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## The Illegality of Sex Discrimination in Contracting

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# The Illegality of Sex Discrimination in Contracting

Whitney A. Brown<sup>†</sup>

## ABSTRACT

*Discrimination on the basis of sex in the sale of goods and services, a practice that puts women at a severe disadvantage in the marketplace, is widespread and remains largely tolerated. This Article argues that the Civil Rights Act of 1866 (now codified as 42 U.S.C. § 1981), the first civil rights law in our nation's history, should be read to prohibit such discrimination.*

*The Civil Rights Act of 1866 broadly pronounces that “all persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens.” Yet the statute’s expansive language and the moral principle of nondiscrimination it expresses has been misinterpreted to exclude claims of sex discrimination in contracting. In this Article, I suggest an interpretation that acknowledges women’s disfavored social status in the nineteenth century and concludes that the statute should be read to support sex discrimination claims. Specifically, I argue that by “white citizens,” Congress could only have been referring to the group of people who at the time the law was passed exercised the unfettered right to contract—that is, white men. Under this reading of the statute, a woman who could demonstrate that she had not been treated equally to white men when making or enforcing a contract could state a claim for sex discrimination under Section 1981. This Article contends that such an understanding of Section 1981 is preferable to traditional readings that exclude claims of sex discrimination. Such readings are inconsistent with the U.S. Supreme Court’s interpretative methodology in civil rights cases and suffer from other historical and interpretative flaws. By adopting the approach advocated in this Article, courts would at last give full effect to the principle of nondiscrimination that Section 1981 embodies, and would ensure that women would no longer be required to pay more than men for goods and services in the marketplace.*

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## INTRODUCTION

Sex discrimination in contracting is rampant and is largely tolerated in a variety of economic markets. Federal law prohibits discrimination on the basis of sex only in certain circumscribed markets, including employment, housing, and education.<sup>1</sup> Sex is not a protected class under federal public accommodations law, which prohibits discrimination only on the basis of race, color, religion, or national origin by business establishments offering goods, services, or facilities to the general public.<sup>2</sup> And no federal law is currently understood to prohibit sex discrimination in the sale of goods or services.<sup>3</sup> Merchants may, for instance,

1. 42 U.S.C. § 2000e et seq. (2012); 42 U.S.C. § 3604(a) (2012); 20 U.S.C. § 1681 (2012).
2. See 42 U.S.C. § 2000a (2012). A “public accommodation” is defined as an establishment that serves the public and whose operations affect commerce, such as hotels, restaurants, sports arenas, and theaters. *Id.* While some states have passed laws prohibiting sex discrimination in public accommodations, see Jonathan Griffin, *State Public Accommodations Laws*, NAT’L CONF. ST. LEGISLATURES (Jul. 13, 2016), <http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx>, the current federal civil rights regime “leaves approximately 66 percent of the dollars we spend—and 35 percent of the dollars we earn—unregulated” with respect to sex discrimination. IAN AYRES, *PERVASIVE PREJUDICE?: UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION* 3 (2001).
3. AYRES, *supra* note 2; Megan Duesterhaus et al., *The Cost of Doing Femininity: Gendered Disparities in Pricing of Personal Care Products and Services*, 28 *GENDER ISSUES* 175, 176

lawfully refuse to sell a car—or a paperclip or any other good—to a woman because of her sex, or may charge a woman twice as much as a man for the same item.<sup>4</sup>

This gap in our civil rights regime is not merely academic. Without the enforcement of a federal law prohibiting sex discrimination in contracting, women suffer manifold and measurable consequences in the marketplace. Women are charged more than men for clothing and personal care products, from deodorant and razor blades to canes and other supports.<sup>5</sup> Studies in multiple states have found that women consistently pay more for haircuts and for dry cleaning, even where the services or products purchased are essentially the same as those purchased by men.<sup>6</sup> The federal tariff schedule, which imposes different rates of duty on goods

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(2011); see also Matthew A. Edwards, *Price and Prejudice: The Case Against Consumer Equality in the Information Age*, 10 LEWIS & CLARK L. REV. 559, 583 (2006) (“[P]rice discrimination in consumer goods and services is pervasive and generally legal.”).

4. AYRES, *supra* note 2; see also FRANCES CERRA WHITTELYSEY & MARCIA CARROLL, WOMEN PAY MORE AND HOW TO PUT A STOP TO IT 3, 14–15 (1995) (highlighting the absence of federal law prohibiting sex discrimination in the price of retail goods and advocating that women “protest these practices” by shopping around and more aggressively negotiating with retailers).
5. A recent study examining price differences encountered by male and female shoppers in New York City found that toys and other products for female children (including bicycles, helmets, backpacks, toys, and arts and crafts supplies); clothing for female children (including shirts, pants, and onesies); clothes for adult women (including shirts, jeans, dress shirts, and dress pants); women’s personal care products (including shampoo, razors, lotion, and body wash); and women’s home health care products (including supports, braces, and canes) regularly were priced higher than substantially similar products for men. N.Y.C. DEP’T OF CONSUMER AFFAIRS, FROM CRADLE TO CANE: THE COST OF BEING A FEMALE CONSUMER (2015), <http://www1.nyc.gov/assets/dca/downloads/pdf/partners/Study-of-Gender-Pricing-in-NYC.pdf>. A Consumer Reports survey found that products directed to women (through packaging, description, or name) cost up to 50 percent more than similar products directed to men. *Men Win the Battle of the Sexes*, 75 CONSUMER REPORTS 8 (Jan. 2010) (reporting that shaving cream, deodorant, pain reliever, eye cream, body wash, and razor blades directed to women cost more than comparable products directed to men); see also WHITTELYSEY & CARROLL, *supra* note 4, at 12–13 (1995) (discussing studies revealing that merchants charge women more than men for standard oxford-style shirts, wool turtleneck sweaters, blue jeans, and t-shirts, despite identical or in some cases inferior quality); Duesterhaus et al., *supra* note 3, at 183 (finding that women’s deodorant contains fewer ounces and costs more per ounce than men’s deodorant).
6. The issue of sex-based disparities in pricing of such services attracted media attention throughout the country in the mid-1990s. See, e.g., N.Y.C. COUNCIL, THE PRICE IS *NOT* RIGHT: GENDER-BASED PRICE DISCRIMINATION IN THE NEW YORK CITY HAIRCUTTING, CLOTHING ALTERATION AND DRY CLEANING INDUSTRIES 3, 11 (1996) (finding that 48 percent of the 199 haircutters surveyed charged women more than men for a basic haircut, and that women were charged between 10.6 and 13.5 percent more than men to get shirts dry cleaned, have pants hemmed, or have the waist taken in on a pair of suit pants); Joanne Ball Artis, *Combating Gender Bias at the Hair Salon*, BOS. GLOBE, Dec. 19, 1992, 1992 WLNR 1873695 (finding that more than half of randomly surveyed salons in the Boston area charged women more—and in some cases up to 50 percent more—than men for a haircut); Dianna Marder, *Being a Woman in Phila.: It Can Cost You, Group Says*, PHILA. INQUIRER, Mar. 5, 1999 (reporting that 90 of 130 hair salons surveyed charged women more than men for a basic shampoo, haircut and blow-dry, and that 50 out of 90 dry cleaners surveyed charged more to launder women’s shirts); Kara Swisher, *In D.C., Bias on Women’s Shirts Ironed Out*, WASH. POST (July 1, 1989), <https://www.washingtonpost.com/archive/politics/1989/07/01/in-dc-bias-on-womens-shirts-ironed-out/b27d5d3d-c9f6-424d-b332-b62bbe088abc/> (reporting that dry cleaners in

imported into the United States, contains over one hundred sex-classified tariff rates.<sup>7</sup> Research also suggests that women, despite having better credit scores than men on average, are more likely to receive subprime mortgages.<sup>8</sup> Taken together, the cumulative cost to women of such price inequities in goods and services—a product of unequal contracting rights—is substantial. Indeed, prior to passing a

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Washington, D.C. charged women up to 200 percent more than men); Gary Washburn, *Price Bias Charges Taken to the Cleaners*, CHI. TRIBUNE, May 29, 1998, 1998 WLNR 6470725 (reporting that 80 percent of hair salons surveyed charged women an average of \$12.21 more than men for a basic shampoo, cut, and blow dry; and that dry cleaning establishments routinely charged women an average of \$1.43 more than men to launder a shirt, and 55 cents more to dry-clean a shirt). Sex-based price disparities at the dry cleaners recently captured the attention of former President Barack Obama. See Juliet Eilperin & Kate Zezima, *Women of America: President Obama Wants to Lower Your Dry Cleaning Bill*, WASH. POST (Apr. 8, 2014), [https://www.washingtonpost.com/news/the-fix/wp/2014/04/08/women-of-america-president-obama-wants-to-lower-your-dry-cleaning-bill/?utm\\_term=.9adfa7721e87](https://www.washingtonpost.com/news/the-fix/wp/2014/04/08/women-of-america-president-obama-wants-to-lower-your-dry-cleaning-bill/?utm_term=.9adfa7721e87) (“I don’t know why it costs more [to dry clean] Michelle’s blouse than my shirt.”). Only a handful of states and localities have passed legislation to prohibit discriminatory pricing in the provision of such services. See, e.g., N.Y.C., N.Y., Local Law 2 of 1998, Int. No. 804-A (Jan. 9, 1998) (banning discriminatory pricing in retail service establishments in New York City); Gender Tax Repeal Act of 1995, CAL. CIV. CODE § 51.6 (West 1995) (banning discriminatory pricing in retail service establishments in California); Miami-Dade Cnty., Fla., Ordinance 97-53 (May 20, 1997) (banning discrimination in the price of goods and services in Miami-Dade County, Florida). These laws, however, often contain loopholes allowing merchants to charge more if the service requires more time, difficulty, or cost, which makes enforcement of the laws challenging without a finding that a business posted prices that explicitly differed on the basis of sex. See *Civil Rights—Gender Discrimination—California Prohibits Gender-Based Pricing—Cal. Civ. Code § 51.6*, 109 HARV. L. REV. 1839, 1839 (1996).

7. U.S. INT’L TRADE COMM’N, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES (2017); see also Jason Lewis, Note, *Gender-Classified Imports: Equal Protection Violations in the Harmonized Tariff Schedule of the United States*, 18 CARDOZO J.L. & GENDER 171, 186 (2011). In some cases, goods meant for men are assessed at a lower tariff rate than the rate used to assess similar goods intended for women. *Rack Room Shoes v. United States*, 718 F.3d 1370, 1372 (Fed. Cir. 2013) (finding that in some categories, women’s footwear is assessed rates of up to 4.3 percent more than men’s footwear). In other cases, men’s products are charged a higher rate. See *Totes-Isotoner Corp. v. United States*, 594 F.3d 1346, 1349 (Fed. Cir. 2010) (holding that the Harmonized Tariff Schedule of the United States’s assessment of a higher tariff on men’s gloves than on women’s gloves is not facially discriminatory, nor had the plaintiff alleged facts sufficient to establish a governmental purpose to discriminate on the basis of sex by its use of sex-classified tariff rates); U.S. INT’L TRADE COMM’N, *supra*, at VIII 42-22, subheading 4203.29.30, .40 (setting forth a duty rate of 14 percent for men’s gloves, and a duty rate of 12.6 percent for gloves for “other persons”).
8. ALLEN J. FISHBEIN & PATRICK WOODALL, CONSUMER FED’N OF AM., WOMEN ARE PRIME TARGETS FOR SUBPRIME LENDING: WOMEN ARE DISPROPORTIONATELY REPRESENTED IN HIGH-COST MORTGAGE MARKET (2006), <http://www.consumerfed.org/pdfs/WomenPrimeTargetsStudy120606.pdf>. While the Equal Credit Opportunity Act of 1974 and the Fair Housing Act formally prohibited sex discrimination in access to credit, mortgage lenders continue to employ predatory practices that discriminate on the basis of sex, creating disparities in subprime mortgages. See Maureen R. St. Cyr, *Gender, Maternity Leave, and Home Financing: A Critical Analysis of Mortgage Lending Discrimination Against Pregnant Women*, 15 U. PENN. J.L. & SOC. CHANGE 109, 110–11 (2011); see also Amy J. Schmitz, *Sex Matters: Considering Gender in Consumer Contracting*, 19 CARDOZO J.L. & GENDER 437, 444 (2013). Whether some of these disparities may also be caused by less familiarity with the mortgage market among women remains unclear. FISHBEIN & WOODALL, *supra*, at 17–18; see also Bob Tedeschi, *Why Women Pay Higher Interest*, N.Y. TIMES (Jan. 21, 2007), <http://www.nytimes.com/2007/01/21/realestate/21mort.html>.

state law that prohibited sex-based price discrimination in retail service establishments (leaving sex discrimination in the price of goods still unregulated), the state of California found that women paid an average “gender tax” of \$1351 per year in added costs for similar goods and services as compared to men.<sup>9</sup> Attempts to solve the problem of sex discrimination in contracting through new legislation have failed, in part because of the lobbying efforts of manufacturers and retailers that charge women more for their products and services.<sup>10</sup>

This Article argues that while practices that discriminate on the basis of sex in the sale of goods and services are widespread, and are largely regarded as lawful, such forms of sex discrimination in contracting were prohibited over one hundred fifty years ago by the passage of the first civil rights statute in our nation’s history—the Civil Rights Act of 1866. Enacted shortly after the conclusion of the Civil War, the Act sought to eradicate widespread and entrenched acts of private discrimination<sup>11</sup> and to block attempts by state legislatures to demote the status of newly emancipated slaves through Black Codes,<sup>12</sup> state laws that curtailed the rights of the newly freed slaves to such an extent that their official emancipation was of little consequence.<sup>13</sup> The 39th Congress recognized that unequal access to

9. CAL. SENATE JUDICIARY COMM., BILL ANALYSIS FOR A.B. 1100, 1995–96 Reg. Sess., at 5 (1995), [http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab\\_1051-1100/ab\\_1100\\_cfa\\_950403\\_145943\\_sen\\_comm.html](http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab_1051-1100/ab_1100_cfa_950403_145943_sen_comm.html); Jennifer Warren, *State Bans Gender Bias in Service Pricing*, L.A. TIMES (Oct. 14, 1995), [http://articles.latimes.com/1995-10-14/news/mn-56735\\_1\\_gender-based-pricing](http://articles.latimes.com/1995-10-14/news/mn-56735_1_gender-based-pricing). Assemblywoman Jackie Speier coined the term “gender tax” to refer to these added expenses. See CAL. SENATE JUDICIARY COMM., *supra*.
10. See, e.g., Jazmine Ulloa, *Bill to End Gender Disparity in Retail Pricing Is Withdrawn After Pushback from Industry Lobbyists*, L.A. TIMES (June 29, 2016, 11:38 AM), <http://www.latimes.com/politics/la-pol-sac-california-toys-gender-discrimination-20160628-snap-story.html>.
11. Barry Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 YALE L.J. 541, 549 (1989).
12. Passed in many Confederate states after the Civil War, these laws were “a substitute for slavery.” *Bell v. Maryland*, 378 U.S. 226, 247–48 (1964) (Douglas, J. concurring) (arguing that policies allowing places of public accommodation to refuse to serve customers on the basis of their race create a system of second-class citizenship reminiscent of slavery). Their penal code provisions subjected black people to “harsher and more arbitrary punishments” than white people, prohibited black people from bearing arms or appearing in public places, prevented black people from engaging in occupations other than domestic or agricultural service, and generally evinced “a desire to keep the freedmen in a permanent position of tutelage, if not of peonage.” *Id.* at 248 n.3 (quoting SAMUEL ELIOT MORISON & HENRY STEELE COMMAGER, *THE GROWTH OF THE AMERICAN REPUBLIC* 17–18 (4th ed. 1950)). Former slave owners often would use labor contracts to ensure the continued dependency of their former slaves by, for instance, locking them into lifetime contracts or charging them exorbitant rates for rent or food. John Hope Franklin, *The Civil Rights Act of 1866 Revisited*, 41 HASTINGS L.J. 1135, 1141 (1990). Such acts of private discrimination exacerbated inequalities and allowed white citizens “to secure, as far as possible, the same control over the freedmen by contracts which the whites possessed when they held them as slaves.” JOINT COMM. ON RECONSTRUCTION, REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION AT THE FIRST SESSION THIRTY-NINTH CONGRESS, PART II, at 123 (1866).
13. Darrell A. Miller, *White Cartels, the Civil Rights Act of 1866, and the History of Jones v. Alfred H. Mayer Co.*, 77 FORDHAM L. REV. 999, 1032 (2008) (“Without a doubt . . . the 1866 Act aimed at obliterating [the Black Codes.]”); *Butchers’ Benevolent Ass’n of New Orleans v. Crescent City Live-Stock Landing & Slaughter-House Co.* (*Slaughter-House Cases*), 83 U.S. 36, 70 (1872) (reviewing the historical context surrounding the enactment of the

contracting—including discriminatory pricing of goods and services—fundamentally interfered with black Americans’ ability to enjoy certain civil rights that were essential to citizenship.<sup>14</sup> To ensure that the rights of newly freed slaves were not so inhibited, Congress included in the Act a provision providing that “all persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens.”<sup>15</sup> Guaranteeing that “all persons” would be able to contract on a level playing field with white citizens would, Congress hoped, eliminate discrimination in the marketplace, ultimately allowing those whose contract rights previously had been abridged to operate independently and to accumulate material wealth.<sup>16</sup>

Unfortunately, the promise of the Civil Rights Act of 1866—and its successor and current incarnation, 42 U.S.C. § 1981<sup>17</sup> (hereinafter Section 1981)—has not been fully realized in a variety of ways. In particular, these statutes have not been applied to prohibit discrimination on the basis of sex. Since its original enactment in 1866, plaintiffs occasionally have urged that Section 1981’s contract protections should be read to prohibit sex discrimination. They have argued, for instance, that the term “white citizens”—to whose rights those of the plaintiff are to be compared—is synonymous with the group most favored by the law, rather than with a racial category.<sup>18</sup> Courts, however, routinely have

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Fourteenth Amendment).

14. Franklin, *supra* note 12, at 1141–42.

15. Civil Rights Act of 1866, ch. 31, 14 Stat. 27. The full text of the Civil Rights Act of 1866 read:

[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

*Id.* While the rights that this statute conferred may seem routine today, in postbellum and post-slavery America, “their centrality to creating a fully vibrant free, civil society was more directly evident.” James W. Fox, Jr., *14th Amendment Citizenship and the Reconstruction-Era Black Public Sphere*, in *INFINITE HOPE AND FINITE DISAPPOINTMENT* 214, 220 (Elizabeth Reilly ed., 2011). For instance, the right to contract “in the context of the 1860s . . . was fundamental. The country was developing into a modern force of industrial capitalism, and contract was one of the legal engines driving this transformation.” *Id.* Scholars further emphasize that “[t]he triumph of a contractarian ideology by the middle of the nineteenth century enabled mercantile and entrepreneurial groups to broadly advance their own interests through a transformed system of private law.” MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 211 (1977).

16. Sullivan, *supra* note 11, at 550.

17. For a brief history of the evolution of the language of the Civil Rights Act of 1866 into that of Section 1981, see *infra* note 35.

18. See, e.g., *Bobo v. ITT, Cont’l Baking Co.*, 662 F.2d 340, 343 (5th Cir. 1990) (dismissing the plaintiff’s argument that “white citizens” should be read to mean the group most favored by the law, and instead concluding that the statute’s political history indicates that Section 1981

dismissed such claims with little analysis.<sup>19</sup> The First, Second, Third, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuit Courts of Appeal have either held<sup>20</sup> or strongly suggested<sup>21</sup> that sex discrimination claims cannot be brought under Section 1981. In doing so, many of these courts<sup>22</sup> have relied on dicta from the

cannot support sex discrimination claims).

19. *See, e.g.,* *Marshall v. Honeywell Tech. Sols., Inc.*, 536 F. Supp. 2d 59, 69 (D.D.C. 2008) (dismissing the plaintiff's claim of sexual harassment at work because "Section 1981 does not provide redress for either sex or age discrimination. To the extent that [the plaintiff] intended to plead a § 1981 claim for sex . . . discrimination, [that] claim[] will be dismissed . . . for failure to state a claim."); *Scott-Riley v. Mullins Food Prods.*, 391 F. Supp. 2d 707, 717 (N.D. Ill. 2005) (dismissing the plaintiff's Section 1981 claim that she had been sexually harassed at her workplace, concluding simply that "[t]he first argument is easily resolved. Gender-based discrimination is not actionable under § 1981."); *Hartman v. Smith & Davis Manufacturing Co.*, 904 F. Supp. 983, 986 n.3 (E.D. Mo. 1995) (dismissing the plaintiff's Section 1981 claim that her employer terminated her employment on the basis of her sex because "Section 1981 is limited to claims of race discrimination and does not encompass claims of sex discrimination"); *Ferrell v. Ass'n of Cent. Okla. Gov'ts*, 481 F. Supp. 125, 128 (W.D. Okla. 1978) (dismissing the plaintiff's Section 1981 claim that her employer terminated her employment on the basis of her sex because "§ 1981 is applicable only to racial discrimination and not to discrimination on the basis of sex"); *Fitzgerald v. United Methodist Cmty. Ctr.*, 335 F. Supp. 965, 966 (D. Neb. 1972) (dismissing the plaintiff's Section 1981 claim for sex discrimination in employment because the 39th Congress could "not by this statute have [been] attempt[ing] to eradicate [sex] discrimination").
20. *Fantini v. Salem State Coll.*, 557 F.3d 22, 33–34 (1st Cir. 2009) (affirming the district court's dismissal of the plaintiff's sex discrimination claim under Section 1981); *Anjelino v. N.Y. Times Co.*, 200 F.3d 73, 78 (3d Cir. 1999) (dismissing the Section 1981 claims brought by "Hispanic" women against their former employer for alleged sex discrimination that impeded the plaintiffs' ability to advance on their employer's "priority" list for seniority and higher pay, "because section 1981 does not reach these forms of discrimination"); *Bobo*, 662 F.2d at 345 (dismissing the plaintiff's claim of sex discrimination in employment under Section 1981 because "sex discrimination is not cognizable under § 1981"); *Movement for Opportunity & Equality v. Gen. Motors Corp.*, 622 F.2d 1235, 1278 (7th Cir. 1980) (dismissing plaintiffs' claims of sex discrimination against their employer in, among other things, promotion to supervisory and management positions, because Section 1981 is "inapplicabl[e] to sex discrimination claims"); *DeGraffenreid v. Gen. Motors Assembly Div., St. Louis*, 558 F.2d 480, 486 n.2 (8th Cir. 1977) ("The district court correctly observed that sex discrimination in employment is not cognizable under § 1981."); *White v. Wash. Pub. Power Supply Syst.*, 692 F.2d 1286, 1290 (9th Cir. 1982) (reversing the trial court's finding of liability under Section 1981, concluding that the trial court may have inappropriately based liability on sex rather than race and that "it is well settled that section 1981 only redresses discrimination based on plaintiff's race"); *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968, 971 (10th Cir. 1979) ("Section 1981 does not apply to sex or religious discrimination.").
21. *Anderson v. Conboy*, 156 F.3d 167, 170 (2d Cir. 1998) (holding, in an alienage discrimination case concerning a Jamaican citizen who had been terminated from his job at a union after his employer became aware of his citizenship status, that while Section 1981 could support a claim of alienage discrimination, "[i]t is . . . settled that Section 1981 does not prohibit discrimination on the basis of gender or religion"); *Jones v. Cont'l Corp.*, 789 F.2d 1225, 1231 (6th Cir. 1986) ("[F]ederal law is quite clear that § 1981 prohibits only race discrimination, not sex discrimination."); *Little v. United Techs., Carrier Transicold Div.*, 103 F.3d 956, 961 (11th Cir. 1997) ("It is well-established that § 1981 is concerned with *racial* discrimination in the making and enforcement of contracts."); *DeJesus v. WP Co.*, 841 F.3d 527, 532 n.2 (D.C. Cir. 2016) (stating that Section 1981, unlike Title VII, "does not cover . . . sex discrimination").
22. Specifically, the First, Second, Third, Fifth, Sixth, Seventh, Eighth, and Tenth Circuit cases cited in notes 20 and 21, *supra*, all cite *Runyon v. McCrary*, 427 U.S. 160 (1976), to support their conclusions. The Ninth Circuit did so in *Shah v. Mt. Zion Hospital & Medical Center*, 642 F.2d 268, 272 n.4 (1981), in support of its conclusion that "[Section 1981] is directed at

U.S. Supreme Court's decision in *Runyon v. McCrary*, in which black male plaintiffs—who neither raised nor briefed a sex discrimination claim—sued a school for racial discrimination in admission.<sup>23</sup> The Supreme Court otherwise has never directly confronted whether sex discrimination claims are cognizable under Section 1981. Lower courts that have concluded that such claims cannot be brought have overlooked the fact that in 1866, the category of people that the statute calls “white citizens” was not a single, undifferentiated class that the law treated equally. Rather, common law throughout the nineteenth century denied married women substantive contract and property rights, relegating them to a status of less-than-fully-participatory citizenship.<sup>24</sup> Unmarried women, too, occupied a position unequal to that of men vis-à-vis the right to contract.<sup>25</sup>

This Article posits that, in describing the new rights to be bestowed upon “all persons,” Congress’s referent category (“white citizens”) could only have been the group of people who at the time possessed the rights to be conferred—that is, white men. Accepting that by “white citizens” Congress was referring to white men would mean that any person—including a black man, a black woman, or a white woman—could make a claim that he or she had not been treated equally to white men when making or enforcing a contract. In the words of the statutory text, these individuals could all argue that they had not been afforded “the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens.” Recognizing that Section 1981’s comparison category—“white citizens”—refers to white men would thus compel a determination that Section 1981 prohibits sex discrimination in the making and enforcement of contracts.

This Article proceeds in three Parts. Part I provides a brief overview of the statutory history of the Civil Rights Act of 1866. In Part II, I discuss three interpretations of the language of Section 1981 that have been or could be adopted by courts and scholars, all of which conclude that Section 1981 cannot support claims of sex discrimination. In the first, Section 1981 is understood to involve a comparison between the rights of the plaintiff and those of any white citizen, male or female. In the second, Section 1981 is read to compare the plaintiff’s rights to those of a white individual of the same sex; in other words, the rights of the plaintiff are compared to those of white men if the plaintiff is male or to those of white women if the plaintiff is female. The third, and most common, interpretation of Section 1981 relies on the statute’s purported purpose only to combat racial discrimination. I discuss the logical flaws of each of these interpretative approaches in turn. In Part III, I argue that Section 1981 should be interpreted in light of the subordinate civil and political status of women under the doctrine of coverture at the time the Civil Rights Act of 1866 was passed, and that such a

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racial discrimination, not other forms of discrimination.”

23. 427 U.S. 160, 167 (1976) (holding that black male plaintiffs properly stated a claim for racial discrimination against a private school, and stating further that “42 U.S.C. § 1981 is in no way addressed to” discrimination on the basis of sex).

24. See *infra* text accompanying notes 52–53.

25. See *infra* text accompanying notes 59–62.

reading would mean that Section 1981 prohibits sex discrimination in contracting. Part III concludes by exploring why this approach avoids the pitfalls of other approaches and properly effectuates the moral principle of nondiscrimination that Section 1981 embodies.

### I. SECTION 1981: A BRIEF STATUTORY HISTORY

The Civil Rights Act of 1866, the statute from which Section 1981 derives, was the first federal statute in U.S. history both to define and to provide broad protections for civil rights.<sup>26</sup> It was enacted by the 39th Congress to give substance and meaning to the recently ratified Thirteenth Amendment,<sup>27</sup> and specifically to prohibit state legislatures from undermining the newly acquired rights of former slaves through the passage of Black Codes.<sup>28</sup> To provide affirmative protections against such measures, Congress first had to define the fundamental rights of citizenship that would now apply to those who had previously been enslaved. As originally introduced, the Act provided:

[A]ll persons of African descent born in the United States are hereby declared to be citizens of the United States, and there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery [and] the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property.<sup>29</sup>

The statutory language evolved considerably during the course of congressional debates, however. While the original bill conferred new rights only to “persons of African descent born in the United States,” its language ultimately was broadened and characterized in neutral terms to clarify that, in the words of the bill’s Senate sponsor, it applied to “white men as well as black men. It declares that all persons in the United States shall be entitled to the same civil rights.”<sup>30</sup> Furthermore, while the bill initially stated only that all persons would have the

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26. STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS PART I, at 99 (Bernard Schwartz ed., 1970) [hereinafter SCHWARTZ].

27. Franklin, *supra* note 12, at 1142. The Civil Rights Act of 1866 was the first piece of legislation to be passed after the ratification of the Thirteenth Amendment. Jennifer Mason McAward, *The Scope of Congress’s Thirteenth Amendment Enforcement Power After City of Boerne v. Flores*, 88 WASH. U. L. REV. 77, 87 (2010).

28. See Franklin, *supra* note 12. Such state laws “imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value.” *Slaughter-House Cases*, 83 U.S. 36, 70 (1872).

29. CONG. GLOBE, 39th Cong., 1st Sess. 474 (Jan. 29, 1866) (remarks of Sen. Trumbull).

30. CONG. GLOBE, 39th Cong., 1st Sess. 599 (Feb. 2, 1866) (remarks of Sen. Trumbull).

“same right,” without qualification or comparison to any group,<sup>31</sup> the words “as is enjoyed by white citizens” were added by amendment to allay concerns that new rights might be extended to all citizens, including women and children.<sup>32</sup> Finally, opponents expressed concern that prohibiting discrimination in “civil rights” would, by definition, also grant newly freed slaves the right to vote, a step that many in Congress were unprepared to take.<sup>33</sup> As a result, in the final statute the term “civil rights” appeared only in the title.<sup>34</sup>

Following its passage into law over President Johnson’s veto, the Civil Rights Act of 1866 was reenacted and recodified several times, but its language has remained largely consistent.<sup>35</sup> Today, it is codified as 42 U.S.C. § 1981, which

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31. BERNARD H. SIEGAN, *THE SUPREME COURT’S CONSTITUTION: AN INQUIRY INTO JUDICIAL REVIEW AND ITS IMPACT ON SOCIETY* 55 (1987).
  32. See CONG. GLOBE, 39th Cong., 1st Sess. app. 157 (Mar. 8, 1866) (remarks of Rep. Wilson) (“[U]nless these qualifying words were incorporated in the bill, those rights might be extended to all citizens, whether male or female, majors or minors.”); see also CONG. GLOBE, 39th Cong., 1st Sess. 1782 (Apr. 5, 1866) (remarks of Sen. Cowan) (“I say that this bill, according to its grammatical construction, and according to the construction that any judge . . . can readily put upon it, confers upon married women, upon minors, upon idiots, upon lunatics, and upon everybody native born in all the States, the right to make and enforce contracts, because there is no qualification in the bill . . .”). In Part II, I argue that the evidence that the 39th Congress did not intend women to be included in the statute is not in fact as clear as it may seem. See *infra* Part II.C.3.
  33. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 477–78 (Jan. 29, 1866) (remarks of Sen. Saulsbury). During the congressional debate over the bill, Senator Saulsbury remarked: “What is a civil right? It is a right that pertains to me as a citizen. And how do I get the right to vote? I get it by virtue of citizenship, and I get it by virtue of nothing else.” CONG. GLOBE, 39th Cong., 1st Sess. 606 (Feb. 2, 1866); see also CONG. GLOBE, 39th Cong., 1st Sess. 1122 (Mar. 1, 1866) (remarks of Rep. Rogers) (“What right do we exercise under the Constitution, including that of the right of suffrage, that under this language Congress may not grant to the negro? The right of suffrage is not a natural right. It is a civil right.”).
  34. Civil Rights Act of 1866, ch. 31, 14 Stat. 27. The term “civil rights” was stricken from the body of the bill by amendment in the House, but remained in the title of the Act. Representative Wilson, the chairman of the House Judiciary Committee and the floor manager of the Act in the House, stated that he “[did] not think it materially changes the bill” but that the amendment was offered by “some gentlemen [who] were apprehensive that [the term “civil rights”] might give warrant for a latitudinarian construction not intended.” CONG. GLOBE, 39th Cong., 1st Sess. 1366 (Mar. 13, 1866) (remarks of Rep. Wilson).
  35. The U.S. Supreme Court discussed the derivation of Section 1981 from the Civil Rights Act of 1866 in *Runyon v. McCrary*, 427 U.S. 160, 168 n.8 (1976) (holding that black children who had been denied admission to a private school properly stated a claim for racial discrimination under Section 1981). In brief, following the ratification of the Fifteenth Amendment, the Civil Rights Act of 1866 was reenacted by the Enforcement Act of 1870, Act of May 31, 1870, 16 Stat. 144, §§ 16, 18. This “routine” reenactment was meant to confirm the Act’s constitutionality and to extend some of its protections to aliens. GEORGE RUTHERGLEN, *CIVIL RIGHTS IN THE SHADOW OF SLAVERY: THE CONSTITUTION, COMMON LAW, AND THE CIVIL RIGHTS ACT OF 1866*, at 80 (2013). Otherwise, however, its scope remained unchanged. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968) (“All Congress said in 1870 was that the 1866 law ‘is hereby re-enacted.’ That is all Congress meant.”). In 1874, the 1866 and 1870 Acts were codified in the Revised Statutes of 1874, which divided into two separate sections the rights held by both aliens and citizens (Section 1981) and those held by citizens alone (Section 1982). RUTHERGLEN, *supra*, at 82. The language of Section 1981, which remains in effect today, is—with the exception of the section title and the amendment made by the Civil Rights Act of 1991, see *infra* text accompanying note 38—identical to the language reenacted in 1870:

provides that:

[A]ll persons . . . shall have the same right . . . 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.<sup>36</sup>

In 1991, Congress passed its first and only substantive amendment to the statute since its original enactment. In response to the U.S. Supreme Court's decision in *Patterson v. McLean Credit Union*, in which the Court held that racial harassment in employment does not interfere with the right to make or enforce contracts and therefore was not actionable under Section 1981,<sup>37</sup> Congress passed the Civil Rights Act of 1991, which provided that "mak[ing] and enforc[ing] contracts" includes the "performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."<sup>38</sup> Besides the broadened scope that the 1991 Act authorized, Section 1981's original language has never been amended or abridged. Today, it remains among the most-relied-upon statutes for plaintiffs seeking relief for infringement of their civil rights.<sup>39</sup>

In the Part that follows, I consider extant interpretations of Section 1981, each of which concludes that the statute cannot support claims of sex discrimination. I also explore why the failure to consider the heterogeneity of the category of persons to which the contract rights of a plaintiff must be compared ("white citizens") creates substantial interpretative obstacles for each of these approaches.

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(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.

42 U.S.C. § 1981 (2012).

36. 42 U.S.C. § 1981 (2012).

37. 491 U.S. 164 (1989). The *Patterson* Court held that such harassment constituted a "condition[] of employment" rather than conduct that interfered with the right to make a contract or enforce established contract obligations, and as such was not actionable under Section 1981. *Id.* at 171.

38. Pub. L. No. 102-166, 105 Stat. 1071 (1991).

39. According to an empirical study of civil rights cases, Section 1981 remains the third most frequently-relied-upon civil rights statute for plaintiffs bringing federal civil rights actions. Theodore Eisenberg & Stewart Schwab, *The Importance of Section 1981*, 73 CORNELL L. REV. 596, 599 (1988). As part of this study, the authors examined the courthouse record in every civil rights case filed in three districts over a one-year (1980–81) period: the Central District of California, the Eastern District of Pennsylvania, and the Northern District of Georgia. *Id.* at 598. Section 1981 was relied upon in 252 cases, surpassed in usage only by Section 1983 (506 cases) and Title VII (433 cases), but well ahead of other civil rights statutes, including Sections 1982, 1985 and 1986, Title VI, Title VIII, the Equal Pay Act, the Age Discrimination in Employment Act, and others. *Id.* at 599.

## II. EXISTING (OR CONCEIVABLE) INTERPRETATIONS OF SECTION 1981

As detailed in Part I, in describing the rights it sought to confer by Section 1981, Congress elected to use a referent class—“white citizens”—whose rights would be the standard against which a plaintiff seeking relief for discrimination under the statute would compare his own. In this Part, I explore several alternative interpretations of this language and of Section 1981 as a whole, each of which ultimately concludes that sex discrimination claims are not cognizable under the statute. Part II.A considers the proposal that “white citizens” could be interpreted to mean “white men *and* white women,” meaning that for a nonwhite plaintiff to recover under Section 1981, his rights to make and enforce contracts must be inferior to those of both white men and white women. Part II.B evaluates the suggestion that “white citizens” should be interpreted to mean “white men *or* white women,” and that the rights to contract of nonwhite male plaintiffs should be compared with those of white men, while the rights of nonwhite female plaintiffs should be compared with those of white women. Finally, Part II.C considers the common assertion that Section 1981 was only intended to remedy claims of racial discrimination. I suggest that each of these interpretations suffers from substantial flaws, and that each provides a less appropriate interpretative framework than one that acknowledges the unequal civil status of women when the statute was originally enacted.

### A. Reading “White Citizens” as “White Men and White Women”

Given that Section 1981’s language is not explicitly gendered, one might first consider whether its term “white citizens” refers to *all* white citizens, meaning white men and white women. Were “white citizens” to be thus understood, a nonwhite plaintiff could recover under Section 1981 only if he could show that his right to contract were subordinate to those of both white men and white women, since his rights would be compared to those of a group consisting of both. Furthermore, claims of sex discrimination would not be supportable under this interpretation, since the contracting rights of female plaintiffs would be compared to those of (white) women; it would therefore not be germane for a woman to demonstrate that she had been treated differently than a man.

This interpretation is problematic, however, because using this approach the Civil Rights Act of 1866 would have done little to ameliorate the position of black citizens in the nineteenth century. Because a black citizen would have to prove that his rights were inferior to those of *all* white citizens, this interpretation implicitly assumes that white citizens in the nineteenth century were a homogenous, undifferentiated class equally capable of exercising the rights enumerated in the Act, and that the rights of white citizens equally exceeded those of black citizens. But this was not the case. The common law treated women

differently and denied them a variety of civil, political, and economic rights.<sup>40</sup> Under the common law doctrine of coverture,<sup>41</sup> married women were unable to enter contracts.<sup>42</sup> Any contract that a woman purported to enter was void; in this respect, women's legal status under coverture was even more tenuous than that of children, whose contracts were merely voidable under the common law.<sup>43</sup> As a

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40. Claudia Zaher, *When a Woman's Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 L. LIBR. J. 459 (2002). These limitations derived from traditional English common law, which was adopted by the American colonies and remained in force through the early twentieth century. *Id.* at 461–62.
41. Under coverture, the husband and wife became one in the eyes of the law, and the married woman was subjected to both substantive and procedural disabilities. See LEO KANOWITZ, *WOMEN AND THE LAW: THE UNFINISHED REVOLUTION* 36 (1969); Zaher, *supra* note 40, at 461 (“[U]pon marriage the husband and wife became one—*him*.”); see also GEORGE E. HARRIS, *A TREATISE ON THE LAW OF CONTRACTS BY MARRIED WOMEN* 1 (1887) (“[The wife’s] personal existence was merged into that of her husband, and they were but one in law.”); JOHN F. KELLY, *A TREATISE ON THE LAW OF CONTRACTS OF MARRIED WOMEN* 22 (1882) (“Marriage makes the husband and wife one person, suspending the legal capacity or existence of the wife during the coverture, depriving her of a free will and subjecting her to obedience to her husband.”). Eighteenth-century theorists like Judge Blackstone argued that these disabilities were not the result of coercion, but rather that coverture implied a unity and equality to which women consented when they decided to marry. MARRIED WOMEN AND THE LAW: COVERTURE IN ENGLAND AND THE COMMON LAW WORLD 14 (Tim Stretton & Krista J. Kesselring eds., 2013) [hereinafter STRETTON & KESSELRING]; see also Nancy F. Cott, *Marriage and Women’s Citizenship in the United States, 1830–1934*, 103 AM. HIST. REV. 1440, 1453 (1998) (marriage was seen as “a reciprocal bargain arising from consent”). Women’s subordinate status was thought to be justified by “‘natural laws,’ which supposedly prescribed weakness, diffidence, and strictly domestic ‘capacities’ for women.” *Id.* at 1454. The laws of coverture were, in other words, believed to be for a woman’s “protection and interest.” *Id.* at 1455. Treatises on the legal rights of women under coverture reflected this contemporary reasoning that a woman’s natural predisposition was to be subservient to her husband. See RANSOM H. TYLER, *COMMENTARIES ON THE LAW OF INFANCY* 311 (1871) (“Nature seems to have assigned to females a more limited sphere of action than to males, and hence they may very properly be excluded from a participation in public affairs.”). In 1872, Justice Bradley invoked similar reasoning in upholding the state of Illinois’s refusal to permit a woman to practice law. *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (“The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.”).
42. KELLY, *supra* note 41, at 22–23; WILLIAM M. STORY, *A TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL* ch. 1 § 62 (1844). Accordingly, a woman could not enter a contract with her husband, nor a husband with his wife, for doing so “would be to suppose her separate existence, and to covenant with her would be only to covenant with himself.” TYLER, *supra* note 41, at 312. Women’s inability to contract under coverture is particularly striking given that this right was recognized as preeminent among those associated with freedom. See *Blyew v. United States*, 80 U.S. 581, 583 (1871) (interpreting an unrelated section of the Civil Rights Act of 1866 to exclude the right of black plaintiffs to testify against white defendants in federal court, but presenting the government’s argument that “no man can be called free who is denied the right to make contracts”); CONG. GLOBE, 39th Cong., 1st Sess. 91 (Dec. 20, 1865) (remarks of Sen. Sumner) (discussing with admiration the Russian Emperor’s order of Emancipation, and noting that its implementing law “secure[d] . . . freedmen in all their rights; first, in the right of family and the right of contract”).
43. HARRIS, *supra* note 41, at 1; TYLER, *supra* note 41, at 312 (“[E]specially in matters of contract [a married woman] is subject to a greater disability than infants.”); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 957 n.11 (1984). Scholars have noted that in general, under coverture, “[m]arried women . . . found themselves linked with ‘idiots’ and

result, marriage automatically gave a husband title to his wife's personal property,<sup>44</sup> an estate in his wife's real property,<sup>45</sup> and absolute ownership of his wife's earnings.<sup>46</sup> Without a legal identity independent from her husband, coverture made a woman dependent on him,<sup>47</sup> and effectively declared her "civilly dead."<sup>48</sup>

Married women's disabilities under coverture were not limited to those arising out of their inability to form valid contracts. A married woman also could not sue or be sued in her own name<sup>49</sup> or recover money in a suit jointly filed with her husband.<sup>50</sup> While women's formal status as citizens in the nineteenth century was unquestioned—even legislators who passed the Civil Rights Act of 1866 referred to women as "citizens"<sup>51</sup>—the disabilities of coverture, taken together with women's other political disadvantages, have led scholars to describe women's citizenship as "lesser"<sup>52</sup> or "less-than-participatory."<sup>53</sup>

While unmarried women, legally referred to as *femes sole*, were not subject to the same legal disabilities as married women,<sup>54</sup> single women were not immune from the subordinating effects of coverture, given the possibility and the

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minors in manifesting disabilities and deficiencies . . ." STRETTON & KESSELRING, *supra* note 41, at 4.

44. KELLY, *supra* note 41, at 24, 27. The husband could use or dispose of his wife's personal property as he wished. *Id.* at 24; *see also* Law, *supra* note 43. Under coverture, title to gifts given to his wife, or to the couple jointly, passed only to the husband. KELLY, *supra* note 41, at 27.
45. KELLY, *supra* note 41, at 24.
46. *Id.* at 24; STORY, *supra* note 42, at § 62; ELIZABETH BOWLES WARBASSE, *THE CHANGING LEGAL RIGHTS OF MARRIED WOMEN 1800–1861*, at 8 (1987); *see also* Amy Dru Stanley, *Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation*, 75 J. AM. HIST. 471, 477 (1988).
47. Cott, *supra* note 41, at 1452. In the words of Justice Story: "The law relating to married women makes every family a barony, a monarchy or a despotism, of which the husband is the baron, king or despot, and the wife the dependent, serf or slave . . ." HARRIS, *supra* note 41, at 3; *see also* *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (observing that a husband "was regarded as [his wife's] head and representative in the social state," and therefore that his wife would be unable to fully perform the duties required by the practice of law); WARBASSE, *supra* note 46, at 21 ("[T]he average wife . . . was completely dependent upon [her husband] for support.").
48. Elizabeth Cady Stanton & Lucretia Mott, *The Declaration of Sentiments*, 1848 Seneca Falls Convention, <http://legacy.fordham.edu/halsall/mod/senecafalls.asp>; *see also* Law, *supra* note 43, at 957 ("[T]he law . . . declared the married woman dead."); Louisa S. Ruffine, *Civil Rights and Suffrage: Myra Bradwell's Struggle for the Equal Citizenship of Women*, 4 HASTINGS WOMEN'S L.J. 175, 179 (1993) (asserting that marriage under coverture constituted "women's civil death").
49. STORY, *supra* note 42, at § 70.
50. Law, *supra* note 43, at 957 n.11.
51. *See infra* text accompanying note 98.
52. Cott, *supra* note 41, at 1473.
53. *Id.* at 1451; *see also* *Kerry v. Din*, 135 S. Ct. 2128, 2135 (2015) (opinion of Scalia, J.) (labeling women's citizenship under coverture as "derivative citizenship"); Ruffine, *supra* note 48, at 177 (labeling women in the nineteenth century as "citizens with nominal rights").
54. Single women, unlike married women, were permitted to own property and enter contracts in their own name. Cott, *supra* note 41, at 1454; WARBASSE, *supra* note 46, at 5–6 (1987).

expectation that they would someday marry.<sup>55</sup> The stereotypes perpetuated by the disabilities of coverture affected the legal rights of all women, in much the same way that the system of slavery perpetuated stereotypes about all black people, including free blacks.<sup>56</sup> While single women enjoyed some rights that married women did not, the political rights that they could lawfully exercise were still severely limited. Prior to 1898, every state prohibited women's participation on juries,<sup>57</sup> and it was not until the ratification of the Nineteenth Amendment in 1920 that women could exercise the right to vote.<sup>58</sup> Furthermore, single women, like married women, were unable to fully exercise the right to contract. Women, both married and single, were denied access to various professions, including the law,<sup>59</sup> and could be terminated from employment if they became pregnant.<sup>60</sup> Both single women and married women faced barriers to obtaining credit; to get a loan, women often had to find a man who would cosign the application.<sup>61</sup> These legal infirmities led the first Women's Rights Convention to declare that "even in widowhood and single life, [women are] oppressed with such limitation and degradation of labor and avocation as clearly and cruelly mark the condition of a disabled caste."<sup>62</sup>

Thus, had women been incorporated in the Act's definition of "white citizens," the rights conferred to newly emancipated slaves might have fallen far short of the rights that the 39th Congress expected the statute to grant. A party

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55. STRETTON & KESSELRING, *supra* note 41, at 5–6; *see also* Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1655–56 (2003) ("Despite the explicit boundaries between the legal rights of married and unmarried women, the law understood and constructed the social and legal status of many unmarried women in relation to marriage."); Ariela R. Dubler, "Exceptions to the General Rule": *Unmarried Women and the "Constitution of the Family"*, 4 THEORETICAL INQUIRIES LAW 797, 801 (2003) ("[I]n both public and private law settings, formal definitions of women's political citizenship and common law doctrines of female support—such as common law marriage, heartbalm actions, and dower—allowed nineteenth-century lawmakers to define all women as wives, thereby erasing the non-marital identities of single women."). A single woman's citizenship was tenuous, for instance, in that she, unlike a man, risked losing her American citizenship if she married a foreigner. Cott, *supra* note 41, at 1460–61.
  56. Emily Calhoun, *The Thirteenth and Fourteenth Amendments: Constitutional Authority for Federal Legislation Against Private Sex Discrimination*, 61 MINN. L. REV. 313, 355 n.172 (1977).
  57. Lucy Fowler, *Gender and Jury Deliberations: The Contributions of Social Science*, 12 WM. & MARY J. OF WOMEN & THE LAW 1, 3 (2005). It was not until the passage of the Civil Rights Act of 1957 that women were given the right to sit on juries in federal trials. Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634.
  58. U.S. CONST. amend. XIX.
  59. *See, e.g.*, *Bradwell v. Illinois*, 83 U.S. 130 (1872) (upholding an Illinois statute denying women licenses to practice law).
  60. It was not until 1978 that Congress amended the Civil Rights Act of 1964 to prohibit sex discrimination on the basis of pregnancy. *See* 42 U.S.C. § 2000e(k) (2012).
  61. Until the enactment of the Equal Credit Opportunity Act in 1974, banks could—and did—require single women to bring a man along to cosign a credit application. *See* S. REP. NO. 93-278, 17 (1973) ("Women with history of employment have been denied credit without their husbands' signatures, even though they had substantial earnings.").
  62. PROCEEDINGS OF THE WOMEN'S RIGHTS CONVENTION, HELD AT WORCESTER, OCTOBER 23D & 24TH, 1850, at 4–5 (Boston, Prentiss & Sawyer 1851) (quoted in Reva B. Siegel, *Home as Work: The First Women's Rights Claims Concerning Wives' Household Labor, 1850–1880*, 103 YALE L.J. 1073, 1100 (1994)).

defending against a legal claim under the Act simply could argue that the statute conferred only the most limited set of rights belonging to “white citizens”—those of white women under coverture. For instance, suppose a black man in 1867 alleged that a bank declined to offer him a loan on the basis of his race. If white women were included in the Act’s referent category (“white citizens”), the bank could have successfully countered that married white women—who were, under coverture, unable to obtain loans as a result of their inability to enter enforceable contracts—were nevertheless “white citizens.” By denying the black plaintiff’s loan, the bank could argue that it had not treated him any differently than it treated “white citizens.”

Even in the years immediately after the Act’s enactment, this result—a consequence of comparing the rights of a black male plaintiff to those of a white woman, and in doing so, finding that the black plaintiff had been treated no differently than “white citizens”—would have defeated the clear goals of the statute. Such an argument, and such a result, is nowhere to be found in the case law history of the Act or Section 1981, since an interpretation that compared the status of black men to white women would have eviscerated the practical effect of the statute by not conferring promised rights to newly emancipated black citizens. An interpretation that would have done little to improve the civil status of black citizens thus seems, both from historical and practical perspectives, an inappropriate one.

### B. Reading “White Citizens” as “White Men or White Women”

Instead of insisting that, to recover under Section 1981, the contract rights of a plaintiff must be inferior to those of both white women and white men, the language of the statute instead could be interpreted to require that the contract rights of nonwhite male plaintiffs be compared to those of white men, while the contract rights of nonwhite female plaintiffs be compared to those of white women. Under this interpretation, then, “white citizens” would refer to white men or white women, depending on the identity of the plaintiff.

The Southern District of Ohio adopted this approach in 1882 in *Gray v. Cincinnati Southern Railroad Co.*<sup>63</sup> In this case, the plaintiff, a black woman, had purchased a first-class, round-trip ticket from Lexington, Kentucky to Cincinnati, Ohio.<sup>64</sup> The return train consisted of two passenger coaches: a rear car, containing both women and men, and a forward smoking car, containing only men.<sup>65</sup> Accompanied by her husband and their sick infant in her arms, the plaintiff attempted to board the rear, non-smoking coach reserved for both men and women.<sup>66</sup> The train operator refused to allow her to enter the rear car,

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63. 11 F. 683 (S.D. Ohio 1882).

64. *Id.* at 684.

65. *Id.* at 684–85.

66. *Id.* at 684.

acknowledged that his refusal was because she was “colored,”<sup>67</sup> and directed her instead to the smoking car.<sup>68</sup> The plaintiff declined to travel in the smoking car, and elected to remain in Cincinnati several more days, ultimately returning to Lexington by a different route.<sup>69</sup> The plaintiff sued the railroad company for unlawfully refusing to permit her to enter the car in which other women were traveling on the basis of her race.<sup>70</sup> The court reasoned that, under the Civil Rights Act of 1866, “[w]hatever the social relations of life may be, before the law we stand upon the broad plane of equality.”<sup>71</sup> Since the plaintiff had purchased a ticket, the company was obligated to “provide for this colored woman precisely such accommodations, in every respect, as were provided upon their train for white women.”<sup>72</sup>

In holding for the plaintiff, the *Gray* court used an interpretative approach in which “white citizens” means white women when a claim is brought by a nonwhite female plaintiff, but white men when brought by a nonwhite male plaintiff. This interpretation cures the deficiency of the approach explored in Part II.A, since a black male plaintiff’s rights would not be compared with those of a white woman, but rather with those of a white male. Under this interpretation, the Civil Rights Act of 1866 and Section 1981 would grant black persons the same contracting rights as a white individual of the same sex. Thus, unlike an interpretation in which “white citizens” is read to refer to both white men and white women, this reading of the statute would have conferred upon recently emancipated slaves new rights that they had not previously enjoyed.<sup>73</sup>

Notably, however, reading “white citizens” to mean “white men or women” would still not permit plaintiffs to state a claim for sex discrimination under Section 1981, since the rights of female plaintiffs would be compared only to those of other women. When a woman’s right to contract is compared with that of individuals of the same sex, she cannot demonstrate that she has been treated differently from men on the basis of her sex alone. The plaintiff in *Gray* was only able to recover because she had been discriminated against on the basis of her race, or in other words, because she had been treated differently from white persons. Because she had suffered racial discrimination, the court did not have to decide whether her rights should be compared with those of male or female passengers. Had the railroad instead treated the plaintiff differently on the basis of her sex, she would not have been permitted to state a claim under Section 1981.

Interpreting Section 1981 to mean that male plaintiffs should be compared

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67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 685.

71. *Id.* at 686.

72. *Id.*

73. If instead the *Gray* court had understood “white citizens” to mean “white men and women,” pursuant to the approach discussed in Part II.A, it would have concluded that the railroad company had not abridged the plaintiff’s rights to enforce her contract, since the plaintiff had been treated no differently than the white men in the smoking car.

to white men and female plaintiffs should be compared to white women would embed within the statute a sex-classificatory structure. As noted above, a fundamental assumption of this reading of the law is that men and women must be treated differently; the experience of men in contracting must be compared only to that of other men, while the experience of women in contracting must be compared only to that of other women. Yet in the century and a half since the passage of the Act, the Supreme Court has repeatedly held that “statutory classifications that distinguish between males and females are subject to heightened scrutiny.”<sup>74</sup> To prevail under heightened scrutiny, the government would have to show that discrimination on the basis of sex in contracting serves important governmental objectives, and that discrimination on that basis is substantially related to the achievement of those objectives.<sup>75</sup>

It seems unlikely that the government could successfully argue that interpreting Section 1981 as inherently sex-discriminatory is substantially related to achieving any important governmental objective. Unlike sex-conscious laws that the Court has upheld under heightened scrutiny—such as a California law that penalized the male, but not the female, participant in statutory rape,<sup>76</sup> or a federal law that made achieving U.S. citizenship automatic when a child’s mother was a citizen, but required that one of three additional conditions be met for the child to achieve citizenship when the child’s father was a citizen<sup>77</sup>—today there is no obvious governmental interest that would justify sex-based classification in contract rights. Thus, an interpretation of Section 1981 in which “white citizens” is taken to mean “white men or white women” is likely to fail under the heightened scrutiny that the Supreme Court has applied to laws that discriminate on the basis of sex.

### **C. An Intent-Based Interpretation: Reading Section 1981 to Prohibit Only Racial Discrimination**

#### **1. The Application That Congress Intended?**

Rather than focusing on the composition of Section 1981’s referent category

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74. *Nevada Dep’t of Human Resources v. Hibbs*, 538 U.S. 721, 728 (2003) (holding that Congress acted within its Section 5 authority by enacting prophylactic legislation—the Family Medical Leave Act—that prohibited facially constitutional conduct in order to deter gender-based discrimination in the workplace).

75. *United States v. Virginia*, 518 U.S. 515, 524 (1996) (holding that a Virginia military college’s policy of sex discrimination could not withstand heightened scrutiny).

76. *See Michael M. v. Superior Court*, 450 U.S. 464, 472–73 (1981) (upholding a California law that held men alone liable for statutory rape, since the statute was sufficiently related to the state’s strong interest in preventing illegitimate pregnancy).

77. *See Nguyen v. Internal Revenue Service*, 533 U.S. 53, 60–69 (2001) (holding that Congress’s decision to impose different requirements on unmarried mothers versus unmarried fathers was justified by two important governmental interests: ensuring that a biological parent-child relationship exists, and ensuring the opportunity to develop a real relationship between the child and citizen-parent, and, with it, the United States).

(to find that “white citizens” denotes “white men and white women” or “white men or white women”), some have argued that the statutory phrase “as is enjoyed by white citizens” was meant to “emphasize the racial character of the rights being protected.”<sup>78</sup> Litigants and courts that espouse this view argue that this plain language prohibits only racial discrimination; claims of unequal treatment on the basis of anything other than race therefore lie outside of the scope of the statute.<sup>79</sup> To bolster this argument, those who believe that Section 1981 only supports claims

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78. *Georgia v. Rachel*, 384 U.S. 780, 791 (1966) (reviewing the legislative and political history of the Civil Rights Act of 1866, a precursor to the statute at issue in the case (28 U.S.C. § 1443)).

79. In addition to pointing to evidence that Congress only intended Section 1981 to prohibit discrimination of a racial character, proponents of an interpretation that the statute prohibits only racial discrimination might also argue that Congress does not have the constitutional authority to enforce the statute in any other manner (for instance, to prohibit sex discrimination). When the Civil Rights Act of 1866 was passed, Congress’s ability to regulate private acts of discrimination was limited to its authority under the Thirteenth Amendment, since the Fourteenth Amendment had not yet been enacted; indeed, the Act was the first piece of legislation to be passed after the ratification of the Thirteenth Amendment, and the members of Congress who passed the Act were largely the same as those who passed the Thirteenth Amendment. *Blyew v. United States*, 80 U.S. 581, 588 (1871); *McAward*, *supra* note 27, at 87. Representative Wilson, the House Judiciary Committee chairman and the Act’s floor manager in the House, maintained that Congress derived its authority to pass the Act from the Thirteenth Amendment’s declaration that “Congress shall have power to enforce this article by appropriate legislation.” U.S. CONST. amend. XIII, § 2. Senator Trumbull, the bill’s sponsor in the Senate, agreed that the Act was meant to “give effect to that declaration and secure to all persons within the United States practical freedom” and in doing so to counteract the “badge of servitude” that the Black Codes perpetuated. CONG. GLOBE, 39th Cong., 1st Sess. 474 (Jan. 29, 1866) (remarks of Sen. Trumbull). However, substantial doubt remained among other members of Congress as to whether the Thirteenth Amendment alone authorized the Act’s provisions that defined and provided protections against states and private actors. Elizabeth Reilly, *The Union as It Wasn’t and the Constitution as It Isn’t: Section 5 and Altering the Balance of Power*, in INFINITE HOPE AND FINITE DISAPPOINTMENT 74, 85 (Elizabeth Reilly ed., 2011). This uncertainty was resolved by the passage of the Fourteenth Amendment by the same Congress only two months later. The Fourteenth Amendment incorporated several of the Act’s key provisions and left “no doubt of the legislative power to legislate in the field of civil rights.” SCHWARTZ, *supra* note 26, at 100–01. Senator Trumbull himself professed that the first clause of the Fourteenth Amendment “is but a copy of the civil rights act.” CONG. GLOBE, 42nd Cong., 1st Sess. 575 (April 11, 1871) (remarks of Sen. Trumbull); *see also* *United States v. Stanley (Civil Rights Cases)*, 109 U.S. 3, 22 (1883) (stating in dicta that it was “not necessary to inquire” whether the Act was fully authorized by the Thirteenth Amendment alone, or only in concert with the authority of the Fourteenth Amendment); Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEXAS L. REV. 1, 28–29 (2011) (finding that even scholars who construe the Fourteenth Amendment narrowly agree that “at a bare minimum the Fourteenth Amendment must be understood as constitutionalizing the Civil Rights Act of 1866”). The Supreme Court’s interpretation of Congress’s broad power to regulate activity that affects interstate commerce puts to rest any lingering concern that Congress lacks the authorization to prohibit both public and private acts of discrimination. *See, e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964) (upholding the constitutional validity of Title II of the Civil Rights Act of 1964, which sought to prohibit racial discrimination in privately owned businesses serving the public). Sex discrimination in contracting, like racial discrimination in privately owned public accommodations, involves a quintessentially economic activity: commercial sales. As such, Congress could reasonably determine that sex discrimination in contracting, like race discrimination in public accommodations, could have “a disruptive effect . . . on commercial intercourse” by deterring people from engaging in commercial activity. *Heart of Atlanta Motel*, 379 U.S. at 257.

of racial discrimination point to the fact that the Congress that passed the Civil Rights Act of 1866 “intended to protect a limited category of rights, specifically defined in terms of racial equality,”<sup>80</sup> and that statements made by members of the enacting Congress only underscore this narrow purpose.<sup>81</sup>

While the Supreme Court has never directly addressed whether sex discrimination is cognizable under Section 1981, it has noted that during congressional debates over the Act, “much was said about eliminating the infamous Black Codes.”<sup>82</sup> And in *Runyon v. McCrary*, the Court went out of its way in dicta to preclude plaintiffs from bringing sex discrimination actions under Section 1981, even though no such claim had been asserted.<sup>83</sup> The *Runyon* Court held that two black children who had been denied admission to the defendant’s private schools in Virginia properly stated a claim for racial discrimination under Section 1981, since the statute reaches private as well as public acts of discrimination.<sup>84</sup> Though the plaintiffs—both male—had not raised a sex discrimination claim, the Court went on to assert that “42 U.S.C. § 1981 is in no way addressed to” discrimination on the basis of sex.<sup>85</sup> Though this language was dicta and was not accompanied by further analysis or discussion, *Runyon* subsequently has been cited by lower courts as indisputably standing for the proposition that Section 1981 does not afford a remedy for sex discrimination.<sup>86</sup>

80. *Bobo v. ITT, Cont’l Baking Co.*, 662 F.2d 340, 345 (5th Cir. 1990); *see also* *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 459 (2008) (Thomas, J., dissenting) (finding, in a Section 1981 action in which the plaintiff alleged that his employer had retaliated against him on the basis of his race, that “[t]he statute assumes that ‘white citizens’ enjoy certain rights and requires that those rights be extended equally to ‘[a]ll persons,’ regardless of their race. That is to say, it prohibits discrimination based on race,” and arguing that retaliation is not discrimination based on race).

81. *See, e.g.*, CONG. GLOBE, 39th Cong, 1st Sess. 1785 (Apr. 5, 1866) (remarks of Sen. Stewart) (stating that the Act was designed “simply to remove the disabilities existing by laws tending to reduce the negro to a system of peonage. It strikes at that; nothing else . . . . That is the whole scope of the law.”). Representative Shellabarger similarly asserted:

If [the Act] undertook . . . to say that a married woman or child under age of intelligence should testify, that would invade the rights reserved to the State. But, sir, it does nothing like that. It permits the States to say that the wife may not testify, sue, or contract. It makes no law as to this. Its whole effect is to require that whatever rights as to each of these enumerated civil (not political) matters the States may confer upon one race or color of the citizens shall be held by all races in equality . . . . [I]f you do discriminate, it must not be ‘on account of race, color, or former condition of slavery.’ That is all. If you permit a white man who is an infidel to testify, so you must a colored infidel.

CONG. GLOBE, 39th Cong, 1st Sess. 1293 (Mar. 9, 1866) (remarks of Rep. Shellabarger).

82. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 433 (1968); *see also supra* note 12.

83. 427 U.S. 160, 167 (1976).

84. *Id.* at 173.

85. *Id.* at 167.

86. *See, e.g.*, *Jenkins v. Arcade Bldg. Maint.*, 44 F. Supp. 2d 524, 529 (S.D.N.Y. 1999) (citing *Runyon* in dismissing a female employee’s claim of sex discrimination in the termination of her employment, because “Section 1981 prohibits race discrimination. Allegations of gender, or sex discrimination are not actionable under the statute.”); *Saad v. Burns Int’l Sec. Servs., Inc.*, 456 F. Supp. 33, 37 (D.D.C. 1978) (citing *Runyon* to dismiss a male “Arabian” plaintiff’s Section 1981 claim that he had been terminated from his job as a security guard and timekeeper at the defendant’s company on the basis of his sex, concluding that “§ 1981 [does not] provide

In light of *Runyon*, when confronted with a plaintiff seeking relief for alleged sex discrimination under Section 1981, lower courts reading the statute as affording relief only for racial discrimination generally have given sex discrimination claims at best one-sentence consideration.<sup>87</sup> Those that have given such claims more than cursory consideration have relied on the immediate legislative history of the Civil Rights Act of 1866 and the intent of its authors to support the notion that the phrase “as is enjoyed by white citizens” means that the statute only supports claims of racial discrimination. For example, in *League of Academic Women v. Regents of the University of California*, twelve female employees and students at the Berkeley campus of the University of California sued the University for declaratory and injunctive relief, urging that the university had discriminated against them in hiring and employment.<sup>88</sup> The plaintiffs asserted that, as a result of women’s limited civil rights in 1866, if “white citizens” referred to anything other than the rights of white male citizens, the Act would relegate “black males . . . to a lesser status than white male citizens.”<sup>89</sup> The Northern District of California rejected this argument, concluding that “nothing in the history of the Act”<sup>90</sup> suggested that Congress contemplated that the Act would be interpreted to remedy anything other than “racial problems and inequalities.”<sup>91</sup>

Similarly, in *Bobo v. ITT, Continental Baking Co.*, a black woman sued her former employer, alleging that she had been discriminated against on the basis of her sex in the conditions and termination of her employment.<sup>92</sup> The plaintiff was originally a route sales representative, a position that involved driving a company truck to deliver loaves of bread, but was transferred to a janitorial position in the bakery.<sup>93</sup> She alleged that several supervisors informed her that she had been transferred because she “was a woman, and a black woman.”<sup>94</sup> The plaintiff was terminated from her job after she allegedly refused to wear a hard hat to protect her head.<sup>95</sup> The plaintiff brought suit under Section 1981, asserting that “white citizens” should be interpreted to mean the “most favored group,” such that she should be permitted to bring a claim for sex discrimination under the statute.<sup>96</sup>

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a remedy for sex . . . discrimination”); *see also supra* note 22.

87. *See supra* note 19.

88. 343 F. Supp. 636, 637 (N.D. Cal. 1972). This case preceded the passage of Title IX, the federal law that prohibited sex discrimination in educational programs receiving federal assistance, which was enacted on June 23, 1972. 20 U.S.C. §§ 1681–1688 (2012).

89. *League of Acad. Women*, 343 F. Supp. at 639.

90. *Id.* Similarly, in *Rackin v. University of Pennsylvania*, a female professor sued her employer for discriminating against her on the basis of sex in the terms and conditions of her employment. 386 F. Supp. 992, 994 (E.D. Penn. 1974). The Eastern District of Pennsylvania dismissed her claim because of a lack of case law supporting the view that by “white citizens” Congress was referring to white male citizens. *Id.* at 1008.

91. *League of Acad. Women*, 343 F. Supp. at 639.

92. 662 F.2d 341 (5th Cir. 1981).

93. Screening Memo at 1–2, *Bobo v. ITT, Cont’l Baking Co.*, 622 F.2d 340 (5th Cir. 1981) (No. 80-1671).

94. *Id.* at 2.

95. *Id.*

96. *Bobo*, 662 F.2d at 343.

In rejecting the plaintiff's argument, the Fifth Circuit relied heavily on the purported intention of the statute's drafters.<sup>97</sup> The court concluded that the phrase "as is enjoyed by white citizens" was added to the text of the Civil Rights Act of 1866 by amendment as a result of legislators' fears that if these qualifying words were not included in the bill, the new rights "might be extended to all citizens, whether male or female, majors or minors."<sup>98</sup> Since outlawing sex discrimination in 1866 was a result "clearly not desired by Congress,"<sup>99</sup> the court held that sex discrimination was not a cognizable claim under Section 1981.<sup>100</sup> That the drafters of the Act never suggested nor voiced support for the idea that women should be the beneficiaries of the rights conveyed by the Act was evidence that the 39th Congress "had no intention to disturb public or private authority to discriminate against women."<sup>101</sup> Accordingly, the Fifth Circuit held that Section 1981 did not support claims of sex discrimination.<sup>102</sup>

## 2. Expanding Applications of Section 1981

As exemplified in *League of Academic Women* and *Bobo*, proponents of the view that Section 1981 provides relief only for claims of racial discrimination have relied heavily on the purported intent of the Congress that passed the Civil Rights Act of 1866. By narrowly emphasizing congressional intent, however, these cases fail to recognize the Supreme Court's apparent willingness to expand the application of Section 1981's protections to groups other than black Americans in cases like *McDonald v. Santa Fe Trail Transportation Co.*<sup>103</sup> In *McDonald*, two white employees of a transportation company were fired for misappropriating cargo from one of the company's shipments.<sup>104</sup> A black employee charged with the same offense was not discharged.<sup>105</sup> The white employees sued their employer, alleging that they had been discriminated against on the basis of their white race in violation of Section 1981.<sup>106</sup> The district court dismissed the complaint, concluding that Section 1981 was "wholly inapplicable to racial discrimination against white persons," and the Court of Appeals affirmed.<sup>107</sup>

In an opinion by Justice Marshall, the Supreme Court reversed, holding that Section 1981 prohibited racial discrimination in private employment against white

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97. *Id.* at 343.

98. *Id.* (quoting CONG. GLOBE, 39th Cong., 1st Sess. app. 157 (Mar. 8, 1866) (remarks of Rep. Wilson)); *see supra* notes 31–32 and accompanying text.

99. *Bobo*, 662 F.2d at 343.

100. *Id.* at 345.

101. *Id.* at 343.

102. *Id.* at 345. Finding no evidence of disparate racial impact nor discriminatory purpose in her former employer's actions, the court also dismissed the plaintiff's claim of racial discrimination. *Id.*

103. 427 U.S. 273 (1976).

104. *Id.* at 275.

105. *Id.* at 275–76.

106. *Id.* at 276.

107. *Id.* at 277.

persons as well as nonwhite persons.<sup>108</sup> Notably, permitting a white plaintiff to recover for racial discrimination under Section 1981 would require that the white plaintiff argue that he had not been afforded the same rights as “white citizens,” an argument that makes little sense unless “white citizens” is interpreted to connote something other than its literal meaning. To solve this problem, the *McDonald* Court refused to give a “mechanical reading”<sup>109</sup> to the term “white citizens.” Instead, the Court emphasized the broad language—“all persons”—that the statute used to refer to the beneficiaries of the enumerated rights.<sup>110</sup> The Court concluded that here the “favored employee”—the individual with whose rights the white employees’ rights should be compared—was black, and thus that the white plaintiffs should be permitted to bring a Section 1981 claim.<sup>111</sup> The Court’s approach in *McDonald* therefore suggests that “white citizens” need not actually refer to people who are white, at least in cases in which the claim is one of racial or ethnic discrimination.

In *McDonald*, the Supreme Court held that Section 1981’s broad language prohibits discrimination against white people as well as black people, suggesting that remedying racial discrimination against a historically disadvantaged group is not the statute’s only cognizable objective.<sup>112</sup> Subsequent decisions have further departed from the idea that Section 1981 was meant only to remedy racial discrimination. In *Saint Francis College v. Al-Khazraji*, for example, the Court held that the respondent, a professor and U.S. citizen born in Iraq who alleged that his employer had denied him tenure on the basis of his “Arabian” ancestry, could state a claim for discrimination under Section 1981.<sup>113</sup> The Court concluded that whether or not a particular classification “would be classified as racial in terms of modern scientific theory,” the history of Section 1981 made clear that Congress intended to protect from discrimination “identifiable classes of persons who are subjected to intentional discrimination” because of their ancestry or ethnicity as

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108. *Id.* at 286–87. While *McDonald* was a 9–0 opinion, Justices White and Rehnquist dissented in part for the same reason that they dissented in *Runyon v. McCrary*, 427 U.S. 160 (1976), which was decided on the same day. *McDonald*, 427 U.S. at 296. In both cases, Justices White and Rehnquist concluded that Section 1981 applies only to discrimination imposed by state law; Section 1981 was therefore inapplicable in cases like these involving private racial discrimination. *Runyon*, 427 U.S. at 192.

109. *McDonald*, 427 U.S. at 287.

110. *Id.* The Court also highlighted statements by legislators in the 39th Congress that suggested the statute was intended to apply to “white men as well as black men.” *Id.* at 290 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 599 (Feb. 2, 1866) (remarks of Sen. Trumbull)); *see also id.* at 294 (stating that the Civil Rights Act of 1866 was meant to apply to people “of every race and color” (quoting CONG. GLOBE, 39th Cong., 1st Sess. 211 (Jan. 12, 1866) (remarks of Sen. Trumbull))).

111. *McDonald*, 427 U.S. at 283.

112. Indeed, the enduring effect of *McDonald* has been the conclusion that, “notwithstanding its text, [Section 1981] prohibits discrimination against white people, as well as non-whites.” *Doe v. Kamehama Sch./Bernice Pauahi Bishop Estate*, 470 F.3d 827, 837 (9th Cir. 2006) (holding that a private school’s admissions policy that gave preference to Native Hawaiians constituted unlawful race discrimination against the non-Native Hawaiian plaintiff under Section 1981).

113. 481 U.S. 604, 606 (1987). In so holding, the Court relied on nineteenth-century encyclopedias that “described race in terms of ethnic groups.” *Id.* at 611.

understood in 1866.<sup>114</sup> Similarly, in *Shaare Telifa Congregation v. Cobb*,<sup>115</sup> the Court held that Jewish plaintiffs could state a claim for racial discrimination under Section 1982—whose language is also derived from the Civil Rights Act of 1866<sup>116</sup>—after the defendants spray-painted the plaintiffs’ synagogue with anti-Semitic slogans and symbols, since Jews were thought to be a “distinct race” when Section 1982 was first adopted in 1866.<sup>117</sup> While *Al-Khazraji* and *Shaare Telifa* are confined to considerations of race or ethnicity, they underscore the Supreme Court’s willingness to engage in an “expansive” interpretation of the statute,<sup>118</sup> and suggest that the Court is not averse to construing a category according to its nineteenth-century definition when assessing which groups should be protected under Section 1981 today.

### 3. Challenges of Divining and Applying Congressional “Intent”

Not only does an interpretation of Section 1981 that focuses on congressional intent fail to acknowledge the Court’s increasing willingness to interpret the statute’s applicability more broadly than to racial discrimination alone, but a prerequisite of such an interpretation is a clear and accurate understanding of the 39th Congress’s intent that the statute would exclude all non-race-based claims of discrimination. Attempting to divine congressional intent is not, however, a straightforward, uncontroversial undertaking, and naturally raises the question of whose intent matters.<sup>119</sup> In *Bobo*, for instance, the court interpreted

114. *Id.* at 613.

115. *Shaare Telifa Congregation v. Cobb*, 481 U.S. 615 (1987).

116. *See supra* note 35; *see also* *Runyon v. McCrary*, 427 U.S. 160, 190 (1976) (Stevens, J., concurring) (“[I]t would be most incongruous to give [Section 1981 and Section 1982] a fundamentally different construction. . . . An attempt to give a fundamentally different meaning to two similar provisions by ascribing one to the Thirteenth and the other to the Fourteenth Amendment cannot succeed.”).

117. *Shaare Telifa Congregation*, 481 U.S. at 617. Interestingly, the Court determined that the key inquiry was not whether Jews are “considered to be a separate race by today’s standards, but whether, at the time § 1982 was adopted, Jews constituted a group that Congress intended to protect.” *Id.* The Court resolved the question by concluding that in 1866 Jews were considered a separate race, but did not directly consider whether the 39th Congress realistically intended Jews to be protected by the new rights conveyed by the Civil Rights Act of 1866. *Id.* Without any explicit debate about the question during congressional deliberation prior to the enactment of Section 1981, it seems just as likely that the 39th Congress failed to manifest an “intent” with regard to Jews as it did with regard to women. *See infra* note 126.

118. George Rutherglen, *The Improbable History of Section 1981: Clio Still Bemused and Confused*, 55 SUP. CT. REV. 303, 343 (2003).

119. For instance, should a court consider the intent of the members who voted for the original measure, in this case the Civil Rights Act of 1866? The intent of all members of the 39th Congress, including those who opposed the Act? The intent of President Johnson, who vetoed the Act but was ultimately overridden by a two-thirds majority of Congress? *See generally* RONALD DWORKIN, *LAW’S EMPIRE* 318 (1986). As evidenced by the protracted and lively congressional debates over the scope of the Act, it is likely that the intent of individual stakeholders within each of these groups also may have varied widely, which further complicates any attempt to determine or apply a single, cohesive congressional intent. *See id.* at 320; *see also* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) (discussing the difficulty of ascertaining legislative intent, given the impossibility of

the addition of the phrase “as is enjoyed by white citizens” to the Act be a clear indication that its drafters “inten[ded] that the statute ban racial discrimination.”<sup>120</sup> However, a closer analysis of the legislative debate reveals that disagreement existed even among members of the 39th Congress as to the practical effect of these words. The Act’s sponsor in the Senate maintained that the added language was “superfluous” and “did not alter the meaning of the bill”<sup>121</sup>—in other words, the additional clause did nothing to narrow<sup>122</sup> its otherwise expansive language. Thus, while statements by the congressman who offered the phrase as an amendment and those of others<sup>123</sup> who expressed reservations about the classes of individuals to whom the Act would grant new rights are not irrelevant to the statute’s legislative history, they should not be taken as representative of the intent or mental state of the majority of legislators who supported the statute.<sup>124</sup> Furthermore, given the unique historical context in which the Act was passed—immediately following the Civil War, when the need to secure the rights of newly emancipated slaves was paramount<sup>125</sup>—it seems likely that legislators in the 39th Congress had not considered other possible applications or consequences of the Act when deciding whether or not to support it. If legislators never thought about whether the Act should someday also prohibit sex discrimination, nor envisioned the unraveling of the laws of coverture and the strides toward equality that women would make in subsequent decades, it is not useful nor even possible to try to deduce what their “intent” might have been vis-à-vis that application.<sup>126</sup> As such,

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determining the intent of each individual legislator); Sullivan, *supra* note 11, at 543–44 (finding that courts “face[] . . . great[] difficulties when . . . required to divine legislative intent from older legislative materials”).

120. *Bobo v. ITT, Cont’l Baking Co.*, 622 F.2d 340, 342 (5th Cir. 1981).

121. CONG. GLOBE, 39th Cong., 1st Sess. 1413 (Mar. 15, 1866) (remarks of Sen. Trumbull). Similarly, while the term “civil rights” was ultimately stricken from the body of the bill by amendment in the House, it remained in the title of the Act. *See supra* note 34.

122. In *Georgia v. Rachel* (reviewing the legislative history of the Civil Rights Act of 1866), the Court suggested that the removal of a general provision forbidding “discrimination in civil rights or immunities” from the bill’s text was further evidence of Congress’s intent to reduce the breadth of the rights protected by the Act. 384 U.S. 780, 791–92 (1966). If these deletions had any effect on the scope of the bill, however, it is on the breadth of *rights* the Act provided, rather than the *individuals* to whom those rights were conveyed.

123. *See, e.g., supra* note 32.

124. DWORKIN, *supra* note 119, at 314. When the Act was passed in 1866, “democracy [was not] sufficiently advanced . . . to provide a democratic argument of fairness for taking the legislators’ concrete opinions as good evidence of public opinion at the time,” so any statements made by individual legislators cannot be treated as definitive evidence of the intent of the public they represented. *See id.* at 364. The relevance of such statements likely diminishes over time as the statute ages, since eventually they will be supplemented and replaced by “other interpretive explanations attached to later statutes on related issues.” *Id.* at 350.

125. *See supra* text accompanying notes 26–28.

126. *See* DWORKIN, *supra* note 119, at 325. Trying to determine how members of Congress might have voted had they considered the application at issue (for instance, if it had been offered as an amendment) likely would be fruitless, since legislators may have a variety of motivations for supporting or opposing a measure, including expressing support for the policy it enacts, not wanting to antagonize the bill sponsor, or wishing to avoid delaying a congressional recess, among other reasons. *Id.* at 326; *see also* Alexander Tsesis, *Gender Discrimination and the*

what is paramount is not congressional intent with respect to the inclusion of women in the class of people that the statute protects, but instead, as I suggest in Part III.B, Congress's intent to enact a statute that seeks to remedy invidious discrimination.

#### 4. The Supreme Court's Interpretative Approach in Civil Rights Cases

Finally, an interpretative methodology that exclusively embraces Congress's original intent and concludes that Section 1981 can only support claims of racial discrimination is inconsistent with the Supreme Court's methodological approach in other civil rights matters. In its Fourteenth Amendment jurisprudence—an apt analogy, given that the Amendment's framers belonged to the same Congress that authored and passed the Civil Rights Act of 1866<sup>127</sup>—the Supreme Court regularly has departed from a strict adherence to congressional intent. Had the Court interpreted the Fourteenth Amendment according to the intent of its framers, it would have come to the opposite result in *Brown v. Board of Education*,<sup>128</sup> since the 39th Congress quite clearly did not intend for the Amendment to outlaw racial segregation in schools<sup>129</sup> and in fact continued segregating schools in the District of Columbia long after its ratification.<sup>130</sup> Following the framers' original intent would have resulted in an unsatisfying outcome: The Fourteenth Amendment's guarantee of equal protection of the laws would not have prohibited school segregation. Such an approach thus would fail to account for a decision that is hailed as declaring an uncontroversial, and even sacred,<sup>131</sup> constitutional right.<sup>132</sup> It also would not explain the Supreme Court's jurisprudence with respect to

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*Thirteenth Amendment*, 112 COLUM. L. REV. 1641, 1655 (2012) (finding that the need to achieve a supermajority to override President Johnson's veto of the Civil Rights Act of 1866 might have precluded the 39th Congress from "tak[ing] up feminist demands for transactional, ownership, and suffrage parity").

127. The Fourteenth Amendment passed the Senate on June 8, 1866, and the House on June 13, 1866, just over two months after Congress overrode President Johnson's veto to enact the Civil Rights Act of 1866 on April 9, 1866. CONG. GLOBE, 39th Cong., 1st Sess. 3042 (June 8, 1866); CONG. GLOBE, 39th Cong., 1st Sess. 3149 (June 13, 1866); SCHWARTZ, *supra* note 26, at 100.
128. 347 U.S. 483, 493–95 (1954) (holding that racial discrimination in public education is unconstitutional).
129. RONALD DWORKIN, FREEDOM'S LAW 9 (1996). During a debate about the Civil Rights Act of 1866 that took place only months before the passage of the Fourteenth Amendment, Representative Wilson asserted that the bill was not meant to confer the right to attend the same schools. CONG. GLOBE, 39th Cong., 1st Sess. 1117 (Mar. 1, 1866) (remarks of Rep. Wilson) ("What do [civil rights] mean? Do they mean that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal? By no means can they be so construed . . . Nor do they mean that all citizens shall sit on the juries, or that their children shall attend the same schools. These are not civil rights or immunities.").
130. DWORKIN, *supra* note 119, at 360. Instead, Congress intended only that the Amendment would end Reconstruction-era Jim Crow practices. DWORKIN, *supra* note 129, at 9.
131. See, e.g., Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 20 (2006).
132. Mark A. Graber, *The Price of Fame: Brown as Celebrity*, 69 OHIO ST. L.J. 939, 1007 (2008) (arguing that *Brown's* holding is frequently cited as "uncontroversially correct").

abortion and same-sex marriage, among other civil rights issues.<sup>133</sup>

Instead, in its civil rights jurisprudence, the Supreme Court has sought to effectuate the underlying moral principle that the original statute embodies.<sup>134</sup> In the case of the Fourteenth Amendment, this principle demanded that the Constitution required all citizens to be treated as equals.<sup>135</sup> The general term (“equal protection”) that Congress chose in lieu of a concrete example or application of this concept inherently declared “a principle of quite breathtaking scope and power: the principle that government must treat everyone as of equal status and with equal concern.”<sup>136</sup> By 1954, it became clear that school segregation was inconsistent with this expansive moral principle.<sup>137</sup> The country was demonstrating a growing sense that segregation, and treating one race as inferior to another, was “incompatible with decency.”<sup>138</sup> By interpreting the Fourteenth Amendment to prohibit school segregation, the Supreme Court’s decision in *Brown* gave more faithful effect to the principle of equality declared in the Amendment than would an approach that looked only at the specific intent of its authors.

The Supreme Court’s approach to civil rights cases under the Fourteenth Amendment, in which it seeks to identify and effectuate the moral conviction set forth in the Amendment rather than the stated or implied intent of the Congress that enacted it, is instructive. In the Part that follows, I argue that the Court’s moral approach to civil rights cases such as *Brown* suggests that interpreting Section 1981—undeniably a foundational civil rights statute—based on original intent, and concluding that it permits only claims of race discrimination, is misguided. Instead, I propose that courts should use the same moral approach to interpreting Section 1981 that they employ with other civil rights statutes.<sup>139</sup>

### III. A NOVEL INTERPRETATION

In Part II, I described three extant interpretations of Section 1981, and concluded that each suffers from unique and disqualifying flaws. In this Part, I suggest a novel interpretation of Section 1981—one that acknowledges women’s

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133. DWORKIN, *supra* note 119, at 366; *see also* Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015) (holding that “the right to marry is a fundamental right inherent in the liberty of the person” under the Fourteenth Amendment).

134. *See generally* DWORKIN, *supra* note 119, at 361–62.

135. *Id.* at 362.

136. DWORKIN, *supra* note 129, at 10.

137. *See* Rebecca L. Brown, *How Constitutional Theory Found Its Soul: The Contributions of Ronald Dworkin*, in *EXPLORING LAW’S EMPIRE* 43, 55 (Scott Hershovitz ed., 2006).

138. DWORKIN, *supra* note 119, at 388.

139. Rather than relying on the purported intent of individual legislators, Professor Dworkin advocates employing a moral approach to statutory interpretation, which involves investigating the record of the legislature as a cohesive unit, or “community of principle.” DWORKIN, *supra* note 119, at 330, 335. This method requires courts to ask what political convictions are “dominant in the legislature as a whole,” or in other words, what “coherent system of political convictions would justify what [the legislature] has done.” *Id.* at 329, 335 (emphasis omitted).

inferior civil status at the time the statute became law—and conclude that it uniquely avoids the pitfalls of existing interpretations. In Part III.A, I describe my proposed interpretation. In Part III.B, I demonstrate why this interpretation is preferable to the existing interpretations reviewed in Part II. Part III.C concludes by addressing and rebutting potential weaknesses of my proposed interpretation.

### A. “White Citizens” as “White Men”

Section 1981 provides that “all persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens.” For its precursor, the Civil Rights Act of 1866, to have meaningfully conveyed any new rights when it was enacted, the “white citizens” to whose rights a plaintiff’s are ultimately compared must have enjoyed those rights when the Act became law. As I described in Part II.A, however, white citizens in the nineteenth century were not equally able to exercise the rights enumerated in the Act. Whether single or married, women could not enter contracts on the same terms as men; indeed, under the doctrine of coverture, any contract that a married woman entered was void.<sup>140</sup> Without the ability to exercise the very rights enumerated in the Civil Rights Act of 1866—to enter and enforce contracts, and, in the case of married women, to sue or be sued and to testify in court (rights which were also conveyed by the Act)—white women therefore could not have been among the individuals that Congress included in its referent category. Instead, the statute could only have referred to the class of citizens who were then able to fully and freely exercise the Act’s enumerated rights. This interpretation implies that “white citizens” does not denote an amalgamation of people with unequal rights, but rather represents the most favored class of citizens to which all others should be compared: white men.<sup>141</sup>

Employing this approach, sex discrimination claims would be cognizable under Section 1981. It is undeniable that women still face barriers to contracting on the same terms as men. Women can expect to pay more than men for a variety

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140. See *supra* notes 41–46 and accompanying text.

141. This interpretation—reading “white citizens” to mean the most favored class of citizens, rather than all white citizens—was adopted by the District of Colorado in *LaFore v. Emblem Tape & Label Co.*, 448 F. Supp. 824, 826 (D. Colo. 1978). In this case, the plaintiff, a Mexican-American citizen of the United States, alleged that the defendant, his former employer, terminated his employment because of his race, color, and national origin. *Id.* at 825. In denying the defendant’s motion to dismiss the plaintiff’s Section 1981 claim, the court first observed that “[t]he use of racial classifications or distinctions in political or judicial functions is fraught with peril.” *Id.* 826. Since Section 1981 “does not even mention race,” the court found equating “white citizens” with a racial classification to be without justification and “utterly lacking in sophistication.” *Id.* Instead, the district court determined that “[h]istorically a class called ‘white citizens’ received more favorable treatment than other classes,” and that the statute should be understood to pronounce a rule that “[a]ll persons are entitled to the same rights and benefits as the most favored class.” *Id.* Under this interpretation, the court concluded that the plaintiff could seek relief under Section 1981 if he could prove that a class of which he was not a member received more favorable treatment than the plaintiff as a result of that class distinction. *Id.*

of goods and services, from clothing and personal care products to cars, mortgages, and haircuts.<sup>142</sup> In some cases, merchants may opt not to sell to women, or may charge women many times what a man would pay for the same item.<sup>143</sup> Thus, whether we consider their status in 1866 or 2017, women cannot be considered members of the favored class that was, or is, most fully and freely able to exercise the right to make and enforce contracts. Then and now, that favored status is usually occupied by white men. Interpreting Section 1981 in light of women's disfavored status would necessitate a finding that women as a class, like members of racial minorities, may argue that they too are treated unequally when compared with "white citizens" (white men) in making or enforcing contracts.<sup>144</sup>

Such an approach is consistent with the Supreme Court's Section 1981 jurisprudence.<sup>145</sup> As discussed in Part II.C.2, in *McDonald v. Santa Fe Trail Transportation Co.*, the Court interpreted the term "white citizens" to mean a black citizen, or "favored employee,"<sup>146</sup> to whom the employer in the case gave preferable treatment. In other words, the Court determined that "white citizens" can be read to mean a "favored" class, or something other than what its plain language implies. Reading the term "white citizens" to mean white men—typically the favored class where sex discrimination is at issue—would hardly stretch the statutory language further than it was already stretched (with the

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142. See *supra* notes 5–9 and accompanying text.

143. See *supra* notes 3–4 and accompanying text.

144. This Article has employed gendered pronouns and a gender binary (male-female) to reflect the way gender discrimination has historically been examined by courts (and, until relatively recently, legal scholars). It is worth noting, however, that my proposed reading of Section 1981 could also support claims of discrimination on the basis of genders other than female, provided that claimants could show that their right to contract had been abridged as compared to that of white men. For evidence of such discrimination against transgender people, see generally JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY (2011), [http://endtransdiscrimination.org/PDFs/NTDS\\_Report.pdf](http://endtransdiscrimination.org/PDFs/NTDS_Report.pdf).

145. This interpretation may also derive support from statements in the congressional record during debates on the passage of the Civil Rights Act of 1866. The bill's sponsor in the Senate declared that "the very object of the bill is to break down all discrimination between black *men* and white *men*." CONG. GLOBE, 39th Cong., 1st Sess. 599 (Feb. 2, 1866) (remarks of Sen. Trumbull) (emphasis added). Others in Congress made statements that also evinced that by "white citizens," they had white men in mind. See CONG. GLOBE, 39th Cong., 1st Sess. 1118 (Mar. 1, 1866) (arguing that the Act should pass "to protect our citizens, from the highest to the lowest, from the whitest to the blackest, in the enjoyment of the great fundamental rights which belong to all *men*") (emphasis added). The Supreme Court has come to the same conclusion. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 (1968) (holding that 42 U.S.C. § 1982—which also derives from the language of the Civil Rights Act of 1866, see *supra* note 35—prohibits private racial discrimination in the sale of property, concluding that the Act was meant to guarantee that "a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a *white man*") (emphasis added). My purpose here is not to contest that the 39th Congress likely did not have women in mind when passing the Act. Instead, these contemporary statements by members of the enacting Congress provide further support for the idea that ascertaining congressional intent is complicated, and basing an interpretation on this intent may not be as obvious as it appears at first blush. See *supra* note 119 and accompanying text.

146. 427 U.S. 273, 283 (1976).

Court's approval) in *McDonald*.<sup>147</sup>

## B. Why This Interpretation Is Preferable

### 1. Avoiding the Shortcomings of Existing Interpretations

Interpreting Section 1981 in light of women's subordinate civil status at the time the Civil Rights Act of 1866 became law avoids the pitfalls of each of the interpretative approaches discussed in Part II. First, recall from Part II.A that reading "white citizens" to mean "white men and white women" would allow a court to compare the rights of a nonwhite plaintiff to those of white women who, like newly emancipated slaves, were limited in their ability to contract. As a result, under this interpretation, the statute would have conferred few, if any, new rights on black citizens, which is palpably absurd. Instead, reading Section 1981's referent category to exclude women—in other words, interpreting "white citizens" to mean only white men—would compel a comparison between the rights of the black plaintiff and a white man fully able to exercise his right to contract, which was clearly the comparison that Congress sought to make in passing the Act.

Similarly, unlike the interpretation discussed in Part II.B in which "white citizens" is interpreted to mean "white men or white women," reading "white citizens" to denote white men would not involve embedded sex-based classifications, since this interpretation requires that a woman's right to contract be compared to that of a man. Instead, reading "white citizens" to mean white men acknowledges that the Supreme Court now views sex-discriminatory laws as "inherently suspect,"<sup>148</sup> and that such distinctions "often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members."<sup>149</sup>

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147. Interestingly, *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976)—in which the Court engaged in a creative interpretation of Section 1981 that sought to effectuate its broad principle of nondiscrimination—and *Runyon v. McCrary*, 427 U.S. 160 (1976)—in which the Court went out of its way to state a narrow, literalist interpretation of the same statute—were decided on the same day in 1976. Seven justices (Marshall, Burger, Brennan, Stewart, Blackmun, Powell, and Stevens) signed on to both majority opinions. Yet the Court's dicta in *Runyon* (stating that Section 1981 does not support claims of sex discrimination, see *supra* text accompanying note 85) seem clearly inconsistent with its moral approach in *McDonald* (holding that Section 1981 could support the white male plaintiff's claim of racial discrimination), which underscores the notion that *Runyon*'s seemingly inflexible language with respect to the interpretation of Section 1981 has not necessarily guided the Court's interpretative approach, and need not do so in the future.

148. *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (striking down a federal law that afforded male members of the armed services an automatic dependency allowance for their wives, but requiring servicewomen to prove their husbands were dependent for over one-half of their support to receive the allowance, concluding that such paternalistic laws "put women, not on a pedestal, but in a cage").

149. *Id.* at 687; see also Brief for American Civil Liberties Union as Amicus Curiae at 34–35, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (No. 71-1694) ("[P]resumably well-meaning exaltation of woman's unique role as wife and mother has, in effect, denied women equal opportunity to develop their individual talents and capacities and has impelled them to accept a dependent, subordinate status in society.").

In its Fourteenth Amendment jurisprudence, the Court routinely has struck down statutes in which sex-based classifications are not substantially related to an important governmental interest.<sup>150</sup> The Court has subjected laws that classify on the basis of sex to this heightened scrutiny for many of the same reasons that racially discriminatory laws are reviewed under strict scrutiny—both categorizations involve “immutable characteristics” that “bear[] no relation to ability to perform or contribute to society” and risk demoting a class of people to a subordinate legal status without reference to their abilities.<sup>151</sup> By failing to acknowledge that the parallel development of the Court’s jurisprudence related to race and sex discrimination is a relevant part of the statute’s history, proponents of a racial discrimination-only interpretation of Section 1981 overlook a reason that the statute might be better read to prohibit both forms of invidious discrimination. Thus, reading “white citizens” to mean white men, and avoiding embedded sex-based classifications, would more appropriately reflect the Court’s reluctance to uphold laws that discriminate on the basis of immutable characteristics.

Finally, my proposed interpretation avoids several of the concerns with an interpretation that focuses exclusively on congressional intent to conclude that Section 1981 was only meant to remedy instances of racial discrimination. Since interpreting “white citizens” to mean white men would permit an historically disfavored class (women) to bring claims of sex discrimination under Section 1981, this approach is consistent with that espoused by the Supreme Court in civil rights cases like *Brown v. Board of Education*, discussed in Part II.C.4, in which considerations of fairness, integrity, justice, and moral decency<sup>152</sup> superseded questions of Congress’s original intent. Indeed, the Supreme Court’s civil rights jurisprudence would counsel not toward an interpretation of the statute that focuses exclusively on congressional intent with respect to whether women should also be its beneficiaries, but instead toward one that considers and effectuates the expansive moral principle of nondiscrimination that the 39th Congress expressed in the Civil Rights Act of 1866—ensuring that all persons should enjoy the same enumerated rights, including the right to make and enforce contracts, as did the most favored class of citizens.

Just as the 39th Congress could not have foreseen—and likely did not intend—that the words of the Fourteenth Amendment would later be used to

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150. See, e.g., *United States v. Virginia*, 518 U.S. 515, 531 (1996) (striking down a public university’s policy of excluding women from its citizen-soldier program as lacking an “exceedingly persuasive justification” for discriminating against women); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 733 (1982) (striking down a public university’s policy of denying otherwise-qualified men admission to its traditionally all-female nursing program); *Craig v. Boren*, 429 U.S. 190, 199 (1976) (striking down a state statute that permitted the sale of “nonintoxicating” 3.2 percent alcohol beer to women ages 18 to 21 while prohibiting its sale to men under the age of 21, as the sex classification was not substantially related to the achievement of the government’s important end of traffic safety); *Frontiero*, 411 U.S. at 688.

151. *Frontiero*, 411 U.S. at 686–87.

152. DWORKIN, *supra* note 119, at 361, 379; see also DWORKIN, *supra* note 129, at 2.

prohibit racial segregation in schools, the very same Congress likely could not have anticipated that the language of the Civil Rights Act of 1866 would someday be read to proscribe sex discrimination in contracting. However, the words of Section 1981 already have been interpreted in ways that would have surprised its authors, for instance, to ban antimiscegenation laws that criminalized marriage contracts between white people and black people.<sup>153</sup> Similarly, the statute has been read expansively to support not only claims of racial discrimination, but also claims of discrimination on the basis of ethnic identity and even religious heritage, both claims that the drafters likely did not envision when the Civil Rights Act of 1866 was debated and passed.<sup>154</sup>

These interpretations of Section 1981, and the Court's interpretation of the Fourteenth Amendment in *Brown v. Board of Education*, demonstrate that the framers of a statute or Amendment may "misunderst[and] the moral principle that they themselves enacted into law."<sup>155</sup> Sometimes, in other words, "legislators misapply or misunderstand their own rules."<sup>156</sup> Indeed, in voicing his concern that the language of the Civil Rights Act of 1866 was broad enough to confer the right to vote, one Senator expressed a recognition that the bill's sponsor's "intention . . . in framing this bill will not govern its construction."<sup>157</sup> The Senator knew that the hopes or intentions that individual members expressed on the floor of the House or Senate would not control its future interpretation. In seeking to effectuate the statute's underlying principle of nondiscrimination, courts would have no choice but to conclude that sex discrimination is illegal under Section 1981, whether or

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153. Calabresi & Rickert, *supra* note 79, at 7. Section 1981 has been read to safeguard other rights that the 39th Congress might not have intended to protect. See CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864–88 PART ONE 1259 (1971) (arguing that the Court's interpretation of the Civil Rights Act of 1866 in *Jones v. Alfred H. Mayer* to apply to racial discrimination in the sale or rental of private property was incorrect, because "[i]t would have been strange indeed if the Congress which first determined what rights should be secured to the four million propertyless freedmen beyond naked liberation from bondage, and which found it proper that black and white sit apart in its galleries, should have resolved that not only were they to have capacity to contract, to testify, to own property, etc., but also that all men would thenceforth be under a duty to refrain from racial discrimination in property transactions"); Sanford V. Levinson, Book Note, *New Perspectives on the Reconstruction Court*, 26 STAN. L. REV. 461, 482 (1974) (reviewing FAIRMAN, *supra*) ("Whatever the words [of the Civil Rights Act of 1866] might mean to a reader uninitiated in legal history, there can be no doubt . . . that the men who passed the Act did not clearly intend to give the rights found by the Court over 100 years later [in *Jones v. Alfred H. Mayer*]. Indeed, it would have been a stunning repudiation of an almost omnipresent racism for Congress to have committed itself in 1866 to such equality for blacks.").

154. See *supra* notes 113–117 and accompanying text.

155. DWORKIN, *supra* note 129, at 13.

156. Calabresi & Rickert, *supra* note 79, at 7 ("[A]lthough the Framers' original expected applications of the constitutional text are worth knowing, they are not the last word on the Fourteenth Amendment's reach. This was recognized at the time, which is precisely why some legislators worried that the Amendment would have unanticipated effects."); *United States v. Virginia*, 518 U.S. 515, 557 (1996) (striking down a public university's policy of excluding women from its citizen-soldier program, and observing that "[a] prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded").

157. CONG. GLOBE, 39th Cong., 1st Sess. 477 (Jan. 29, 1866) (remarks of Sen. Saulsbury).

not its original authors would agree with this conclusion.

While I suggest that a moral approach to interpreting Section 1981 is more aligned with the Supreme Court's approach in its civil rights jurisprudence, importantly, the plain language of Section 1981 does not clearly foreclose an interpretation that would permit claims of sex discrimination under a textualist theory. Those who argue that the plain text of Section 1981 only supports claims of racial discrimination, including the Fifth Circuit in *Bobo v. ITT, Continental Baking Co.*,<sup>158</sup> must in coming to this conclusion disregard other relevant statutory language. The phrase "as is enjoyed by white citizens" does not operate independently of the rest of the statutory text. In the same sentence, Section 1981 grants "full and equal benefit of all laws and proceedings" to "all persons." By considering Section 1981's expansive language as a whole, rather than narrowly focusing on a single phrase or clause ("white citizens"), one could readily interpret the statute as articulating a broadly applicable prohibition against discrimination in contracting.<sup>159</sup>

Furthermore, when the bill was originally introduced, the new rights conferred by the Act were to apply only to "persons of African descent born in the United States."<sup>160</sup> As was detailed in Part I, this language was ultimately broadened and characterized in neutral terms to "declare[] that all persons in the United States shall be entitled to the same civil rights."<sup>161</sup> In holding that Section 1982—whose language mirrors that of Section 1981 and also derives from the Civil Rights Act of 1866<sup>162</sup>—prohibits private racial discrimination in the sale of property, the Supreme Court in *Jones v. Alfred H. Mayer Co.* acknowledged that the Act's language was "far broader than would have been necessary to strike down [racially] discriminatory statutes [such as the Black Codes]."<sup>163</sup> In electing

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158. 662 F.2d 340 (5th Cir. 1990).

159. Indeed, the words of the statute have led scholars to argue—and courts to acknowledge—that the failure to apply Section 1981 to more than racial discrimination is due to an inappropriately narrow "judicial interpretation of the statute, not lack of statutory protections" against such discrimination. Mary Margaret Penrose, *Beyond Observable Prejudice—Moving From Recognition of Differences to Solutions: A Critique of Ian Ayres' Pervasive Prejudice?*, 55 OKLA. L. REV. 361, 366 n.23 (2002) (book review); see also *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 554 (E.D. Cal. 1982) (denying a defendant employer's motion to dismiss the plaintiff's Section 1981 action for discrimination on the basis of her Puerto Rican descent in employment, and determining that Section 1981's "apparent breadth and clarity" in applying to "all persons" has been "clouded by subsequent case law" to exclude some groups from its protection); Calhoun, *supra* note 56, at 318–19 (finding that Section 1981 has been "judicially construed" to give no protection to victims of sex discrimination); Deseriee A. Kennedy, *Consumer Discrimination: The Limitations of Federal Civil Rights Protection*, 66 MO. L. REV. 275, 306 (2001) (highlighting the fact that courts have regularly rejected the idea that Section 1981 requires people to be treated equally regardless of race while engaged in commercial shopping activities); Tsesis, *supra* note 126, at 1659 (finding that Section 1981 is "worded broadly enough to include cases of gender equality," and that an "inclusive interpretation of the statute would provide remedies to all citizens, irrespective of sex or race").

160. CONG. GLOBE, 39th Cong., 1st Sess. 474 (Jan. 29, 1866) (remarks of Sen. Trumbull).

161. CONG. GLOBE, 39th Cong., 1st Sess. 599 (Feb. 2, 1866) (remarks of Sen. Trumbull).

162. See *supra* note 35.

163. 392 U.S. 409, 426–27 (1968). The Court went on to conclude that the breadth of the Act's final language could not be considered a "mere slip of the legislative pen." *Id.* at 427. Congress

to use the words “all persons” rather than language specific to race or ethnicity, “[i]t is hard to imagine what broader language the Congress could have adopted.”<sup>164</sup> Congress’s choice of expansive, race-neutral language runs counter to the inference that the drafters of the Act did not intend the statute to support claims other than those of racial discrimination. Had Congress wished only to grant black citizens the same civil rights as white citizens, it could have chosen language that made this purpose clear.<sup>165</sup> Instead, by adopting inclusive language, Congress expressed a broader purpose: that everyone, without qualification, should have the same enumerated rights—such as the right to make and enforce contracts—as white citizens.<sup>166</sup> Thus, even those who eschew a moral approach to statutory interpretation could appropriately conclude that the text of Section 1981 is broad enough to support an interpretation permitting claims of sex discrimination.

## 2. Addressing Section 1981’s Political History and Shifts in Popular Opinion

As I discussed in Part II, proponents of an intent-focused interpretation of Section 1981 have adopted a myopic view of the statute’s subsequent political history, which is not irrelevant to its present-day meaning.<sup>167</sup> Section 1981 has endured for over 150 years in essentially the same form in which it was originally signed into law. It has never been overruled nor amended in ways that abridged its

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may have been motivated to employ this broad language as a result of the failure of previous measures aimed only at the annulment of racially discriminatory laws in Southern states. JACOBUS TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* 159 (1951). The primary objection to such measures was that they were “too narrowly conceived.” *Id.*

164. *Ortiz*, 547 F. Supp. at 553 (concluding that the plaintiff could state a claim for discrimination in employment on the basis of her Puerto Rican descent). Some argue that the use of the term “all persons” was merely designed to include both non-citizens and persons not born in the United States in the coverage of Section 1981, rather than to “extend coverage to all rights of all people.” *League of Acad. Women v. Regents of Univ. of Cal.*, 343 F. Supp. 636, 639 (N.D. Cal. 1972) (rejecting plaintiffs’ argument that Section 1981 supports claims of sex discrimination). However, this interpretation discounts the statute’s plain language, which is “the best and most reliable index of its meaning, and where language is clear and unequivocal it is determinative of its construction.” *Monte Vista Lodge v. Guardian Life Ins. Co. of Am.*, 384 F.2d 126, 128 (9th Cir. 1967). Had Congress wished to limit the application of Section 1981, it easily could have used less expansive language. *See infra* note 165.
165. For instance, Congress simply could have stated: “Non-white citizens [or “Non-white persons”] . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens.”
166. *See* TENBROEK, *supra* note 163, at 161 (finding that the Civil Rights Act of 1866 was “the practical application of the idea of equality as an essential principle of liberty”). This purpose is further supported by Section 1981’s title (“Equal rights under the law”), and its section title (“Statement of equal rights”). 42 U.S.C. § 1981 (2012).
167. Employing a moral approach, courts should interpret not only the text of the statute but also its full political history, beginning before it became law and extending to the present day. DWORKIN, *supra* note 119, at 348. Public opinion—both at the time the statute was passed and at the time it is being interpreted (today)—is pertinent to the political history of a statute, as is Congress’s failure subsequently to repeal the statute. *Id.* at 349–50.

scope, which might suggest a renewed congressional intent to narrow its practical effect. In fact, the only substantive amendment to Section 1981 was made in 1991, in which Congress expanded the breadth of rights covered by the statute to include not only the making and enforcement of contracts, but also the “performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.”<sup>168</sup> Courts, too, have expanded its reach to encompass not only claims of racial discrimination, but also discrimination on the basis of ethnic identity.<sup>169</sup> Section 1981 is credited not only as the precursor to subsequent civil rights legislation<sup>170</sup> but also as a landmark in its own right and “a statute of enduring significance.”<sup>171</sup> It remains among the most-relied-upon statutes for plaintiffs seeking relief for infringement of their civil rights.<sup>172</sup> This political history does not suggest that Section 1981 has been eclipsed by other legislation or is no longer relevant to today’s civil rights discourse. Instead, that the statute was recently amended to have an even broader effect, and that courts have interpreted its language expansively, bolsters the argument that Section 1981 should be understood inclusively to prohibit conduct that interferes with the statute’s principle of nondiscrimination.<sup>173</sup>

Finally, historical shifts in popular opinion, as well as modern notions of morality and fairness, also cannot be ignored in determining how the principle of nondiscrimination espoused by the Civil Rights Act of 1866 should now be applied.<sup>174</sup> Public opinion of inequality in contracting, and our country’s political and legislative approach to sex discrimination generally, has undergone a dramatic evolution since 1866,<sup>175</sup> when women’s legal status was severely limited by the laws of coverture<sup>176</sup> and women were excluded from jury service and the vote.<sup>177</sup> In the intervening years since the Act was debated and passed, Congress, through the passage of subsequent civil rights legislation,<sup>178</sup> and the courts, through the sex discrimination jurisprudence previously described, have begun to recognize

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168. Pub. L. No. 102-166, 105 Stat. 1071 (1991).

169. See *supra* notes 113–117 and accompanying text.

170. See G. Edward White, *The Origins of Civil Rights in America*, 64 CASE W. RES. L. REV. 755, 816 (2014) (“It seems fair to say that with the enactment of the Civil Rights Act of 1866 came the origins of civil rights in America.”).

171. RUTHERGLEN, *supra* note 35, at 9. The significance of Section 1981 rests in part on that fact that it “proscribe[s] conduct and afford[s] remedies that are not encompassed by more recent civil rights legislation,” including the prohibition of private racial discrimination and the availability of injunctive relief and punitive damages. Calhoun, *supra* note 56, at 317–18. Furthermore, “§ 1981 does not require plaintiffs to exhaust administrative remedies before filing suit in an Article III court.” Tsesis, *supra* note 126, at 1689.

172. See Eisenberg & Schwab, *supra* note 39, at 599.

173. See *supra* text accompanying note 159.

174. DWORKIN, *supra* note 119, at 364.

175. See, e.g., Edwards, *supra* note 3, at 560 (discussing the “depth of public distaste with the unequal treatment caused by price discrimination”).

176. See *supra* Part II.A.

177. See *supra* notes 57–58.

178. E.g., Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

women's equal civil and political status in education, employment, and housing. This subsequent history only reinforces the idea that an interpretation of Section 1981 that looks only to congressional intent in order to conclude that it does not prohibit sex discrimination not only fails to effectuate the principle of nondiscrimination that Congress set forth in the statute, but also does not properly account for intervening political and judicial developments that suggest that such an interpretation is no longer appropriate.<sup>179</sup>

### C. Possible Criticisms of This Approach

#### 1. The End of Coverture

Critics of an interpretative approach that acknowledges women's subordinate civil status in the nineteenth century might, in addition to arguing that such an approach is contrary to congressional intent, also emphasize that the laws of coverture that so limited women's ability to enter and enforce contracts in the nineteenth century are no longer in effect. Since women no longer suffer the same legal handicaps that they did when Section 1981 was enacted, so the argument might go, these handicaps are irrelevant to modern interpretation of the statute.

While it is true that the laws of coverture largely have been repealed or struck down,<sup>180</sup> historical advancements in women's civil status should not determine whether they are entitled to sue for relief under Section 1981. Indeed, while black citizens undoubtedly enjoy greater civil rights than they did in 1866, they are still able to bring suit for racial discrimination under this statute. Furthermore, while state and federal laws have supplanted the legal disabilities of coverture over time, bringing women's civil status closer to that of men,<sup>181</sup> women today—like black

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179. See DWORKIN, *supra* note 119, at 345–50.

180. See, e.g., Kirchberg v. Feenstra, 450 U.S. 455, 456 (1981) (invalidating under the Equal Protection Clause a Louisiana statute that “gave a husband, as ‘head and master’ of property jointly owned with his wife, the unilateral right to dispose of such property without his spouse’s consent”).

181. By the mid-nineteenth century, states had begun to pass statutes known as married women's property acts that gave married women the power to own and convey both real and personal property, and to sue and be sued with respect to their property. Cott, *supra* note 41, at 1453, 1457; HARRIS, *supra* note 41, at 6–7; KELLY, *supra* note 41, at 261. These statutes were not, however, designed to bestow upon married women full legal equality with men. WOMEN, THE LAW, AND THE CONSTITUTION xii (Kermit L. Hall ed., 1987); see also Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 983 (2002) (“It is often said that the married women's property acts abolished the common law doctrine of coverture in the nineteenth century—a legal fiction if ever there was one.”). Married women's property acts empowered women to contract only with respect to her separate estate; these measures granted no new rights to women who did not own property. HARRIS, *supra* note 41, at 6–7. Women's capacity to contract remained strictly limited by the terms of the statute; if a contract into which a woman entered was not clearly contemplated by the statute, it was void per common law. *Id.* at 7. In passing these laws, state legislatures may have been motivated less by a desire to encourage women's autonomy, and more by the benefit to husbands of being able to insulate some familial assets from creditors. Cott, *supra* note 41, at 1457. Beginning in the 1850s, state legislatures embarked on a second wave of reform legislation by passing “earnings statutes” that gave women property rights in their personal

citizens—remain disadvantaged in contracting on equal terms as men.<sup>182</sup> Where women continue to face practical inequality with men in making and enforcing contracts, the formal repeal of the laws of coverture should not preclude an interpretation that accounts for such disparities. Furthermore, the Court’s recent jurisprudence in cases like *St. Francis College v. Al-Khazraji* and *Shaare Telifa Congregation v. Cobb*—which held that a U.S. citizen born in Iraq and a Jewish individual could bring claims under Section 1981 and Section 1982, respectively, because “Arabs” and Jews were considered races at the time the Civil Rights Act of 1866 was enacted—endorses the idea that employing nineteenth century definitions in interpreting the statute is entirely appropriate.<sup>183</sup> These decisions therefore support an interpretation that takes into account women’s subordinate status under coverture at the time Section 1981 was originally passed.

## 2. Super-Strong *Stare Decisis*

In addition to the repeal of the laws of coverture, one might also argue that the eight federal circuit courts that have ruled (or whose dicta have strongly suggested) that sex discrimination claims are not cognizable under Section 1981<sup>184</sup> are bound by the breed of super-strong *stare decisis* that accompanies statutory decisions.<sup>185</sup> Overcoming such precedent would therefore be an obstacle to a plaintiff seeking to prevail on a sex discrimination claim. However, as was discussed in Part II.C.1, many of these courts<sup>186</sup> based their decisions on dicta in *Runyon v. McCrary*,<sup>187</sup> a race discrimination case brought by two male schoolchildren. *Runyon* did not concern sex discrimination, nor did the parties brief whether such a claim could—or should—be cognizable under Section 1981. The Supreme Court “precedent” on which other courts subsequently based their decisions was therefore not binding law at all, but rather an errant remark that was not grounded in the facts of the case before it. Having erroneously relied on Supreme Court dicta to come to their decisions, statutory *stare decisis* would be no barrier to reinterpreting the statute with attention to women’s inferior status at the time that it was enacted.<sup>188</sup>

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labor. Siegel, *supra* note 62, at 1083. These laws may have had a more tangible effect on the life circumstances of women who did not own property, but instead had only the proceeds of their labor. *Id.*

182. See *supra* notes 5–9 and accompanying text.

183. See *supra* notes 113–117 and accompanying text.

184. See *supra* notes 20–21 and accompanying text.

185. See *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 452 (2008) (observing that *stare decisis* has “special force in the area of statutory interpretation” and holding that Section 1981 encompasses claims of racial retaliation (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989))).

186. See, e.g., *supra* notes 22 and 86.

187. 427 U.S. 161 (1976).

188. Chief Justice Marshall articulated why dicta should be given less precedential weight than holdings in *Cohens v. Virginia*:

It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go

### 3. Slippery Slope of Nondiscrimination

Finally, some might argue that reading “white citizens” to mean the most favored class of citizens would open the door to a variety of other discrimination claims—for instance, permitting claims of religious discrimination where a plaintiff could show that he belonged to and was discriminated against on the basis of his membership in a minority or disfavored religion. Similarly, some could argue that an expansive reading of Section 1981 to prohibit all forms of discrimination in contracting could preclude forms of discrimination that are socially acceptable, and even laudable, such as the provision of reduced-fare tickets on public transit for senior citizens (discrimination on the basis of age) or discounts at office supply stores for teachers (discrimination on the basis of employment) or at theaters for students (discrimination on the basis of student status).

An over-expansive reading of the statute is not, however, an inevitable consequence of my proposed interpretation. Rather, reading Section 1981 to refer to the most favored class of citizens comports with a constrained interpretation that focuses on repairing and preventing discrimination against discrete classes of people who have suffered historically documented discrimination and oppression,<sup>189</sup> and who faced invidious discrimination at the time Section 1981 was enacted. Black citizens and women are two clear examples of such classes. While others may be able to argue that their right to contract has been abridged by comparison to a more favored group, or that they have suffered a variety of invidious discrimination comparable to that endured by black citizens and women, the ultimate breadth of Section 1981 is beyond the scope of this Article to define. It suffices to observe that, given the subordinate social position of women and people of color when the statute was originally enacted—and continuing today—both of these classes should be eligible to bring claims of discrimination under

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beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

19 U.S. 264, 399–400 (1821); *see also* *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379 (1994) (“It is to the holdings of our cases, rather than their dicta, that we must attend . . .”); Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOKLYN L. REV. 219, 232 (2010).

It is a basic tenet of the rule of law that similarly situated people ought to be treated similarly. *Stare decisis* helps further this goal of consistent legal outcomes. Elevating dicta into holding, however, disrupts this basic tenet. By treating dicta as holding, the court treats as similar those litigants who are not similarly situated. And by declaring the holding of a prior court to be dicta, the court treats disparately those litigants who are in fact similarly situated.

*Id.*

189. *See generally* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting that statutes that discriminate against “discrete and insular minorities” may warrant “more exacting judicial scrutiny”).

Section 1981.

### CONCLUSION

Women face innumerable obstacles to participating in economic markets, from a persistent and well-documented wage gap<sup>190</sup> to disparate opportunities in certain economic and employment sectors.<sup>191</sup> Sex discrimination in the pricing of basic goods and services—from vehicles and personal care products to dry cleaning and haircuts—results in a “gender tax”<sup>192</sup> that further impedes women’s ability to compete on a level playing field with men.

Yet an existing statute may offer a solution to sex discrimination in the consumer marketplace. Since its original enactment in 1866, Section 1981 has played a pivotal role in ensuring that all persons, regardless of race, have equal rights to enter and enforce contracts. In construing its words, however, courts have adhered to a method of statutory construction that fails to fulfill the full scope of the principle of nondiscrimination pronounced by the statute. Interpretations of Section 1981 that conclude the statute does not support claims of sex discrimination have failed to recognize that women occupied a subordinate civil and political status at the time the statute was enacted, and were not then able to exercise the right to contract to the same extent as white men. Though women’s rights to make and enforce contracts were severely limited throughout the nineteenth century, courts often categorize the abridged rights of women alongside those of men in defining the rights of the “white citizens” to which those of Section 1981 plaintiffs are to be compared. But an approach in which “white citizens” is taken to mean “white men and white women,” for instance, could have severely abridged the rights conferred to newly emancipated slaves by allowing their rights to be compared to those of white women, which were little better than those of the newly freed slaves themselves. Similarly, reading “white citizens” to mean “white men or white women” would require courts to accept that—while its language does not explicitly reference sex—the composition of the “white citizens” category varies depending on the sex of the plaintiff. As I have described, such a construction is unlikely to survive the exacting scrutiny that the Supreme Court applies to statutes that classify on the basis of sex. Furthermore, an interpretation that insists that racial discrimination was the only type of discrimination the statute’s authors intended to prohibit ignores the Supreme Court’s methodology in its civil rights jurisprudence, in which the Court has sought to effectuate the

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190. See, e.g., Bryce Covert, *New Census Data Shows the Gender Wage Gap Hasn’t Improved in 7 Years*, THINKPROGRESS (Sept. 16, 2015, 10:13 AM), <http://thinkprogress.org/economy/2015/09/16/3702004/gender-wage-gap-2014/>.

191. See CATHERINE HILL ET AL., AAUW, *WHY SO FEW? WOMEN IN SCIENCE, TECHNOLOGY, ENGINEERING, AND MATHEMATICS* (2010), <https://www.aauw.org/files/2013/02/Why-So-Few-Women-in-Science-Technology-Engineering-and-Mathematics.pdf> (documenting the underrepresentation of women and girls in the fields of math, science, technology, and engineering, and outlining the barriers women and girls face to entry into these sectors).

192. See *supra* text accompanying note 9.

moral principle that a statute expresses, even where such an interpretation results in outcomes to which the enacting Congress might have objected—like school desegregation in the District of Columbia. And an interpretation that excludes sex discrimination fails to cohere with subsequent political and social history in which Congress and the courts have increasingly acknowledged women’s equal status with men in a variety of other contexts, from education to employment.

Instead, courts should acknowledge the unequal legal status of women at the time the statute was enacted and employ an interpretative approach that realizes the 39th Congress’s underlying conviction that all persons should have the same right to make and enforce contracts. Such an approach yields the inevitable conclusion that the statute’s referent class—“white citizens”—denoted white men. Since a woman who could demonstrate that she had been treated unequally to a white man in making or enforcing a contract could state a claim under Section 1981, this approach would have the effect of prohibiting sex discrimination in contracting, including sex-based price discrimination in the sale of goods and services. In adopting this interpretation, courts would grant women a remedy to combat the pervasive discrimination they currently face in the marketplace, and would fully effectuate the moral principle that Section 1981 enunciates.