CLASSICAL NOSTALGIA: RACISM, CONTRACT IDEOLOGY, AND FORMALIST LEGAL REASONING IN *PATTERSON V. McLEAN CREDIT UNION*

ALLAN H. MACURDY*

INTRODUCTION

Racial prejudice and the economic violence of classical liberal philosophy have long existed in symbiosis. Liberal theory provides a set of tools of oppression with which to perpetuate the exclusion and exploitation of an economic underclass; racism serves to delineate a significant portion of that class. To adherents of a liberal cosmic order, liberty entails permission to act up to the point where one's action harms another.[1] So long as power elites succeed

* Lecturer of Law, Boston University School of Law. J.D., 1986, Boston University School of Law; B.A., 1983, Boston University.

The course of scholarship is by no means a straight line. It is, rather, more often marked by false starts and dead ends. At such an impasse in the writing of this piece, I dashed off a letter to Avi Soifer, who was on sabbatical in Tel Aviv at the time. The letter brought my ideas into focus, and Avi's reply, full of warmth and humor, let me know I was on the right track. It is to Avi, whose profound compassion, gentle wit, and abiding faith in community have supported and sustained me, that I dedicate this Article.

In addition, this project would not have been possible without the interest and encouragement of many other individuals, too numerous to list. I would like to thank them all, especially Kathy Abrams, Jack Beerman, Fred Lawrence, Martha Minow, Mark Pettit, Ken Simons, and Joe Singer. I am also grateful to members of the Boston University School of Law Legal Theory Workshop, Marlene Alderman and the library staff, and, for research assistance, to Kim Carlisle, Sumita Sinhe, and Wendi Snyder.

1. Classical liberalism is grounded in the distinction between "self-regarding" and "other-regarding" acts. *See* J.S. MILL, ON LIBERTY 70-86 (Norton ed. 1975); T. HOBBES, LEVIATHAN 189-90 (Penguin ed. 1976); J.J. ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES (Everyman's ed. 1950); *see also* C. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE 1-4 (1964); R. WOLFF, THE POVERTY OF LIBERALISM (1968). For an illuminating discussion of liberal rights analysis, see Singer, *The Legal Rights Debate in Analytical Jurisprudence: From Bentham to Hohfeld*, 1985 WISC. L. REV. 976.

in defining such harm to suit their own interests, liberal theory maintains the distribution of power. Contract, defined as a discrete transaction between parties presumed to hold equal knowledge and power, is the fundamental expression of liberal legal theory. This private law foundation maintains a pervasive influence upon the economic landscape of legal culture, extending so far as to shape even the contours of civil rights jurisprudence by obscuring the race-based elements of economic conflict behind the talisman of the neutral exercise of free will.[2]

In *Patterson v. McLean Credit Union*,[3] Justice Kennedy, writing for a majority of the Supreme Court, found that racial harassment occurring after the formation of a contract is not actionable under section 1981.[4] Justice Kennedy reasoned that such racial harassment did not infringe upon the statutorily protected right to "make and enforce contracts."[5] While most professional attention has focused upon whether section 1981 reaches private discrimination,[6] it is the private law model itself which serves to thwart the achievement of non-discriminatory relations in contract. When Justice Kennedy states that racial harassment relating to the condition of employment "is not actionable under § 1981" because the statute "covers only conduct at the initial formation of the contract,"[7] he espouses a formalistic conception of contracting. This model posits an atomistic world of independent parties meeting at a singular moment in time, at which point the voluntarily assumed obligation attaches. Nothing else is relevant.[8] By disregarding the behavior

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2. As Charles Lawrence notes:

> [L]aw transmits ideological imagery that helps to preserve and legitimize existing power relationships. Those in power use the legal system to achieve results in individual disputes that maintain the status quo. What is less obvious, but perhaps more important, is the use of legal ideas to create and transmit utopian images that serve to justify that status quo. By representing reality in ideal terms, the law validates the socioeconomic setting in which legal decisions are made. The ideological imagery masks or denies the reality of oppressive or alienating social and economic relations and persuades us that they are fair.

Lawrence, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 325 n.30; *see also* Gabel & Feinman, *Contract Law as Ideology*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 172 (D. Kairys ed. 1982) [hereinafter POLITICS OF LAW].

3. 491 U.S. 164 (1989).

4. Section 1981 reads in pertinent part:

> All 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 . . . .

42 U.S.C. § 1981 (1988).

5. 491 U.S. at 176-78. This specific holding has since been legislatively overturned. *See infra* note 15 and accompanying text.

6. *See, e.g.*, Karst, *Private Discrimination and Public Responsibility: Patterson in Context*, 1990 SUP. CT. REV. 1; Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 YALE L.J. 541 (1989).

7. 491 U.S. at 179.

8. As Betty Mensch noted, formal contract doctrine "posit[ed] a magic moment of formation, when individual wills created a right whose enforcement was necessary for the protection

and position of the parties, the majority's view harkens back to the classical liberal world of the pursuit of self-interest.

The legal world has not, however, remained frozen in the late nineteenth-century world of classical legal thought — at least not entirely. Justice Kennedy's contract model fails to account for government regulation of consumer and workplace relations, the inquiries of modern legal theory, and development in contract law, all of which have disturbed the tidy home of liberal contract theory. These developments have challenged power distributions that favored stronger parties. From "good faith" and "unconscionability" under the Uniform Commercial Code,[9] to the Occupational Safety and Health Act[10] and the Federal Trade Commission Act,[11] substantive contract law reflects a rejection of significant portions of the classical contract model. This rejection largely results from the analyses of power disparities developed by Legal Realism in the 1930s, as well as the societal dynamics which created the welfare state. Such criticism continues through the private law inquiries of Critical Legal Studies (CLS)[12] and contract relationalism.[13]

In short, the *Patterson* majority's analysis of section 1981 represents a fossilized conception of the nature of contractual relationships, replete with antiquated visions of textualism and a presumed equality of bargaining power. Such a vision presupposes a simplistic, binary model of social interaction, smacking of late nineteenth-century notions of formal equality, and grounded in a ruthless laissez-faire philosophy. Viewed from this perspective, *Patterson* marks a return to the formalist reasoning of the classical period that threatens to reinvigorate the partnership of economic violence and racial subjugation characteristic of that era.[14]

This Article will examine the power dynamics underlying the majority's analysis in *Patterson*. Although Congress recently overturned the specific holding of *Patterson*,[15] the analysis utilized in the majority opinion reflects a

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of free will itself." Mensch, *Book Review: Freedom of Contract as Ideology*, 33 STAN. L. REV. 753, 760 (1981).

9. U.C.C. §§ 1-203, 2-302 (1978).

10. 29 U.S.C. § 655 (1988).

11. 15 U.S.C. § 45 (1988).

12. *See, e.g.*, Feinman, *Critical Approaches to Contract Law*, 30 U.C.L.A. L. REV. 829 (1983); Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 567 (1982) [hereinafter *Distributive and Paternalist Motives*]; Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) [hereinafter *Form and Substance*].

13. *See* I. MACNEIL, THE NEW SOCIAL CONTRACT (1980) [hereinafter NEW SOCIAL CONTRACT]; MacNeil, *Relational Contract: What We Do and Do Not Know*, 1985 WISC. L. REV. 483 [hereinafter *Relational Contract*].

14. The Rehnquist Court has shown a similar disregard for the inequities left unaddressed by mere proclamations of a new day of equality. *See, e.g.*, City of Richmond v. J.A. Croson, 488 U.S. 469 (1989) (invalidating minority set-asides in city contracts).

15. Civil Rights Act of 1991, Pub. L. 102-166, § 101, 105 Stat. 1071 (1991) ("the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, and conditions of the contractual relationship").

conservative jurisprudential trend. The immediate concern is not the Court's interpretation of section 1981, which now covers post-contract formation activity, but the mode of legal reasoning employed by the *Patterson* majority. In addition to presenting an analysis of the Court's reformulation of a nineteenth-century judicial method, this Article attempts to lay some of the conceptual foundations for a proper interpretation of the section 1981 ban on racial discrimination in contracting. By deconstructing the formalist presupposition of a bright line dividing civil rights law from other bodies of law, the analysis will connect formalism in economic relations to the legal doctrine of formal equality to show how they combine to oppress minorities through economic violence.[16]

In Part I, I begin with a conceptual journey through *Patterson v. McLean Credit Union*, emphasizing the Court's use of formalism and classical contract methods to restrict the scope of section 1981. Part II explores the historical antecedents of the method of judicial reasoning utilized in *Patterson* by examining the conditions under which the freedmen were obliged to contract in the Reconstruction era and the late nineteenth century. The rise of classical contract theory during this period was part of the larger ascendancy of High Formalism, writ large as freedom of contract, triumphant individualism, and formal equality. The Article then traces two strands of the incorporation of civil rights norms into private law. In Part III, I examine the Supreme Court precedents that apply a statutory imposition of a broad mandate of nondiscrimination in the economic realm. This Part focuses on sections 1981 and 1982, both of which derive from the 1866 Civil Rights Act, to show that this mandate precludes the kind of formalism adopted by the majority in *Patterson*.

Finally, in Part IV, I examine internal critiques of contract theory that have emerged in twentieth-century legal scholarship. Legal Realism and Critical Legal Studies reject the formalist presupposition of a strict boundary that cordons private law from other legal areas and interpret contract law as a means to perpetuate power disparities. Relationalism attempts to reconstruct the rights and obligations under a contract to include norms that reflect underlying social values. Rejecting the formalist presumption that only "objectively" determinable criteria may be used to give content to a contract's terms, relationalism attempts to incorporate multiple perspectives, including that of the less powerful party to the contract, into shaping the underlying norms that

16. For a brilliant, recent exposition of this connection, see Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988). Although this Article focuses upon racism in the economic sphere, it is important to recognize that the struggle of minorities to overcome oppression cannot be subsumed within an ideology of class conflict. Economic discrimination is, in part, a form of racism carried out through economic violence; class conflict contributes to, but does not entirely explain this discrimination. *See* Dalton, *The Clouded Prism*, 22 HARV. C.R.-C.L. L. REV. 435 (1987); Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 321 (1987); Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987).

should govern a contractual relationship. Brenda Patterson did not enter into a contract that bound her to an employment relationship which entailed harassment on account of her race. The *Patterson* majority's great flaw is that it failed to take this perspective into account when determining the scope of section 1981.

I.
THE RETURN TO FORMALISM: *PATTERSON V. MCLEAN CREDIT UNION*

The Supreme Court created great dismay in the civil rights community when, on its own initiative, it set *Patterson* for reargument on the question of whether the holding in *Runyon v. McCrary*[17] affirming the applicability of section 1981 to private conduct should be reconsidered.[18] In *Runyon*, after a detailed examination of the legislative history of section 1981 and of prior decisions construing the provision, the Court held that this remnant of the 1866 Civil Rights Act prohibits private schools from excluding qualified children solely on the basis of race. The Court declared that the statute bars "racial discrimination in the making and enforcement of private contracts."[19] The *Runyon* majority built its decision upon the section 1981 cases in the wake of the holding in *Jones v. Alfred H. Mayer Co.*[20] that section 1982[21] reached private discrimination in the sale or rental of real or personal property. Because sections 1981 and 1982 have common roots in the 1866 Civil Rights Act,[22] the Court found the *Jones* holding applicable to section 1981.[23]

The parties in *Patterson*, however, did not raise the issue addressed in *Runyon*. Brenda Patterson, a black woman, was employed as a teller and file

17. 427 U.S. 160 (1976).

18. 485 U.S. 617 (1988).

19. 427 U.S. at 168. The public-private distinction in *Runyon* is inextricably intertwined with the contract issues in *Patterson*. As Duncan Kennedy and others have noted, it is those areas of law governing relations between private actors which maintain power disparities. *See Form and Substance, supra* note 12. Thus, even *Runyon*'s holding that section 1981 may be applied to private contracts does not alter power disparities where the terms of a contract are facially neutral. Race-based economic oppression can continue unabated in the private realm.

20. 392 U.S. 409 (1967).

21. Section 1982 (1988) reads in pertinent part:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 1982 (1988).

22. Sections 1981 and 1982 are part of a network of civil rights enactments in the Reconstruction Era. They are joined by 42 U.S.C. § 1985 (1988) outlawing conspiracies to deprive citizens of equal protection of privileges and immunities, *see, e.g.*, Griffin v. Breckenridge, 403 U.S. 88, 104-105 (1971); 42 U.S.C. § 1994 (1988), which prohibits peonage, *see* Pollock v. Williams, 322 U.S. 4, 8 (1944); and 18 U.S.C. § 1581 (1988), providing criminal penalties for imposing peonage, *see* Clyatt v. United States, 197 U.S. 207, 218 (1905).

23. Runyon v. McCrary, 427 U.S. 160, 168-72 (1976); Johnson v. Railway Express Agency, 421 U.S. 454, 459-60 (1975); Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 439-40 (1973).

coordinator by McLean Credit Union until July 1982. After termination, Patterson brought suit alleging the Credit Union had harassed her, failed to promote her to an intermediate accounting clerk position, and then discharged her, all on the basis of race in violation of section 1981. The district court held that her claim for racial harassment was not actionable under section 1981.[24]

In the court of appeals, Patterson's lawyers challenged the district court's determination, as well as the jury instruction that in order to prevail on her claim, Patterson had to demonstrate she was more qualified than the white employee whom she alleged was promoted in her stead. The Fourth Circuit affirmed the district court on both issues.[25] On the racial harassment question, the court held that while an allegation of harassment may state a claim under Title VII, and may be probative of discriminatory intent under section 1981, racial harassment alone does not abridge the right to "make" or "enforce" contracts.[26] The Supreme Court granted certiorari to consider two issues: whether racial harassment was actionable under section 1981, and whether the district court erred in its jury instructions.[27] In April 1988, the Court requested reargument on the continuing validity of the holding in *Runyon*.[28]

The Court elected to leave *Runyon* undisturbed. Finding the traditional justifications for overruling prior decisions lacking, Justice Kennedy's majority opinion invoked the hoary principle of stare decisis to uphold the decision.[29] However, Kennedy's sober discussion of stare decisis provided cover for the Court's retreat from a commitment to broad-based civil rights enforcement envisioned by the thirty-ninth Congress when it enacted the 1866 Act. Despite *Runyon*'s continuing viability, the Court upheld the lower court's finding that racial harassment claims are not actionable under section 1981. The Court reasoned that since harassment claims do not involve the "making" or "enforcement" of a contract, they fall outside the statute's coverage.[30]

The distinction between formation and performance effectively recreates the private/public division eliminated by the section 1981 cases following

24. 42 Fair Empl. Prac. Cas. (BNA) 659 (M.D.N.C. 1985), *aff'd*, 805 F.2d 1143 (4th Cir. 1986), *aff'd in part, vacated in part*, 491 U.S. 164 (1989).

25. 805 F.2d 1143 (4th Cir. 1986), *aff'd in part, vacated in part*, 491 U.S. 164 (1989).

26. *Id.* at 1145-46.

27. 484 U.S. 814 (1987).

28. 485 U.S. 617 (1988).

29. 491 U.S. 164, 171-75 (1989). Finding no special justification, no intervening law to weaken its underpinnings, no detriment to coherence, or inconsistency with justice or the social welfare, the Court let *Runyon* be and moved on. An exchange ensued between Justices Kennedy and Brennan over the justification for respecting the earlier decision as precedent. *Compare id.* at 172-75 (majority opinion) *with id.* at 190-205 (Brennan, J., concurring). In essence, the issue was whether the decision in *Runyon* should be upheld because it was not yet sufficiently obsolete under the standards for stare decisis (Justice Kennedy's position) or because it was properly decided (Justice Brennan's view). Justice Brennan reviewed the history relied upon in *Jones* and *Runyon* and concluded that *Runyon* was correctly decided. *Cf.* Kairys, *Legal Reasoning*, in POLITICS OF LAW, *supra* note 2, at 15 (Court's decision not to overrule an established precedent "is based on the likely public perception of and reaction to such a decision and the effect on the Court's power and legitimacy").

30. 491 U.S. at 178.

Jones.[31] By confining the inquiry to formation alone, Justice Kennedy limited civil rights regulation of contract without taking the blame for openly overturning *Runyon*. The Court returned the bulk of contract law to the realm of private ordering. While Title VII covered racial harassment in employment situations, the Court limited section 1981's coverage to discrimination prior to formation in non-employment contracts. As Justice Brennan wrote in dissent: "What the Court declines to snatch away with one hand, it takes with the other."[32]

The majority opinion began the retreat by limiting the interpretation of section 1981 that arose out of the holding in *Jones*. According to Justice Kennedy, section 1981 provides broad protection only to a narrow set of specified rights.[33] Although the Court relied upon the common statutory roots of sections 1981 and 1982, and noted that *Jones* viewed section 1982 as "prohibit[ing] all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein,"[34] in Justice Kennedy's view, " '[t]he legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights.' "[35]

The specified rights turn out to be those found in the text: the right to make and enforce contracts. "Making," in Justice Kennedy's view, refers only to discriminatory refusals or offers to contract. As such, section 1981's protections do not extend to post-formation conduct, which is "more naturally"

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31. *See supra* note 23.

32. 491 U.S. at 189.

33. *Id.* at 176.

34. *Id.* at 176 (quoting Jones v. Alfred H. Mayer, Co., 392 U.S. 409, 436 (1968)).

35. *Id.* (quoting Georgia v. Rachel, 384 U.S. 780, 791 (1966)). This sort of judicial misreading of statutes and legislative history derailed Reconstruction and has continued to hobble civil rights enforcement. Professor Hyman notes that "[i]t was largely the decision to leave matters to the judiciary, and to case-by-case evaluation, that undermined the congressional Reconstruction policy." H. HYMAN, A MORE PERFECT UNION 245-81 (1973). As Justice Brennan suggested in his *Patterson* dissent, there is evidence that broad support for sweeping civil rights protection existed in the thirty-ninth Congress. 491 U.S. at 193-96. *See generally* Soifer, *Paradox of Paternalism and Laissez-Faire Constitutionalism*, 5 L. & HIST. REV. 249 (1987) [hereinafter *Paradox of Paternalism*]. Though a complete discussion of the legislative history of the 1866 Act is beyond the scope of this essay, *see infra* note 67, a few remarks by Senator Lyman Trumbull of Illinois, principle sponsor of the Act, may be instructive. Trumbull noted repeatedly that the Act guaranteed "inherent, fundamental rights which belong to free citizens or men in all countries." CONG. GLOBE, 39th Cong., 1st Sess., 1757 (1866). He stated further that the freedman "must be fully protected in all his rights of person and of property," and that "any legislation or any public sentiment which deprived any human being in the land of those great rights of liberty will be in defiance of the Constitution; and if the States and local authorities, by legislation or otherwise, deny these rights, it is incumbent on us to see that they are secured." *Id.* at 1777. For both sides of the historical debate, compare Soifer, *Review Essay: Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 691, (1979), with R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1978); Berger, *Soifer to the Rescue of History*, 32 S.C. L. REV. 427 (1981). *See generally* W. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 1-39 (1988) (arguing that scholarship about the intent of the thirty-ninth Congress has reached an impasse).

governed by state contract law and Title VII.[36] Kennedy makes this claim despite clear evidence that Congress, in enacting Title VII, specifically declined to restrict the effect of section 1981 in the employment area.[37]

The right to "enforce" contracts is also narrowly defined. The Court argued that section 1981 removes legal disabilities created by state law, whether substantive or procedural, which hinder access to contract enforcement, and prohibits certain private attempts to prevent enforcement. Justice Kennedy defined the latter category as follows:

> Following this principle and consistent with our holding in *Runyon* that § 1981 applies to private conduct, we have held [in *Goodman v. Lukens Steel Co.*] that certain private entities such as labor unions, which bear explicit responsibilities to process grievances, press claims, and represent members in disputes over the terms of binding obligations that run from the employer to the employee, are subject to liability under § 1981 for racial discrimination in the enforcement of labor contracts.[38]

Thus, in the Court's view, section 1981 is not a broad guarantee of freedom from discrimination in the nation's economic life. Rather, the Court reads the statute simply as a prohibition against discrimination in the initial formation of contracts or in using courts to enforce discriminatory contracts.[39]

Justice Kennedy's response to the standards proposed by the Solicitor General and Justice Brennan for determining when harassment is actionable reveals his central concerns. The Solicitor General proposed that harassment be actionable only if it amounts to a breach of contract under state law.[40] Justice Kennedy found this approach to be in conflict with *Runyon*. He argued that even if harassment rises to the level of a state law breach of contract, it still does not implicate the right to make or enforce contracts. To Kennedy, there is no enforcement issue, because a plaintiff's access to state court is unimpaired.[41] Moreover, the Solicitor General's interpretation of section 1981 would result in the federalization of all state law claims alleging racial harass-

36. 491 U.S. at 176-77.

37. *See infra* notes 171-81 and accompanying text.

38. 491 U.S. at 177-78 (citing Goodman v. Lukens Steel Co., 482 U.S. 656 (1987)).

39. The Court reached this conclusion despite its own rule, in the context of section 1982, that " '[w]e are not at liberty to seek ingenious analytical instruments . . . to carve from § 1982 an exception for private conduct,' " Jones v. Alfred Mayer, Co., 392 U.S. 409, 437 (1958) (quoting United States v. Price, 383 U.S. 787, 801 (1966)), because a "narrow construction of the language of § 1982 would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866." Memphis v. Green, 451 U.S. 100, 144 (1981) (quoting Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237 (1969)). Nevertheless, the *Patterson* majority takes such a narrow view of section 1981 as to cast doubt on the continuing vitality of its own command.

40. 491 U.S. at 182 (citing Brief of the United States as Amicus Curiae Supporting Petitioner, December 3, 1987, Brenda Patterson v. McLean Credit Union, No. 87-1).

41. *Id.* at 183 (citing Goodman v. Lukens Steel Co., 482 U.S. 656 (1987)).

ment. Kennedy finds this result unacceptable.[42]

In dissent, Justice Brennan focused on the distinction between pre- and post-formation conduct. Noting that "acts of persecution" against freedmen were a central concern for the thirty-ninth Congress in enacting the 1866 Civil Rights Act, Justice Brennan found that it was "clear that in granting the freedmen the same right . . . to make and enforce contracts as white citizens, Congress meant to encompass post-contractual conduct."[43] Brennan acknowledged that the statutory language of section 1981 does place some limits "upon the type of harassment claims that are cognizable," but he asserted that "the Court mistakes the nature of that limit."[44] Under Brennan's proposed standard, which he based on Title VII, harassment would be actionable when "the acts constituting harassment [are] sufficiently severe or pervasive as effectively to belie any claim that the contract was entered into in a racially neutral manner."[45]

Brennan's view is easily dispatched by Kennedy's make/enforce framework. The majority found that the severity or pervasiveness of the harassment does not transform a question of work conditions into a make/enforce issue. Kennedy conceded, however, that racial harassment can be used as evidence for the existence of a non-racially neutral term which results from an employer's refusal, at the time of formation, to enter into a nondiscriminatory agreement.[46]

Thus, to Justice Kennedy, the critical question remains whether the employer, *at the time of the formation of the contract*, intentionally refused to enter into a contract on racially neutral terms.[47] If Justice Kennedy's analysis means what it says, there is no recourse, even if the terms of the contract, both explicit and those imposed on the working relationship, are discriminatory. Discriminatory terms of a contract do not necessarily implicate the "making" of a contract, as conceived by the majority, though it appears Kennedy would still include explicit discriminatory terms.[48] This is an exercise in formal jus-

42. *Id.* at 183 (quoting Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 479 (1977)) ("Although we must do so when Congress plainly directs, as a rule we should be and are reluctant to federalize matters traditionally covered by state common law."); *see also* S.P.R.R. v. Imrex, 473 U.S. 479, 507 (1988) (Marshall, J., dissenting). However, in situations where state law violates federally protected civil rights, or the state has failed to protect individuals from violations by private actors, or where race is a determinate factor in contractual relationships, the thirteenth and fourteenth amendments have already federalized these claims.

43. 491 U.S. at 206-07 (citing S. EXEC. DOC. No. 2, 39th Cong., 1st Sess 19 (1865) (report of C. Schurz) [hereinafter SCHURZ REPORT]).

44. *Id.* at 207.

45. *Id.* at 208.

46. *Id.* at 184.

47. *Id.*

48. *Id.* at 188. Indeed, under the Kennedy framework, if the neutral terms are breached in a discriminatory fashion, section 1981 would not apply despite the fact that civil rights laws, such as the Peonage Act, 42 U.S.C. § 1994 (1988), and modern contract theory address facially neutral, discriminatory practices. Nor would the narrow enforcement right be engaged, as this is not a restriction upon access to a legal process.

tice, law as a set of rigid boxes.

Among the fallacies of the Court's literalist exercise is that it does not necessarily lead to the majority's conclusion. Justice Kennedy claims to be engaging in a literal interpretation of section 1981 in distinguishing between the making and enforcing of contracts, on the one hand, and the regulation of their terms, on the other. But a literal interpretation of section 1981 generates at least four possible meanings for the same right to make contracts.[49] The right may (1) abolish race-based contract incapacities; (2) require contracts, but on no specific terms, so that the white person must state some set of terms under which she would be willing to contract; (3) require contracts on nondiscriminatory terms at formation; or (4) mandate nondiscriminatory terms *during* the relationship, as no rational person would voluntarily make a contract that includes the sort of harassment experienced by Brenda Patterson.[50] All of these interpretations fit within a literal reading of the statute, and each may be premised on a world of atomistic individuals. Neither formalism nor the classical free market paradigm require the choice of any one of these very different meanings of the right to make contracts. Nevertheless, Kennedy's brand of formalism is supported by a kind of literalism that permits the Court to keep "bad" public rights issues out of private contract, while claiming merely to rely upon the words on the page. This kind of formalism has less to do with doctrinal consistency than with hostility toward civil rights enforcement.

The awkwardness of the narrow definition of the right to make a contract is evident as the Court tip-toes around petitioner's promotion claim. Patterson argued that she was not promoted to the position of intermediate accounting clerk because of her race. The majority acknowledges that this claim falls under section 1981, but imposes a stringent standard. Having set up the make/enforce restriction, the Court is forced to practice acrobatics to delineate when a failure to promote states a claim under section 1981.

The court of appeals addressed this issue by declaring that "claims of racially discriminatory . . . promotion go to the very existence and nature of the employment contract and thus fall easily within § 1981's protection."[51] But according to Justice Kennedy, this reasoning "somewhat overstates the case."[52] In his analysis, Kennedy again relied upon the make/enforce model and found that "[o]nly where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer is

49. I am indebted to Joe Singer for offering this argument after reading an early draft of this Article.

50. This fourth possible reading recalls Justice Stevens' remark in City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 455 (1985) (Stevens, J., concurring): "I cannot believe that a rational member of this disadvantaged class could ever approve of the discriminatory application of the city's ordinance in this case."

51. Patterson v. McLean Credit Union, 805 F.2d 1143, 1145 (4th Cir. 1986), *aff'd in part, vacated in part*, 491 U.S. 164 (1989).

52. 491 U.S. 164, 185 (1989).

such a claim actionable under § 1981."[53]

Kennedy's interpretation of the enforcement right is equally puzzling. He argues that the reach of section 1981 is limited to the removal of disabilities attached to the right to enforce contract through legal processes.[54] To say that the statute prohibits laws that officially sanction discrimination, but does not reach public or private behavior greatly narrows its scope.[55] But it is particularly strange given the majority's pious refusal to overturn the private-actor liability declared in *Runyon*. To eliminate legally created incapacities does not require anyone to contract. Rather, it merely mandates enforcement of a contract between a white person and a black person, if they have entered into one.

In his separate dissent in *Patterson*, Justice Stevens compared *Runyon*, in which he voted in the majority, to the present case.[56] In *Runyon*, admission to a private school was held to be the equivalent of being hired. The Court found that the presence of obstacles rooted in race discrimination which deter an admission or hiring constitutes interference with the making of a contract as guaranteed by section 1981.[57] Similarly, if the terms of two contracts are the same, but the black person works in dark, uncomfortable surroundings, while the white person works in well-lit comfort, the situation should be actionable because it constitutes discrimination prior to formation. Stevens argued that under the established precedent, the latter situation would allow for recovery under either of two theories: (1) the employer intended to discourage formation, the equivalent of a refusal to contract, or (2) the employer intended to

53. *Id.* (citing Hishon v. King & Spaulding, 467 U.S. 69 (1984) (holding Title VII applicable to law firm's selection of partners)).

Since *Patterson*, the lower courts' handling of section 1981 employment cases demonstrates the unclarity of the make/enforce distinction. *Compare* McKnight v. General Motors Corp., 908 F.2d 104 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1306 (1991); Lavender v. V & B Transmission & Auto Repair, 897 F.2d 805 (5th Cir. 1990); Rivera v. AT & T Information Sys., 719 F.Supp. 962 (D. Colo. 1989) (applying *Patterson* to find a claim of racially discriminatory discharge not actionable under § 1981) *with* Hicks v. Brown Group, 902 F.2d 630 (8th Cir. 1990) (holding that *Patterson* does not bar a claim of racially discriminatory discharge under section 1981, *vacated*, 111 S. Ct. 1299 (1991)); *see also* Jackson v. Mcleod, 748 F. Supp 831 (S.D. Ala. 1990) (holding that an employer's refusal to permit an employee to perform the job contemplated in a verbal hiring agreement, upon reporting to work, is not post-contract formation conduct, and thus is actionable under section 1981).

54. 491 U.S. at 177.

55. Professor Kaczorowski argues that if Congress had intended the 1866 Civil Rights Act to guarantee the right to be free of discriminatory state laws regarding state-conferred rights, or the right to racially impartial state laws, then Congress could not, as in section 3, confer the federal government with jurisdiction over civil actions between private parties or criminal cases. In Kaczorowski's view, it would be illogical to interpret section 1 as merely removing legal disabilities when section 2 criminalizes certain violations of section 1 rights, and section 3 confers on the federal courts primary civil and criminal jurisdiction over cases involving these rights. Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of* Runyon v. McCrary, 98 YALE L.J. 565, 589 (1989).

56. 491 U.S. at 220 (Stevens, J., dissenting).

57. 427 U.S. 160, 172-73 (1976).

contract, but only on discriminatory terms.[58] Stevens asked why an employer who reveals her discriminatory intent prior to formation has discriminated in the making of a contract, but the employer who conceals and later reveals her intention through harassment has not. In Stevens' view, an employer who decides to treat black and white employees unequally after formation is guilty of discriminating in the making of a contract.[59]

Justice Brennan's dissent makes a similar point regarding deterrence at the time of formation. He argued that if the explicit terms of the contract are the only significant considerations, a party is deterred only when discriminatory terms are present. But if the contract is facially neutral and harsher conditions are imposed on blacks, the black person is deterred from making the most of the contractual relationship. Eventually blacks will be deterred from contracting with a particular party altogether because they will have learned that discriminatory, abusive working conditions will be imposed. As one commentator put it: "[W]hen a person is deterred, because of his race, from even entering negotiations, his equal opportunity to contract is denied as effectively as if he were discouraged by an offer of less favorable terms."[60]

The majority conceded that discriminatory contractual terms that are based upon race may, if known prior to formation, violate the right to make contracts.[61] However, modern contract law exhibits a more complex understanding of the rights and obligations of contracting parties. In Justice Stevens' words, "[a] contract is not just a piece of paper. Just as a single word is the skin of a living thought, so is a contract evidence of a vital, on-going relationship between human beings. An at-will employee, such as petitioner, is not merely performing an existing contract, she is constantly remaking that contract."[62] When an employer implements a policy of harassment after formation, a new, discriminatory term has been added to the contract.

As suggested by Justice Stevens, the major flaw in the Court's analysis is its superficial conception of a contract as nothing more than a collection of explicit terms. Brenda Patterson alleged that her supervisor, who evidenced clearly racist attitudes,[63] discriminated against her on the basis of her race

58. 491 U.S. at 220. Stevens also compared the facts of *Patterson* to those in Goodman v. Lukens Steel Co., 482 U.S. 656 (1987). In *Lukens*, a union was held liable under section 1981 for "toleration and tacit encouragement of racial harassment." *Id.* at 665. Justice Kennedy characterized the finding of liability in *Lukens* as being premised solely on the union's interference with the plaintiffs' right to enforce the contract pursuant to the collective bargaining agreement; an interpretation consistent with his make/enforce analysis of section 1981. 491 U.S. at 183. Stevens, who was in the majority in *Lukens*, took issue with that reading, arguing that harassment by the union fits comfortably within the holding in *Runyon*, as a substantive claim involving the making of a contract. *Id.* at 292. Stevens noted that the *Lukens* Court never used the term "enforce," nor did it otherwise refer to that language in the statute. *Id.*

59. 491 U.S. at 221.

60. Comment, *Developments in the Law — Section 1981*, 15 HARV. C.R.-C.L. L. REV. 29, 101 (1980), *quoted in Patterson*, 491 U.S. at 208 n.13 (Brennan, J., dissenting).

61. 491 U.S. at 177.

62. *Id.* at 221 (Stevens, J., dissenting).

63. A manager at the Credit Union "testified that when he recommended a different black

both by harassing her in the course of her employment and by refusing to promote her.[64] While the Court acknowledged that this behavior, if true, was "reprehensible," it refused to incorporate civil rights norms into the private realm of contracting so as to address this conduct.[65] Rather, the Court chose to slice the contracting process into hermetically sealed boxes and held that section 1981 reaches only two of them — making and enforcing, but not post-formation conduct that determines the conditions of employment. As Justice Brennan wrote, the majority "adopts a formalistic method of interpretation antithetical to Congress' vision of a society in which contractual opportunities are equal."[66]

The *Patterson* Court's formalism has its roots in nineteenth-century classical legal thought. After tracing the historical rise of this method of legal reasoning and its use during the Reconstruction era in facilitating the continued economic subjugation of the newly freed black laborer, the Article will turn to two twentieth-century legal developments that have undermined the formalist method. First, the Supreme Court's own precedents have established that the Civil Rights Act of 1866 was meant to instill the norm of nondiscrimination into the realm of private economic ordering. Second, modern legal analyses of the contracting process have shown that the formalist perspective, while purportedly neutral, in fact hides and legitimizes real social power dynamics. These analyses propose a broader vision of the contracting process that posits the contract as a continuing relationship between parties that gives rise to ongoing rights and responsibilities, including the duty not to discriminate. In light of both of these twentieth-century developments, the *Patterson* Court's adoption of formalism represents a step backward in the struggle for racial justice.

II.
RACE AND CONTRACTING IN THE POST-CIVIL WAR ERA

While many scholars have relied on an investigation into legislative intent to determine the scope of the contract rights protected by section 1981, it is far more instructive to examine the reality of contracting during this period and its connection to a rising tide of formalism.[67] Historical inquiry provides a

person for a position as a data processor, [Patterson's] supervisor stated that he did not 'need any more problems around her,' and that he would 'search for additional people who are not black.' " *Id.* at 178 n.2 (quoting Trial Transcript 2-160-61).

64. *Id.* at 178.

65. *Id.* at 179.

66. *Id.* at 189.

67. Despite Justice Brennan's argument "that in granting the freedman the 'same right . . . to make and enforce contracts' as white citizens, [the thirty-ninth] Congress meant to encompass postcontractual conduct", *id.* at 206 (Brennan, J., dissenting), congressional intent is an uncertain foundation upon which to build a cause of action for racial harassment. *See generally*, Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 434 (1989) ("legislative intent is at best an incomplete guide to statutory interpretation"). I certainly believe that the legislative history of the 1866 Act is persuasive in demonstrating that Congress

richer understanding of the social dynamic between contract law and racial and economic oppression which provided the backdrop to the passage of the 1866 Civil Rights Act. In the years following emancipation, economic exploitation of the ex-slave and formalist legal method were closely connected. Republican free labor ideology, a rising tide of formalism in private law, particularly contract law, and a tradition of economic and physical coercion converged in a devastating system of oppression.

The central economic issue facing the southern planter after the Civil War was the "re-creat[ion of] a disciplined labor force."[68] To the former slaveholder, emancipation "changed only the method of compensation, not the basic arrangement."[69] In his May 1865 report to the Congress, Major General Carl Schurz noted that some planters were attempting to maintain "the relation of master and slave, partly by concealing from [their slaves] the great changes that had been taking place, and partly by terrorizing them into submission to their behests."[70] Planters resorted to authoritarian methods, taken directly from slavery. Referring to the whip, one southern planter opined: "I have come to the conclusion that the great secret of our success was the great motive power contained in that little instrument."[71] In addition to physical intimidation, planters imposed labor contracts that established their authority over every aspect of the freedmen's lives.[72]

In the early years of Reconstruction, southern legislatures responded to the planters' needs by enacting statutes designed to ensure sufficient labor for the harvest and by reestablishing traditional prerogatives over black workers.[73] Known as the Black Codes, these enactments typically defined blacks as agricultural workers, barred or circumscribed alternate occupations, and com-

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intended to reach post-formation abuses carried out "more naturally" under state contract law. *See* Kaczorowski, *supra* note 55, at 589. At the same time, I know that continued reliance upon the collective and discernable mind of the thirty-ninth Congress is an uncertain footing, subject to differing readings of that same mind. Although Congress has recently, through the Civil Rights Act of 1991, *see supra* note 15 and accompanying text, remedied the damage caused by *Patterson*, contracts are still regarded as discrete, isolated events, unsullied by interference from public law. That perception continues at best to blind judges to oppressive bargains, or much worse, to justify their complicity in that oppression.

68. E. FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 129 (1988) [hereinafter RECONSTRUCTION].

69. L. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 337 (1980). Professor Litwack's fascinating account of life after emancipation captures the details and atmosphere within which freedmen contracted.

70. SCHURZ REPORT *supra* note 43, at 15.

71. RECONSTRUCTION, *supra* note 68, at 132.

72. *Id.* at 135.

73. *See id.* at 199-202. Reporting on the Black Codes, Schurz wrote:

> [W]hile accepting the 'abolition of slavery,' [the planters] think that some species of serfdom, peonage, or some other form of compulsory labor is not slavery, and may be introduced without a violation of their pledge . . . . What particular shape the reactionary movement will assume is at present unnecessary to inquire. There are a hundred ways of framing apprenticeship, vagrancy, or contract laws, which will serve the purpose.

SCHURZ REPORT, *supra* note 43, at 35.

pelled blacks to work. Freedmen who were unable to prove they had lawful employment could be arrested as "vagrants," fined, and jailed. If unable to pay, the freedmen could be hired out, and the fine deducted from their pay. A deserting worker was subject to arrest and forcible return, and other employers were forbidden to "entice" workers away from their current positions.[74]

Shortly after the enactment of the Black Codes, federal officials formally disallowed such overt attempts to recreate the authority of slavery.[75] Other methods of coercion remained, however.[76] Physical intimidation was a constant, brooding presence in the freedmen's world. Blacks were often tied up by the thumbs until they agreed to contract. Patrols of white men dispensed summary punishment to force workers to contract, and for contract violations.[77] In South Carolina, one employer shot a freedman when he insisted on a consultation with a Freedmen's Bureau official[78] regarding a disputed contract clause.[79] Many planters continued to use the whip as an "incentive" to work, in the belief that "[y]ou cannot make the negro work without physical compulsion."[80] The whip was also used as punishment for perceived transgressions. "The habit [of corporal punishment]," concluded Schurz, "is so inveterate with a great many persons as to render, on the least provocation, the impulse to whip a negro almost irresistible".[81]

Nevertheless, physical coercion and intimidation, alone, did not give the planters sufficient control over the newly freed black labor force. Freedmen refused to be bound by the contracts that regulated all aspects of their lives.[82] Having lost the interim solution of the Black Codes, the planters turned to supplemental means to help accomplish their aims. The northern ideology of free labor combined with a formalist vision of law to create an effective method for the continued subjugation of the freedman.

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74. L. LITWACK, *supra* note 69, at 367.

75. *Id.* at 370.

76. *Id.* at 372.

77. *Id.* at 419-20; *see also* E. AYERS, VENGEANCE & JUSTICE: CRIME AND PUNISHMENT IN 19TH CENTURY AMERICAN SOUTH 142-65 (1984); J. WILLIAMSON, THE CRUCIBLE OF RACE: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION 19-35 (1984); B. WYATT-BROWN, SOUTHERN HONOR: ETHICS AND DISHONOR IN THE OLD SOUTH 453-61 (1982). *See generally* A. TRELEASE, WHITE TERROR: THE KU KLUX CONSPIRACY AND SOUTHERN RECONSTRUCTION (1971).

78. The Freedmen's Bureau was created in 1865 by the federal government to assist in the former slaves' transition to freedom. *See* L. LITWACK, *supra* note 69, at 183.

79. *Id.* at 417.

80. SCHURZ REPORT, *supra* note 43, at 16.

81. *Id.* Schurz noted that, "[i]n many instances [those] who walked away from the plantations, or were found along the roads, were shot or otherwise severely punished, which was calculated to produce the impression among those remaining with their masters that an attempt to escape from slavery would result in certain destruction." *Id.* at 17. For more on the obstacles to freedmen's enjoyment of contract rights, see H.R. EXEC. DOC. NO. 11, 39th Cong., 1st Sess. (1865); REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, 39th Cong., 1st Sess., pts I-IV (reporting on incidents of violence to restrain exercise of freedom, whippings as incentive or punishment, and wage disparities).

82. RECONSTRUCTION, *supra* note 68, at 135.

A. Free Labor Ideology and the Rise of Classical Formalism

At the heart of Republican ideology was the idea of free labor, the antithesis of the "Slave Power."[83] Abraham Lincoln's Republican party stood "before the country, not only as the anti-slavery party, but emphatically as the party of free labor."[84] Free labor ideology presented a vision of society as composed of hardworking, independent laboring men. Politicians used the rhetorical power of this vision to establish the superiority of northern society over the slave economy of the South. In the North, Lincoln argued, there was

> no such . . . thing as a free man being fixed for life in the condition of a hired laborer. . . . Men, with their families . . . work for themselves on their farms, in their houses, and in their shops, taking the whole product to themselves, and asking no favors of capital on the one hand nor of labor on the other.[85]

The free labor ideology was carried forth with a powerful tide of optimism, giving rise to a feeling that "an almost perfect opportunity for social mobility existed."[86] Radical Republican James M. Harlan, a senator from Iowa, declared in 1856 that the goal was to place the laborer "on a platform of equality — let him labor in the same sphere, with the same chances for success and promotion — and if, in the conflict of mind with mind, he should sink beneath the billow, let him perish."[87] Thus the free labor movement advanced the banner of equality of opportunity.[88] Indeed, in the early years after Emancipation, even supporters of legal rights for the freedmen insisted that the former slaves prove themselves capable of economic advancement before being granted full legal equality.[89]

In this ideological atmosphere, state regulation of the employment relationship came under heavy fire in the courts.[90] For example, the West Virginia Supreme Court in *State v. Goodwill*,[91] invalidated a law requiring that payment of wages to mining and manufacturing workers be made in legal currency rather than scrip. The court found that this interference with the workers' right to contract for their labor violated "the essential distinction between freedmen and slavery; between liberty and oppression."[92] Under the ideology

83. E. FONER, FREE SOIL, FREE LABOR, FREE MEN 9 (1970) [hereinafter FREE LABOR, FREE MEN].

84. C. SCHURZ, SPEECHES OF CARL SCHURZ 108 (1865), *quoted in id.* at 11.

85. 5 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1899, at 122 (J. Richardson ed. 1896-99), *quoted in* RECONSTRUCTION, *supra* note 68, at 29 (1988).

86. FREE LABOR, FREE MEN, *supra* note 83, at 25.

87. CONG. GLOBE, 34 Cong. 1st Sess. 276 appendix (1856) (remarks of Sen. Harlan), *quoted in* W. NELSON, *supra* note 35, at 16.

88. FREE LABOR, FREE MEN, *supra* note 83, at 300 ("The free labor ideology [was] . . . based on the premise that all Americans, whatever their origins, could achieve social advancement if given equal protection of the law . . . .").

89. *See id.* at 298.

90. *See Paradox of Paternalism*, *supra* note 35, at 258-60.

91. 33 W.Va. 179 (1889).

92. *Id.* at 183.

of free labor, employment regulation was attacked as a form of slavery, violative of freedom of contract, and "degrad[ing to] the intelligence, virtue and manhood of the American laborer."[93] It was paternalism of a "most objectionable character," since it "assumes that the employer is a knave, and the laborer an imbecile."[94] General welfare legislation chipped away at the most crucial foundation of society, the power of individualism.

Jurists of this era adopted a highly formalized mode of reasoning.[95] Throughout the nineteenth century, as the law came increasingly to reflect commercial interests, formal free contract values replaced concerns of substantive fairness.[96] By 1860, judges had responded to the expansion of the market economy by focusing their concerns on adherence to rigid legal categories rather than on substantive justice.[97] As Professor Horwitz states, the emerging reality of "markets and speculation was simply incompatible with a socially imposed standard of value."[98]

Central to this shift was a belief in the indeterminacy of value. Where earlier courts sought to establish a just price, value came to be regarded as inherently subjective, determined in the marketplace by the concurrence of individual preferences. Any attempt to divine what price would achieve substantive justice was considered an arbitrary and uncertain endeavor. But as Professor Horwitz argues, without intrinsic value there can be no "substantive measure of exploitation and the parties are, by definition, equal."[99] Under this model, theoretical equality exists only because of the lack of a valid measure of inequality.[100] Jurists refused to conceive of obligations superior to those agreed upon by contracting individuals. Substantive justice fell away, and the utopia of equal bargaining power became the principle basis of all economic and legal analysis."[101] The will of the parties achieved primacy.

Classical theorists then set out to disguise the "recent origins and the foundations in policy and group self interest" of the will theory and its presumed equality of bargaining power.[102] For a legal system espousing a scientific method, and seeking to disguise its power agenda, the will theory permitted too great a degree of discretion and subjectivity. In their zeal to abandon the subjective-therefore-uncertain elements in contract law, propo-

93. *Id.* at 186.
94. *Id.*
95. *See* Mensch, *The History of Mainstream Legal Thought*, in THE POLITICS OF LAW, *supra* note 2, at 23-26. It should be noted that while the formalism of classical legal thought first emerged in the second half of the nineteenth century, many of the specific doctrines that comprised this form of legal reasoning originated earlier.
96. M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 160, 211 (1977). For example, in the late eighteenth century, contract cases were often decided by an inquiry into the underlying justice of the agreement. *Id.* at 161-73.
97. *Id.* at 211.
98. *Id.* at 181.
99. *Id.* at 161.
100. *Id.*
101. *Id.* at 210.
102. *Id.* at 254.

nents concluded that only objectively observable evidence could be relevant in contract interpretation. The effect of minimizing the subjective meeting of the minds standard in favor of an objective theory was to restrict the opportunity for an inquiry into the facts of the contracting process. The doctrines of mistake and undue influence became so diluted that courts, given a contract, came close to imposing absolute liability.[103]

The decline of permissible discretion that resulted from the insistence on objectivity, together with the lack of substantive standards to evaluate the merits of the exchange, marked the dawn of a new age in which the legal system appeared to be "self-contained, apolitical, and inexorable."[104] An example of the operation of this new system was the law of duress. In his treatise on contracts, Justice Joseph Story drew the boundaries of duress quite narrowly. A contract requires assent, freely and voluntarily given; axiomatically, compulsion or duress voids the obligation.[105] However, Justice Story found compulsion only where unlawful imprisonment occurred or threats were made against the person, or in cases of lawful imprisonment, where the danger of force or privation was present. To be actionable, the danger was required to rise to the level that a "firm man" would feel compelled to accede to the demand.[106]

Even in situations in which a "firm man" would be expected to accede to compulsion, the contract was not necessarily void. Justice Holmes argued that voidable contracts are founded on experience rather than logic. Therefore, unless the repugnant terms were so central as to change the substance of the agreement, the inquiry should end.[107] Where terms are inconsistent, or individual express terms are unacceptable, a contract should be voided. Under this theory, courts could neither take cognizance of an atmosphere of racial violence surrounding contract formation, nor consider evidence of post-formation abuse or harassment. The contract was reduced to little more than a liturgical ceremony.[108]

B. Contract Doctrine, Freedmen, and Economic Exploitation

The newly emergent formalist contract method combined with free labor ideology and an atmosphere of violence to provide an effective combination. As Professor Litwack observes: "[E]conomic necessity and the enforcement of contracts could achieve the same goals within an ideological framework famil-

103. G. GILMORE, THE DEATH OF CONTRACT 44 (1974).

104. M. HORWITZ, *supra* note 96, at 254; *see also* K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 38 (1960).

105. J. STORY, LAW OF CONTRACTS 312 (2d ed., 1847).

106. *See id.* at 316. Firm, not "suspicio cujuslibet vani et meticulosi hominis." ("The suspicion of any vain and timorous man.") *Id.*

107. O.W. HOLMES, THE COMMON LAW 310-11 (M.D. Howe ed. 1963).

108. *Cf.* Patterson v. McLean Credit Union, 491 U.S. 164, 184 (1989) (refusing to permit the existence of "severe or pervasive" racial harrassment to form the basis for a section 1981 claim).

iar and acceptable to the North."[109] Contracts provided the appearance of a voluntary agreement between the parties, setting forth the terms and conditions of employment. The agreements suggested impartiality, equality before the law, and the American virtue of compromise.[110]

In the North, business relationships, including employment, were formed through contracts, both oral and written. To the Freedmen's Bureau, it therefore seemed appropriate that the freedmen should be bound under a contract like northern workers. Flush with noble intentions, Bureau agents urged the ex-slaves to sign employment contracts, assuring them of fair treatment.[111] One early Freedmen's Bureau order required that freedmen in Mississippi enter into labor contracts or be arrested for vagrancy.[112]

Employment contracts often bound the freedmen to the land, committed them to one year of service, and withheld one half of their wages as surety until the close of that year. When the freedmen violated a contract, refused to enter into a contract, or were deemed by their employer to be indolent, insolent, or disobedient, the workers often forfeited their pay and were subject to military arrest and employment without pay on public works projects.[113]

Contracts were often standardized and reflected the social graces of slave days. Workers were required to give "perfect obedience," to be prompt, faithful, and of proper demeanor, and to recognize the "lawful authority" of their employer. The laborer promised to act to "gain the good will of those to whom we must always look for protection."[114] One planter declared: "They agreed to it, and I put into the contract that I was to whoop 'em when I pleased."[115] Pay could be withheld as surety until the end of the contract term. Some employers deducted pay for "certain necessaries" to control worker spending. Others sought to capitalize on illiteracy and Bureau indifference through complicated provisions, such as granting the worker "one third of seven twelfth," or "one fifth of one third" of the crop.[116]

Justice Story provided a venerable justification of these practices.

> [E]very person, who is not, from his peculiar condition or circumstances, under disability is entitled to dispose of his property in such manner and upon such terms, as he chooses; and whether his bargains are wise and discreet, or otherwise, profitable or unprofitable, are considerations, not for the Courts of Justice, but for the party

109. L. LITWACK, *supra* note 69, at 371.

110. *See* RECONSTRUCTION, *supra* note 68, at 164.

111. L. LITWACK, *supra* note 69, at 407.

112. Schmidt, *Principle and Prejudice: The Supreme Court and Race in the Progressive Era, Part 2: The Peonage Cases*, 82 COLUM. L. REV. 646, 650 (1982).

113. *Id.*; *see also Paradox of Paternalism*, *supra* note 35, at 1951.

114. L. LITWACK, *supra* note 69, at 409 (quoting from contemporary labor contracts).

115. *Id.* at 337 (quoting letter, Dr. Ethelred Phillips to Dr. James J. Phillips, Aug. 2, 1865, James J. Phillips Collection, Univ. of North Carolina); *see also* J. TROWBRIDGE, THE SOUTH: A TOUR OF ITS BATTLE-FIELDS AND RUINED CITIES, A JOURNEY THROUGH THE DISSOLVED STATES AND TALKS WITH THE PEOPLE 390-91 (1866).

116. L. LITWACK, *supra* note 69, at 412-13.

himself to deliberate upon.[117]

Formalist contract theory, with its emphasis on protecting the parties' objective will rather than advancing substantive justice, served to shield from legal scrutiny the wide multitude of compulsory practices that led to the freedman's economic exploitation. As Professor Soifer observes, "the use of the hoary legal principles about contractual autonomy . . . returned black workers almost to the status quo ante bellum."[118]

Breach of contract resulted in enormous economic penalties, which employers often pursued.[119] Even trivial violations were punishable with the loss of an entire year's earnings, thus giving employers an incentive to provoke workers into leaving near the end of the season. One worker described the resulting frustration:

> So dey 'buses dem, an' jerks 'em by de two fums, an' don' give 'em de bacon, an' call on 'em to do de work in de night time an' Sun'ay, till de colored people dey gits oneasy an' goes off.[120]

Once again, contract law provided a doctrinal justification for this exploitative practice. Under the rule of "entirety," a breach of any provision of a contract amounted to a breach of the whole.[121] For example, in *Stark v. Parker*,[122] the plaintiff contracted for one year of farm labor at 120 dollars. The employer paid for three months work, but when the worker quit without consent two months later, the employer refused to pay. In an action in indebitatis assumpsit,[123] the worker sought back pay. The Massachusetts Supreme Judicial Court denied recovery. Writing for the majority, Judge Lincoln reasoned that it is the role of the courts to enforce contracts, not to help "those who seek . . . impunity . . . for the violation of them."[124] As the contract at issue was "entire," the worker's performance was a condition precedent to the employer's payment. Neither the payment of three months wages, nor counsel's argument that "no laborer would make such a contract unless he were imposed upon" made an impression on the court.[125]

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117. J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 246-67 (1885), *quoted in* R. NEWMEYER, THE SUPREME COURT AND JUSTICE JOSEPH STORY 294-95 (1985).

118. Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L.J. 1916, 1950 (1987) [hereinafter *Status, Contract*].

119. *See* W.S. MCFEELEY, YANKEE STEPFATHER: GENERAL O.O. HOWARD AND THE FREEDMEN 157 (1968).

120. L. LITWACK, *supra* note 69, at 418.

121. Modern students of contract might fall back on quantum meruit to avoid "substantive unfairness," but nineteenth-century courts tended to view this as an unacceptable "rewriting" of the contract in denigration of the worker's freedom to contract as he chose. Reasonable value for the worker's services, they believed, could not be ascertained since all value was "arbitrary and uncertain." Annotation, *Quantum Meruit Under Special Contract*, 19 AM. DEC. 268, 272 (1910).

122. 19 Mass. 267 (1824).

123. A common law action, off the contract, for compensation for a benefit not gratuitously bestowed, but accepted by another. *See* BLACK'S LAW DICTIONARY 163 (5th ed. 1983).

124. 19 Mass. at 271.

125. *See* Holt, *Recovery by the Worker Who Quits*, 1986 WISC. L. REV. 677, 680-81.

Regardless of such duress, mistake, or occasional interim payments by the employer, courts were "driven to resolve all ambiguity in contracts in favor of the employer's contention that they were 'entire.'"[126] Planters did not have to rely on brute force, so long as their contracts reflected contractarian orthodoxy. The practices decried by Carl Schurz were now fully legitimate, and employers had greater "inducement to create conditions near the end of the term that would encourage the laborer to quit."[127] But the courts did not acknowledge such incentives. Judge Lincoln wrote:

> Any apprehension that this rule may be abused to the purposes of oppression, by holding out an inducement to the employer, by unkind treatment near the close of a term of service, to drive the laborer from his engagement, to the sacrifice of his wages, is wholly groundless.... Wherever there is a reasonable excuse, the law allows a recovery.[128]

Despite Judge Lincoln's assurances, however, contract doctrine itself revealed the underlying bias of the law. While treating employment contracts under the rule of entirety, the law permitted the segmentation of building contracts, as well as recovery off the contract. True to the entrepreneurial thrust of the free labor movement, building contractors could obtain payment for partial performance. In *Hayward v. Leonard*,[129] a builder completed a house on defendant's property. After completion, the defendant found defects in materials and workmanship, and refused to pay the balance, relying on the decision in *Stark*. The Supreme Judicial Court, Chief Justice Parker writing, found for the builder, noting that the building "was still valuable and capable of being used," and that "*it would be a hard case indeed if the builder could recover nothing.*"[130]

Some courts of the period recognized the inconsistency of the principles

126. M. HORWITZ, *supra* note 96, at 186; *see* Hansell v. Erickson 28 Ill. 257, 259 (1862) ("He left his employer in the midst of his harvest, probably under the promise, for some meddlesome person, to give him higher wages. This is contrary to justice and good morals and cannot be tolerated."); *see also* Holt, *supra* note 125, at 679; Hughes v. Cannon, 33 Tenn. (1 Sheed) 622, 627 (1854) ("Before the time is half out, the employee finds he can do better, and without any other cause abandons his engagement and claims compensation for what he has done.").

127. M. HORWITZ, *supra* note 96, at 187.

128. Stark v. Parker, 19 Mass. (2 Pick.) 267, 275 (1824). *Accord Hansell*, 28 Ill. at 259 ("[S]uch contracts are mutual and attended with no hardship, for if the employer discharges his servant without cause, he can recover against him for the whole time agreed upon.").

129. 24 Mass. (7 Pick.) 181 (1828); *see also* Thomas & Trott v. Ellis & Co., 4 Ala. 108 (1842) (builder granted *quantum meruit* award under special construction for house substantially completed and accepted by owner); Haslack v. Mayers, 26 N.J.L. 284 (1857) (when a contract for exchange of goods is not apportioned, the contract is entire, and neither party may recover for part performance under the theory of *quantum valebant*); Steeples v. Newton, 7 Or. 110 (1879) (plaintiff recovers under *quantum meruit* for partially performing contract to dig ditches). Some oddities appear in these cases. *Compare* Lee v. Ashbrook, 14 Mo. 378, 385-86 (1851) (adopting the substantial performance rule for building contractors) *with* Earp v. Tyler, 73 Mo. 617, 619 (1881) (refusing to apply the substantial performance rule to builder).

130. 24 Mass. at 185 (emphasis added).

declared in *Stark* and *Hayward*. In *Britton v. Turner*,[131] a case involving a worker who had completed nine-and-one-half months of a one-year contract, Judge Parker called the *Stark* rule "very unequal, not to say unjust."[132] Upon the worker's departure, his employer refused to pay his wages for time worked. The court ordered the employer to pay, finding no difference between this case and *Hayward*. Judge Parker argued: "The party who contracts for labor . . . for a certain period does so with full knowledge that he must, from the nature of the case, be accepting part performance from day to day . . . , and with knowledge also that the other may eventually fail to complete the entire [contract]."[133] As to worker's performance being a condition precedent to employer's duty of payment, Judge Parker pointed out "that the general understanding of the community is, that the hired laborer shall be entitled to compensation for the service actually performed, though he do[es] not continue the entire term contracted for."[134]

But in *Hayward*, the Supreme Judicial Court addressed the difference between labor and building contracts. According to Chief Justice Parker, employees breached "voluntarily" and "without fault" of their employers. Builders, on the other hand, were seen as unwilling breachers, doing so by inadvertence, having "honest intention[s]" to fulfill the contract.[135] Again in *Olmstead v. Beale*,[136] the court argued that "[l]aborers . . . may excite sympathy, but in a government of equal laws, they must be subject to the same rules and principles as the rest of the community."[137]

A final example of the interaction between formalist contract method and the economic exploitation of the freedman was the peonage system.[138] Although a peon is defined as one held in "a status or condition of compulsory service, based upon the indebtedness of the peon to the master,"[139] a broad

131. 6 N.H. 481 (1834).

132. *Id.* at 486; *see also* Begole v. Mckenzie, 26 Mich. 470 (1873); Chamblee v. Baker, 95 N.C. 98 (1886).

133. 6 N.H. at 489.

134. *Id.* at 493.

135. 24 Mass. (7 Pick.) at 185; *see* M. HORWITZ, *supra* note 96, at 187. Only a few states deemed all contracts to be entire. *See, e.g.*, Mason v. Heyward, 3 Minn. 116 (1859); Smith v. Brady, 17 N.Y. 173 (1858). For a critique of this distinction, see, e.g., Laube, *The Defaulting Employee:* Britton v. Turner *Reviewed*, 83 U. PA. L. REV. 825, 847, 849 (1935).

Stare decisis prevented courts from adopting the substantial performance rule, even when they recognized the equity of *Britton v. Turner*. *See* Hanuu v. Williams, 2 Haw. 233, 235 (1860); Timberlake v. Thayer, 71 Miss. 279, 281, 14 So. 446, 446 (1894); Blast v. Byrne, 51 Wis. 531, 537, 8 N.W. 494, 496 (1881).

136. 36 Mass. 528 (1837).

137. *Id.* at 528-29. The *Stark-Hayward* dichotomy remains unresolved. *See* Holt, *supra* note 125, at 683.

138. Avi Soifer has noted that, "the ideology of formalistic contract law . . . was directly implicated in the emergence of a practical peonage system after the [Civil] [W]ar." Soifer, *Status, Contract, supra* note 118, at 1940.

139. Clyatt v. United States, 197 U.S. 207, 215 (1905). One agricultural labor arrangement likely to result in debt-based involuntary servitude is sharecropping, where money is advanced for seed, or the employer "rents" tools, draft animals, and facilities. What then happens is the laborer, unable to keep up with the payments, goes deeper in debt, to the great benefit of

combination of debt, fraud, an atmosphere of conspicuous violence, and "solemn" contracts maintained the subjugation of freedmen, and brought harm to poor whites as well.[140]

Peonage rested in part upon the formalist assumption that all parties stand on equal footing, that bargaining power is to be assessed "objectively," without taking into account the "subjectively" weaker position of the less powerful party. The rule of entirety, the exclusion of parol evidence as to the meaning of an agreement (offered by mostly illiterate workers who often were not permitted to testify against whites), and narrow conceptions of mistake, undue influence, and duress all contributed to a self-perpetuating system of exploitation.[141] Employers compelled workers to enter agreements that were grossly unfair, to accept abusive treatment, or to endure being cheated on the day accounts were settled. "The reality of the sharecropper's bargaining position . . . had no place in the legal categories through which appellate judges enforced their own views about government regulation of the natural struggle of life."[142]

Unable to earn enough to stay out of debt because of unfair treatment, the freedmen learned that the courts were unwilling to evaluate agreements they

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the employer. *See* W. HARRIS, THE HARDER WE RUN: BLACK WORKERS SINCE THE CIVIL WAR 7-50 (1982); Roback, *Southern Labor Law in the Jim Crow Era: Exploitative or Competitive?*, 51 U. CHI. L.REV. 1161 (1984); Weiner, Higgs & Woodman, *Class Structure and Economic Development in the American South, 1865-1955*, 84 AM. HIST. REV. 970 (1979) (colloquy on the sharecropping debate). *Compare* J. MANDLE, THE ROOTS OF BLACK POVERTY: THE SOUTHERN PLANTATION ECONOMY AFTER THE CIVIL WAR (1978) *with* R. HIGGS, COMPETITION AND COERCION: BLACKS IN THE AMERICAN ECONOMY, 1868-1914 (1977).

140. In *Bailey v. Alabama*, 219 U.S. 219 (1911), the Court broadened the definition of compulsory labor to encompass more than debt-based coercion. In *Bailey*, the defendant had been convicted under an Alabama law that created a presumption of fraud when a laborer was in breach of contract, while excluding the defendant's testimony regarding his intent. Justice Hughes writing for the majority, found that the law furnished "an instrument of compulsion, particularly effective as against the poor and ignorant, its most likely victims." *Id.* at 245. The thirteenth amendment, however, prohibited all "control by which the personal service of one man is disposed of or coerced for another's benefit." *Id.* at 241. The Court continued: "Congress was not concerned with mere names and manner of description, or with a particular place or section of the country. It was concerned with a fact, wherever it might exist; with a condition, however named and wherever it might be established, maintained or enforced." *Id.* at 242. *See generally* Schmidt, *supra* note 112.

141. *See, e.g.*, Williams v. Water, 36 Ga. 454 (1867). In this case, Williams, a freedman, sued a Georgia planter for violating a sharecropping contract by refusing to pay divide the crop according to the terms of the agreement. Although he won at trial, Williams appealed claiming that damages should have been measured according to an oral contract which he and several other freedmen had made with the planter. Under this verbal agreement, about the terms of which Williams testified at trial, the freedmen were "not to pay anything for rent of land or hire of mules, wagons or plantation tools." *Id.* at 455. The freedmen, however, also had signed a written contract at the office of a local judge, according to which the planter "furnished the land at a rent of $2,000 dollars which was to be returned at the end of the year, the corn and fodder, eight mules at a hire of $25 each, one wagon at a hire of $25, and plantation tools at a hire of $100." The Supreme Court of Georgia granted the planter a new trial on the ground that the testimony as to the terms of the oral contract should have been excluded under the parol evidence rule. *Id.* at 458-59.

142. *Status, Contract*, *supra* note 118, at 1950.

judged as freely entered. Consent in this formalist world was simply saying "I agree." Relief, therefore, was dependent upon a complete absence of consent. Accordingly, a binding contract arose where the weaker party made any sign of assent. As John Dawson once put it, "the more unpleasant the alternative," the greater the veracity of that assent, "the more real the consent which would avoid it."[143]

Further, despite the federally imposed repeal of the Black Codes, many states retained, or subsequently enacted, laws making breach of contract a criminal offense.[144] These statutes were used to place in servitude laborers or sharecroppers who had received advances and then breached contracts without repayment."[145] The convicts were then "leased" by the state to private employers for labor. Many convicts, seeking to avoid the harsh cruelties of the state convict-labor system, turned to private employers to pay their fines in return for a period of servitude.[146] Thus, the peonage system provided white employers with "a potent weapon . . . to bend blacks to their bidding."[147]

Free labor ideology and formalist contract law combined to provide the southern planters class with a formidable tool to maintain the economic exploitation of the freedman in the post-Civil War period. Despite Reconstruction and federal intervention, racism and economic subjugation remained in a system where "the most private and individualistic legal categories seemed quickly and convincingly to overcome all others."[148] Contract ideology triumphed over the imposition of legal norms to prevent racial and economic discrimination.

The following Parts discuss two developments in the twentieth century that have fundamentally challenged the formalist method of the Reconstruction era and the triumph of freedom to contract. First, the judiciary has interpreted civil rights statutes to place clear limits upon the ability of private parties to discriminate on the basis of race. Second, modern contract theories — from Legal Realism to Critical Legal Studies to relationalism — have "deconstructed" formalist contract ideology to reveal the power dynamics underlying this method and have developed alternative interpretive principles that incorporate substantive norms of civil rights and equality into contract law. In light of these developments, it is astounding that the Court in *Patterson* chose to return to formalist contract methods.

143. Dawson, *Economic Duress — An Essay in Perspective*, 45 MICH. L. REV. 253, 266-67 (1947).

144. See Schmidt, *supra* note 112, at 651.

145. *Id.*

146. *Id.* at 653.

147. *Id.*

148. *Status, Contract, supra* note 118, at 1941.

III.
THE STATUTORY IMPOSITION OF A CONTRACTUAL RIGHT TO NONDISCRIMINATION

In his *Patterson* dissent,[149] Justice Brennan asserted that it is impossible to reconcile the majority's narrow interpretation of section 1981 with the Court's interpretation of the rights protected by section 1982 "to inherit, purchase, lease, sell, hold and convey real and personal property." He noted that " 'in light of the historical interrelationship between § 1981 and § 1982,' "[150] the Court has repeatedly held that there is no reason to construe the two sections differently. The majority's view of the section 1981 right to contract contradicts the "economic rights" thrust of section 1982.

Section 1982 has been applied broadly to discrimination after the commencement of economic relationships. In *Hurd v. Hodge*,[151] the Court refused to enforce private covenants which restricted the sale of certain property on racial grounds, despite the fact that the legal right of blacks to purchase and sell other property was unimpaired. In *Hurd*, black petitioners had bought some of the restricted lots. At trial, the district court declared the deeds null and void.[152] The Supreme Court reversed, holding that the private covenants violated section 1982. Chief Justice Vinson argued that to equate the right to purchase property subject to racially restrictive covenants with the right of white citizens to purchase property is "to reject the plain meaning of the [statute's] language."[153]

Since *Hurd*, the Court has broadened the rights protected under section 1982. In *City of Memphis v. Greene*,[154] the Court stated that section 1982 guaranteed not only the right to acquire or dispose of property but the "right . . . to *use* property on an equal basis with white citizens,"[155] as well as the right "not to have property interests impaired because of . . . race."[156] Similarly, in *Shaare Tofila Congregation v. Cobb*,[157] the Court recognized a section 1982 claim where members of an identifiable group were deprived of the full

149. 491 U.S. 164, 207 n.12 (1989).

150. *Id.* at 196 (quoting Tillman v. Wheaton Haven Recreation Ass'n, 410 U.S. 431, 440 (1973)); *see also* General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 390, n.17 (1982) ("It is true that § 1981, because it is derived in part from the 1866 Act, has roots in the Thirteenth as well as the Fourteenth Amendment. Indeed, we relied on that heritage in holding that Congress could constitutionally enact § 1982, which is also traceable to the 1866 Act, without limiting the reach to 'state action.' ").

151. 334 U.S. 24 (1948).

152. *Id.* at 27.

153. *Id.* at 34.

154. 451 U.S. 100 (1981). The Court did not find that the impairment to black property interests reached the level of section 1982. However, *Greene* makes clear that the right to be free from discrimination in economic life must encompass more than the entry into transactions, to include the relationships created by such entry.

155. *Id.* at 120 (emphasis added).

156. *Id.* at 122 (footnote omitted).

157. 481 U.S. 615 (1987).

use of their property because of behavior motivated by racial prejudice.[158] The Court has also found section 1982 to include the right to utilize a lease provision for an assignable membership in recreation facilities[159] and the right to obtain a preference to purchase a non-transferable membership to a swim club for residents.[160]

In *Jones v. Alfred H. Meyer Co.*,[161] the Court stated the rationale underlying its broad view of the remedial purposes of section 1982. The Court moved beyond a baseline formulation that section 1982 "must encompass every racially motivated refusal to sell or rent"[162] by looking to the thirteenth amendment — the source of the 1866 Act. "At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live."[163] Otherwise, wrote Justice Stewart, the "Amendment has made a promise the nation cannot keep."[164]

The promise is equally false if, in a contractual context, the Court protects the individual's right to enter into contracts on an equal basis with white citizens but refuses to guarantee freedom from discriminatory treatment subsequent to the formation of the contractual relationship. In keeping with the principle of construing sections 1981 and 1982 together, the *Patterson* Court should have decided as it did in *Jones*. Just as the right to purchase or rent property is of little value if that property cannot be used on an equal basis, so too the right to enter into or enforce a contract should be accompanied by the

158. *Id.* at 616.

159. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237 (1969).

160. Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973). The lower courts have also given a broad interpretation to the rights protected under section 1982. In Clark v. Universal Builders, Inc., 501 F.2d 324 (7th Cir.), *cert. denied* 419 U.S. 1070 (1974), the Seventh Circuit held that section 1982 actions are not limited to traditional forms of discrimination such as refusal to rent or sell, but include situations where "defendants exploited a situation created by socioeconomic forces tainted by racial discrimination." *Id.* at 334. Accordingly, the Court stated that a plaintiff may state a claim under section 1982 if she demonstrates that "(1) as a result of racial residential segregation dual housing markets exist and (2) defendant sellers took advantage of this situation by demanding prices and terms unreasonably in excess of prices and terms available to white citizens for comparable housing." *Id.* While this exploitation often involves a refusal to rent on equal terms, a situation which would satisfy Justice Kennedy's reductionist make/enforce framework, often there is an identifiable obstacle to entering into the relationship. The victim may not know about the divergent terms, or behavior, at the moment of consummation. *See also* Woods-Drake v. Lundy, 667 F.2d 1198 (5th Cir. 1982) (section 1982 prohibits a landlord from evicting white tenants if they receive black guests); Concerned Tenants Association v. Indian Trails Apartments, 496 F. Supp. 522 (7th Cir. 1980) (withdrawal of services which resulted when a building which formerly housed mostly white tenants became predominantly black, constituted a violation of section 1982). Discrimination in the form of higher prices or more burdensome terms than offered to white citizens has been actionable for at least two decades. *See* McDonald v. Verble, 622 F.2d 1227 (6th Cir. 1980); Harris v. Wissert, 514 F.Supp. 1153 (E.D. Wis. 1981); Contract Buyers League v. F & F Investment, 300 F.Supp. 210 (N.D. Ill. 1969), *aff'd* 420 F.2d 1191 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970).

161. 392 U.S. 409 (1967).

162. *Id.* at 421-22.

163. *Id.* at 443.

164. *Id.*

right to work in an environment free from harassment, so that the economic interest may be "used" to equal advantage.

A broad interpretation of section 1981 is also consistent with more recent congressional efforts to combat discrimination.[165] For example, the Court in *Jones* took pains to emphasize, both at oral argument and in the opinion, that Congress had recently passed the 1968 Civil Rights Act. Congress considered the 1968 bill at the same time as oral arguments in *Jones*, and each branch kept close watch on the other. On April 10, 1968, Representative Kelly of New York noted that Attorney General Ramsey Clark had argued that the "scope [of the two statutes] was somewhat different, the remedies and procedures were different, and that the new law was still quite necessary."[166] Later that same day, the House passed the 1968 Act, but the Court indicated that "[i]ts enactment had no effect upon Section 1982 and no effect upon this litigation."[167]

At oral argument, the Attorney General, when asked about the effect of the 1968 Civil Rights Act, replied that it would not in any way affect section 1982, but "would stand independently."[168] Justice Stewart responded that "[t]his is, of course, correct," and pointed to section 815 of the 1968 Act, which stated that "[n]othing in this title shall be construed to invalidate or limit any law of . . . any . . . jurisdiction in which this title shall be effective, that grants, guarantees, or protects the . . . rights . . . granted by this title."[169] In his concurrence, Justice Douglas agreed that "the Congress that passed the so-called Open Housing Act of 1968 did not undercut any of the grounds on which § 1982 rests."[170]

In 1972, Congress enacted the Equal Employment Opportunity Act amending Title VII.[171] In the course of debate on this legislation, Senator Hruska proposed an amendment that Title VII be made the exclusive remedy for employment discrimination because it superseded the remedy derived from the 1866 Act.[172] Without exclusivity, he argued, a plaintiff might "completely bypass" Title VII.[173] Senator Williams, floor manager of the bill, stated that it

165. *See* Johnson v. Ryder Truck Lines, 575 F.2d 471 (4th Cir. 1978) (no part of section 1981 was repealed by implication or preempted by Title VII), *cert. denied*, 440 U.S. 979 (1979); *see also* Eisenberg & Schwab, *The Importance of Section 1981*, 73 CORNELL L. REV. 596 (1988) (discussing pre-*Patterson* case law regarding the impact of the 1964 Act on section 1981).

166. 392 U.S. at 416 (quoting 114 CONG. REC. H2807 (1968)).

167. *Id.* at 416-17.

168. *Id.* at 416 n.20.

169. *Id.* at 417 n.20. In a footnote, the Court noted that on April 22, 1968, it asked the parties for their views on the effect of the 1968 Act. The Attorney General and the parties agreed that the rights developed in the 1968 Act would not be in effect until January 1, 1969, covering actions occurring no earlier than April 11, 1968.

170. *Id.* at 449.

171. Pub. L. No. 92-261, 86 Stat. 103.

172. H.R. REP. NO. 92-238, 92d Cong., 1st Sess. 66-67, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2137 (minority view).

173. 118 CONG. REC. 3172 (1972) (statement of Sen. Hruska).

was not the purpose of the bill "to repeal existing civil rights laws."[174] He argued that Title VII and the 1866 and 1871 Civil Rights Acts "must be read together to provide alternative means to redress individual grievances."[175] Since employment discrimination is of a "peculiarly damaging nature," a plaintiff "should not be forced to seek his remedy in only one place."[176] Senator Javits also opposed the Hruska Amendment because it would "cut off . . . the possibility of using civil rights acts long antedating the Civil Rights Act of 1964 in a given situation which might fall, because of the statute of limitations or other provisions, in the interstices of the Civil Rights Act of 1964."[177] The Hruska Amendment failed in the Senate;[178] the House, after initially adopting it,[179] agreed with the Senate.[180] Absent congressional action to the contrary, the Court lacks authority to limit the scope of the 1866 Act merely because more recent enactments cover the same types of behavior.[181]

Justice Kennedy's discussion of the overlap between Title VII and section 1981 in the employment discrimination context obscures the differences in scope between the two statutes. Section 1981 applies to all contracts, employment or otherwise. In *Runyon*, for example, the Court held the statute applicable to a discriminatory admissions policy of a private school.[182] Section 1981 has also been applied to a discriminatory recreation facility membership policy,[183] a bar policy to eject non-drinkers,[184] and a medical facility's refusal to treat patients.[185] However, in the name of preserving some balance between Title VII and section 1981, Justice Kennedy would significantly limit the effectiveness of section 1981 in all contractual relationships. But as Justice Brennan argued: "Rights as between an employer and employee simply are not involved in many § 1981 cases and the Court's restrictive interpretation of § 1981, minimizing the overlap with Title VII, may also have the effect of restricting the availability of § 1981 as a remedy for discrimination in a host of

174. *Id.* at 3371 (statement of Sen. Williams).

175. *Id.*

176. *Id.*

177. *Id.* at 3370 (1972) (statement of Sen. Javits).

178. *Id.* at 3965 (1972).

179. 117 CONG. REC. 32111 (1971).

180. H.R. REP. NO. 92-238, 92d Cong., 2d Sess. 21, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2179.

181. Congressional silence may be regarded "as probative to varying degrees, depending upon the circumstances of . . . acquiescense." Patterson v. McLean Credit Union, 491 U.S. 164, 200 (1989) (Brennan, J., concurring) (citing Johnson v. Transp. Agency, Santa Clara County, 480 U.S. 616, 629-30 n.7 (1987). However, in this context Congress had done something more than "mere . . . silence and passivity," Flood v. Kuhn, 407 U.S. 258, 283 (1972), by rejecting an amendment that would have made section 1981 unavailable for cases involving private employment discrimination. *See supra* text accompanying notes 172-80.

182. 427 U.S. 160 (1976).

183. Tillman v Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973).

184. Wyatt v. Security Inn Food & Beverage Inc., 819 F.2d 69 (4th Cir. 1987).

185. Hall v. Bio-Med Application, 671 F.2d 300 (8th Cir. 1982).

contractual situations to which Title VII does not extend."[186]

Even in the employment sphere, section 1981 and Title VII serve different functions.[187] As Justice Brennan noted in his *Patterson* dissent, the Court held in *Johnson v. Railway Express Agency*[188] that "the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent."[189] As for Kennedy's assertion that the overlap in coverage between the two statutes interferes with Title VII procedure, Brennan noted, for example, that in *Johnson* the Court rejected the suggestion that timely filing with the Equal Employment Opportunity Commission tolls the statute of limitations for section 1981. The *Johnson* Court acknowledged that the availability of section 1981 may deter use of the remediation and conciliation provisions of Title VII. However, the Court found that "these are the natural effects of the choice Congress has made available to the claimant by its conferring upon him independent administrative and judicial remedies. The choice is a valuable one. Under some circumstances, the administrative route may be highly preferred over the litigatory; under others the reverse may be true."[190]

That the 1866 Civil Rights Act reached pervasive discrimination in all aspects of economic life — not simply in the momentary transaction — was emphasized in *Jones*. The notion that "a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man" is not the only significance of these statutes.[191] In situations of wide disparities in power and knowledge, parties may be victimized without being excluded from "the game." Under the legitimating construct of voluntariness, actors make transactions and enter economic relationships without appearing to encounter racist agendas, only to be exploited within the four corners of the relationship.

Finally, evidence that the 1866 Act was meant to combat broad-based economic discrimination can be drawn from the economic situation at the time of enactment. Sharecropping and peonage, two of the more virulent

186. Patterson v. McLean Credit Union, 491 U.S. 164, 211 (1989) (Brennan, J., dissenting).

187. Among the differences between the two statutes at the time of the *Patterson* decision (and thus prior to passage of the Civil Rights Act of 1991) were: (1) Section 1981 applies to all employers, not only those with greater than 15 employees. *Compare* 42 U.S.C. § 1981 (1988) *with* 42 U.S.C. § 2000e(b) (1988). (2) Damage awards are permitted in section 1981 cases but not under Title VII. *Compare* Johnson v. Railway Express Agency, 421 U.S. 454, 460 (1975) *with* 42 U.S.C. § 2000e-5(g) (1988). *But see* Civil Rights Act of 1991, Pub. L. 102-166, § 102, 105 Stat. 1071, 1072 (authorizing punitive and compensatory damages under Title VII). (3) Jury trials are permitted under section 1981 but not under Title VII. *Compare* 42 U.S.C. § 1981 (1988) *with* 42 U.S.C. § 2000e-5(f)(4) (1988). *But see* Civil Rights Act of 1991, § 102 (providing for jury trials in Title VII cases involving punitive or compensatory damages). (4) Unlike section 1981, Title VII provides for mediation and conciliation procedures. *Compare* 42 U.S.C. § 1981 (1988) *with* 42 U.S.C. § 2000e-5(b) (1988).

188. 421 U.S. 454 (1975).

189. *Id.* at 461.

190. *Id.*

191. 392 U.S. 409, 443 (1967).

forms of exploitation, were prevalent in the Reconstruction period.[192] Republican efforts on behalf of the freedmen were targeted at those "artificial," nonmarket restrictions which prevented blacks from competing in the marketplace. Seen in this way, property and contract rights are indistinguishable, as both are necessary for full participation in economic life.[193] Congress considered both property and contract rights in the 1866 Act, understanding that oppression was not limited to the acquisition of property or the formation of contracts. Harassment, unequal treatment on the job, or limits on the use and disposal of property are all forms of economic exploitation because they require that the black worker contribute her labor and resources in exchange for a much smaller bundle of rights than her white counterpart. Section 1981, therefore, ought to reflect the statutory imposition of civil right norms upon private economic relations by prohibiting discrimination and exploitation in contractual affairs.

IV.
TOWARD A RELATIONALIST CONTRACT THEORY

The larger question presented by a comparison of section 1982 and section 1981 jurisprudence is how to develop an alternative to Justice Kennedy's formalistic interpretation in *Patterson*. This inquiry is particularly relevant in light of the recent congressional overturning of the holding in *Patterson*.[194] While Kennedy's formalism has been rejected, the courts are still in need of a coherent framework for interpreting the statutory contract rights under section 1981 that gives credence to civil rights norms.

We may turn to various strands of modern contract theory to locate the role and possibility of contract law. If contracts continue to be viewed as discrete exchanges of individuals with equal bargaining power, humiliation and racial insult after contract formation will never be actionable. Contracts where harassment occurs following formation will continue to be explained away as "bad bargains" which could have been avoided by shopping around.[195] Clearly, contracts are about power, a means of compulsion neatly wrapped in an ideology of individual choice. Understanding how that point is disguised and exercised is essential to the project of developing an interpreta-

192. *See supra* text accompanying notes 138-47.

193. Indeed, in many contexts the fiction of separate categories has become absurd. For example, is there any meaningful difference between a unilateral contract right and a vested property interest? *See* Petit, *Modern Unilateral Contracts*, 63 B.U.L. REV. 563 (1983). Morris Cohen described property as a relation between the holder who has exclusive control and all others. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12 (1927-28); *see also infra* note 204. Power disparities in both areas have been utilized to exploit black laborers by excluding them from full economic benefit and participation. Artificial boundaries here reflect convenience, but racial oppression cuts across all legal categories.

194. *See supra* note 15 and accompanying text.

195. *See* Kessler, *Contracts of Adhesion — Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629 (1943). Since contracts are the result of free bargaining between parties with equal bargaining power, freedom of contract poses no threat to the social order. *Id.* at 630.

tion of section 1981 that combats the racial oppression embedded in the formalist perspective.

The formalist perspective operates on several fronts to conceal the power agenda inherent in contractual relationships. Classical legal reasoning, which presumes the existence of objectively correct answers to legal questions, provides one level of concealment. According to this model, correct legal analysis requires nothing more than the neutral exercise of reason. As such, this view ignores the influence of individual perspective and assumes that all individuals see legal questions in the same way regardless of experience, race, or gender.[196]

However, as the Realists argued, legal reasoning is "socially constructed," rather than a "matter of deductive logic," and is therefore a function of individual perspective.[197] Perspective includes attitudes about race that the individual judge or lawyer may spend little time exploring. Indeed, because most white people are not confronted with issues of race on a daily basis, they may fail to recognize the role of racial assumptions in economic life.[198] This, in turn, leads to the exclusion of minority and dissenting viewpoints from the decisionmaking process, under the mistaken assumption that the dominant view was arrived at by objective reasoning. On a deeper level, the individual judge who fails to consider the experience of others will almost certainly fail to understand "how legal argumentation is used to impose a world view on those it robs of power or resources."[199]

The Realist critique also examines the role of legal doctrine in the ascension of the classical perspective. Legal rules, while sufficiently malleable to reach a variety of results, nevertheless provide an aura that judicial choices are restricted and coherent.[200] Thus, an elastic common law enables courts to pursue their own vision of social desirability. According to classical contract doctrine, that vision is embodied by the notion of freedom of contract. The Realists looked behind the free-contract mask to real-world cause and effect, emphasizing the inequalities of social and economic power that are excluded

196. Beerman & Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 GA. L. REV. 911, 912-13 (1989) ("There is a grave danger . . . of confusing the views of the powerful with reason itself.").

197. *Id.*

198. *Id*; *see* Delgado, *Critical Legal Studies and the Realities of Race — Does the Fundamental Contradiction Have a Corollary?*, 23 HARV. C.R.-C.L. L. REV. 407, 407-08 (1988) (white persons ability to live without thinking about race is a privilege of white supremacy); *see also* Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 151 (1988) (belief in a world of equality and freedom while exercising/benefiting from illegitimate power makes "others" unseen, or understood only on our terms).

199. Dalton, *Deconstructing Contract Doctrine*, 94 YALE L.J. 997, 1007 (1985). Dalton presents "an explanation of how a legal order that claims itself to be based on democratic principles, individual rights, and equal protection can still operate to exclude important constituencies from the benefits available within the society."

200. *See* Kairys, *supra* note 29, at 11-17.

from the classical universe.[201] It was their assertion that the existing system must be prevented from calling itself "exclusively valid" by requiring constant reevaluation in light of real-world practice.[202]

Indeed, what Realism underscores is the impossibility of creating a formal, rule-based doctrine which takes full account of that real-world context or of the complexities of the contractual relationship.[203] Formalist theory's emphasis on remedies for process flaws fails to take notice of actual business behavior or of the power dynamics that underlie economic activity.[204] But if, under the classical view, law exists to protect individual property, it must, as the Realists point out, determine what may be acquired, and who shall do the acquiring, without regard for substantive inequities.[205] Holders of property utilize not only procedure, but superiority in knowledge, skill, and economic power to preserve and enlarge that property.

The Realist critique called for the imposition of behavioral norms, such as the duty of "good faith," to correct the inequities in the contractual relationship. In response, the classical model offers a third level of concealment. It rejects behavioral duties as paternalistic intrusions into private contracting. The classical model exhorts the ideology of individual choice in the private realm. The question of regulation is, accordingly, reduced to a binary choice: no regulation, which preserves free will, versus total regulation, which suppresses free will.[206] From this perspective, existing social and economic ine-

201. M. MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW 371 (1990).

202. Llewellyn, *What Price Contract? An Essay in Perspective*, 40 YALE L.J. 704, 705 (1931).

203. Feinman, *supra* note 12, at 836.

204. Llewellyn, *supra* note 202, at 736. The Realist examination of power inequalities in contract relationships was rooted in a more sophisticated understanding of property. In his 1927 article, Morris Cohen noted that to characterize freedom of contract as a property right merely reinforces the formalist utopia. Cohen, *supra* note 193, at 12. Property itself is power, denoting certain rights rather than physical possession. "[A] property right is a relation not between an owner and a thing, but between the owner and other individuals in reference to things." *Id.* From this perspective, employment relationships are sovereign-property that compels service: If you want part of my property you must serve. That compulsion, called a "free bargain," is often neither free nor a bargain for the worker who needs a job. Professor Cohen reminded us that most people acquire money by working for those whom the law gives dominion over the things necessary for subsistence, and that dominion over the things we cannot do without is dominion over us. Brenda Patterson must work, and therefore the employer's economic power over her compels service in the face of insult and degradation. *Id.* at 12-13. As Llewellyn describes it, unequal skill and power results in "unofficial government of some by others via private law. " Llewellyn, *supra*, note 202, at 731.

205. Llewellyn, *supra* note 202, at 736. Dawson also argues that "the freedom of the 'market' was essentially a freedom of individuals and groups to coerce one another, with the power to coerce reinforced by agencies of the state itself." Dawson, *supra* note 143, at 266.

206. A framework of binary choice is the hallmark and foundation of the classical contract model. Mensch's "magic moment" of contract formation is a switch — no obligations then "click," legally bound. In Justice Kennedy's world, though, the sequence is reversed. From a state of obligation — nondiscrimination — prior to formation, the magic switch cuts off the obligation following formation. Section 1981, therefore, cannot reach discrimination during the time of the contract. The Realists reclaimed contract law from the meta-constitutionalists, *see*

qualities are natural and neutral.[207] An individual's autonomy is not impeded by the current power dynamic, so long as she acts upon her preferences. The resulting situations are thus the product of choice.[208] Regulation, in contrast, represents the negation of that choice and risks non-neutrality.[209] Under this model, Brenda Patterson "freely" chose to enter into an employment contract where she would be subjected to harassment, despite the fact that there was no evidence at the time of formation that harassment would be a condition of employment.[210] Like classical legal reasoning, the bipolar vision of regulation cloaks its favoritism of the powerful in an ideology of benign neutrality. As Martha Minow points out: "Assuming that the way things have been resulted either from people's choices or from nature helps to force legal arguments into these alternatives and to make legal redress of historic differences a treacherous journey through incompatible alternatives."[211]

The public-private dichotomy conceals indifference, if not hostility, toward weaker parties. Process-based remedies such as duress and unconscionability are a "self-consciously 'public' . . . [enforcement of the] limits of 'fair' bargain."[212] This model sanctions state intervention, but asks only whether

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generally Cohen, *The Basis of Contract Law*, 46 HARV. L. REV. 553 (1933), launching a broad critique, which commenced with the seemingly binary nature of contract law. *See* G. GILMORE, *supra* note 103, at 55-65; Fuller & Perdue, *The Reliance Interest in Contract Damages (Part 2)*, 46 YALE L.J. 373 (1937); Mensch, *supra* note 8, at 760.

207. M. MINOW, *supra* note 201, at 70. As Minow notes, "[s]tating the assumptions that have gone unstated . . . opens room for debate, and for new kinds of solutions." *Id.* at 78. Or as Singer and Beerman frame it: "Incorporating baseline questions into the structure of moral and legal argument will both direct our attention to multiple perspectives and enable us to make choices among them." Beerman & Singer, *supra* note 196, at 915.

208. M. MINOW, *supra* note 201, at 52. *But see* J. ELSTER, SOUR GRAPES, STUDIES IN THE SUBVERSION OF RATIONALITY (1985); Sunstein, *Legal Interference with Private Preferences*, 51 U. CHI. L. REV. 1129 (1986).

209. M. MINOW, *supra* note 201, at 52. In reality, intervention may further the values of free-contracting. When courts react, for example, to extreme disproportion in values in a bargain, they require explanations which can usually be found in misplaced reliance, partial disclosure, extreme inequality of knowledge, experience, or economic resources. *See* Dawson, *supra* note 143, at 267. Correction can be regarded as an adjustment to compensate for market-distortion caused by "unusual" circumstances.

210. A classic "Hobson's choice." Thomas Hobson ran a livery business in sixteenth-century England and permitted the customer to choose a horse so long as it was the horse closest to the stable door. WEBSTER'S NEW UNIVERSAL DICTIONARY 864 (2d ed. 1989); *see* Note, *Twentieth Century Slavery Prosecutions: The Sharpening Sword*, 8 CRIM. JUST. J. 47, 60 (1985) (describing peonage as a "Hobson's choice").

211. M. MINOW, *supra* note 201, at 74. In this section of her book, Minow considers the problem of difference in the treatment of pregnancy leave. She argues that choices are not made in a vacuum; rather, "choices by working women and decisions by their employers both were influenced by larger patterns of economic prosperity and depression, and by shifting social attitudes about appropriate roles for women. These larger patterns became real in people's lives when internalized and experienced as individual choice." *Id.*

212. Dalton, *supra* note 199, at 1024. As defined in the Uniform Commercial Code, the concepts of duress and unconscionability remained as narrowly circumscribed as they were under traditional contract doctrine. For example, Official Comment 1 to U.C.C. § 2-302 reads: "The principle is one of the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power." U.C.C. § 2-302 comment 1 (1978).

anyone could resist *that* threat, control *those* circumstances, agree to *that* deal. Broader issues of social and economic context and substantive fairness are placed beyond the scope of permissible state inquiry. But as Clare Dalton argues, the important questions transcend binary alternatives. How, she asks, do we conceive relationships between people? How should we police the boundary between self and other?[213]

Crucial to these inquiries is an understanding of how the invocation of the private realm shields racial and economic inequalities from plain sight, facilitating the perpetuation of the existing distribution of power. Critical Legal Studies has made significant contributions to an understanding of how contract law, seemingly neutral and apolitical, functions to perpetuate oppression.[214] A CLS perspective seeks to discover how law structures perceptions of reality to exclude or repress alternative visions, factually and normatively.[215]

The classical vision regards contract law as private, hence apolitical. To the critical perspective, though, private law is of greater significance than law with a more obviously political cast because it conceals a means of social control within a purportedly "neutral" system.[216] According to one commentator, "[t]he public/private split ideologically legitimizes private . . . dominance, masks the lack of real participation or democracy, and personalizes the

213. Dalton, *supra* note 199, at 1000.

214. Admittedly, there have been blunt exchanges between proponents of critical theory and minority advocates over the importance of rights. *See* Delgado *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301 (1987). Minority scholars have, however, expressed some attraction to the critical perspective for its view that legal ideas are capable of manipulation, and that law legitimates existing maldistributions of wealth and power. CLS also provides tools to analyze how legal indeterminacy works in specific contexts, the degree of connectedness of law to historical, economic and political factors, and the central importance of legal consciousness. *See, e.g.*, Crenshaw, *supra* note 16, at 1369-81 (proposing a "realignment of the Critical project to incorporate race consciousness"); Matsuda, *supra* note 16, at 325.

215. For example, classical liberal theory grounds its presumptions of bargaining equality and freedom of contract in a Panglossian best world of rugged individualism. Such individualism has been successfully invoked to support a politics of social transformation as well. *See* Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. L. REV. 195, 200 (1987); Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981) (cost benefit analysis, usually employed to limit regulation, can be manipulated, consistent with premises and principles, to justify virtually any regulatory regime). For a non-CLS scholar who makes a similar point, see Macauley, *Non-Contractual Relations in Business: A Preliminary Review*, 28 AM. SOC. REV. 55 (1963). Though intervention through antidiscrimination law could be characterized as government intrusion into the realm of private contracting, it can also be viewed as an intervention that protects and fosters the private contract regime itself. *See* Gordon, *supra*, at 211.

216. M. HORWITZ, *supra* note 96, at xii. For example, critical theorists believe that the impact of constitutional law has been overstated, obscuring the slower, more unconscious processes of change and control. Such a focus, in Horwitz' view, is too dependent upon the historical, intellectual and institutional background of judicial review, and therefore overly concerned about the "nay-saying" function of law and on the "special circumstances of intervention in social control." *Id.*

powerlessness it breeds."[217] CLS scholarship seeks to reveal the hidden power dynamics of this interaction among law, economics, and society. As *Patterson* illustrates, the power imbalance, though often manifested in economic coercion, is inseparable from racial supremacy. Duncan Kennedy attributes this dynamic to the fact that decisionmakers operate in a world where "[g]roup conflict and economic conflict almost always overlap to some extent, and are almost never fused in a single conflict."[218]

Proponents of CLS recognize the Realist emphasis on real-world economic conflict and coercion but maintain that, because the Realists failed to understand classical theory's true nature, they were unable to transcend it. For example, the more extreme freedom-of-contract model has been attacked for distributive blindness and insensitivity to issues of paternalism. To adherents of this model, however, freedom of contract explicitly acknowledges these criticisms. Fraud, duress, incapacity are "constitutive" of the free-contract model, but are addressed as threshold judgements.[219] So long as the decisionmaker is satisfied that a contract is voluntary, the inquiry is complete.

CLS scholarship is thus critical of solutions which address power inequalities but fail to recognize their ideological impact. Such solutions serve as apologies for unequal bargaining power, while avoiding the call to equalize the actual enjoyment of material wealth.[220] An emphasis on unequal bargaining power serves distributive objectives by "minimizing conscious recognition" of actual distribution, and by examining only the "procedural" aspects of the relationship between the parties.[221]

This limitation of the choices available to the disempowered is not simply a function of social and economic class, but reflects a spectrum of prejudices. CLS has often demonstrated a limited understanding of the complexity of difference, and the unique experience of exclusion based upon immutable characteristics.[222] To address only economic issues denies the corrosive power of racial hatred across and between socio-economic classes. The former slave quickly discovered that gaining economic power only reinforced the sense of inferiority and powerlessness when this new-found power failed to alter ingrained attitudes of racial supremacy.[223] Nonetheless, the critical perspective

217. Kairys, *Introduction*, in POLITICS OF LAW, *supra* note 2, at 4.

218. *Distributive and Paternalist Motives*, *supra* note 12, at 567.

219. "To claim that freedom of contract doesn't take into account unequal bargaining power or possible monopoly of information or the congenital folly of some types of contracting parties is just wrong. Allowance for these situations is part of the very definition of the institution." *Id.* at 577.

220. *Id.* at 621.

221. *Id.* at 623.

222. *See* Crenshaw, *supra* note 16, at 1356-69. However, exceptions do exist. *See, e.g.*, Freeman, *Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

223. The unique limitations imposed by racism are illustrated by remarks of the veteran black abolitionist Rev. Henry Highland Garret to a group of freedmen: "[t]he more money you make, the lighter your skin will be. The more land and houses you get, the straighter your hair will be." Litwack, *Blues Falling Down Like Hail": The Ordeal of Black Freedom*, in NEW

has pierced the facade of formalism by which judges create value systems of social and economic domination and control, while maintaining belief in their own neutrality and reason.[224]

What the CLS perspective highlights is that unless antidiscrimination law pierces the private realm, enforcement will remain vulnerable to Justice Kennedy's brand of narrow line drawing. If the Court in *Patterson* had acknowledged that Brenda Patterson and McLean Credit Union were parties to an ongoing relationship, and from there applied norms of nondiscrimination to all aspects of that relationship, from first contact until the point where all contacts ceased, the distinction made between making and enforcing contracts would have been irrelevant to the section 1981 analysis.

This kind of contract analysis, which emphasizes the interaction of parties over time, is known as relationalism. While classical theory is atomistic, viewing contracts as instantaneous, discrete transactions rather than as the formalization of human interaction, the relational critique is rooted in an understanding of the neglected communitarian interconnectedness of a society. Thus, according to Professor Gottlieb, "[t]he simplistic concept of the [Uniform Commercial] Code that anyone's business is his private affair does not account for the ties that hold together members of a civilized society and its growing complexity."[225]

The relational critique exposes a myriad of ways in which Justice Kennedy's revival of formalist ideology fails to address the developments of twentieth-century economic life. Society has become "corporatist," governed increasingly by group processes and bureaucratic dynamics.[226] It is no longer credible to assert that contracts are simply momentary connections between free and equal individuals. Parties owe duties and have interests that run with the contract. Indeed, it is these rights and duties that comprise the contract at any particular moment in time. Contractual rights and obligations are "articulations of the qualities of relationships that themselves shift over time,"[227] and cannot be frozen at the time of formation.

PERSPECTIVE ON RACE AND SLAVERY IN AMERICA 109, 116 (R. Abzug & S. Maizlish eds. 1986). Litwack notes that, as southern blacks found the path to economic opportunity blocked, they were asked to "pay obeisance to the same materialist deities, values and goals that motivated the larger society." *Id.* Entirely consonant with free labor ideology, success came to those who were "hardworking," "honest," "served faithfully," "respected property and the sanctity of contracts," and led "moral, virtuous Christian lives." To southern blacks, "such advice was as naive and mistaken in its assumptions as it was persistent." *Id.*

224. Kairys, *supra* note 217, at 5.

225. Gottlieb, *Relationalism: Legal Theory for a Relational Society*, 50 U. CHI. L. REV. 567, 587 (1983); *see also* M. GLENDON, THE NEW FAMILY AND THE NEW PROPERTY (1981) (as legal ties among family members have weakened, the law has played a greater role in cementing employment relationships; rights in modern employment relationships are more quickly recognized and less easily terminated); Pettit, *supra* note 193, at 563 (benefits had been regarded as gratuities to reject contractual claims; runs counter to contemporary conceptions of the employment relationship and has largely been abandoned).

226. M. GLENDON, *supra* note 225, at 207-15.

227. M. MINOW, *supra* note 201, at 371.

The relationalist perspective recognizes the need to manage changing circumstances throughout the life of a contract. Given imperfect foresight, a large degree of flexibility is a necessary part of most contracts. For example, parties need to respond to unforeseen circumstances such as market vagaries, transportation failures, or natural disasters.[228] To specify every eventuality in advance would be financially wasteful.[229] In addition, as with personal relationships, bad behavior may harm the association. Thus, according to the relationalist critique, standards of post-formation behavior must reflect developments in economic need and public purposes. Indeed, a relationalist perspective views general regulation as a necessary part of the traditional government function of monitoring and mediating conduct between its citizens. The primary function of law becomes the enhancement of mutuality.[230] Antidiscrimination norms advance mutuality by limiting the use of immutable characteristics to create and perpetuate inequalities.

The relationalist perspective thus leads to a mode of judicial decisionmaking which minimizes rather than reifies the explicit terms of a contract. Given the limited number of things upon which the human mind can focus, the lack of information available about the future, and the need to fit premises within "symbolic forms of communication,"[231] contracts are at best guidelines or fragments of a complex dynamic entity.[232] To paraphrase Holmes, they provide evidence of the skin of a living interconnection between parties.[233] As it is the relationship between the parties, not the fragment, that has legal significance, "any distinction between a status quo before an exchange and the situation following projection of exchange into the future [*i.e.*, post-formation] tends to become virtually meaningless."[234] In addressing issues of power and mutuality, relational contract law emphasizes the need to "deal with these

228. Gottlieb, *supra* note 225, at 588.

229. *See* Williamson, *Transaction Cost Economics: The Governance of Contractual Relations*, 22 J. LAW & ECON. 233 (1979).

230. NEW SOCIAL CONTRACT, *supra* note 13, at 25.

231. *Id.* at 8.

232. Karl Llewellyn observes that contracts provide a framework "for well-nigh every type of passing or permanent relation between individuals and groups . . . , a framework highly adjustable, a framework which almost never accurately indicates real working relations but which affords a rough indication around which such relations vary, an occasional guide in cases of doubt, and a norm of ultimate appeal when the relations cease in fact to work." Llewellyn, *supra* note 202, at 737. He notes further that unequal bargaining power and standardization deflect the norm of ultimate appeal to one side. *Id.* Under this analysis, it is clear that leaving Brenda Patterson with the right to enforce only the explicit terms of the contract provides insufficient protection.

233. *See* Towne v. Eisner, 245 U.S. 418, 425 (1918) ("A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used."); *cf.* Patterson v. McLean Credit Union, 491 U.S. 164, 221 (1989) (Stevens, J., concurring) (quoted *supra* text accompanying note 62).

234. NEW SOCIAL CONTRACT, *supra* note 13, at 86. Because the classical discrete transaction took no notice of the pre-formation balance of power, the law need not become concerned about how parties divide the "exchange surplus," hence no one can be unjustly enriched or victimized. *Id.* at 84-85.

issues before, during and after exchanges."[235] Harassment, in this view, need not occur at a certain moment, or within a range of moments for it to be illegal. It is impermissible at any point in the relationship.

Martha Minow employs a social relations model to illustrate the relational approach. Using the example of a deaf child in need of a sign language interpreter, she demonstrates that the different approaches of parents and school system were based upon the assumption that the problem was the child's inability to communicate, rather than the shared need of all participants in the classroom, and school, to interact.[236] Similarly, Justice Kennedy appears to assume that the problem presented in *Patterson* was Brenda Patterson's inability to overcome the isolation created by her "different" race, rather than the shared need of all participants in the Credit Union to interact, to the benefit of themselves and their common endeavor.[237] The problem of difference — whether deafness or race — should be seen as embedded in the relationships among and between individuals. Members of all races, like the deaf and hearing students, lose when racial harassment puts walls between us.[238]

This approach challenges the assumption that the existing frameworks are natural and necessary. A relational perspective requires an understanding of the world view of the powerless, a resistance to claims that the ideology of power represents the totality of the universe. Mari Matsuda poses the challenge to complacency in the struggle against racial oppression, admonishing us to "Look to the Bottom" and "adopt[ ] the perspective of those who have seen the falsity of the liberal promise."[239]

CONCLUSION

When courts look at the law of contract or property — the supposed "private" world — judges see clear boundaries and singular exchanges. They find legal categories whole unto themselves, unswayed by the glittering temptations of "public" law intermeddling. It is certainly easier to maintain separate cubby holes for contract formation, execution, or enforcement than to address the messy complexity of human relationships.

Superficial or marginal changes may be adopted if important social concerns are implicated by private arrangements, but the fundamental "private" nature of the contracting event is preserved. To that end, priority is first placed on those forms of regulation germane to the transaction-entry process

235. *Id.* at 86.

236. M. MINOW, *supra* note 201, at 83 (discussing Rowley v. Bd. of Educ., 483 F. Supp. 528 (S.D.N.Y.), *aff'd*, 632 F.2d 945 (2d Cir. 1980), *rev'd*, 458 U.S. 176 (1982)).

237. "Few tragedies can be more extensive than the stunting of life, few injustices deeper than the denial of opportunity to strive or even to hope, by a limit imposed from without, but falsely identified as lying within. . . . We inhabit a world of differences and predilections, but the extrapolation of these facts to theories of rigid limits is ideology." S.J. GOULD, THE MISMEASURE OF MEN 28-29 (1981), *quoted in* M. MINOW, *supra* note 201, at 75.

238. M. MINOW, *supra* note 201, at 85-86.

239. Matsuda, *supra* note 16, at 324.

itself, such as fraud or capacity. Second priority is accorded to the monitoring and control of the effects of the transaction; prevention of socially unacceptable behavior, danger to health and safety, fairness, and good faith. Antidiscrimination principles, however, seem irrelevant to the business of conducting business, and are thus of low priority. Fairness and good faith are mandated for sales of goods between merchants, but not for the victims of racial oppression. But there is another explanation for resistance to regulation. This perspective assumes that existing frameworks are natural and necessary, that economic and political arrangements are derived purely from neutral choice.

In contrast, when members of excluded groups look at "private" transactions, they see relationships with people and organizations that hold positions of domination, and whose ascendancy is legitimized by "the liberal promise" of neutrality and free choice. From "the perspective of those who have seen the falsity of [that] promise," the categories and rules of contract or property are simply further signs of relationships based upon inequalities of power.[240] The mechanisms employed by many citizens for economic participation and its concomitant social and political advantage are unavailing when business relationships — customer, investor, employee — fail to include norms of nondiscrimination.

How do we confront and neutralize prejudice in the most fundamental structures of our economy and legal system? Hidden by a lattice-work of rigid categories, "private" law perpetuates power relationships that exploit and corrode. The wrong done to Brenda Patterson was not in bad words at wrong times but in the maintenance of a relationship grounded in racial supremacy. But a relational perspective requires an understanding of the world view of the powerless, a resistance to claims that the ideology of power represents the totality of the universe. As Martha Minow has noted, "[a] relational understanding of difference replaces debates over similar or different treatment with analysis of the ways in which institutions construct and utilize differences to justify and enforce exclusions — and that such institutional practices can be changed."[241] Principles of antidiscrimination and human value, then, are relevant to private law transactions because relationships based upon racial supremacy or patriarchy, regardless of legal categories, are unacceptable.

240. *Id.* at 324.

241. M. MINOW, *supra* note 201, at 184.