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## 42 U.S.C. § 1981's Contract Clause: Racial Equality in Contractual Relationships

Among federal statutes that address racial discrimination, 42 U.S.C. § 1981's contract clause uniquely focuses on guaranteeing a person's equal right to make and enforce contracts without regard to race. More specifically, § 1981's contract clause provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens."

This In Focus explains this provision's history, enforcement, and interpretation, and discusses examples of its application to different contractual relationships. (This summary does not address a related provision, 42 U.S.C. § 1982, concerning racial equality in property-related rights.)

### Historical Background

Section 1981 was originally enacted as § 1 of the Civil Rights Act of 1866, an immediately post-Civil War legislative effort to ensure that newly freed slaves received the same rights as other citizens. The Civil War ended in April 1865; the Thirteenth Amendment, which abolished slavery in the United States, was ratified later that year. In April 1866, the Civil Rights Act of 1866 became law.

Following ratification of the Fourteenth Amendment, Congress reenacted the 1866 Act as part of the Enforcement Act of 1870, including § 1 of the 1866 Act. The statute was recodified in 1874, but its basic coverage did not change until 1991. It is now codified at 42 U.S.C. § 1981.

### Enacting basis

The Supreme Court has interpreted § 1981 as enacted under Congress's authority to enforce the Thirteenth and Fourteenth Amendments to the Constitution. Laws enforcing the Thirteenth Amendment concern, among other things, eliminating "the badges and incidents" of American slavery, and may apply to private and state actors. Laws enforcing the guarantees of Section 1 of the Fourteenth Amendment, including equal protection of the laws, need not relate to slavery and may address discrimination based on race as well as other characteristics such as sex. Such legislation, however, may only apply to state actors.

### Section 1981's Contract Clause

Section 1981(a) enumerates several rights, guaranteeing "[a]ll persons" the same right, for example, "to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." Claims under § 1981, however, have largely arisen under its contract clause—that is, statutory language providing for "the same right . . . to make and enforce contracts" that "white citizens" possess. This right to make and enforce contracts applies to private and governmental actions; §

1981's statutory text expressly protects "against impairment by nongovernmental discrimination and impairment under color of State law."

### General Background

An outright refusal to contract with a person or party because of race is perhaps the plainest violation of § 1981's contract clause. In its 1976 decision in *Runyon v. McCrary*, for example, the Supreme Court addressed § 1981's application to the refusal by nonsectarian private schools to contract with parents to provide educational services because the children seeking enrollment were Black. When analyzing those claims, the Court described the refusals as "amount[ing] to a classic violation of § 1981."

In the Civil Rights Act of 1991, Congress amended § 1981 to further clarify and define the contracting conduct under its protection. Congress amended the law in response to the Supreme Court's decision in *Patterson v. McLean Credit Union*, which construed § 1981 to exclude from its reach certain contract-related racial discrimination that occurs *after* a contract is formed. As amended, § 1981 now defines the right to make and enforce contracts to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

Thus, § 1981's scope is not limited to racial discrimination in the formation of a contract. Racial discrimination in the performance or termination of a contract, among other things, may violate § 1981's contract clause. A termination-related claim, for example, might allege that a party discriminatorily terminated a contract to sell property upon learning that the buyers were Black.

In its 2008 decision in *CBOCS West, Inc. v. Humphries*, the Supreme Court interpreted § 1981 to also prohibit retaliation for reporting a violation of a contract-related right under the statute.

### Varied Contexts of § 1981 Claims

Contractual relationships play out in a range of settings and industries. Such relationships may arise in relation to employment, the provision of goods and services, financing, or business partnerships, for example. A federal court's analysis of a § 1981 claim can vary based on differences in context and the contractual relationship at issue.

### Employment Contracts

Many § 1981 claims concern discrimination arising out of contractual employment relationships. These claims may allege various forms of racial discrimination in the

workplace, such as a racially hostile work environment. Such § 1981 claims may thus overlap to some degree with claims brought under Title VII of the Civil Rights Act of 1964, which addresses discrimination in the workplace. The statutes differ in important ways, however. For example, § 1981 applies to employers regardless of size, while Title VII applies to employers with 15 or more employees. Additionally, while both § 1981 and Title VII apply to state actors, the Supreme Court has held that Title VII is the exclusive statutory remedy for job-related racial discrimination by the federal government. The statutes also have distinct remedies and enforcement schemes. For more discussion of Title VII, see CRS Report R46534, *The Civil Rights Act of 1964: An Overview*, by Christine J. Back.

### Retail

Federal courts have also evaluated § 1981 claims brought in the consumer and retail contexts against commercial businesses, including for racially discriminatory refusals to contract and discrimination in performing contracted services. Such claims might include, for example, allegations that a bank discriminatorily refused to engage in a transaction based on a patron's race; that a hotel discriminatorily refused to contract with a Black-owned company to hold a function predominantly attended by Black audience members based on race; or that a restaurant refused to serve patrons based on their Arab descent.

### Financing and Property

Some § 1981 claims relate to financing and have alleged discriminatory denials of contracts for loans or mortgages. In one such case, a federal court of appeals evaluated a complaint alleging that a locality had discriminatorily refused to grant an economic development loan to a minority-owned business based on race. The court in that case identified the “key issue” as being whether the city applied more stringent loan conditions to minority-owned business than it did to nonminority-owned businesses.

Section 1981 claims have also been raised in relation to contracts for property leases or sales. In one case, a federal appellate court upheld a jury verdict finding that a property management company had terminated the plaintiff's retail lease and refused to offer a new lease for retail space based on her race and the race of her business clientele.

### Racial Characteristics Under § 1981

While Congress's principal motivation in enacting § 1981 was to secure equal rights for Black citizens post-slavery, the Supreme Court held in *McDonald v. Santa Fe Trail Transportation Company*, a case involving a private employer, that the provision permits claims brought by White persons as well.

In *Saint Francis College v. Al-Khazraji*, the Court also interpreted § 1981 to prohibit intentional discrimination based on “Arabian ancestry,” when such discrimination is not based “solely on the place or nation of his origin, or his religion.” Congress, the Court concluded, intended to protect such “identifiable classes of persons.”

### Intent and Causation

Section 1981 does not expressly refer to an intent requirement or a causation standard. The Supreme Court has interpreted § 1981 to require a showing of intentional discrimination. In addition, in its 2020 decision in *Comcast v. National Association of African American-Owned Media*, the Court interpreted § 1981 to require that a plaintiff show race was a “but for” cause of the contract-related injury—that is, that the injury would not have occurred “but for” the plaintiff's race.

### Private Right of Action

Section 1981 does not expressly create a private right of action or address remedies. Since its 1975 decision in *Johnson v. Railway Express Agency, Inc.*, however, the Supreme Court has interpreted § 1981 to permit a private suit for remedies such as “equitable and legal relief, including compensatory and, under certain circumstances, punitive damages.”

Relatedly, § 1981 does not contain a statute of limitations for bringing a private suit. The Supreme Court has applied two methods for determining the timeliness of § 1981 claims. If a claim arises under, or was made possible by, the 1991 amendments to § 1981, the Court has applied a four-year limitations period from another statute (28 U.S.C. § 1658). If the claim arises under § 1981 as it was before the 1991 amendments, courts are to apply “the most appropriate or analogous state statute of limitations.”

### Suits Against State Actors: 42 U.S.C. § 1983

Though the Supreme Court has interpreted § 1981 to permit private suits for remedies, it has held that with respect to suits to enforce § 1981 against *state* actors, another federal statute—42 U.S.C. § 1983—provides the exclusive federal remedy. Under this precedent, to prevail on a claim alleging a state actor violated § 1981, a plaintiff must bring suit under § 1983 and show that a contract-related violation was “caused by a custom or policy within the meaning of” the Court's precedent construing § 1983.

### Considerations for Congress

Section 1981 applies to contracts and contract-related conduct that arise in a range of specific contexts, yet its text is phrased in general terms. In the absence of legislative direction addressing circumstances and legal questions that have reached federal courts under § 1981, courts have played a significant role in determining how § 1981 is interpreted, applied, and enforced. As it did with the 1991 amendments, Congress may, consistent with constitutional limitations, supersede judicial decisions interpreting § 1981 or resolve or clarify debates over its scope, operation, and application. In any future amendments to § 1981, Congress would likely need to consider the scope of its authority to enforce the Thirteenth and Fourteenth Amendments. To the extent that courts construe other statutes in light of § 1981, changes to § 1981 could have implications for how courts interpret other statutes as well.

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