courts often express a need to firstly find whether there is a viable contractual relationship with which to interfere. It is here that the stakes for the shape of the private sphere of contracting that section 1981 carries become most evident.

B. The Value of Contract – Contractual Scripts in the Interpretation of Section 1981

Do Hampton, Cooper, and Garrett have section 1981 claims against the vendors? In order to understand the answers courts give to this question, I develop a typology of two strands of interpretation of the statute that present two distinct approaches. Although Patterson’s specific ruling was overturned by the 1991 Act, the two opposite approaches to antidiscrimination policy that had shaped the majority and the dissent in this case continue to inform the interpretation of section 1981. One approach, reflected in the dissent in Patterson, wishes section 1981 to be as broad as possible. It should cover as many acts of prejudice and stereotyping as possible. Supporters of this approach try to downplay the role of contract as part of an attempt to expand the statute’s applicability. The second approach, represented by the majority in Patterson, believes that the road taken in Jones v. Mayer and followed in the 1991 Act is a dangerous one; one that may lead us to a legal system which excessively polices individual behavior. Therefore, followers of this approach claim that the statute should be interpreted so that the behavior potentially covered by the statute is as narrow as possible.

I propose that this common understanding of the conflict over the proper policy to apply to section 1981 misses an important dimension of the statute’s interpretation. The two interpretive approaches to the duty under section 1981 reflect not only a normative and political conflict between different approaches to antiracism, but also a conflict between two distinct conceptions of the scope and character of the private sphere defined by section 1981 and the limits it imposes on permissible contract discrimination. Supporters of these approaches disagree on what produces a well functioning contractual relationship and, more importantly, on the value that is being produced in a contractual relationship. This dimension of the interpretation of the statutory duty has so far received little attention in disparate treatment jurisprudence. Indeed, for section 1981 to apply, the

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66 The express-implied distinction should be distinguished from the distinction between a refusal based in general store policy and a refusal based in a single employee’s will to contract, which is more a question of agency than contract covered by the doctrine of respondeat superior. See generally, General Building Contractors Association v. Pennsylvania United Engineers and Constructors, 458 U.S. 375, 393 (1982). For this issue in the consumer contracts context see Arguello v. Conoco, Inc., 207 F.3d 803, 807 (5th Cir. 2000); Bobbitt v. Rage Inc., 19 F.Supp.2d 512, 520 (W.D.N.C. 1998).
conduct must refer to a contractual relationship; this is how courts currently understand the statute. However, in the current understanding of disparate treatment jurisprudence this contract requirement of section 1981 has become merely technical; it carries no normative force since all normative energy is invested in the debate over racism.

To show how the contractual dimension figures in section 1981 interpretation I develop the concept of contractual script. With the concept of script I hope to critically evaluate visions of contract making as they appear in the case law and scholarship. By script I mean general social schemas and patterns of spoken and unspoken interaction through which performers define a situation which involves a repeated social routine.67 When an actor takes on an established social role, such as the role of a consumer, her performance relies on a repeated social routine, namely, on pre-established patterns of action which are unfolded during performance.68 I propose that acts of contracting, performed repeatedly by each individual in contemporary society almost every day, can be seen as such a routine. Repeated routines such as contracting tend to develop scripts. Scripts are standard expressive event sequences which define a frequently occurring situation.69 When a script of contracting is followed through completely it reaches the happy end of exchange. But the road to exchange can be bumpy. To have a script is also to insure the possibility of deviation from the definition of the situation as a successful exchange, that is, the occurrence of a disruptive event that will deviate from the projected definition of the encounter.

Against this background, my claim is that judges and scholars who address section 1981 cases implicitly assign contractual scripts to social performances when they interpret social instances of exchange. They try to fit any observed contract encounter

67 This understanding relies on a tradition that sees social practice as a type of performance. In each performance, individuals acquire information with respect to each other and their situation by relying on expectations and assumptions regarding the situation reflected in their mutual performance. See e.g. ERVIN GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE 6 (1959).

68 Id. at 16.

69 The script concept has been used frequently in studies of social cognition. Cognitive psychologists and sociologists refer to scripts as structures that describe appropriate sequence of events in a particular context. They see script as a predetermined sequence of actions that defines a well-known situation. See ROGER C. SCHANK & ROBERT P. ABELSON, SCRIPTS, PLANS, GOALS AND UNDERSTANDING – AN INQUIRY INTO HUMAN KNOWLEDGE STRUCTURES (1977); Robert P. Abelson, Psychological Status of the Script Concept, 36 AM. PSYCHOL. 715 (1981). A script is defined as “a stereotypical knowledge structure for an everyday event, such as going to the restaurant or visiting a doctor, around which specific instances of that event are built”. Alex Mesoudi & Andrew Whiten, The Hierarchical Transformation of Event Knowledge in Human Cultural Transmission, 4 J. COGNITION & CULTURE 1, 2-3 (2004). As event schema, scripts serve to structure and interpret information and to organize people’s expectations regarding a likely sequence of events. They provide for social actors generic prior knowledge that gives rise to certain stereotyped expectations and assumptions with respect to a repeated social situation. See SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION 96-139 (1991). Scripts assign social roles and provide modes of interaction. Every script has associated with it a number of roles and when “a script is called for use, i.e., ‘instantiated’ by a story, the actors in the story assume the roles within the instantiated script” SCHANK & ABELSON, Id., at 41-42.
into an imagined process or scenario. By so doing they suggest a pattern for the performance of exchange interactions that assigns certain roles to each participant in such social interactions. In every legal analysis of a section 1981 case an encounter is defined as “actionable” under the statute in terms of the degree in which it is perceived to conform to a certain script. The script provides expectations for an encounter successfully defined and consequently performed as contract; it also ascribes the interpretive tools to understand and assess disruptive events and assign liability in cases of deviation. A disruption may lead to departure from the expected script, determination of violation of the legal duty, and imposition of legal remedy.

The script analysis I propose thus uses scripts not as a sociological tool to study everyday behavior but as an interpretive tool to examine how judges capture that behavior. I intend to examine not how performances of everyday exchange develop certain scripts, but how judges assign certain scripts to contract practice when they engage in the legal interpretation of social performances.

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70 This point of view relies to a certain extent on those who have pointed out that law can be seen as narrative. For prominent examples see Robert M. Cover, *Forward: Nomos and Narrative*, 97 HARV. L. Rev. 4 (1992); Robin West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, in ROBIN WEST, NARRATIVE, AUTHORITY AND THE LAW 345 (1993); ANTHONY AMSTERDAM & JEROME BRUNER, MINDING THE LAW (2000).

71 This use marks a departure from the common way in which the concept of scripts has been invoked in legal scholarship. Following the cognitive sciences, most legal scholars have referred to scripts as a tool to understand the manner in which people understand and process information in everyday life and that possible effect these processes should have on legal policy. For example, some studies argued that understanding the way in which certain scripts affect certain social behavior, such as adolescent violent crimes or eye witnessing testimony, may suggest a change in the legal policy toward such phenomenon. Deanna L. Wilkinson & Jeffrey Fagan, *The Role of Firearm in Violence “Scripts”: The Dynamics of Gun Events among Adolescent Males*, 59 LAW & CONTEMP. PROBS. 55 (1996); Martin S. Greenberg et al., *When Believing Is Seeing: The Effect of Scripts on Eyewitness Memory*, 22 LAW & HUM. BEHAV. 685 (1998). In the context of contracts, it has been claimed that there is a discrepancy between the common social contract script and the legal script of contract relations, between “lay scripts” and “expert scripts”. Menachem Mautner, *Contract, Culture, Compulsion, or: What is So Problematic in the Application of Objective Standards in Contract Law?*, 3 THEORETICAL INQUIRIES L. 545, 565-570 (2002). Such a claim relies on a perceived gap between social practice and the legal interpretation of such practice and, often, on a belief that a way may be devised to bridge this gap. This is not the type of endeavor I take here. My interest lies in clashes between and among the positions held by different scholars and judges on how to script human behavior and not in the gaps between such theorized scripts and the actual behavior of those who are subject to legal sanctions.

72 Ronald Chen and Jon Hanson have turned the notions of schemas and scripts from the cognitive sciences to examine the knowledge structures of legal theory. Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. Rev. 1103 (2004); Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimating Schemas of Modern Policy and Corporate Law*, 103 MICH. L. Rev. 1 (2004). I share with them the effort to conceptualize legal theoretical attempts as scripts. However, the orientation and goals of my analysis are quite different. Chen and Hanson examine how a certain area of law develops a dominant macro script that helps determine what dispute are resolved by it, what its goal is, and also how individual cases should be resolved. They wish to show how that script may affect a categorical bias that favors a certain vision of the world and thus produce a legitimizing effect that favors the interests of a certain social group. I use scripts as an interpretive tool to capture the analytical framework that guides judges and theorists. Rather than search for the script that emerges as the dominant one in the area of contract antidiscrimination theory, I see the field of legal theory.
she does not merely describe a contract encounter, she suggests how this encounter must be imagined and what this encounter should be. Contractual scripts thus have the quality not of a particular performance, but of ideal types. As such, they reflect normative commitments and aspirations as much as an attempt to capture actual human behavior. Each contract script type provides a picture of contract relations and supplies an organizing vision to which every contract relation must aspire. Whenever a judge perceives a performance of a particular contract relationship to deviate from the script, legal remedy must be assigned to restore the debunked relationship. The controversy over section 1981 is over what ideal script type must guide legal analysis.

I therefore examine what type of archetypical script or structured scenario is implied by each interpretive approach to section 1981 cases. The two interpretive approaches to section 1981 are animated by two ideal contractual script types. The first conceives contract relations as organized around consent. The second, developed largely as a reaction to the first, sees contracts as rooted in relations of interdependence. By following the details of the contractual scripts courts use when they interpret the cases brought before them, I hope to lay out the fundamental contest over how this legal doctrine should regulate the private sphere.

I do so not only in order to highlight a normative dimension that is currently missing from the doctrinal analysis. By examining the details of the contractual scripts reflected in these two approaches I intend to make a further argument. I claim that the two interpretive approaches’ respective aspirations to narrowness and broadness cannot be sustained without further consideration of the contract dimension and the value the court wishes to bring about through it. The key to defining the scope of the legal duty imposed by section 1981 lies in the interplay between one’s position with respect to how racism should be approached by legal remedies and the details of the contractual script that supports such position. In other words, to make a compelling claim with respect to the scope of duty to contract without regard to race under section 1981, attention must be given to the relations between the image of the private sphere and the image of the public sphere that it supports.

C. Script I - Consensual Script

Most courts dealing with consumer discrimination under section 1981 espouse an interpretive approach which reflects a consensual script of contract. This approach relies on a prima facie test for section 1981 claims that includes two separate, independent, and cumulative conditions: that the defendant intended to discriminate based on race (the “discriminatory intent requirement”); and that the discrimination concerned the making

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73 On modes of legal thought as ideal types see David Trubek, Max Weber on Law and the Rise of Capitalism, 1972 Wis. L. Rev. 720.
of contracts (the “contract requirement”). Proponents of the consensual script attempt to use the contract requirement as a check against a too expansive coverage of section 1981. Motivated by a resistance to the possibility of section 1981 being employed as a source for general racial harassment cause of action against private individuals, they argue that on top of a racial motivation, the statute requires that the act be related to a certain protected activity: the making and enforcement of contract.

So in order for the statute to apply - even if membership in a protected group and the existence of discriminatory intent is assumed - one needs to determine whether the

74 The prima facie test accepted by most jurisdictions which follows the consensual script approach is that in order to establish a claim under section 1981, plaintiffs must show that “…(1) they are members of a racial minority; (2) the defendant had an intent to discriminate on the basis of race; and (3) the discrimination concerned one or more of the activities enumerated in the statute (i.e., the making and enforcing of a contract).” Morris v. Office Max, Inc., 89 F.3d 411, 413 (7th Cir. 1996). This prima facie test was widely adopted by most courts with respect to the application of section 1981 outside of the employment context. See e.g. Bellows v. Amoco Oil Co., 118 F.3d 268, 274 (5th Cir.1997); Green v. State Bar of Tex., 27 F.3d 1083, 1086 (5th Cir. 1994) ; Mian v. Donaldson, Lufkin, & Jenrette Securities Corp., 7 F.3d 1085, 1087 (2d Cir. 1993); Rutstein v. Avis Rent-A-Car Systems, Inc. 211 F.3d 1228, 1235 (11th Cir. 2000). For use of this prima facie case specifically in the context of consumer contracts under section 1981 see e.g. Hampton v. Dillard Dep't Stores, Inc., 247 F.3d 1091, 1102 (10th Cir. 2001); Shen v. A&P Food Stores, No. 93 CV 1184 (FB), 1995 WL 728416 at *2 (E.D.N.Y. Nov. 21, 1995); Ackerman v. Food-4-Less, No. 98-CV-1011, 1998 WL 316084, at *2 (E.D. Pa. June 10, 1998); Buchanan v. Consolidated Stores Corp., 125 F.Supp.2d 730, 734 (D. Maryland 2001); Hickerson v. Macy’s Department Stores, No. CIV. A. 98-3170, 1999 WL 144461, at *1 (E.D. La. March 16, 1999); Perry v. Burger King Corp., 924 F.Supp. 548, 552 (S.D.N.Y. 1996).

Some courts have criticized the requirement that plaintiff show intentional discrimination as part of the prima facie case since this issue is suitable for the ultimate determination of liability. They offered to replace the element of intentional discrimination with a more lenient test that would require the plaintiff to show that “the defendants treated the plaintiff less favorably with regard to the allegedly discriminatory act than the defendants treated other similarly situated persons who were outside plaintiff's protected class”. Benton v. Cousins Properties, Inc., 230 F.Supp.2d 1351, 1370 (N.D. Ga. 2002); Solomon v. Waffle House, Inc., 365 F.Supp.2d 1312, 1322 (N.D. Ga. 2004).

Recently, as a reaction to both versions of this prima facie test, the 6th Circuit has adopted a different test in Christian v. Wal-Mart Stores, Inc., 252 F.3d 862, 874 (6th Cir. 2001). I will address this emerging test later under the interdependent script approach.

75 “Section 1981 does not provide a general cause of action for race discrimination. . . The requirement remains that a plaintiff must point to some contractual relationship in order to bring a claim under Section 1981” Youngblood v. Hy-Vee Food Store, Inc. 166 F.3d 851, 855 (8th Cir. 2001). Similarly, a construction of the situation which suggests the existence of “an unstated, unwritten contract between commercial establishments and the public, that all who enter premises of the former will be treated equally regardless of race” was rejected by courts following the consensual script. Allowing such an implied contract “would come close to nullifying the contract requirement of altogether, thereby transforming the statute into a general cause of action for race discrimination in all contexts”. Lewis v. J.C. Penney Company, Inc. 948 F.Supp. 367, 371-372 (D. Del. 1996). See also Shawl v. Dillard’s Inc., 17 F.Appx. 908, 912 n.3 (10th Cir. 2001).

76 Interestingly, the second element of discriminatory intent is often experienced by the courts to be heavily fact depended and thus not proper for investigation in a motion to dismiss or summary judgment stage. Courts are therefore often willing to assume its existence for that stage in the litigation and see only the contract requirement as the element that can be decided as a matter of law. However, showing racial motivation, even based on the alleged facts, is not always an easy threshold to pass. See Matt Graves,
parties were engaging in the making or enforcement of contracts. Proponents of the consensual script claim that for the statute to apply, the vendor’s behavior must either interfere with the completion of the duties of an already existing contract or frustrate a specific contractual offer by the customer. The script they employ is organized around a moment of contractual consent in which the availability of section 1981 remedy depends on the location of the conduct under consideration with respect to this moment. Only conduct that occurs after the moment of consent, or after a valid contractual offer was made, may raise a section 1981 claim. By formulating this framework proponents of the consensual script believe that they establish clear bright-line rules for the interpretation of the statutory duty that assures that only cases in which a person’s right to make and enforce contract was actually violated would support a claim under section 1981. In what follows I examine to what extent they succeed in fulfilling this aspiration.

1. The Cycle of Contract

What is a consensual script of contract? The consensual script has been a staple of the legal analysis of the common law of contracts and is readily familiar to students of contract law.77 A consensual script relies on consent as the basis to any contractual relationship and contractual liability. The working consensus is that without a manifestation of consent to be legally bound to a future exchange the situation cannot be defined as involving contractual relations. The consensual script searches for a moment of contract – a moment of mutual consent. The moment of contract, when it arrives, is a moment in which the participants’ desires to contract, for a certain price under certain terms, completely correlate and their expectations from the relationship are joined and united. The moment never lasts long and soon after it the parties’ expectations grow apart and they desire to become strangers again. Nevertheless, they cannot become total strangers before they exhaust the duties that originated in the moment of contract. The contract is thus the source for their lasting connection and mutual obligation. When the contract is finally exhausted, so does their mutual dependence.

In section 1981 cases I believe it would be useful to see courts that employ a consensual script as imagining the interaction between the parties to occur along a cyclical time-sequence, defined by a moment of consent. The time sequence of the interaction between the individuals entering the store and the store is characterized by a cyclical transition between three periods of interaction: from no-contract, to pre-contract, to

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77 Some scholars rely explicitly on consent as the organizing norm of their legal analysis of contracts. See e.g. Randy E. Barnett, A Consent Theory of Contract 86 COLUM. L. REV. 269 (1986); CHARLES FRIED, CONTRACT AS PROMISE (1981). Other scholars rely on the consensual script more implicitly although it still informs much of their legal analysis of contract. For example, although a complete analysis of their position is beyond the scope of my inquiry here, I believe that a consensual script has informed the contract analysis of many members of the economic analysis of law school of thought. See e.g. Ian Ayres & Robert Gertner, Filling Gaps in Incomplete Contracts, 94 YALE L. J. 97 (1989); STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 289-470 (2004); RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 93-143 (2003).
to post-contract, and then back to no-contract. Such image of a cycle of contract is a common strategy of approaching contractual questions by consensual script minded analysts. The sharp division of the contractual cycle into distinct periods is marked by the moment of mutual consent. When in the no-contract, the parties have yet to express any desire to contract through any conventional means, and thus have no contractual obligations between them. When in the pre-contract, the parties – at least one of them but sometimes both - have expressed some desire to contract, yet it has still failed to reach the moment of consent. If, and when, the parties reach this moment of consent, they enter the post-contract. This is the period in which they carry the burdens and enjoy the benefits of that moment of contract. Each is obligated to complete and satisfy the other’s expectations as they were contemplated in that fateful moment. After completing these mutual expectations, the parties enter once more the pool of no-contract.

(a) No-Contract

In order to determine liability courts try to figure out when along this cycle of contracting the allegedly racist behavior of the vendor – for example accusation of shoplifting - occurred. Liability under the statute never arises if the interference occurs in the no-contract period in which neither of the parties had performed any act that may define the situation as one which involves negotiation for a contract. This period is marked by the parties conceived as two strangers with no contractual obligations whatsoever and therefore no liability under section 1981 can arise.

(b) Pre-Contract

In the period of pre-contract the parties are no longer the complete strangers of the no-contract period, but still they have not reached the moment of contract. It is a period of anticipation for a contract. Liability may arise - if certain conditions are met - in the pre-contractual period. Those conditions are typically requirements for a valid and definite contractual offer as defined by the consensual script. The customer must

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78 See, for example, the discussion about reliance damages in contracts by some legal economists. Those scholars claim that reliance damages should be available only during “pre-contractual relations”, namely before the parties mutually consent to enter into a legally binding contract. During the pre-contractual period all a person can hope for is either to reach a consensual contract or to get reliance damages to cover her investment so that she would return to the position she had before negotiation started. After a consensual contract is reached, expectation damages are available, namely, a party can ask a court to put her in the position she would have been in had the contract been performed. In other words, in this case too, the type of contract remedy available is a function of the determination of where along a time line leading from pre-contract to post-contract through a moment of consent the event triggering the legal claim happened. See Richard Craswell, *Offer, Acceptance and Efficient Reliance*, 48 STAN. L. REV. 481 (1996); Avery Katz, *When Should an Offer Stick? - The Economics of Promissory Estoppel in Preliminary Negotiations*, 105 YALE L.J. 1249 (1996); Lucian A. Bebchuk & Omri Ben-Shahar, *Precontractual Reliance*, 30 J. LEGAL STUD. 423 (2001).

79 See e.g. Barfiled v. Commerce Bank, N.A., 484 F.3d 1276, 1278 (10th Cir., 2007) (a customer's offer to do business in a retail setting qualifies as a phase and incident of the contractual relationship under section 1981).
express an offer to contract with the vendor that satisfies the requirements of definiteness and specificity. That is, his conduct must reflect an intention to enter into a specific contract for the purchase of a particular item. A “generalized intent” to purchase an item is insufficient to support a claim under the statute.\(^{80}\) In a frequently cited case, two African-American men were shopping at an Office Max store. Their entrance drew the attention of the store manager who called the police and informed them of “two males blacks acting suspiciously”.\(^{81}\) The two men were in the store examining time-stamp machines by the time two police officers came to the store and approached them. After a short questioning the police officers apologized for the inconvenience and left. The two men filed a section 1981 action. The court decided that the plaintiffs were not deprived of the right to make and enforce contract. Although they claim that the encounter with the police made them lose interest in the time stamp machine, “they produced no evidence to suggest they had anything more than a general interest in the merchandise”. The plaintiffs claim that the store interfered with “‘prospective contractual relations’ is speculative and insufficient to state a claim under §1981. A claim for interference with the right to make and enforce contract must allege the actual loss of a contractual interest, not merely the possible loss of future contract opportunities”.\(^{82}\)

\(c\) Post-Contract

Liability always arises if the interference occurs during the post-contractual period which lasts from the moment of contract until the parties have completed the exchange and performed the duties following from it. Under the consensual script, the moment of contract itself is very brief; in the context of retail store shopping it typically lasts between the handing of the merchandise to the cashier and the payment of money. This is the moment in which the store representative accepts the customer’s offer to contract and consents to the creation of a contractual obligation. After the making of the contract – and as long as contractual obligations exist - there is an increased duty not to discriminate. This period ends when the parties have exhausted all their mutual obligations from the contract. During this post-contract period liability would always arise if the vendor’s conduct is shown to be motivated by racial prejudice since it would interfere with contractual obligations as defined in the moment of contract.

\(d\) No-Contract

The no-contract period recurs when the post-contractual period ends, namely when both parties have completed all obligations that arise from the contract. The parties are back in the pool of no contract. Now, when the contract is no more, nothing the vendor may do can come under section 1981 because it cannot interfere with the customer’s right to make or perform contracts. Again, the customer cannot find remedy

\(^{80}\) See e.g. Hickerson v. Macy’s Department Stores, No. CIV. A. 98-3170, 1999 WL 144461 (E.D. La. March 16, 1999)

\(^{81}\) Morris v. Office Max, Inc., 89 F.3d 411, 412 (7th Cir. 1996).

\(^{82}\) Id. at 414-415.
in section 1981. So, for example, in *Lewis v. J.C. Penney* two customers who were leaving the store after purchasing a few items were approached by two store security guards. The guards suspected them of shoplifting and asked them to return to the store for the guards to inspect their bags. Thereby they searched their bags, asked for identification, and questioned them for ten to twenty minutes. One of the customers, who was black, alleged that the conduct was racially motivated. The court ruled that since “Lewis had done her shopping and was leaving the mall”, she cannot bring a section 1981 claim since “no contract relationship remained” between the parties.\(^83\) Plaintiff must point out to some contractual relationship with the store, otherwise she actually seeks remedy for the mere fact that she was stopped and interrogated for shoplifting; such conduct standing alone cannot lead to liability under the statute.\(^84\)

2. **Reasonable Expectations - Expanding and Shrinking the Contractual Periods**

The cycle of contract may seem a straightforward formal arrangement of the statutory duty. However, when attempting to define the contract periods and delineate their boundaries in particular cases, courts have often confronted difficulties. Locating the vendor’s conduct along the cycle of contract surfaces the contested issues of the contract value protected under a consensual script approach to section 1981. Identifying the stage of contracting depends on a perception regarding *when* a contract value in created and – more importantly – *what* the contract value is. In the consensual script, the value of a contractual relationship depends on the court’s decision regarding the parties’ reasonable expectations. However, neither the content of those expectations nor a way to assess those expectations is provided by the script itself. It has to be searched elsewhere.

\(\text{(a) Pre-Contract – Contract Offer and Contract Value}\)

We have seen that in the pre-contract period, unless there is a definite invitation to constitute a contractual bond in the form of a specific offer to contract, there is not enough of a contractual connection to form a basis for section 1981 liability. However, articulating a definite test for definiteness proves not to be an easy task. There are numerous instances between the time a person enters a store (which is typically the time the pre-contract period begins) and the time her offer to purchase an item is met by the store’s acceptance (that is, the moment of contract) in which a definite contractual offer may crystallize.

Courts have indicated that definiteness had been achieved in different points of time along the typical trip of a customer in a retail store. In *Morris*, as mentioned, the


\(^{84}\) *Id.* at 372. See also *Hickerson v. Macy’s*, 1999 WL 144461 at *2*. In *Hickerson*, the store’s security guard yelled at Hickerson to stop as he was approaching his car in the parking lot, after returning a pair of jeans he bought at the store earlier that same day. The security guard accused him of shoplifting and said they had him “on tape” stealing a pair of jeans. They checked his bag and receipt and permitted him to go. The court ruled that because Hickerson was not prevented from making a particular purchase or from returning the pant he had previously bought, he had no section 1981 claim.
court rejected the possibility that considering purchasing a particular item and examining it in the store is enough to constitute an offer. Some courts argued that “each time a customer takes an item off the shelf, a new contract looms, and each time the item is returned, the potential contract is extinguished”. One court reasoned:

The purpose of going to a grocery store is to buy groceries. The purpose of picking an item off the shelf at a grocery store is so one may buy it. We feel that it is a very reasonable inference that Plaintiff picked up the Spanish spice powder so that she could purchase the seasoning. Therefore, Defendant’s argument that Plaintiff’s mere act of picking up the spice is not evidence enough of her intent to form a contract fails.

Other courts have considered the moment of a definite contract offer to arrive when the customer had some items in a shopping cart; was on the way to the cashier; or presented an item to the cashier. In other words, since the earlier in the encounter a contract offers looms so does the potential for section 1981 liability, courts can expand or shrink liability may be expended or shrunk based on the time in which they determine a definite offer to contract had been formed.

Many courts insist on the existence of a definite offer to contract because they want to make sure that the customer had some kind of a “contract value”, or interest, at jeopardy. If the customer has expressed no definite contractual expectation to buy an item from the store, she could have suffered no “actual contract loss”. If she had a contractual interest at stake, reflected in her offer to contract for an item at a given price, she may have been prevented from fulfilling her intention following the vendor’s action. In such a case she has suffered a loss of contract value. The question of definiteness and the question of actual loss are therefore intertwined, almost to the point that it is hard to tell them apart. The question of loss is usually framed negatively: had there been no interference, would the customer have completed the contract as planned? Such a question is similar for all practical purposes to the question of whether the customer expressed a definite contractual offer because the loss of contractual value depends on the customer subjective intent to contract as manifested in her contractual offer.

It is important to note the type of contract interest that is reflected in this consensual script analysis. The contract value is the expectation interest to exchange a certain item for a certain price. And it is the lost of this interest that may trigger liability. Courts therefore need to decide whether the customer actually intended to purchase an item before the alleged conduct occurred. As a result, they often express difficulty and

85 See discussion of Morris v. Office Max, supra text accompanying note 82.
86 Garrett v. Tandy Corporation, 295 F.3d 94, 100 (1st Cir. 2002).
88 See e.g. Christian v. Wal-Mart Stores, Inc., 252 F.3d 862, 874 (6th Cir. 2001) (Selecting a merchandise for purchasing by putting it in a shopping cart and having the means to complete the transaction is enough to conclude that there is “a valid contract interest at stake”).
89 e.g. Morris v. Office Max, Inc., 89 F.3d 411, 414-415 (7th Cir. 1996); Hampton v. Dillard Dep't Stores, Inc., 247 F.3d 1091 (10th Cir. 2001).
unease when considering pre-contract situations under the consensual script. To illustrate the confusion with which the questions of definite offer and actual loss of contract value are presented, consider Shawl v. Dillard’s in which the court ultimately held that picking up a specific item and taking it to the cashier was not sufficient in that case to show that the plaintiff sought to enter into a contract:

Shawl argued that the basis of her contract claim was that she entered Dillard's "with the specific intent to make a specific contract: the purchase of brown sandals," "continued the formation when she asked to try on two pairs of brown sandals," and "brought the sandals to the counter with the distinct intent to buy that specific pair of sandals." The only thing that prevented her from purchasing the sandals was that the salesperson had been rude to her and she believed he would get a commission if she purchased the sandals at that time. Accordingly, she decided to put the sandals on hold, but the salesperson at the register informed her they could not be put on hold because they were on sale.

Shawl contends "[t]he fact that the purchase was to be finalized the next day is irrelevant." However, with the facts of this case, it seems highly relevant. When Shawl left the store there was no guarantee that the shoes would be there the following day. Further, there was no guarantee Shawl would return to purchase the sandals the next day. Rather than leaving Dillard's "in the middle of the contract formation" as she alleges, Shawl opted not to purchase the shoes that night and risk that they would still be available the next day. Ultimately, Shawl asks the court to allow her to proceed with a Section 1981 case based on her unexpressed subjective intent to return to purchase a pair of sandals that might no longer have been there. She has not shown an actual contract loss. Rather, she opted not to pursue the contract.

90 Some courts experience the contractual loss to be too speculative if it is so tightly linked to the customer losing her subjective interest in continuing the transaction. As a result, those courts frame the question of actual loss as a more factual inquiry and try to understand whether the customer was “actually prevented, not merely deterred, from making a purchase or receive a service after attempting to do so”. Ackerman v. Food-4-Less, 1998 WL 316084 at *2.

91 Shawl v. Dillard’s Inc., 17 F.Appx. 908, 911-912 (10th Cir. 2001) (emphasis added). The search for a definite offer and actual loss in the pre-contract period is an effect of the transition from exclusionary practices to particular transactions. Although cases of exclusionary practices are pre-contract cases under the consensual script, courts dealing with exclusionary practices do not regularly search for a definite offer or insist on actual loss to support a section 1981 claim. Quite to the contrary, the practice manifesting a general refusal to contract itself is considered actionable under section 1981. See e.g. Watson v. Fraternal Order of Eagles, 915 F.2d 235 (6th Cir.1990) (refusal to sell soft drinks by removing plaintiffs from a club constitutes a violation of section 1981); Bagley v. Ameritech Corp., 220 F.3d 518, 521 (7th Cir. 2000); Bagley v. Lumbermens Mutual Casualty Company, 100 F.Supp.2d. 879, 882 (N.D. Ill. 2000).
(b) Mutual Expectations - When Does Post-Contract End and No-Contract Begin?

So it seems that deciding when a contract value surfaces in a form of definite contract offer turns out to be a tricky question. Deciding when contract value no longer exists - or, in other words, when the post-contract period ends - proves to be much harder. One may assume that in the context of the seemingly relatively simple and discrete transaction in a retail store the post-contractual moment would be rather brief. The customer walks to the cashier with an offer to purchase an item, the cashier accepts, and the post-contract lasts from that moment until the payment is complete. However, when courts are called to set the boundaries of the post contract, this simple transaction often turns out to be quite complex. This is so because the length of the post-contract period depends on what the content of the contract value is - on what the parties’ expectations from their contractual relations were.

The post-contract period starts in the moment of contract. The moment of mutual consent both signals the creation of contractual bond and defines the boundaries of such bond by the obligations consented to by the parties. So long as the parties have not completed the obligations to which they had consented at the moment of contract, they remain in the post-contract period and may be subject to liability. The central question becomes what those obligations are. Different contractual obligations, measured by different expectations of the parties at the moment of contract, may result in substantially different understanding of the post-contract period and thus of potential section 1981 liability.

Hampton v. Dillard Department Stores, which I mentioned earlier, may serve as a good example. Recall that in that case Ms. Hampton - who was shopping with her niece, Ms. Cooper, at a Dillard department store - was stopped by a security guard under suspicion of shoplifting. At the time of the encounter she was at the fragrance counter, redeeming a coupon for cologne samples she received from the cashier after making a purchase. The court examined whether the security guard’s behavior interfered with the parties’ contractual relationship, namely, whether it occurred during the post-contract period. The jury determined that the coupon was a benefit of the plaintiff’s contractual relationship with the store. The court ruled that the granting of the coupon can be constructed either as a benefit of the purchase contract or as an offer for a unilateral contract. Under the latter construction, Ms. Hampton completed the invited performance when she walked to the fragrance counter and therefore the security guard interrupted in the middle of the transaction.92 The security guard’s behavior - for which, the court ruled, there was enough evidence to suggest that it had been motivated by racial prejudice - frustrated the redemption of the coupon. By so constructing the parties’ expectations the court extended the post-contractual relationship to cover the period of time the plaintiff spent between the cashier and the perfume stand and to find the security guard’s conduct actionable under the statute.93 Ms. Hampton, in one of the few cases that went to

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92 Or, alternatively, the granting of the coupon created an option contract section 45 of Restatement (Second) of Contracts – the court does not settle this issue and concludes it is immaterial. Hampton v. Dillard Dep’t Stores, Inc., 247 F.3d 1091, 1104 (10th Cir. 2001)

trail, was awarded $1.1 million. Her niece’s claim under section 1981 was, however, denied by the court. Ms. Cooper received a coupon as well, but the court ruled that the receipt of the coupon did not establish a contractual relationship between her and the store. Her complaint was dismissed because she failed to make a purchase herself (her aunt bought the item for her) and thus never made or attempted to make a contract with the store. The court apologetically claims that it “cannot extend §1981 beyond the contours of a contract”. 94

The Hampton court interprets the contract value that was undermined by the store’s security guard conduct to be the ability to enjoy the expected benefit of the fragrance coupon. However, there is no reason for the contract value, measured by the expectations of the parties at the time of the contract, to include many other contractual terms. As the cases in which vendors imposed additional contractual terms on customers discussed earlier demonstrate, contractual terms in consumer contracts such as these may include the method of payment, 95 the timing of payment, 96 and even the type of clothes one wears as one sits for dinner. 97

Thus, the consented terms of the contract, as shaped by the participants’ mutual expectations, may be many and diverse. Consider Garrett v. Tandy Corporation in which, as mentioned, a Radio Shack store manager wrongly suspected Mr. Garrett, who earlier purchased items in the store, of stealing a computer and reported his name to the police. The court’s majority ruled that the visit Garrett received from the police bore no real connection to the contractual relationship, since it occurred after the post-contract period was over. Put simply, “[b]y the time that he returned home, his contract with Radio Shack had been fully performed, and he was not deprived of the benefit of the bargain by subsequent events”. 98

This apparently straightforward conclusion relies on a certain conception of the contractual expectations and the contractual obligations which derive from them. Such a situation of apparent no-contract may actually be perceived as post-contract given a different set of contractual expectations and as a result bring about an opposite conclusion as to the applicability of section 1981. Two possible such interpretations were

94 Hampton v. Dillard, 247 F.3d at 1118. It is unclear to me why Ms. Cooper did not make a section 1981 claim even under the court’s own construction of the situation. If, as the court suggested, the granting of the coupon itself can be construed as an offer to enter a unilateral contract (which is unrelated to the purchase by Ms. Hampton), one can claim that Ms. Cooper accepted this offer when she begun the invited performance by approaching the fragrance counter. According to this understanding she too was denied the opportunity to complete the formation of the contract, especially since the court does not seem to be concerned with any issue of lack of consideration with respect to the transaction with Ms. Cooper. See also Barfiled v. Commerce Bank, N.A., 484 F.3d 1276, 1279-1280 (10th Cir., 2007) (ruling that the plaintiff has made a section 1981 claim when a bank refused to provide him change because asking for change constitutes a contract offer even though the bank does not charge fees for this service).

95 Williams v. Staples, Inc. 372 F.3d 662, 668 (4th Cir., 2004)


98 Garrett v. Tandy Corporation, 295 F.3d 94, 102-103 (1st Cir. 2002)
suggested in *Garrent*; one by the plaintiff, the other by the dissent. The plaintiff claimed that there are still open unresolved terms in the contract: the contract allows the customer to return the items bought for a refund within a certain period of time. When the police visited him, Garrett still had this right. He claimed that he intended to return an item he bought and that his ardor was cooled by the visit form the police. The majority rejected this claim arguing that although “the right to return merchandise is incident to, and, thus, part of, the prototypical retail contract”, the option to return an item is merely a possibility to modify the contract. Garrett, the court ruled, must allege actual loss, not the mere theoretical loss of possible future opportunity to modify the contract.

Written by Chief Judge Boudin, the dissent offered an additional different understanding of the parties’ contractual expectations, which would also trigger section 1981 liability. According to Boudin’s interpretation of the situation, the freedom from non-founded harassment should be considered a term of the contract, given the parties reasonable expectations:

Radio Shack’s action in sending policemen to Garrett's home to investigate shoplifting after his purchase, if Garrett was singled out solely because he was black, could be deemed a sufficient interference to trigger liability.

What one describes as an ‘interference’ with the right to ‘make’ a contract and to ‘enjoy’ its ‘benefits’ depends on judicial construction. Section 1981 is now (post-Patterson) commonly used to remedy racial discrimination in continuing employment relationship, yet to do so is to interpolate reasonable expectations: employment contracts do not normally say that freedom from harassment is a contracted for benefit of employment. Similarly, one who makes a purchase at Radio Shack would not ordinarily expect that a no-doubt humiliating visit from the police, prompted by racial bias on the store's part, would directly follow.

Boudin points out that the reasonable expectations of the parties which define the terms of the contract are a judicial construct. There is no inherent reason in the consensual script to limit them to the expectation to exchange a certain item for its declared monetary value.

Another frequently cited case, *Youngblood v. Hy-Vee Food Store, Inc.* suggests similar conflicting visions of the parties’ expectations under the contract. After making a purchase the plaintiff was stopped by a store employee as he was walking toward the exit and was detained for 20 minutes for suspicion of shoplifting. The employee suspected that he filled up a beef jerky canister he bought with the content of another canister. The employee took the beef jerky Youngblood bought from him. Then after, the police

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99 *Id.* at 102.
100 *Id.* at 107-108 (Boudin J., dissenting) (emphasis in original, citation omitted). Chief Judge Boudin’s opinion, as we shall see later, generally follows an interdependent script of contact; but he claims that similar outcome can be reached also under the majority’s construction.
101 166 F.3d 851 (8th Cir. 2001).
arrived and arrested him. The criminal charges brought against Youngblood were ultimately dismissed. 102 The majority ruled that plaintiff had no claim under section 1981 because at the time of the event the purchase was complete and no contractual relationship remained. The majority ruled that “[o]nce Youngblood paid the cashier and received the beef jerky from the cashier, neither party owed the other any duty under the retail-sale contract”. 103 Here also, the dissent offered a different construction of the situation which extends the post-contractual period through a different understanding of the parties’ expectations: “A person’s right to leave a store where he has purchased an item without being surrounded, detained, and having the item removed from his possession (and his money not returned) can easily be understood as a ‘benefit’ of the contract”. 104

To conclude, it turns out that the scope and length of the period in which section 1981 liability may arise can only be ascertained based on the determination of what the particular expectations of the parties from the contract are. These expectations define the boundaries of the contractual value deserved of legal protection. Contract parties in retail store contracts rarely explicitly express their expectations from the contract. They more often rely on certain conventions with respect to the performance of the cultural ritual of shopping. When courts interpret their performances in the context of assigning section 1981 liability they inevitably extrapolate reasonable expectations. If those expectations include only receiving a certain item for a certain price, then the extent of the statutory duty would be quite limited. However, if those expectations may include further terms, including, for example, the expectation not to be single out as a potential shoplifter because of your race, then the post contract period would look quite differently. When courts decide what the parties’ reasonable expectations are they determine the scope of permissible contract discrimination.

3. Summary

Consensual script interpretation of section 1981 cases relies on a notion that voluntary acts of mutual consent are the source for contractual value and thus contractual obligation. An actionable conduct under section 1981 is that which undermines contractual value so created. Consensual script’s proponents aspire to articulate a system of bright-line rules in which the contract requirement plays only the technical role of a gate keeper. I hope that my analysis so far have persuaded the reader that this wish is often, if not always, unachievable in practice. The consensual script may potentially offer a less narrow interpretation of section 1981 than some of its supporters might hope. How racial prejudice might undermine the contractual value depends on the content of the consented contract value, namely, on a conception of the participants’ reasonable expectations. Courts routinely read expectations into contracts. However, positions toward the content of contractual expectations in the interpretation of section 1981 seem

102 Id. at 853-854.

103 Id.. Furthermore, the fact that the store wrongfully confiscated items purchased by a customer may offer plaintiff some remedy, but the “nature of the action, however, is not in contract, but in tort”. Id. at p. 855.

104 Id. at p. 859 (Arnold J., dissenting).
to draw on intuitions that are external to the consensual script itself. The consensual conceptual framework offers very limited tools to identify and assess such intuition. To decide which expectations it would be reasonable to interpolate into the contractual relations, a court must look into substantive considerations that are outside the contours of the consensual script. Proponents of the consensual script may very well have a certain view as to what this contractual value should be. But they cannot find support for such a view in the supposed technicality of their classificatory system. The system of a cycle of contract does not answer the normative questions that are on the table. The difficulty is that a position regarding these questions is exactly what is called for when considering the duty under section 1981.

Within the consensual script any race-based preference is a private preference. A purely consensual script would perceive all private preferences, including racial prejudice, as exogenous to the model of contracting and therefore outside the judgment of the law. Those who wish to provide remedy against private acts that reveal race-based preferences while still adhering to some version of the consensual script face a puzzle. The question is how a script that has traditionally relied on indifference to the private preferences affecting contract making may now take them into account. Section 1981 requires suppression of some private preferences in order to avoid statutory sanction. The difficulty is to articulate a version of a consensual script that might support it, to find a compelling basis for such suppression without undermining the whole theory of market relations on which the script is founded. The task is not only to claim that personal preferences in contracts are not outside of the judgment of the law, that they are and

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105 The parties’ expectations are, by definition, outside of the script’s parameters because they are determined by the particular preferences of the parties. The inevitable need to consider and judge the content of individual preferences in legal analysis of contractual relations was discussed in other contexts. In the context of the common law of contracts, many legal economists claim that while the purpose of contracts is to promote the preferences that compose an individual well-being, the content of these preferences should have no normative effect on the legal analysis they propose. They claim that individual well-being may include and accommodate any imaginable preference, taste, or desire. LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS V. WELFARE 18-21 (2002). The important thing to note is that according to this view in a regime of complete freedom of contract the decision maker should not dictate preferences - the only role for legal rules is to supply the mechanism for the maximization of those individual internalized preferences. Furthermore, the legal rules do not affect the subjective “ends”, “preferences”, “tastes” which are exogenous to the legal analysis and are irrelevant to its function. Id. at 413-418, 431-436. This image of utility maximization through law has been criticized as incompatible with actual processes of judgment and decision making. Some scholars have claimed that, based on observations from cognitive psychology and behavioral economics, some legal rules, supposedly external and objective means, are not neutral with respect to how individuals see their subjective ends and therefore affect these individuals’ process of choice – in fact, legal rules influence the substance of the process and consequently the choices made. Furthermore, some motivations that are considered external to individuals’ ends by traditional law and economics are constant components of many individuals’ internal goals as they engage with each other within the confines of a legal rule system. See e.g. Russell B. Korobkin & Thomas S. Ulen, Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics, 88 Cal. L. Rev. 1051 (2000); Christine Jolls, Cass R. Sunstein and Richard H. Thaler, A Behavioral Approach to Law and Economics, 50 Stan. L. Rev. 1471 (1998); Mark Kelman, Choice and Utility, 1979 Wis. L. Rev. 795. For implications of this approach to contract law see e.g. Christine Jolls, Contracts As Bilateral Commitments: A New Perspective on Contract Modification, 26 J. LEGAL STUD. 203 (1997) Russell Korobkin, The Status Quo Bias and Contract Default Rules, 83 CORNELL L. REV. 608 (1998).
should be judged and assessed by legal doctrines such as section 1981; the challenge is also to be able to identify, analyze, and tell apart different personal preferences and motives within a conceptual framework that to a large degree has kept them exogenous to the analysis. In the consensual script the duty imposed by section 1981 is the duty not to let any race-based preferences interfere with one’s choice of a contracting partner, a duty to treat the other party with “equal respect”, namely to perceive the other party as a contracting individual with full and equal capacity to make contracts. However, it is this demand for equal respect that stands in direct opposition to the perception of contracts as a vehicle to fulfillment of personal preferences. There is a fundamental inconsistency between the requirement for equal respect and the commitment to allow personal preferences to prevail.106

In other words, the challenge still remains to delineate the contours of permissible contract discrimination. Supporters of a consensual script approach to section 1981 do not acknowledge the inevitable moment of judgment in which the contract requirement presents a normative choice regarding what the legal regime of private ordering should be, a choice that can no longer be kept apart from the existence or lack of existence of “discriminatory intent”. The result is what seems to be an arbitrary application of section 1981 liability. In antidiscrimination doctrines such as section 1981, consent and prejudice, contract and race, remain in a state of irreconcilable differences.

I emphasized the interpretive rather than necessary character of the consensual script to point out the manner in which a certain conception of the arrangement of a private ordering may affect the scope and character of a doctrine of contract anti-discrimination. Although it reflects a very powerful and common legal conception of contracts, the consensual script is hardly the only available interpretive prism to assess exchange relations in the market. Can the difficulties faced by the consensual script be addressed by the employment of a different contract script? To answer these questions I turn to the interdependent script in the interpretation of section 1981.

D. Script II - Interdependent Script

A growing body of case law and scholarship has been developed as a reaction to the consensual script approach to section 1981 claims, or more accurately to a notion of increased discontent with the consensual script’s shortcomings in interpreting cases brought under the statute.107 In this section I suggest that these critics rely on an

107 The cases that present a most comprehensive view of the opposite approach are Christian v. Wal-Mart Stores, Inc., 252 F.3d 862 (6th Cir. 2001) and Callwood v. Dave & Busters, 98 F. Supp. 2d 694 (D. Md. 2000). As we have seen this has also been the view of a few forceful dissents in Garrett v. Tandy Corporation, 295 F.3d 94, 106-108 (1st Cir. 2002), Youngblood v. Hy-Vee Food Store, Inc. 166 F.3d 851, 856-859 (8th Cir. 2001), and Hampton v. Dillard Dept Stores, Inc., 247 F.3d 1091 1121-1123 (10th Cir. 2001)). It seems also to be the dominant view among the law review articles on the issue of consumer discrimination. See e.g. Desereree Kennedy, Consumer Discrimination: The Limitations of Federal Civil Rights Protection, 66 Mo. L. Rev. 275 (2001); Regina Austin, A Nation of Thieves: Securing Black People’s Right to Shop and to Sell in White America, 1994 Utah L. Rev. 147; Harris, supra note 57; Graves, supra note 76; Amanda G. Main, Racial Profiling in Places of Public Accommodation: Theories
alternative contractual script for the interpretation of section 1981 which I label the interdependent script. Proponents of this approach emphasize what they see as the consensual script’s niggling insistence on fitting any situation into a rigid set of categories; an insistence which consequently generates decisions which either turn on the fortuity of the timing of the store’s discriminatory behavior or arrive at a solution that is contrary to the consensual script’s own logic. Critics of the consensual script claim that the analysis should be less formalistic and more sensitive to “human realities.” A more realistic approach, they claim, would fully take into account the remedial purpose of section 1981 and focus on the racially discriminatory behavior of the store. The dissent in Youngblood put it thus:

Accepting Youngblood's version of the facts (which we must for present purposes) racial discrimination pervaded the entire contracting process, not just the moment that Youngblood exchanged money for beef jerky. Youngblood was singled out for surveillance by the store clerk before he made his purchase, singled out for suspicion as he walked to the register to make his purchase (when the store clerk alerted the manager), and singled out for detention by three store employees as he tried to leave the store with his purchase. In short, the entire contracting process - from the time Youngblood entered the store until the time he was prevented from leaving with the beef jerky he had paid for - was tinged with racial discrimination, if Youngblood's evidence is believed. Given §1981’s remedial purpose, whether Youngblood had been detained and the beef jerky seized prior to his paying for it, as he was paying for it, or as he was heading for the exit with it should not make a difference under §1981.
We have seen that for proponents of the consensual script contractual consent is a useful tool, because they believe it provides the clear boundaries to assure that only cases which may involve a violation of the right to make and enforce contracts, as opposed to cases of mere racial harassment, be actionable under the statute. For their opponents, contractual consent is an unnecessary hurdle on the path of liability and they call for a new framework for the interpretation of section 1981. In what follows, I study the traits of the alternative framework they bring to section 1981 interpretation.

1. The Christian Test

In *Christian v. Wal-Mart*, the court tried to introduce a new test for liability under section 1981. The court adopted a new prima facie test in an attempt to address the difficulties associated with the common prima facie test under the consensual script. According to the *Christian* test, to have a claim under section 1981 in the context of consumer contracts the plaintiff must show that he or she:

1) is a member of a protected class, and
2) sought to make or enforce a contract for services ordinarily provided by defendant, and
3) was denied the right to enter into or enjoy the benefits or privileges of the contractual relationship in that
   (a) he or she was deprived of services while similarly situated persons outside the protected class were not, and/or
   (b) he or she received services in a markedly hostile manner and in a manner which a reasonable person would find objectively discriminatory.\(^ {111} \)

The first two elements of the test provide the background, set the stage, for the applicability of the statute. The first refers to the identity of the customer, that is, that she belongs to a group that is protected by the statute. The second locates the customer in the context that might trigger liability – the customer has approached the vendor in a situation that has the potentiality of contractual relationship.

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The third element of the Christian test presents two alternative options for the assignment of liability: deprivation of service because of membership in a minority group, proven by the different treatment of members of different racial groups (3(a)); or receiving of service, but in a manner that is markedly hostile and objectively discriminatory (3(b)). Of these two alternatives only the second cannot be reconciled with the consensual script approach. The first option, deprivation of service, amounts to explicit refusal to contract or to engaging in exclusionary practice, such as imposing additional conditions to contract on members of a certain racial group. I noted earlier that under the consensual script refusal to contract with members of a certain racial group or agreement to contract with members of this group under conditions different than those imposed on non-members are both actionable under section 1981. It remains so under the Christian test. When intent not to contract with members of a certain racial group is either expressly declared by the vendor or can be inferred directly from its exclusionary practice the vendor is liable.

The markedly hostile/objectively discriminatory manner of service alternative in 3(b) is radically different than any test based on a consensual script. However, supporters of the Christian test believe it is utterly important because it covers all of those cases that cannot be understood as deprivation of service but should still be covered by the statute.

2. Regulating Contracts

At first blush the Christian test may seem to reject any focus on the interpretation of contract relations as such. To offer a broader interpretation of section 1981, its supporters strive to renew the focus of section 1981 analysis on racism and its consequences. According to this view, while proponents of the consensual script approach rely on contract as a check against what they perceive to be the excesses of legal remedies against racially motivated acts, their opponents embrace a test for racism divorced of contracts, rooted instead in the objective standards of “markedly hostile manner of service” or “objectively discriminatory manner of service by reasonable standards”.

I think that would be a misconception. A closer look reveals that the Christian test calls for a different type of regulation of contract relations, grounded in an

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112 See section II.A.1 supra.
113 See Callwood v. Dave & Buster's, 98 F.Supp.2d at 707.
114 Indeed, it is the element of the test to cause most opposition form the consensual script supporters. For example, in Benton v. Cousins Properties, 230 F.Supp.2d 1351, 1378 (N.D.Ga.,2002) the court was willing to adopt the Christian test, except for section (3)(b).
115 See e.g. Callwood v. Dave & Buster's, 98 F.Supp.2d at 706: “Given the ephemeral nature of interpersonal interactions in the public accommodations context, therefore, it may be wholly unrealistic to require a member of the protected class who suffers through what she perceives to be a shockingly discourteous and hostile experience, to identify victims of such outlandishly horrendous service who are not members of the protected class before the federally-guaranteed rights embodied in section 1981 may be vindicated.”
interdependent script of contracts which reflects a different understanding of the value which contract relations foster and consequently defines a different character and scope for the regime of private ordering. Contract and race are not two exclusive categories in the interpretation of section 1981. Alternative interpretations of section 1981 do not reflect a choice of one or the other. Rather than a separation of race from contract, the two approaches reflect different conceptions as to how race and contract may relate to each other in the interpretation of the statutory duty.

After all, proponents of the consensual script, for the most part, also support the cause of eradicating racism from social practice through legal remedy. Nevertheless, they insist, a duty under the statute may arise only after the expression of consent to contract or a definite offer which invites such consent. Section 1981 does not provide a “presumed right to be free of race discrimination while accepting a store’s invitation to shop”. Customers who bring suits under section 1981 must show “something more than poor service”. Supporters of the Christian test anticipate and react to such concerns. They assure their opponents that under their approach not any poor service would amount to section 1981 violation. However, they claim, “while a plaintiff may not state a civil rights violation for every indignity suffered in the course of daily life, a restaurant and its employees may not evade liability under §1981 because the defendant has devised creative means to harass and intimidate customers”.

Thus, despite what may appear on first impression, proponents of the alternative approach do not advocate a general duty under section 1981 not to discriminate in all matters and instances. They try to strike a balance between two extremes, yet a balance

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117 Bobbitt v. Rage Inc., 19 F.Supp.2d 512, 518 (W.D.N.C. 1998). In the restaurant context, as opposed to the retail stores contracts, courts that follow the consensual script have occasionally allowed for the possibility that some extremely low quality or outrageous service might satisfy the contract requirement of section 1981 claim. Although courts, as a general matter, reject the element of “manner of service” as part of section 1981 prima facie case, they often leave the possibility open that an extreme poor level of service quality may amount to a violation of the duty under section 1981 (even if the customer is allowed admittance and is being served food). In Bobbitt v. Rage Inc. the plaintiff made a section 1981 claim against a Pizza Hut restaurant based on “their ten- to twelve-minute wait to be seated; the discourteous way in which their waitress seated them; the fact that their ten to fifteen minute wait to receive menus and to order was longer than that of white patrons; and the assistant manager’s touching of their pizza with his fingers”. Id. at 518. The court ruled that these allegations amount to nothing more than poor service. Nevertheless, the court states that “[t]here may be some level of bad service that would suffice to satisfy the third prong of the section 1981 prima facie case notwithstanding the successful completion of a sales contract. If such a level of service does exist, it has not been pled in the instant case.” Id. See also Benton v. Cousins Properties, Inc., 230 F.Supp.2d 1351 (N.D.Ga.,2002); Robertson v. Burger King, Inc., 848 F.Supp. 78, 81 (E.D.La.1994). In Solomon v. Waffle House, Inc. 365 F.Supp.2d 1312, 1324 (N.D. Ga. 2004) the court ruled that a section 1981 plaintiff is not required to “wait indefinitely” for food service; if “a reasonable person can conclude that no service is forthcoming”, a plaintiff who left the restaurant before being served may have a section 1981 claim.

different than the one adopted by the consensual script approach. They strive for a compromise that would locate the solution somewhere between the consensual script and the all-inclusive broadest one. Chief Judge Boudin, in his dissent in *Garrett*, presented most lucidly the two perceived extremes understandings of “making contracts”: “Read narrowly, this phrase could be applied only to outright refusals to sell or deal. Read as broadly as possible, it might be taken to ban all racial discrimination by retail stores (to speak only of the present context) affecting present or prospective customers”.  

Furthermore, even assuming that some critics of the consensual script advocate a general “racial harassment” law, my argument has been all along that such aspiration is unattainable if one ignores the context of action in which race is enacted. Pointing to “racial harassment” would not suffice, because the harassment itself, standing alone, cannot encompass the duty under section 1981. Section 1981 always regulates the private sphere defined by contract. The question is not whether section 1981 *should* regulate contracts but rather *how* and to what extent. Thus, as opposed to what may initially appear, those who oppose the consensual script approach to section 1981 do not collapse contract into race. The two approaches to section 1981 reflect different notions and sensibilities. These notions, however, have to do not with their take on racial discrimination per se but rather with their different understandings, perhaps visions, of how people interact in the market - or, in other words, make contracts – and of the value produced in such encounters.

3. The Interpretive Framework of the Interdependent Script

I therefore propose that the *Christian* test reflects the interdependent contract script, which defines a different arrangement of the private ordering and therefore a different duty to contract without regard to race under the statute. When proponents of the interdependent script strive to better connect the application of the statute to its remedial purpose they promote an alternative understanding of contracting in the marketplace.

Here too racism is channeled and being manifested through contractual conventions. A consensual script revolves around a moment of agreement and arranges the entire analysis around that moment. How the parties reached that moment (excluding fraud or duress) is not material to the analysis. The interdependent script focuses more on other conventions in the social performance of contract making. It turns the analyst’s attention to the manner of providing service in a store rather than to the intent to make a purchase of a particular item in the store. The “markedly hostile service” element of the *Christian* test brings the “manner” to the front of the analysis. Under this test, the process, the way to a purchase, is not peripheral, but central to the contractual relationship. In a contractual relationship in a retail store, making a purchase, acquiring a certain item for certain value, is not the only, or even central, element. Other aspects of the shopping experience that relate to the manner of service, such as the atmosphere in the store, the behavior of the store’s representative, the manner in which the items are stacked, the responsiveness of the clerks, are all central to the shopping experience. They

119 Garrett v. Tandy Corporation, 295 F.3d 94, 107 (1st Cir. 2002).
are part of the value the participants in the contractual relation exchange. Sometimes, according to the Christian test, under certain conditions, a deviation from these practices may lead to liability under section 1981.

The challenge remains to clearly articulate the alternative interdependent script that allows such perception and to define the statutory duty to contract without regard to race that it defines. Despite the fact that they clearly adopt a different vision of contract making, proponents of the interdependent script never clearly articulate it. However, a vision similar to the one proposed by the Christian test supporters has been extensively developed in the field of contract theory by supporters of what is commonly called “relational contract theory”. In my attempt to flesh out what an interdependent script in the context of determining section 1981 liability I will rely on this script as it was contemplated by relational contract theorists.

According to the interdependent script of relational contract theory, contract relations are characterized by interdependence among the participants in exchange relations accompanied by a need for increased cooperation. They are firstly a locus of solidarity and power. Consent is not entirely irrelevant to contract relations; effectuation of consent is one of the contract norms. But consent is not the only contract norm, nor is it the most important one. Three of the most important norms of contract relations are contract solidarity, reciprocity, and creation and restraint of power.

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121 Although I believe the interdependent script is strongly implied by relational contract theory, relational contract theorists rarely argue that they develop anything resembling a script of contracting. In fact, Macneil have claimed repeatedly that what he does is simply telling how contract parties actually conduct contract relations, not offering an interpretive framework to analyze those relations. See most recently in Macneil, Relational Contract Theory, supra note 120, at 879- 880. The interdependent script is therefore my own re-conceptualization of Macneil`s work for my purposes here rather than a presentation of relational contract theory as its supporters might necessarily see it.

122 See especially Macneil, Values, supra note 120, at 356-359. Macneil, Economic Analysis, supra note 120, at 1029-1031.

123 For an extensive overview of the other common contract norms according to Macneil see IAN R. MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS 10 36-70 (1980).
situation of fruitful interdependence participants must invest in nurturing solidarity and trust and restraining power.\textsuperscript{124} Without the existence of these norms exchange relations would fall apart. The working consensus of the interdependent script is that only with the expansion of contractual solidarity and reciprocity the situation can be described as involving mutually fruitful contractual relations. An individual who enters the presence of another may attempt to project a definition of the situation as involving effective contractual relations through gestures which project solidarity and willingness for reciprocity. The other may project a similar definition of the situation by virtue of his response that projects similar qualities and readiness to restrain his own power. Contract is achieved through greater dependence on the other.

I have noted earlier that the normative aim of the consensual script is to further the preferences of the parties, whatever they may be. This commitment has caused difficulties for its supporters when dealing with racism. The interdependent script is interested less in individual preferences and more in the character of the relations created by a certain social encounter. The concern is with how legal rules may affect the norms that define a certain contract relation and the degree to which it may induce performance that reflects certain contractual norms. Supporters of this script conceive legal rules as actively shaping the norms that define the social relationship. Also legal rules bestow power on certain participants in the social interaction and by so doing change the power relations between the parties. Legal rules are judged by their effect on the degree of cooperation between participants in the relations.\textsuperscript{125}

Two major differences between the interdependent script and the consensual script that are particularly noteworthy in the context of contract discrimination:

\textit{(a) Gradual Accumulation of Contractual Obligation}

The interdependent script marks a move from a perception of the contact as centered around a moment of contract to an understanding grounded in gradual accumulation of contract liability. While the consensual script searches for a snapshot of a moment of contract and relates all liability to that moment, the interdependent script sees the formation of a contract as a continuous process. Under the consensual script the parties have no liability until they achieve mutual consent and thereafter they are obligated to perform the consented terms, but in the interdependent script the parties’ liability progresses on a gradual scale. This is so because the greater dependence between the parties is understood and assessed on such a gradual scale. Because the parties were never complete strangers before they meet in contract relations, the parties do not experience a dramatic transformation of the relationship of the type envisioned in the consensual script’s moment of contract. It is rather a continuous process in which conventional speech and behavior produce an increase (or decrease) in interdependence and consequently in contractual obligation. The contractual obligations between the

\textsuperscript{124} See especially Macneil, \textit{Economic Analysis, supra} note 120, at 1032-1034, 1049-1060.

\textsuperscript{125} See especially Macneil, \textit{Values, supra} note 120, at 370-377; Macneil, \textit{Relational Contract Theory, supra} note 120, at 897, 903.
participants may therefore also accordingly progress on a gradual scale as the parties get to better trust and rely on each other.

(b) Incomplete Freedom of Contract

A related notion is the idea of an always incomplete freedom of contract. The consensual script is based in the notion of complete freedom of contract, understood as the privilege to choose who one contracts with and the power to call upon the state to enforce such contract. The interdependent script is not based in a regime of complete freedom of contract so understood; freedom to contract is assumed to be restrained rather than complete. It is constrained by the condition of interdependence that all contract relations are assumed to involve. Since the sequence of the encounter is understood as a continuing flow there is never a quick and sharp transition from complete freedom to restraint imposed at a moment of consent (or a series of consensual moments). A person’s privilege to act is always constrained by norms such as contract solidarity, reciprocity and restraint of power.

The interdependent script sees a different organization of the power relations between the participants in contract relations. Power struggles govern the entire relationship and become the defining characteristic of legal analysis. So conceived, the power of contract, that is, the power to simply enforce consent as it is manifested by the parties, must occasionally be restrained. Complete freedom of contract and complete power to call the state to enforce the consented agreement is no longer the staple of the script of contracting. “Power of contract”, Macneil argues, “aims at implementing party purposes”; many legal sanctions and protections, however, involve “social control . . . aims primarily at limiting the effect given party purposes, thus limiting the power of contract”.\textsuperscript{126} The question for legal analysis becomes not how to support the exercise of the power of contract, but how and to what extent would it be necessary to restrain this power. The limits of permissible contract discrimination become a defining feature of the contractual script rather than a force external to it. Its contours determined by the viability of norms such as trust and restraint of power.


The two approaches to the interpretation of section 1981 script differently the social performances of contractual encounters in retail stores, restaurants and other shopping establishments. Analyzing those approaches through the notion of scripts relies on the perception that when a customer enters a store he does not engage in a unique unscripted one-of-a-kind contractual encounter. Despite many idiosyncrasies that may accompany any shopping experience, it is a well-scripted encounter. Shopping at public places such as retail stores or restaurants is a cultural ritual, repeated time and again in everyday life. This ritual is regulated by numerous conventions as to the manner in which individuals in such encounter, both the customer and the vendor, should behave.

\textsuperscript{126} IAN R. MACNEIL & PAUL J. GUDEL, CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONS 383 (3rd ed. 2001)
An encounter which may seem discrete, crude, and fast is orchestrated by certain expectations and assumptions as to the shopping experience that are already embedded in any social interaction in a retail store setting.

Some conventions of the shopping experience reflect values regularly attributed to the consensual script, such as getting the best value for your money. The notion of acquiring a certain item for the best value is often eminently present in shopping practices. It informs, on the side of the vendor, rituals such as the big clearance sale and promises such as “the lowest price or your money back guarantee”; and, on the side of the customer, practices such as price comparison among different vendors and even sometimes haggling for a discount.

Proponents of the interdependent script claim that these conventions are hardly the only worthy of attention when antidiscrimination remedies are assigned. The interdependent script they propose reflects an understanding of contractual relations, the duties they produce, and the values they contain which emphasizes different elements of these social encounters. They point out to those conventions that help produce familiarity, reliance, and trust among persons who know little or nothing at all about each other. Proponents of the interdependent script perceive these conventions as material to the contract relationship and valuable to its participants. Participants assign value to contract conventions which encourage trust and solidarity at least as much as they do to the conventions of getting the best deal for the best price.

Mutual dependence is achieved both by the mere repetition of a familiar practice and by the signals conveyed in the message of such practice. These aspects of the contractual relationship tend to be left out when it is perceived as an exchange of an offer for the best price with an acceptance for the best value. The atmosphere in the store, the behavior of the store’s representative, the invitation to take part in a store lottery free of charge, the manner in which the items are stacked, the responsiveness of the clerks, the store’s return policy, the generosity of the customer care department, are all central to the shopping experience. Here too, patterns of trust and reliance are performed not only by the vendor, but by the customer as well. So, for example, customers will avoid gestures that may signal that they entered the store to steal rather than to purchase. A customer is thus not likely to put an item in his bag, even if he intends to pay for it at the cashier, but rather keep it in plain sight; she may present her receipt to the guard at the store’s exist if asked to do so, and so on.

These practices may ease the way towards an exchange. But the interdependent script suggests more than that. First, these practices are inseparable and, in many respects, precede the offer to purchase an item and its acceptance. Second, these practices have a life of their own. They are (and should be) followed irrespective of whether an exchange is ultimately materialized. Embedded in the contractual relationship, they represent at least part of the benefit, or value, extracted from the contracting experience. Third, because of the value of these practices, according to the interdependent script, a deviation from these practices may require legal remedy if certain conditions are met. Section 1981 prescribes a legal remedy as a reaction to a certain type of such deviation.
Against this backdrop the interest of proponents of the interdependent script in “racial harassment”, in “the myriad ways in which racism has become subtly muted and infused into everyday interactions”,\(^{127}\) in how “racial discrimination pervaded the entire contracting process”\(^ {128}\) receives a new meaning. I suggest interpreting this statement to mean that the entire relationship was so tainted with prejudice that the possibility of mutual trust and solidarity was disallowed. This violation carries the potential of a breach of the statutory duty.

The elements in the *Christian* test of “markedly hostile” and “objectively discriminatory” manner of service may also be reassessed based on this understanding of the interdependent script. Whether the customer receives “service” from the vendor in the sense of getting an item in exchange for money is not necessarily the point. Even when a customer purchases an items successfully the vendor may be in violation of the statute when the vendor serves the customer in a manner that is markedly hostile or objectively discriminatory. I propose to read these standards to mean that a vendor violates her duty under the statute to contract without regard to the customer’s race if she treats the customer in a manner that deviates from the cultural conventions of such contractual encounter which are designed to increase trust and solidarity to the degree that such a deviation reflects a refusal to see the customer as a potential contracting partner on whom she may rely.

An analysis of a case like *Hampton* through the lenses of an interdependent script so defined would turn on the extent to which the store representatives’ deviated from such script. It would examine whether the continuous surveillance and the search under suspicion of shoplifting during the contract process have departed from the habitual pattern of contracting. It would see whether conventions designed to create trust and restrain power were disallowed to an extent that the creation of a contractual bond of the sort imagined by the script was denied. Other conventions which regulate the contract encounter, especially those pertaining to when exactly a purchase is made, are not material for the assigning of liability. Whether the coupon Hampton received at the cashier was a benefit which originated in the moment of purchase is immaterial under the interdependent script. The patterns and norms of the shopping ritual that this script emphasizes often begin before a definite offer to purchase has materialized and last after a purchase and any of its direct ancillary obligations have been completed.

5. **Trust and Power**

The interdependent script of contract provides an alternative framework for the interpretation of section 1981 cases that addresses many of concerns raised against the consensual script approach. Yet at the same time, the interdependent script approach raises many new questions and concerns. First among these is how to determine how concepts such as trust, solidarity and restraint of power operate in a particular contract relationship. These concepts seem as abstract as notions such as consent and individual

\(^{127}\) Kennedy, supra note 107, at 281.

\(^{128}\) See *Youngblood v. Hy-Vee Food Store*, 166 F.3d at 859.
preferences. Ian Macneil claims that the common contract norms are an effective vehicle for a proper analysis of contractual relations. He calls for a contextual analysis of all elements of the enveloping relation that might affect the transaction significantly, using contract norms such as solidarity, reciprocity, and restraint of power as a framework for understanding those relations and evaluating them. The function of each of these norms is to be drawn from the specific context of action under investigation.\(^{129}\) How will these norms be assessed in the context of section 1981 cases in consumer contracts?

Consider, for example, power. The exact character of the power relations between the participants in cases that come under section 1981 is hardly self evident. It seems clear on the outset that the store has a significant power advantage over the customer. Consumer contracts have long been recognized as a type of contractual relation deserving of special legal attention because of common discrepancies in bargaining power between customers and vendors. As a result it seems that an interpretation of a section 1981 case must work under the assumption that the behavior of the customer and the store’s employees is performed against a background of superior bargaining power on part of the store. The store’s invocation of diverse gestures of trust, often to a degree much greater than the customer’s, can be understood as an effect of such discrepancy in bargaining power. The increased power on the side of the store requires extensive gestures of trust to “soften” the customer and convince her that she may trust the store’s representations and behavior as sincere. From this perspective, the doctrinal controversy over section 1981 is on how much protection against legal liability retail stores should enjoy against a backdrop of unequal bargaining power. This power inequality is evidenced by the case law - there is not a single case in which a store sues a customer under section 1981; suits are always brought by customers against stores and not contrariwise.

We have seen that those who oppose antidiscrimination legislation have long made the claim that market forces can cure private discrimination.\(^{130}\) Although many have claimed that such an outcome is doubtful, a more modest claim can be made with respect to the balance of power between the parties in this context. In most cases in the market for retail stores, the customer can quite easily choose to go to another store that offers similar merchandise and level of service. Gestures that invite trust and reliance on the part of the store are actually a reflection of the customers’ increased options in choosing the store in which they shop and therefore increased bargaining power vis-à-vis the store. In other words, if a customer is not content with the level of service he receives at Wal-Mart, including a belief that the store treats customers differently based on their race, she can always go to Kmart instead. Furthermore, if such concerns become widespread, the damage to the store’s reputation that may result from a perception of the store as racist can be quite severe.

Moreover, while the vendor’s superior bargaining power in the context of a legal dispute over a from contract drafted by the vendor is clear, the store’s advantageous bargaining power in the current context is little murkier. Examining actual encounters of the type that trigger section 1981 claims in the case law discussed earlier, I believe the

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\(^{130}\) See the discussion in footnote 47.
balance of power is much more complicated than it may initially seem. The reason has to do less with the balance of bargaining power between the store and the customer in general than with the bureaucratic structure of the store. The customer usually deals with a low level employee of a big retail store, typically a national chain. Such an employee is at the bottom of the company hierarchy and her ability to utilize the store’s general bargaining power advantage may be questionable. As long as no store-wide racist policy is involved, the stakes for the employee for any misconduct, not to mention an accusation of racist treatment, may be high.

If this is indeed the context of action, it may be sensible to assume that, as far as analyzing the behavior of the employee, the customer enjoys a more balanced bargaining power than it may initially appear. This is not to say that the customer ultimately enjoys a greater bargaining power than the store. At the ultimate analysis, it is very likely that the store enjoys the greater power in the relationship and that an analysis based in the interdependent script will look to restrain this power. My point is only that an interdependent script analysis would call for a contextual and intricate analysis of the power relations between the parties in the assessment of the adequate legal remedy.

Giving content to standards such as trust and power in the context of a particular relationship can be challenging. The main question still remains what acts reach the same level of blameworthiness as exclusionary practices or refusals to contract because of the other person’s race. In other words, the interdependent script searches for the level of hostile service – objectively assessed and measured - that would amount to a deprivation of service, to a refusal to contract that is rooted in racial prejudice towards the customer’s protected group. The task becomes determining which subjectively motivated acts should be deemed public refusals to deal; which observable acts (other than express refusal) should be deemed to be motivated by a racial prejudice; which acts can be rescued from the darkness of the subjective prejudice into the light of the objective, observable and legally prohibited behavior. We still need to more clearly flesh out the relations between the interdependent script of contracting an a certain understanding of racial relations. Under the interdependent script, will one drop of racism pervade the entire dealing? Will any racist element negate all aspects of the contract, breach the terms of fair and equal dealing promised by the norms of solidarity and restraint of power?

E. Racial Prejudice, Racial Hierarchies, and Contractual Scripts

How do the two scripts interplay with the other dimension of section 1981 — antiracism? Each script relates to a certain view of racism. Since section 1981 is considered a disparate treatment doctrine, the common understanding is that it purports to cure only intentional discrimination. However, we have seen in earlier that courts and scholars have increasingly focused on how the statute may approach racism not in terms of intentions, preferences, and prejudices, but in terms of unconscious categories, cultural expectations, and racial hierarchies. The two scripts reflect a similar tension. Proponents of the consensual script tend to see section 1981 as targeting only intentional discrimination, that is, acts that result from conscious racial prejudice towards the other
party. Those who interpret section 1981 through an interdependent script tend to see the same social performances as expressions of racial hierarchies and stereotypes.

According to the consensual script, encounters in the market are products of voluntary acts by component individuals; all connections in the marketplace are a product of contracts produced by individuals based on each individual subjective preference ordering. In the context of section 1981, within a consensual script, an intention to discriminate based on race sabotages the intention to contract for an exchange of goods. After enough of a contract intent as been manifested or a contract was formed and yet to be exhausted, the performance of a racially prejudicial act is a betrayal of the contractual bond thus created. An act motivated by a subjective preference to discriminate based on race affects a change in the interaction that frustrates its definition as a contractual encounter between two equal and autonomous individuals as defined by the consensual script.

We have seen that this type of consensual script analysis is hard to sustain. The reason is that the administration of section 1981 inevitably involves the determination of the contract value produced by the exchange. Because only behavior by the vendor that frustrates contractual value can be actionable under the statute, the sanctioned behavior must be part of the parties “reasonable expectations”. Most proponents of the consensual script may prefer to keep their interpretation of the value produced by the contract - the parties’ reasonable expectations - as limited as possible. However, we have seen that consensual script itself, which is indifferent to the actual preferences of the parties, does not necessarily supports such narrow interpretation. The determination of the parties’ reasonable expectations is an unavoidably objective moment in which the court interpolate meaning into the contractual encounter. This is a moment of normative judgment in which the court determines (and therefore intervenes in) the parties’ subjective preferences. Courts can interpret these expectations to be only the exchange of money for goods coupled with an expectation not to invidiously discriminate. Courts can, as some courts and dissent opinions did, include in those expectations additional elements such as the expectation to be treated fairly and equally during and following the contracting experience and to refrain from any expression of racial hierarchies.

Supporters of the interdependent script see the goal of the statute to undermine lingering racial hierarchies, to resist a world saturated with racist stereotypes. As opposed to the consensual script supporters, they try to resist the need to assess actual subjective intentions to discriminate based on race. They counter with an alternative script that aims to undermine the consensual script’s reliance on formality and subjective intent by examining the contract relations from an objective vantage point. In the interdependent script, the duty to contract without regard to race does not loom after a binding contract is formed; quite the opposite, it is the fulfillment of this duty that makes the existence of such contract at all possible. Under this script, well functioning contract encounters are defined by relations of trust and cooperation. Certain performances may project a definition of the situation as involving relations of hierarchy, domination and power rather than reciprocity and solidarity. An act which projects a perception of members of a certain group as possessing stereotypical qualities may disrupt the maintenance of certain conventions of trust, reliance and restraint of power, and consequently disallow the type of definition of the situation envisioned by the
interdependent script. By breaking away from these cultural expectations of trust, a participant in the contractual relations singles her refusal to engage with the other participant in the type of contractual relations envisioned by the interdependent script. Any exchange that may result from such encounter would decrease in value if not become almost totally barren and section 1981 reflects the aspiration to restore the definition of the situation by remedying this lost value.

Applying the interdependent script to section 1981 cases, one must ultimately agree that the legal analysis cannot do away with intentionality all together. If we were not to examine the actual subjective intentions of the parties at all, we may end up with a limitless over broad legal remedy of the type against which opponents of the interdependent script warn. If we allow no consideration of subjective intent under the interdependent script, the outcome may be that no meaningful contract relations can be conducted until all racial hierarchies, stereotypes, and unconscious categories are no longer part of our society; and until then, any drop of racism would taint a contract relations to the point of requiring legal remedy. This is not only not an unlikely construction of section 1981, it also makes the supporters of the interdependent script look like those who think that we can actually imagine people outside of their racial identity, that contract can trump race. Many proponents of the interdependent script acknowledge that in order to fight the caricature “regulators” who crush private autonomy at all cost which is sometime attributed to them, they cannot rely only on an “objective” test that has no concern with the parties’ actual intention. Rather then pure objectivism, they ultimately call for a trade off between racial prejudice and racial hierarchies, consciousness and unconsciousness, subjectivism and objectivism.

Does that mean that the two scripts are so flexible and manipulable that each can justify any legal outcome, that the choice of script to practice in the interpretation of section 1981 ultimately has no bearing on the legal conclusion a court reaches? The analysis I have conducted in this article shows that this is not the case. A choice of scripts dictates a certain scenario within which the court imagines the contractual encounter. A choice of scripts makes certain elements of a case more available than others. It highlights certain aspects of the parties’ performance and gives them a certain relative weight in the analysis. The interpretive tool of reasonable expectations may, in principle, allow the inclusion of values that are more far reaching than those adopted by most of the courts supporting the consensual script. Yet in practice, courts rarely interpret reasonable expectations so broadly. They rely on the apparent formality of the cycle of contract in order to reach a narrow application of the statute. My point is only that those courts need to further qualify their position with a clearer view on when a contract value is created and what that value should be, a view that inevitably inserts an objective element to their analysis. The same is true with respect to the interdependent script. Supporters of the interdependent script aim to establish an interpretation of section 1981 that has a broader application than that which the consensual script supporters espouse. The interdependent script provides such a wider understanding of the social performance of contract making by stretching the timeline of section 1981 applicability and highlighting other features such as the patterns of trust and power produced by the relationship. However, what the interdependent script seems ill-suited to provide is a limit on its own broad application; such a limit can only be produced by a subjective moment to counter the objective analysis.
Conclusion

The current controversy over section 1981 is understood to be over how narrow or broad the scope of race-based acts covered by the statute should be. This view reflects only a very limited understanding of what is at stake in the interpretation of section 1981 cases. The different interpretations of the duty under the statute are better understood not in terms of their width, but in terms of their conflicting images of what constitutes a well-functioning contractual relationship in the marketplace and how these images play out against different positions on the type of racism that the statute aims to address and eradicate. When we analyze section 1981 cases through the lenses of contractual scripts, we can flesh out these organizing visions of contract making in the interpretation of the statutory duty and show how a certain script defines a certain scope and character of the protected private sphere under an antidiscrimination regime. Yet these scripts provide more that just an image of contracting – they provide a detailed ideal scenario for the contract relations. Contracts are the context of action in which race-based acts are conducted in section 1981 cases. Contractual scripts provide a useful framework for analyzing and assessing actual cases in context as we strive to implement a certain antidiscrimination policy.

Courts tend to choose one script and follow it through, but maybe that should not be the way for courts to analyze social performances in retail stores in the context of assigning section 1981 liability. After all, scripts are only ideal types, frames for assigning meaning. Many shopping practices do not fall neatly into one script or another. It seems that participants in market encounters often oscillate between performing one script and another as they participate in the ritual of shopping. One of the lessons of the story about Patricia Williams and Peter Gabel is that when contractual scripts operate against racial categories, different scripts can produce different levels of trust depending on the context of their operation. And the actual performance may be quite unexpected. While Gabel chose to perform an interdependent script to signal his trust in the other party, Williams performed the consensual script to entice trust, relying on its apparent formality.

Can legal analysis reflect such sensibilities? I believe that at least steps in this direction can and should be taken. Section 1981 cases call for a contextual analysis of the sort script analysis can supply the required elements to conduct. A full examination of this matter would require the development of a detailed strategy which is beyond the scope of this article. In the broadest terms, I believe that a legal analysis of section 1981 cases of this type will share with supporters of the interdependent script the position that understanding contract practice only as a product of free voluntary action must be abandoned. This view, which has animated so much of the interpretation of section 1981, has failed to provide a sustainable basis for enforcement since it cannot justify within its contours passing judgment on individual preferences – and such judgment is at the heart of section 1981 as an anti-racism remedy. The first step for the analysis of section 1981 cases should therefore involve an objective analysis in which courts assess and give meaning to social performances based on the quality of the relations irrespective of what individuals might have intended them to be. When examining whether plaintiffs like...
Hampton or Garrett should receive legal remedy, a judge must ask not whether they have manifested an intention to contract, but what the structural constraints – including racial conceptions and stereotypes - within which such performance might have been possible. The structural constraints which the judge identifies should serve as the basis for the next step in which the judge examines the subjective representations of the actual parties within those social constraints. The subjective representations must also be remembered if one wants to account for the daily struggles through which contract participants try to achieve practical advantages as they apply to social institutions such as contracts. After all, those struggles are the materials from which those social institutions are ultimately constructed; they are those that aim at transforming or preserving their structures. Reading contract encounters through those lenses, courts may be able to more fully capture the interplay between contract and race in everyday market exchange and provide a legal remedy that reflects a more comprehensive vision of those relations for the assessment and implementation of antidiscrimination policy.