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# Banning Contractual Performance Discrimination

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*Recent evidence reveals a critical but often overlooked form of discrimination within consumer markets: "discrimination in contractual performance." This phenomenon occurs when sellers use discretionary authority in ways that disproportionately disadvantage certain consumers, including those belonging to racial or ethnic minorities or lower socioeconomic classes. Presumably, sellers intend to standardize transactions and limit discretionary decisions by using form contracts. But empirical evidence reveals that sellers' representatives frequently adjust terms to benefit some customers (e.g., white, more affluent consumers) over others (e.g., those belonging to minority groups and lower-income consumers). For instance, Black consumers encounter greater difficulties in returning items without receipts or obtaining homeowners' insurance claims compared to white consumers, and lower-income homeowners face more challenges in avoiding foreclosure compared to their more affluent counterparts. This disparity, fueled by implicit biases, constitutes a hidden form of price discrimination by which minority consumers receive inferior services at the same cost. Yet, despite the social harms that this practice generates, it has so far received very limited scholarly or regulatory attention.*

*Building on the accumulating evidence suggesting that sellers routinely engage in discriminatory contract performance, this Article proposes that sellers be banned from discriminating against minority consumers in contractual performance. More specifically, it suggests using existing anti-discrimination laws to address this form of marketplace discrimination, particularly the Civil Rights Act of 1866, codified at 42 U.S.C. § 1981, which prohibits racial discrimination in the "making and enforcing" of contracts.*

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*While courts have predominantly restricted this statute's application to the initial stages of contract formation, this Article advocates for a broader interpretation of Section 1981 to encompass discriminatory practices in the performance of form contracts. While doing so, this Article confronts the legal and practical challenges of stringent causation standards in discrimination lawsuits, recommending a shift from intent-based inquiries to a "disparate treatment" analysis and streamlining evidence collection through disclosure mandates. By addressing these challenges, the Article aims to promote more equitable contractual performance for all consumers.*

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> *"If our 'anti-discrimination' principles regularly absolve defendants of liability where groups or individuals in fact would have been treated better if they were white, or men, or non-disabled, then anti-discrimination law is not worthy of its name."*[1]

INTRODUCTION

Consumers from racial minority groups often face significantly worse treatment while shopping or consuming goods or services compared to their majority counterparts.[2] Researchers have documented that they are more frequently denied services,[3] subjected to heightened surveillance,[4]

1. Katie Eyer, *The But-For Theory of Anti-Discrimination Law*, 107 VA. L. REV. 1621, 1624 (2021).
2. *See generally* SHAUN L. GABBIDON & GEORGE E. HIGGINS, SHOPPING WHILE BLACK: CONSUMER RACIAL PROFILING IN AMERICA (2020) (surveying evidence of racial discrimination against Black consumers while shopping); Cassi Pittman, *"Shopping While Black": Black Consumers' Management of Racial Stigma and Racial Profiling in Retail Settings*, 20 J. CONSUMER CULTURE 3 (2020) (same); Aronté Marie Bennett, Ronald Paul Hill & Kara Daddario, *Shopping While Nonwhite: Racial Discrimination Among Minority Consumers*, 49 J. CONSUMER AFFS. 328 (2015) (reporting, based on a survey, that non-white customers are significantly more likely to feel discriminated against in stores than are white customers).
3. *See, e.g.*, Benjamin Edelman, Michael Luca & Dan Svirsky, *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, 9 AM. ECON. J.: APPLIED ECON. 1, 7 (2017) (finding, based on an online field experiment, that Airbnb hosts were more likely to refuse booking requests made by guests with Black-sounding names compared to guests with white-sounding names); Andrew Hanson, Zackary Hawley, Hal Martin & Bo Liu, *Discrimination in Mortgage Lending: Evidence from a Correspondence Experiment*, 92 J. URB. ECON. 48, 48-49 (2016) (using similar methods and finding evidence of discrimination in the credit market); CHRISTINE L. WILLIAMS, INSIDE TOYLAND: WORKING, SHOPPING, AND SOCIAL INEQUALITY 111-12, 128 (2006) (presenting personal evidence that white customers received significantly better service than Black customers, who were denied services and were subject to employee calls to police for no reason).
4. *See, e.g.*, GABBIDON & HIGGINS, *supra* note 2, at 10-19 (discussing evidence that store clerks tend to be more suspicious of Black customers and unfairly target them with surveillance and calls to the police); David Crockett, Sonya A. Grier & Jacqueline A. Williams, *Coping with Marketplace Discrimination: An*

and quoted higher prices for identical products.[5] In fact, there is strong evidence that they often receive lower-quality service in general.[6]

Recent empirical evidence suggests that this unequal treatment extends to contractual performance in certain contexts.[7] In particular, an audit study I recently conducted in Chicago reveals that retail store clerks are significantly more likely to grant concessions to white consumers seeking to return items without a receipt as compared to their Black counterparts.[8]

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*Exploration of the Experiences of Black Men*, 4 ACAD. MKTG. SCI. REV. 1, 1 (2003) (making similar observations); Jennifer Lee, *The Salience of Race in Everyday Life: Black Customers' Shopping Experiences in Black and White Neighborhoods*, 27 WORK & OCCUPATIONS 353 (2000) (reporting, based on seventy-five in-depth interviews of Black consumers, that Black customers feel that they are treated unfairly in shops located in predominantly white neighborhoods); JOE R. FEAGIN, LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE (1994); Regina Austin, *"A Nation of Thieves": Securing Black People's Right to Shop and to Sell in White America*, 1 UTAH L. REV. 147, 148 (1994) ("There can hardly be a black person in urban America who has not been denied entry to a store, closely watched, snubbed, questioned about her or his ability to pay for an item, or stopped and detained for shoplifting.").

5. *See, e.g.*, Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 831 (1991) (finding that car dealers charged significantly higher prices for identical cars when dealing with Black customers, as compared to similarly situated white customers); Ian Ayres & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car*, 85 AM. ECON. REV. 304 (1995) (replicating the study using a larger-scale sample and obtaining similar results).

6. *See, e.g.*, Josephine Louie, *We Don't Feel Welcome Here: African Americans and Hispanics in Metro Boston*, HARV. U. C.R. PROJECT 41 (Apr. 25, 2005), https://eric.ed.gov/?id=ED508363 [https://perma.cc/5K8F-WTY7] (finding, based on a survey, that over half of Black respondents residing in the Boston Metropolitan Area report being "treated with less respect, offered worse service, called names or insulted, or confronted with another form of day-to-day discrimination at least a few times a month"); Zachary W. Brewster & Sarah N. Rusche, *Quantitative Evidence of the Continuing Significance of Race: Tableside Racism in Full-Service Restaurants*, 43 J. BLACK STUD. 359, 375 (2012) (reporting on a study in which almost forty percent of the surveyed restaurant workers reported providing lower quality service to minority consumers based on race).

7. *See infra* notes 8-12.

8. Meirav Furth-Matzkin, *Racial Discrimination in Retailers' Willingness to Accept Returns: A Field Study*, 119 NW. U. L. REV. 1135, 1140 (2025) [hereinafter Furth-

Other studies reveal similar discriminatory patterns across various industries. For instance, there is evidence suggesting that Black homeowners receive worse treatment than white homeowners who file claims under their homeowners' insurance policies.[9] Specifically, Black homeowners receive compensation less frequently than comparable white homeowners and, even then, are required to complete more paperwork and engage in more interactions with insurance company representatives.[10] In a similar vein, a study by Manisha Padi demonstrates that mortgage service providers more frequently opt to refrain from exercising their contractual right to foreclose on defaulting borrowers when the homeowner resides in affluent, predominantly white ZIP codes (compared to less wealthy neighborhoods).[11] And a study conducted by Redzo Mujcic and Paul Frijters in Australia reveals that bus drivers are twice as likely to allow white individuals to ride the bus for free than Black individuals.[12]

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Matzkin, *Racial Discrimination*]; *see also* IAN AYRES, PERVASIVE PREJUDICE?: UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION 7-8 (2001) (suggesting that "[r]etailers may also discriminate in their willingness to accommodate private and somewhat idiosyncratic consumer requests" and citing research to that effect).

9. *See* Emily Flitter, *Black Homeowners Struggle to Get Insurers to Pay Claims*, N.Y. TIMES (Jan. 1, 2021) [hereinafter Flitter, *Black Homeowners Struggle*], https://www.nytimes.com/2020/12/29/business/black-homeowners-insurance-claim.html [https://perma.cc/CP79-L93R] (reporting on Black homeowners' difficulties in receiving insurance payouts, including allegations of racial bias in claims processing); Emily Flitter, *Where State Farm Sees 'a Lot of Fraud,' Black Customers See Discrimination*, N.Y. TIMES (Mar. 18, 2022) [hereinafter Flitter, *State Farm*], https://www.nytimes.com/2022/03/18/business/state-farm-fraud-black-customers.html [https://perma.cc/3BM8-KNBS] (reporting allegations that State Farm disproportionately investigates and denies claims from Black policyholders under the guise of fraud prevention); Emily Flitter, *New Suit Uses Data to Back Racial Bias Claims Against State Farm*, N.Y. TIMES (Dec. 14, 2022) [hereinafter Flitter, *New Suit*], https://www.nytimes.com/2022/12/14/business/state-farm-racial-bias-lawsuit.html [https://perma.cc/HZP2-EZ2Z] (discussing a lawsuit that uses statistical analysis to support claims of racial discrimination in State Farm's insurance practices).

10. Flitter, *New Suit*, *supra* note 9.

11. Manisha Padi, *Contractual Inequality*, 120 MICH. L. REV. 825, 858 (2022).

12. Redzo Mujcic & Paul Frijters, *The Colour of a Free Ride*, 131 ECON. J. 970, 971 (2021).

I dub this practice of exercising discretionary authority in the implementation of consumer contracts to the disadvantage of minority consumers *discriminatory performance of consumer contracts*.[13] Discriminatory contract performance likely stems, at least in part, from implicit biases that link a consumer's race with their perceived buying power, transactional expectations, and likelihood of lodging complaints.[14] Previous research suggests that heightened suspicion towards minority customers, particularly Black customers, may also contribute to these biases.[15]

The discriminatory application of standard form contracts represents a largely unacknowledged form of everyday racial discrimination.[16] And yet, the implications of this phenomenon are profound and troubling. Discrimination in contractual performance not only denies minority customers equal service but effectively results in price discrimination.[17] Minority customers are paying the same price but receive inferior service. In essence, the discriminatory performance of consumer contracts results in minority customers subsidizing the shopping experiences of their white counterparts.[18]

In previous work, I have suggested that sellers adopt certain bias-reducing measures, including implementing debiasing training and accountability mechanisms, as well as hiring and promoting more diverse personnel to counteract and mitigate bias in the performance of sellers' form contracts.[19]

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13. *See* Meirav Furth-Matzkin, *Discrimination in Contractual Performance: Evidence, Theory, and Preliminary Policy Prescriptions*, 99 WASH. L. REV. 1165, 1177-84 (2024) [hereinafter Furth-Matzkin, *Discrimination in Contractual Performance*] (defining this phenomenon and surveying the evidence regarding its prevalence in consumer markets); Furth-Matzkin, *Racial Discrimination*, *supra* note 8, at 1141 (same).

14. Furth-Matzkin, *Racial Discrimination*, *supra* note 8, at 1186-90.

15. *Id*.

16. Furth-Matzkin, *Discrimination in Contractual Performance*, *supra* note 13, at 1183.

17. *Id*. at 1183-84.

18. *See id*. (observing that "because communities of color customers pay the same price, this scenario effectively results in communities of color customers subsidizing higher quality services for more privileged groups").

19. *See id*. at 1184-99.

This Article turns to consider the law and policy implications of this phenomenon. A seemingly straightforward approach would be to prohibit sellers from allowing their representatives to exercise discretion in deviating from the terms of their written agreements or policies.[20] I argue, however, that this solution is both impractical and unwarranted.[21] Instead, I propose that sellers be prohibited from discriminating among consumers in the performance of their form contracts or policies.[22]

In setting forth this solution, I show how the current legal framework falls short of adequately safeguarding consumers against discrimination in the execution of sellers' form contracts.[23] Specifically, while federal civil rights statutes, particularly the Civil Rights Act of 1866, which has been codified at 42 U.S.C. § 1981, explicitly prohibit racial discrimination in the "making and enforcing" of contracts,[24] judicial interpretations have typically confined the statute's scope to the initial stages of contract formation.[25] Moreover, although recent legal developments suggest a possible expansion of this interpretation to include discrimination in post-contractual phases,[26] it remains uncertain whether courts will recognize practices such as granting disproportionate privileges or waiving contractual obligations based on race as forms of unlawful discrimination in contractual performance.[27]

This Article calls on courts to embrace a broader application of anti-discrimination laws.[28] This approach could reduce biased discretionary practices in the implementation of sellers' formal policies and contracts, leading to a more equitable society.

This Article proceeds as follows: Part I defines the practice of discrimination in contractual performance and surveys empirical evidence of such discrimination across various areas and markets. Building on this

20. *See infra* Section II.A. I use the terms "policy," "contract," "agreement," and "form" interchangeably to refer to consumer contracts.

21. *Id*.

22. *See infra* Section II.B.

23. *Id*.

24. 42 U.S.C. § 1981 (2018) (stipulating that all persons shall have equal rights to "make and enforce contracts . . . as is enjoyed by white citizens").

25. *See infra* Section II.B.1.a.

26. *Id*.

27. *Id*.

28. *Id*.

evidence, Part II—the core of this Article—explores the implications of this phenomenon for law and policy. Section II.A considers whether the law should prohibit discretionary deviations from sellers' form contracts. In light of the limitations of this approach, Section II.B proposes that sellers be prohibited from discriminating in the performance of their form contracts. Part III concludes and highlights the broader implications of this research and the avenues it opens for future exploration.

## I. CONTRACTUAL PERFORMANCE DISCRIMINATION

### A. Background and Empirical Evidence

Sellers often grant their representatives discretion to deviate from the formal terms of their standardized agreements with consumers.[29] For instance, research in the credit industry suggests that while credit card issuers typically include provisions for late fees in their contracts, they may authorize agents to waive these fees if borrowers can demonstrate that a

29. *See, e.g.*, Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 MICH. L. REV. 857, 858 (2006) (suggesting that firms use "clear and unconditional standard-form contract terms not because they will insist upon those terms, but because they have given their managerial employees the discretion to grant exceptions from the standard-form terms on a case-by-case basis"); Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 MICH. L. REV. 215, 281 (1990) (suggesting that sellers may authorize employees to exercise discretion, selectively waiving or modifying terms to maintain customer satisfaction and loyalty); Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 827-28 (2006) ("A seller concerned about its reputation can be expected to treat consumers better than is required by the letter of the contract."); Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, WIS. L. REV. 679, 705 (2004) [hereinafter Gillette, *Rolling Contracts*] (suggesting that sellers may use a "contract clause that assigns an entitlement to the seller, but that the seller may underenforce where it is dealing with a good claimant"); Clayton P. Gillette, *Pre-Approved Contracts for Internet Commerce*, 42 HOUS. L. REV. 975, 977 (2005) (observing that sellers may use "ostensibly oppressive terms" to allow themselves "discretion to treat buyers who appear to be acting in good faith differently from those who appear to be acting opportunistically").

missed payment was accidental.[30] Similarly, airlines, whose "contracts of carriage" mandate fees for passengers who miss their flights, may empower agents to waive such fees for passengers facing unforeseen circumstances.[31] In the mortgage sector, service providers with the contractual right to foreclose on defaulting borrowers sometimes authorize agents to forgo foreclosure, depending on factors like a borrower's credit risk profile.[32]

Historically, it has been assumed that this discretionary flexibility benefits consumers by allowing exceptions to rigid contract terms.[33] However, little attention has been paid to the distributional implications of

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30. *See, e.g.*, Michelle Crouch, *Poll: You Can Get Better Credit Card Terms Just by Asking*, YAHOO FIN. (Mar. 26, 2017), https://finance.yahoo.com/news/poll-better-credit-card-terms-030000309.html [https://perma.cc/VC64-F57Y] (explaining how consumers can negotiate better credit card terms and fee waivers).

31. *See, e.g.*, Christopher Elliot, *Travel Nightmares: What To Do If You Miss Your Flight*, USA TODAY (Mar. 25, 2018), https://www.usatoday.com/story/travel/advice/2018/03/25/missed-flight-passenger-rights/450366002 [https://perma.cc/KBJ7-QVSX] (explaining how airlines may let passenger catch the next available flight without penalty if they miss their flight notwithstanding the formal rules set forth in the airline's contract of carriage); Blane Bachelor & Charlie Hobbs, *What Happens If You Miss Your Flight?*, CONDÉ NAST TRAVELER (Jan. 24, 2025), https://www.cntraveler.com/story/what-happens-if-you-miss-your-flight [https://perma.cc/3TVJ-5UCT] (making a similar point).

32. Robert B. Avery, Raphael W. Bostic, Paul S. Calem & Glenn B. Canner, *Credit Risk, Credit Scoring, and the Performance of Home Mortgages*, 82 FED. RES. BULL. 621, 622 (1996).

33. *See, e.g.*, Johnston, *supra* note 29, at 858 ("[A] firm will often provide benefits to consumers . . . beyond those that its standard form obligates it to provide . . . . Were firms legally required to extend such benefits . . . then both firms and their customers would be worse off."); Gillette, *Rolling Contracts*, *supra* note 29, at 706 (noting, for example, that "if sellers systematically provide redress where goods are clearly defective, but systematically contest less credible disputes about product quality, then the insertion of a clause into a[] [rolling contract] that disfavors buyers may be less problematic, because the clause is applied disproportionately against bad claimants"); Bebchuk & Posner, *supra* note 29, at 828 ("A one-sided contract may thus be preferred ex ante by informed parties as a cheaper mechanism for inducing efficient outcomes, should contingencies arise during the performance of the contract, than a more 'balanced' contract that, because of imperfect enforcement, could create costs as a consequence of consumers' enforcing protective provisions in the contract.").

such practices.[34] Specifically, minority or lower-income consumers are not accorded the same lenient treatment as their white, higher-income counterparts when they request exceptions beyond the terms of their agreements.[35]

Research into discretionary decision-making and bias suggests that such discretion may, in fact, result in disproportionately favorable treatment for white, higher-income consumers compared to similarly situated non-white or lower-income consumers.[36] Evidence from various domains—including law enforcement, judicial proceedings, housing, and employment—consistently reveals that racial bias permeates human judgment.[37] This body of research highlights a troubling pattern: the greater the discretionary power in decision-making, the more pronounced the racial, gender, or ethnic disparities.

For example, studies simulating hiring processes in the employment sector have found significant bias against Black candidates when qualifications were ambiguous, prompting recruiters to rely more heavily on subjective discretion.[38] Similarly, in the legal realm, Harvard Law School Professor Crystal Yang examined the impact of the Supreme Court's decision in *United States v. Booker*, which relaxed mandatory sentencing guidelines and expanded judicial discretion.[39] Her analysis of data from

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34. For notable exceptions, see Shmuel I. Becher & Tal Z. Zarsky, *Minding the Gap*, 51 CONN. L. REV. 69, 91 (2019) (observing that "uninformed and weak groups of consumers are subject to the strict [standard form contract]" while "sophisticated and informed groups are treated more forgivingly or generously"); Eyal Zamir, *Contract Law and Theory: Three Views of the Cathedral*, 81 U. CHI. L. REV. 2077, 2100 (2014) (noting that sellers' desire to maintain their good names and customers "are much more likely to work in favor of large, recurring, and sophisticated customers—whose goodwill the supplier values highly—than in favor of the weak, occasional, and unsophisticated customers, whose goodwill is valued less").

35. *See infra* notes 43-53 and accompanying text.

36. For a broad overview of this vast literature, see generally Marianne Bertrand & Esther Duflo, *Field Experiments on Discrimination*, in HANDBOOK OF FIELD EXPERIMENTS 309 (Abhijit Vinayak Banerjee & Esther Duflo eds., 2017).

37. *Id*.

38. John F. Dovidio & Samuel L. Gaertner, *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 PSYCH. SCI. 315, 318 (2000).

39. Crystal S. Yang, *Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing*, 44 J. LEGAL STUD. 75 (2015).

1994 to 2010 revealed a substantial increase in sentencing disparities between Black and white defendants post-*Booker*.[40]

As noted by University of Oregon School of Law Professor Erik Girvan, "implicit bias tends to influence decisions that are inherently ambiguous, difficult, or subjective[,]" precisely the type of situations that require decision makers to exercise discretion, make judgment calls, or rely on intuition.[41] Indeed, unstructured decision-making environments are exactly where implicit biases are most likely to manifest.[42]

Recent empirical studies and anecdotal evidence further suggest that sellers' discretionary performance of contractual terms often results in discrimination against minority and lower-income consumers, leading to disparate outcomes across multiple sectors.

In the insurance industry, for instance, a class-action lawsuit against State Farm revealed racial disparities in claims processing.[43] Survey data showed that Black homeowners faced more paperwork, longer processing times, and lower compensation rates than white customers under similar

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40. *Id*. at 77; *cf.* Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities Under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, 9 J. EMPIRICAL LEGAL STUD. 729, 730 (2012) (finding that increased judicial discretion following the shift to non-binding sentencing guidelines did not necessarily result in greater racial disparities in sentencing post-*Booker*).

41. Erik J. Girvan, *When Our Reach Exceeds Our Grasp: Remedial Realism in Antidiscrimination Law,* 94 OR. L. REV. 359, 375 (2016). The substantiated claim that broader discretion might result in greater discrimination has also been raised and discussed in the context of the "rules versus standards" conundrum. *See, e.g.*, Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 974 (1995) (observing that rules can counteract bias, favoritism, or discrimination because they are "associated with impartiality"). For a general overview of the rules versus standards debate, see, for example, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559-60 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1701 (1976); and Russell D. Covey, *Rules, Standards, Sentencing, and the Nature of Law*, 104 CALIF. L. REV. 447, 450 (2016).

42. Jon Kleinberg, Jens Ludwig, Sendhil Mullainathan & Cass R. Sunstein, *Discrimination in the Age of Algorithms*, 10 J. LEGAL ANALYSIS 113, 120 (2018).

43. *See* Flitter, *New Suit, supra* note 9 (Flitter, *New Suit*, *supra* note 9 (reporting on the lawsuit against State Farm alleging that State Farm's use of algorithms in claims processing disproportionately affects Black policyholders); Huskey v. State Farm Fire & Cas. Co., No. 22-CV-7014, 2023 WL 5848164, at *6 (N.D. Ill. Sept. 11, 2023) (denying in part State Farm's motion to dismiss, allowing plaintiffs' disparate-impact claims under the Fair Housing Act to proceed).

circumstances.[44] These findings suggest systemic biases in the discretionary actions of claims adjusters, contradicting the standardized treatment ostensibly promised by insurance contracts.

Similarly, in the mortgage industry, research by Manisha Padi demonstrated that mortgage servicers selectively enforce foreclosure rights based on neighborhood affluence.[45] Borrowers in wealthier (predominantly white) areas were 3.3 percentage points more likely to avoid foreclosure despite defaults, indicating that discretion was disproportionately applied in favor of affluent borrowers.[46] This pattern suggests that lenders prioritize such borrowers, perhaps due to a perceived higher likelihood of repayment or fear of legal challenges,[47] thereby disadvantaging those who might need relief the most.[48] The economic and social implications of these discretionary practices are significant. Padi estimates that borrowers from low-income neighborhoods suffer over $500 million in additional foreclosure losses annually compared to borrowers from wealthier neighborhoods.[49]

The public transportation sector is not immune either. A study by economists Redzo Mujcic and Paul Frijters documented racial

44. Flitter, *New Suit*, *supra* note 9.

45. *See* Padi, *supra* note 11.

46. *Id*. at 858 (finding that "[borrowers from] high-income neighborhoods have a [0].033 higher probability of avoiding foreclosure").

47. *Id*. at 861 ("One economically rational reason for this inequality would be that borrowers in rich neighborhoods are better credit risks. That is, these borrowers are more likely to pay off their loans, so naturally the mortgage provider is willing to be more accommodating."). Note, however, that Padi includes measures of borrower creditworthiness, including credit score and debt-to-income ratio, in her regression, and the results still hold. She thus concludes that "it is more likely that servicers are making the decision to extend forbearance based on qualities correlated with wealth but not directly determining creditworthiness." *Id*.; *see also* Omri Ben-Shahar, *Tailored Standard Form Contracts and Inequality*, JOTWELL (Nov. 2, 2021), https://contracts.jotwell.com/tailored-standard-form-contracts-and-inequality [https://perma.cc/4JAD-77A5] (suggesting that more affluent borrowers may be "more likely to fight foreclosure tooth and nail with every legal means and inflict higher enforcement costs on the banks").

48. Padi, *supra* note 11, at 860 ("As in the literature on economic inequality generally, the most well-off receive disproportionately large benefits from contractual inequality, despite being governed by the same contract terms.").

49. *Id*. at 861-62.

discrimination on public buses in Australia using an audit methodology involving over 1,500 observations.[50] Their study found that bus drivers were twice as likely to let white passengers ride for free compared to Black passengers, even when dressed identically.[51]

Even in retail settings, discriminatory contractual performance is evident. In a recent field experiment, I examined how retail clerks handle return policies based on race and gender.[52] Testers of varying racial backgrounds attempted to return items without receipts, revealing that Black customers—especially Black men—were consistently denied refunds or treated less favorably than white customers (particularly white women) under identical conditions.[53] These disparities endured even when managers intervened, underscoring the pervasiveness of implicit biases at multiple levels.[54]

Collectively, these findings reveal a systemic pattern: discretionary performance of contractual terms often disadvantages minority consumers,

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50. *See* Mujcic & Frijters, *supra* note 12, at 970.

51. *Id*. at 971.

52. Furth-Matzkin, *Racial Discrimination*, *supra* note 8.

53. *Id*. at 1159-65. The stark differences in treatment between white women and Black men underscore the need for an intersectional approach to studying discrimination. For prominent recent scholarship advocating for discrimination research to adopt an intersectional approach emphasizing how racial and gender identities interact, see, for example, Sumi Cho, Kimberlé Williams Crenshaw & Leslie McCall, *Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis*, 38 SIGNS: J. WOMEN CULTURE & SOC'Y 785, 787 (2013), which comments that intersectionality has "played a major role in facilitating consideration of gender, race, and other axes of power in a wide range of political discussions and academic disciplines"; and Catharine A. MacKinnon, *Intersectionality as Method: A Note*, 38 SIGNS: J. WOMEN CULTURE & SOC'Y 1019, 1020 (2013), which notes that intersectionality "adds the specificity of sex and gender to race and ethnicity, and racial and ethnic specificity to sex and gender." Originally conceived to address the unique challenges faced by Black women, intersectionality also provides a framework for understanding the nuanced and layered forms of discrimination experienced by Black men. *See* Devon W. Carbado, Kimberlé Williams Crenshaw, Vickie M. Mays & Barbara Tomlinson, *Intersectionality: Mapping the Movements of a Theory*, 10 DU BOIS REV. 303, 303 (2013) (observing that while the term "intersectionality" has been introduced "to address the marginalization of Black women," this paradigm has shifted to engage Black men).

54. Furth-Matzkin, *Racial Discrimination*, *supra* note 8, at 1168-74.

reinforcing existing social inequities. Far from being an impartial mechanism for flexibility, discretion in contract enforcement can perpetuate racial and socioeconomic disparities, underscoring the urgent need for reform.

### B. Discrimination in Contractual Performance: A Typology

The evidence discussed above highlights a pervasive yet often overlooked form of marketplace discrimination: the unequal enforcement of sellers' form contracts and policies based on race, ethnicity, socio-economic status, or gender. This evidence demonstrates that such discriminatory practices permeate various industries, where companies' discretionary policies lead to significant disparities in customer treatment.

As these examples illustrate, discrimination in contractual performance is most likely to occur in situations when (1) sellers grant their representatives discretion in the implementation of contracts or policies, allowing them to deviate from standard terms on the basis of personal judgment; and (2) minority consumers lack the ability to observe easily how similarly situated nonminority consumers are treated.

For example, a store clerk is unlikely to charge minority consumers higher prices for the same product, as price tags provide a clear basis for comparison. However, discretionary decisions—such as accepting a return without a receipt or after the return period has expired—lack an obvious comparison point and are more prone to biased application.

Discrimination in contractual performance can manifest in two primary ways:

1. *Denial of Contractual Rights*. Minority consumers may face disproportionate denial of contractual benefits or rights to which they are legitimately entitled. For instance, a Black customer might be refused a return despite complying with the store's return policy, while a similarly situated white customer is allowed to make the return. Similarly, minority consumers may be unjustly denied upgrades or benefits explicitly outlined in their contracts.

2. *Preferential Treatment*. White, male, or higher-income customers may receive concessions, accommodations, or favorable discretionary decisions not extended to minority customers. This preferential treatment results in minority consumers' receiving lower-quality goods or services for the same price, thus undermining the fairness of the contractual exchange.

Below is a typology that highlights how these forms of discrimination may occur across different contract types. The table illustrates how the language of standard contracts or policies can lead to unequal treatment when coupled with discretionary enforcement.

| Contract/Policy Type | Policy Language | (1) Disproportionate Denial of Contractual Rights | (2) Disproportionate Concessions |
|---|---|---|---|
| **Return Policy** | "Refund allowed with a receipt" or "Refund allowed with a receipt, subject to the store clerk's discretion." | Black customers might be disproportionately denied refunds even when they present valid receipts. | White customers may be disproportionately granted refunds despite failing to present receipts. |
| **Mortgage Agreement** | "If Borrower fails to make any payment on time, Lender may initiate foreclosure to recover the debt." | Minority or lower-income borrowers might face foreclosure more frequently, even if payments are made on time. | White or higher-income borrowers may face fewer foreclosures, even if they miss payments. |
| **Insurance Contract** | "Upon submission of all required documentation, including proof of medical necessity, the insurer agrees to reimburse the policyholder for covered expenses." | Minority consumers might be disproportionately denied reimbursements despite submitting all required documentation. | White consumers may be disproportionately granted reimbursements even when they fail to provide all necessary paperwork. |

The table above illustrates how discretionary enforcement of seemingly neutral policies can lead to discriminatory outcomes. For instance, the wording of a standard return policy allows for subjective interpretation ("subject to the store clerk's discretion"), which can result in unequal treatment of customers based on race or socio-economic status. Similarly, mortgage agreements and insurance contracts can be applied unevenly due to biases in discretionary decisions, leading to higher foreclosure rates or denial of reimbursements for minority consumers.

## II. SOCIAL WELFARE IMPLICATIONS

Discriminatory performance of consumer contracts not only undermines principles of fairness but also perpetuates systemic inequities, amplifying social and economic disparities for already marginalized groups. These practices extend beyond mere marketplace inconveniences; they

have far-reaching implications that exacerbate social inequalities and harm the well-being of affected communities, particularly communities of color.[55]

At a structural level, discriminatory contract performance inflicts direct economic harm on minority consumers by effectively imposing a hidden form of *price discrimination*.[56] While these consumers pay the same prices as others, they often receive lower-quality goods or services, thereby subsidizing the superior treatment and "extras" provided to more privileged groups. This unequal exchange is particularly harmful because it is both opaque and pervasive, eroding consumer trust and perpetuating cycles of disadvantage.

For example, minority customers might be denied returns or insurance reimbursements despite complying with all stated requirements, while similarly situated white customers receive lenient accommodations. In such cases, companies may plausibly factor the cost of these accommodations into their overall pricing strategies, passing on the financial burden to consumers deemed "less desirable."

Thus, minority consumers are indirectly charged more for less, unknowingly subsidizing the benefits enjoyed by others. This hidden form of price discrimination is insidious because it appears neutral on its face but perpetuates systemic inequities by disproportionately disadvantaging certain demographic groups.

Beyond their immediate financial impact, these discriminatory practices also impose significant social and psychological harms. When minority consumers are systematically denied benefits or provided inferior services, it not only degrades their experience as consumers but also has

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55. *See, e.g.*, Yin Paradies et al., *Racism as a Determinant of Health: A Systematic Review and Meta-Analysis*, 10 PLOS ONE 2 (2015) (surveying the evidence that discrimination is significantly associated with negative health consequences); Michael T. Schmitt, Nyla Branscombe, Tom Postomes & Amber Garcia, *The Consequences of Perceived Discrimination for Psychological Well-Being: A Meta-Analytic Review*, 140 PSYCH. BULL. 921, 922 (2014) (finding significant negative impacts of discrimination on mental health, self-esteem, and life satisfaction, and a somewhat weaker, but still significant, association with physical health). For a general assessment of the social costs produced by marketplace race discrimination, see Peter Siegelman, *Racial Discrimination in "Everyday" Commercial Transactions: What Do We Know, What Do We Need to Know, and How Can We Find Out*, *in* URBAN INST., A NATIONAL REPORT CARD ON DISCRIMINATION IN AMERICA: THE ROLE OF TESTING 70 (Michael Fix & Margery Austin Turner eds., 1998).

56. Furth-Matzkin, *Racial Discrimination*, *supra* note 8, at 1141; Furth-Matzkin, *Discrimination in Contractual Performance*, *supra* note 13, at 1183-84.

deeper consequences for their mental well-being.[57] Being unfairly treated in an everyday transaction—whether it involves a denied return, a refused insurance claim, or a less favorable mortgage concession—can lead to feelings of humiliation, decreased life satisfaction, and diminished self-esteem.[58]

The case of Jacqueline Huskey and other similarly situated Black homeowners exemplifies this issue.[59] In 2021, Jacqueline Huskey, a Black woman residing in suburban Illinois, filed a claim with State Farm, her insurer, concerning a hailstorm that damaged her roof.[60] After being denied assistance more than a dozen times, Ms. Huskey eventually became the named plaintiff in a class-action lawsuit against State Farm for discriminatory claims processing.[61] The lawsuit, which included policyholders in six states, relied on survey evidence that revealed racial disparities in how State Farm agents enforced the terms of the company's insurance policies.[62]

The findings revealed that Black homeowners had a significantly harder time across several measures. For example, "most white customers" typically had their claims approved in "fewer than three interactions" and "were . . . one-third more likely to have their claims paid out in less than a month."[63] Such data were consistent with a prior study, conducted in 2020, which detailed the challenges Black homeowners faced in getting insurers to pay their claims.[64]

Facing mortgage foreclosures due to unjust denials of homeowner insurance claims, minority homeowners not only risk financial ruin but also experience significant emotional distress. These incidents echo the long-

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57. *See, e.g.*, Schmitt et al., *supra* note 55, at 922; Paradies et al., *supra* note 55, at 10-11.

58. Schmitt et al., *supra* note 55, at 934-36.

59. Huskey v. State Farm Fire & Cas. Co., No. 22-CV-7014, 2023 WL 5848164 (N.D. Ill. Sept. 11, 2023).

60. *Id*. at 2; *see also* Flitter, *New Suit*, *supra* note 9.

61. *Huskey*, 2023 WL 5848164, at *1-2.

62. *See id*.

63. Flitter, *New Suit*, *supra* note 9.

64. *See* Flitter, *Black Homeowners Struggle*, *supra* note 9; Flitter, *State Farm*, *supra* note 9.

term impacts of historical redlining,[65] perpetuating the racial wealth gap and contributing to housing insecurity in minority communities. The compounded effect of discriminatory practices can thus reinforce existing social hierarchies, undermining efforts toward racial and economic equity.

The unequal enforcement of mortgage agreements also has profound implications for broader social welfare. By disproportionately initiating foreclosures against minority borrowers, lenders effectively perpetuate the legacy of redlining. These practices undermine homeownership opportunities in minority communities, contributing to persistent gaps in wealth and economic stability.[66] The cascading effect is severe: foreclosures not only strip families of their homes but also devalue entire neighborhoods, perpetuating cycles of poverty and disinvestment.[67]

Furthermore, as the evidence suggests, discrimination in contractual performance extends to industries beyond real estate. Whether it involves lower-quality health insurance reimbursements, disparate enforcement of public transit policies, or biased application of service agreements, the cumulative impact on minority communities is profound. These inequities reinforce broader social harms, limiting economic mobility and perpetuating intergenerational disadvantage.

## III. BANNING CONTRACTUAL PERFORMANCE DISCRIMINATION

Addressing the broader social harms of discriminatory contract enforcement requires a multifaceted approach. *Education* is critical to raising awareness among lawmakers, businesses, and the public about these practices' subtle yet pervasive nature. As I have argued elsewhere, businesses should also be encouraged—or even mandated—to implement

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65. For evidence and discussions about consumer redlining and its repercussions, see generally Tracy L. Vargas, *Consumer Redlining and the Reproduction of Inequality at Dollar General*, 44 QUALITATIVE SOCIO. 205 (2021); Denver D'Rozario & Jerome D. Williams, *Retail Redlining: Definition, Theory, Typology, and Measurement*, 25 J. MACROMARKETING 175 (2005); and Emily E. Lynch et al., *The Legacy of Structural Racism: Associations Between Historic Redlining, Current Mortgage Lending, and Health*, 14 SSM-POPULATION HEALTH (2021).

66. *See* Padi, *supra* note 11, at 861 (discussing the regressive implications of mortgage inequality).

67. *See id.* at 862 ("Poor neighborhoods are already less able to bear losses from foreclosures, let alone disproportionately large losses relative to their richer counterparts.").

proven bias-reducing measures.[68] These include debiasing (or diversity) training,[69] monitoring and accountability systems,[70] adopting objective criteria,[71] recruiting and hiring more diverse personnel,[72] and leveraging artificial intelligence to mitigate biased decision-making.[73]

While these initiatives are vital to fostering long-term change, they must be complemented by immediate and enforceable legal reforms to combat discrimination in contractual performance. This Article focuses on the legal measures regulators and courts could implement to address such discrimination effectively.

A key driver of bias in contractual performance is sellers' deviations from standard contracts. A seemingly straightforward legal solution is to prohibit all discretionary deviations, thereby preventing discriminatory practices. For example, researchers have proposed eliminating discretionary tipping in taxis to address bias against minority drivers.[74]

However, as I explore in greater detail elsewhere,[75] an outright ban on discretionary deviations raises significant challenges. Such a solution could prove difficult to enforce, diminish service quality (as sellers would be forced to provide identical service to all consumers, including opportunistic ones), or lead to higher consumer costs.[76] Furthermore, it could unintentionally harm vulnerable consumers, particularly those with limited financial flexibility.[77] Strict rules might also result in inequitable outcomes by removing necessary discretion in situations requiring flexibility, such as waiving fees for emergencies.[78]

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68. Furth-Matzkin, *Discrimination in Contractual Performance*, *supra* note 13, at 1197-98 (proposing that regulators consider offering legal "safe harbors" for sellers who comply with effective, regulator-defined anti-bias precautions, or imposing sanctions on sellers who fail to take such bias-reducing measures).
69. *Id.* at 1185-90.
70. *Id.* at 1190-91.
71. *Id.* at 1191-92.
72. *Id.* at 1192-94.
73. *Id.* at 1194-97.
74. *See* Ian Ayres, Fredrick E. Vars & Nasser Zakariya, *To Insure Prejudice: Racial Disparities in Taxicab Tipping*, 114 YALE L.J. 1613, 1618-19, 1627 (2005).
75. Furth-Matzkin, *Racial Discrimination*, *supra* note 8, at 1190-92.
76. *Id.*
77. *Id.*
78. *Id.*

Instead, this Article proposes to explicitly ban discrimination in contract execution.[79] This could be achieved by amending existing legislation or by enacting new laws specifically targeting discriminatory practices in contractual performance. Recognizing the practical challenges and delays inherent in legislative reform, this Article also recommends an interim strategy: encouraging courts to adopt a broader interpretation of existing anti-discrimination laws, supplemented by a more quantitative, data-driven approach to demonstrating causation. This Article now turns to this solution, including its attendant hurdles and suggestions for overcoming them.

### A. Broader Interpretation of the Statutes

The Civil Rights Act of 1866, which has been codified in relevant part at 42 U.S.C. § 1981, and Title II of the Civil Rights Act of 1964 prohibit racial discrimination in contracts and places of public accommodations, respectively.[80] They therefore hold promise for addressing discrimination

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79. Relatedly, Hanoch Dagan and Avihay Dorfman have recently proposed adopting a new tort: the tort of discrimination. *See* HANOCH DAGAN & AVIHAY DORFMAN, RELATIONAL JUSTICE: A THEORY OF PRIVATE LAW 177-99 (2024). Until such a new tort is adopted, and until it is interpreted to encompass discrimination in contractual performance, this Article calls on courts to apply existing laws to prohibit discrimination in contractual performance, as explained in the following Sections. Additionally, encouraging sellers to adopt effective bias-reduction strategies can balance fairness with flexibility in contractual enforcement. *See* Furth-Matzkin, *Discrimination in Contractual Performance*, *supra* note 13, at 1185-97.

80. *See* Civil Rights Act of 1866 § 1, 42 U.S.C. § 1981 (2018); Civil Rights Act of 1964 § 201(a), 42 U.S.C. § 2000a(a) (2018). Several statutes prohibit race discrimination in specific areas. The Fair Housing Act (the "F.H.A.") prohibits discrimination by housing providers and related entities, including landlords, real estate companies, municipalities, banks, lending institutions, and homeowners' insurance companies. 42 U.S.C. §§ 3604-3606 (2018). The Equal Credit Opportunity Act (the "E.C.O.A.") prohibits discrimination in any credit transaction, including by small businesses and various organizational structures. 15 U.S.C. § 1691 (2018). It bars discrimination "on the basis of race, color, religion, national origin, sex or marital status, or age." 15 U.S.C. § 1691(a)(1). Both the E.C.O.A. and the F.H.A. make it unlawful for lenders to discriminate in any residential real estate–related transaction. This Article focuses on 42 U.S.C. § 1981 and Title II of the Civil Rights Act of 1964, which are not limited to specific industries and can apply broadly to discrimination in consumer contracts, as I discuss in the following Sections.

in the implementation of sellers' contracts and policies.[81] However, judicial application of these statutes reveals significant practical hurdles. Specifically, courts have limited § 1981's reach to interactions related to contract *formation* (as opposed to *execution*) and have refused to apply Title II to businesses (such as retail establishments) that are not explicitly mentioned in its list of places of public accommodations.[82]

The limited number of cases directly addressing post-contractual discrimination reflects not an inherent incompatibility of the statutes with such claims but rather a lack of opportunities for courts to consider these applications. The dearth of litigation likely stems from various factors, including the challenges of identifying and proving discrimination in discretionary decision-making processes and the under-recognition of these harms as actionable under current interpretations of the law.

Indeed, recent lower court decisions signal a gradual broadening of the scope of § 1981, suggesting that courts could—and should—consider wider applications. While courts have historically focused on contract formation, contemporary rulings increasingly recognize that post-contractual interactions may also fall within § 1981's protections. This trend supports the belief that the statute's purpose and language encompass not only the right to make contracts but also the full enjoyment of their terms and benefits.

In line with this judicial trend and consistent with statutory language, this Article advocates a broader interpretation of these statutes. First, § 1981 should be interpreted to cover post-contract-formation discrimination. Second, § 1981 should be applied to prohibit racial inequities in the allocation of benefits or concessions (i.e., beyond what is outlined in sellers' policies or contracts), rather than merely prohibiting deviations from the contract or policy to the detriment of minority consumers. Third, Title II should be interpreted to encompass

81. *See, e.g.*, Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L.J. 1271, 1302 (2017) ("[E]ven though it is not specifically oriented to address discrimination by public accommodations, section 1981 is a useful tool in the civil rights litigator's toolbox to combat . . . discrimination . . . .").

82. *See* Suja A. Thomas, *The Customer Caste: Lawful Discrimination by Public Businesses*, 109 CALIF. L. REV. 141, 148 (2021) ("Title II, Section 1981, and Section 1982 currently fail to adequately protect people of color from common methods of discrimination and segregation in places of public accommodation. Most courts have declared that as long as people of color are admitted or served, places of public accommodation can otherwise freely discriminate against them.").

discrimination in all consumer markets and settings—including, for example, the retail and financial markets.

### 1. Interpreting § 1981 to Prohibit Post-Contract Discrimination

Section 1981 specifically provides that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."[83] This law, passed during Reconstruction, declares that U.S. citizens have certain inalienable rights, including the right to make contracts, own property, sue in court, and enjoy full federal protection. A 1991 amendment clarified that these protections extend to the "making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[84] However, despite what appears to be unequivocal language, courts interpreting § 1981 have focused primarily on discrimination during the formation of a contract, rather than on post-formation conduct.[85]

Indeed, in a landmark case involving claims of racial discrimination in the workplace, the Supreme Court ruled that § 1981 does not cover post-contractual conduct, such as discriminatory working conditions or termination.[86] This decision, known as the *Patterson* case, limited the scope

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83. 42 U.S.C. § 1981 (2018); *see, e.g.*, Brown v. Am. Honda Motor Co., 939 F.2d 946, 949 (11th Cir. 1991) (observing that the purpose of § 1981 "is to remove the impediment of discrimination from a minority citizen's ability to participate fully and equally in the marketplace" (citing Patterson v. McLean Credit Union, 491 U.S. 164, 176 (1989))).

84. Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1071-72 (codified at 42 U.S.C. § 1981). The statute has been interpreted to cover both public and private actions. *See* 42 U.S.C. § 1981(c) (2018) (stating that the right to contract is "protected against impairment by nongovernmental discrimination and impairment under color of State law"); *cf.* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968) (extending 42 U.S.C. § 1982 beyond state actions to include private discrimination).

85. *See, e.g.*, Deseriee A. Kennedy, *Consumer Discrimination: The Limitations of Federal Civil Rights Protection*, 66 MO. L. REV. 275, 306 (2001) (noting that "courts routinely reject the assertion that all shoppers must be treated equally while engaged in shopping activities regardless of race or . . . that Section 1981 applies to post transaction activities").

86. *See Patterson*, 491 U.S. at 176-77 (holding that § 1981 does not cover "problems that may arise [after contract formation] from the conditions of continuing employment . . . including breach of the terms of the contract or

of § 1981 to the formation and enforcement of specific contract terms, since the Court refused to apply it to subsequent employment conditions.[87]

As a result, lower courts have followed this narrow interpretation and generally required plaintiffs seeking redress under § 1981 to prove that discriminatory actions completely obstructed contract formation, thus dismissing cases of post-transaction discrimination in various consumer settings.[88] For example, in *Shugri v. Home Depot USA*, a court found that post-purchase surveillance and racial profiling did not violate any ongoing contractual duty,[89] and in *Youngblood v. Hy-Vee Food Stores, Inc.*, a court found that the contractual relationship was concluded once the purchase was complete and refused to apply § 1981.[90] These cases illustrate the

imposition of discriminatory working conditions," and that § 1981 "cannot be construed as a general proscription of racial discrimination in all aspects of contract relations").

87. Although the 1991 amendment to the Civil Rights Act legislatively overruled *Patterson*, as discussed here, courts continue to disagree over the exact scope of § 1981.

88. *See, e.g.*, Steven J. Burton, *Racial Discrimination in Contract Performance:* Patterson *and a State Law Alternative*, 25 HARV. C.R.-C.L. L. REV. 431, 433 (1990) ("After *Patterson*'s narrow interpretation of section 1981, no federal law prohibits racial discrimination in the performance stage of a great many contracts."); Claudine Columbres, *Targeting Retail Discrimination with Parens Patriae*, 36 COLUM. J.L. & SOC. PROBS. 209, 214 (2003) ("[B]ecause courts narrowly construe § 1981, victims of retail discrimination who are harassed by store employees . . . after they complete a purchase are unable to recover." (footnote omitted)); Anne-Marie G. Harris, Geraldine R. Henderson & Jerome D. Williams, *Courting Customers: Assessing Consumer Racial Profiling and Other Marketplace Discrimination*, 24 J. PUB. POL'Y & MKTG. 163, 164 (2005) (making a similar observation); Flowers v. TJX Cos., No. 91-CV-1339, 1994 WL 382515, at *6 (N.D.N.Y. July 15, 1994) (dismissing claims of discrimination in service because "plaintiffs completed their retail transactions . . . despite the alleged discrimination of defendants"); H.R. REP. NO. 102-40, pt. 2, at 36 (1991) (reporting that following the *Patterson* decision, more than 200 § 1981 race discrimination claims were dismissed).

89. No. 14-CV-3443, 2015 WL 1746637, at *1-2 (D. Minn. Apr. 16, 2015) (holding that in the context of "a contractual relationship based on a purchase in a retail setting, no contractual duty continues to exist after a purchase is completed").

90. 266 F.3d 851, 854 (8th Cir. 2001) (holding that once the customer-plaintiff "paid the cashier" and received the purchased product, "neither party owed the other any duty under the retail-sale contract").

courts' reluctance to extend § 1981's protections to post-contractual interactions.

This Article advocates broadening the application of § 1981 to encompass discrimination occurring after contract formation. Such an interpretation would align with the statute's original comprehensive wording,[91] as well as with the Supreme Court's 2008 decision in *CBOCS West, Inc. v. Humphries*.[92] In that case, Hedrick Humphries, an African-American assistant restaurant manager, alleged that he was fired for complaining about racial discrimination in his workplace.[93] The Court ruled that § 1981's protections against racial discrimination in making and enforcing contracts did cover retaliation for complaining about such discrimination.[94]

Several circuit and district court decisions also hint at a willingness to broaden the scope of § 1981 to post-formation discrimination. For instance, in *Hampton v. Dillard Department Stores, Inc.*, the Tenth Circuit determined that § 1981 protects against racial discrimination in the enjoyment of contractual benefits, such as coupon redemption.[95] In that case, the plaintiff, a Black woman in Kansas, sued Dillard's under § 1981 after a store's security guard closely monitored her and her niece, interrupted her while redeeming a coupon, and threatened to call the police.[96] Because the plaintiff could show that the guard's actions interfered with her contractual rights (i.e., the right to redeem the coupon), the court allowed the case to proceed, and the jury awarded her $56,000 in compensatory and

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91. For a similar observation, see, for example, CHRISTINE J. BACK, CONG. RSCH. SERV., IF12535, 42 U.S.C. § 1981'S CONTRACT CLAUSE: RACIAL EQUALITY IN CONTRACTUAL RELATIONSHIPS 1 (2023), https://crsreports.congress.gov/product/pdf/IF/IF12535 [https://perma.cc/9J65-LUSG] ("[Section] 1981's scope is not limited to racial discrimination in the formation of a contract. Racial discrimination in the performance or termination of a contract, among other things, may violate § 1981's contract clause.").

92. 553 U.S. 442 (2008).

93. *Id.* at 445.

94. *Id.* at 457.

95. 247 F.3d 1091, 1103-05 (10th Cir. 2001); *see also* Hampton v. Dillard Dep't Stores, Inc., 18 F. Supp. 2d 1256, 1263 (D. Kan. 1998) (holding that § 1981 "provides that once a contractual relationship exists, a benefit or privilege of that relationship may not be withheld based on the race of one party to the contract").

96. *Hampton*, 247 F.3d at 1099-1100.

$1,100,000 in punitive damages.[97] This case suggests that courts may be willing to recognize that post-contractual rights, such as returning goods, could fall under § 1981.

Other cases also suggest that such a shift may be coming. In *Spencer v. Bloomingdale's King of Prussia*, the court recognized that claims of racial profiling and discrimination could constitute violations under § 1981.[98] In that case, the court found that the store's actions vis-à-vis a Black customer, such as forcing him to pay a higher price and requiring him to return to the store at a later date to redeem a coupon, interfered with his business transactions and violated § 1981.[99] And recent district court cases from 2019 and 2020 may further signal a judicial shift toward acknowledging post-transaction discrimination under § 1981, especially when it impairs the enjoyment of established contractual benefits.

Similarly, in *Law v. Hilton Domestic Operating, Co.*,[100] a Virginia district court ruled that a hotel's repeated demands for identification from a Black guest could constitute a § 1981 violation, as it impaired the guest's enjoyment of the hotel's premises.[101] The court emphasized that § 1981 covers the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship, which include the use of common areas and amenities of the hotel. Thus, the repeated questioning and demands for identification, which were not imposed on white guests, met the criteria for a plausible claim under § 1981.[102]

More recently, in *Kong v. Chatham Village HOA*, a Tennessee district court allowed the plaintiff to proceed with her § 1981 claim against her

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97. *See Hampton*, 18 F. Supp. 2d at 1261.

98. No. 17-CV-3775, 2017 WL 6525797, at *3-4 (E.D. Pa. Dec. 21, 2017).

99. *Id*.

100. No. 20-CV-145, 2020 WL 7130785 (E.D. Va. Dec. 4, 2020). The plaintiff in that case, a Black male guest at a Hilton hotel in Richmond, was repeatedly asked by security for his identification and room key while waiting in the lobby, even though no white guests were asked for such proof. *Id*. at *1. Upon complaining, he was told that he "fit the homeless profile." *Id*. The plaintiff filed a complaint against Hilton in 2020, alleging a violation of § 1981. *Id*. The court found that these allegations sufficiently stated a claim under § 1981. *Id*. at *4-8.

101. *Id*. at *4-8.

102. For a decision reaching the same conclusion on a similar fact pattern, see *Biddle v. Park Place Hotel, LLC*, No. 08-CV-2235, 2008 WL 11417814 (W.D. Tenn. July 25, 2008).

condo association.[103] The plaintiff, an Asian homeowner, alleged that the defendant discriminatorily foreclosed on her condo due to her race, while non-Asian homeowners with higher outstanding fees did not face foreclosure.[104]

Support for a broader interpretation of § 1981's reach can also be found in a case involving banking transactions. In *Branscumb v. Horizon Bancorp, Inc.*, the plaintiff, an African American woman, claimed that her bank discriminated against her on the basis of race when it froze her bank account due to a purportedly suspicious deposit.[105] The United States District Court for the Western District of Michigan denied the defendant's motion to dismiss, concluding that the plaintiff had presented a prima facie case of race discrimination under § 1981.[106]

All of these cases hint at a shift in judicial thinking, potentially paving the way for expanding the scope of § 1981 to include racial discrimination in the enforcement of sellers' contracts or policies. They collectively suggest an evolving legal landscape where courts are increasingly willing to recognize and address racial discrimination in the performance of contracts, expanding the protective reach of § 1981 beyond the formation of contracts to include their enforcement and execution.

#### 2. Broadening the Interpretation of § 1981 to Address Disproportionate Privilege

Although § 1981 may emerge as a promising legal tool for addressing racial discrimination in the execution of sellers' form contracts or policies—especially in the context of access to services—its effectiveness in cases of "tailored forgiveness,"[107] where white customers benefit from concessions denied to Black customers, remains in question.

While denying contractual rights to minority consumers is unequivocally unlawful, the legality of disproportionately granting privileges or concessions to white customers remains less clear. Moreover, these two forms of discrimination may differ in prevalence and

103. No. 23-CV-02405, 2024 WL 1175707 (W.D. Tenn. Mar. 19, 2024).

104. *Id.* at *6-7.

105. No. 23-CV-53, 2023 WL 4676874 (W.D. Mich. July 21, 2023).

106. *Id.* at *2-6.

107. The term "tailored forgiveness" is borrowed from Jason Scott Johnston. *See* Johnston, *supra* note 29, at 868.

manifestation. As Ian Ayres has said, "Discriminatory gifts are more likely than discriminatory denials."[108]

Ayres draws a compelling analogy: "A police officer is an out-and-out bigot if she targets innocent blacks for speeding tickets. But an officer who is more likely to give a pass to white motorists who exceed the speed limit than to black ones is also discriminating, even if with little or no conscious awareness."[109] This analogy holds true in consumer transactions as well. A store clerk cannot lawfully deny Black customers their right to return unused items, provided they meet the store's return policy criteria. However, if that same clerk is more inclined to overlook the lack of a receipt for white customers than for Black customers, this too—this Article argues—should be recognized as discrimination.

Indeed, given the evidence of racial imbalances in contractual leniency, this Article advocates a broader interpretation of § 1981, one that guarantees equal entitlement to contractual concessions. A broader interpretation would encourage courts to assess both the contractual agreement on paper and its real-world application, focusing on practical rather than purely textual interpretations of contracts. As Samuel Becher and Tal Zarsky have argued, firms' "[r]eliance on provisions which have not been applied in the past might undermine basic notions of fairness."[110] To the extent that this selective reliance disproportionately targets minority consumers and firms do not apply these terms toward majority consumers, such discrimination should fall under the scope of § 1981.

This approach also aligns with the "reasonable expectations" doctrine, which has been adopted and applied in multiple cases involving consumer

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108. Ian Ayres, *When Whites Get a Free Pass*, N.Y. TIMES (Feb. 24, 2015), https://www.nytimes.com/2015/02/24/opinion/research-shows-white-privilege-is-real.html [https://perma.cc/TR5L-JK7E].

109. *Id*.

110. *See* Becher & Zarsky, *supra* note 34, at 109. For a more general suggestion that courts refuse to allow companies to strictly adhere to the terms of the written contract in cases when they deliberately and consistently deviated from the agreement in favor of consumers, see *id*. *See also* Lisa Bernstein & Hagay Volvovsky, *Not What you Wanted to Know: The Real Deal and the Paper Deal in Consumer Contracts: Comment on the Work of Florencia Marotta-Wurgler*, 12 JRSL. REV. LEGAL STUD. 128, 129 (2015) (suggesting that scholars, policymakers, and courts shift attention from "the terms of the paper deal" to "the terms of the real deal," the "way sellers actually behave in the shadow of both written contracts and the wide variety of other forces that may constrain or influence their behavior").

transactions, mostly in the insurance context.[111] According to this doctrine, "[i]n dealing with standardized [consumer] contracts courts have to determine what the weaker contracting party could legitimately expect by way of services according to the enterpriser's 'calling,' and to what extent the stronger party disappointed reasonable expectations based on the typical life situation."[112] Applied in this context, minority consumers could be assumed to legitimately and reasonably expect the same treatment as majority consumers who entered into the same transaction with the seller, even if the treatment majority consumers receive is not dictated by the literal terms of the contract.

This approach is also consistent with the "course of performance" doctrine, which refers to how the parties to a contract have conducted themselves during the performance of the contract. This doctrine is particularly relevant in interpreting and enforcing contracts, as it helps clarify the intentions and understandings of the parties involved.

The course of performance doctrine is explicitly addressed in the Uniform Commercial Code ("UCC"), which governs commercial transactions in the United States. According to UCC § 1-303, a course of performance is relevant to ascertaining the meaning of an agreement and may supplement or qualify the terms of the agreement.

The doctrine assumes that if the parties have consistently acted in a particular way over time, this conduct reflects their mutual understanding of the contract terms.

Repeated and accepted performance can also indicate a mutual agreement to modify the original terms of the contract. For instance, if one party regularly accepts late payments without objection, it might be construed that the original deadline has been modified by mutual consent.

The course of performance doctrine is instrumental in resolving disputes where the written contract is not entirely clear or does not cover specific situations that have arisen during the performance of the contract. By examining the parties' actions and responses, courts aim to enforce the contract in a manner that aligns with the parties' established practices and mutual understanding.

Applied in the context of discriminatory contract performance, courts could infer that a seller's conduct vis-à-vis the majority of consumers reflects the seller's understanding of its obligations toward *all* of its customers, regardless of race, gender, and other immutable characteristics.

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111. Becher & Zarsky, *supra* note 34, at 110.

112. *See, e.g.*, Gray v. Zurich Ins., 419 P.2d 168, 172 (Cal. 1966) (quoting Friedrich Kessler, *Contracts of Adhesion*, 43 COLUM. L. REV. 629, 637 (1943)).

Furthermore, as previously mentioned, a firm's behavior towards most customers can legitimately shape other customers' expectations.[113]

If the "real deal" includes "tailored forgiveness" for some consumers under certain conditions, such concessions should be free from racial bias and not systematically favor some racial groups over others.

This approach would support the statute's broader objective to eliminate racial discrimination in contractual engagements. It would also reflect the evolving nature of commercial transactions and the need for legal principles to adapt, effectively addressing subtler forms of discrimination. A broader interpretation of § 1981 that mandates unbiased "tailored forgiveness" would be a significant step towards achieving these goals.

### 3. Expanding Public Accommodation Laws

This Article has thus far explored the role that § 1981 could play in curtailing discrimination in the implementation of sellers' form contracts or policies. Since such discrimination typically occurs in public places (e.g., retail stores), Title II of the 1964 Civil Rights Act ("Title II"), which prohibits race discrimination in places of public accommodations, also emerges as a potentially viable tool.[114]

But this statute contains a list of "public places" (e.g., restaurants, theaters, and hotels), which courts have so far interpreted as exhaustive.[115] Indeed, courts have generally refused to include other establishments, such as retail stores and food markets, under Title II's scope.[116] This judicial hesitance has spurred commentators to advocate for broadening Title II's interpretation.[117]

Indeed, in some contexts, there have been legislative efforts to fill this gap by adopting anti-discrimination laws in specific areas not covered by

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113. For a similar yet more general observation regarding the potential role of the "course of performance" doctrine in courts' interpretation of firms' obligations, see Becher & Zarsky, *supra* note 34, at 112.

114. *See* 42 U.S.C. § 2000a (2018).

115. *See* Joseph W. Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1288–89 (1995).

116. *See, e.g.*, Newman v. Piggie Park Enterprises, Inc., 377 F.2d 433, 436 (4th Cir. 1967) (reasoning that "retail stores, food markets, and the like were excluded from [Title II of the 1964 Civil Rights Act] for the policy reason [that] there was little, if any, discrimination in the operation of them"), *aff'd on other grounds* 390 U.S. 400 (1968) (affirming availability of attorney's fees).

117. *See* Singer, *supra* note 115, at 1288-89.

Title II. For example, the "Customer Non-Discrimination Act," proposed in 2019 by the House of Representatives, sought to outlaw discrimination in retail settings, but it stalled in Congress.[118] The Fair Access to Financial Services Act, introduced in 2022, aimed to prohibit discrimination in financial services, but it has not become law either.[119]

Meanwhile, the state-level response to this issue presents a fragmented picture. For example, in the retail context, forty-four states have laws explicitly prohibiting racial discrimination in retail spaces. Still, six states—Alabama, Florida, Georgia, Mississippi, North Carolina, and Texas—lack such explicit protections, with Mississippi allowing retail stores to refuse service at their discretion.[120] In the financial markets context, some states recently began enacting (or are considering enacting) legislation requiring financial institutions to provide customers with "fair access" to financial services. Tennessee and Florida, for example, have enacted "fair access" laws that came into effect on July 1, 2024, and which apply to national and state banks and insurers.[121] At least eight other states—Arizona, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, and South Dakota—are also considering fair access bills, some of which would apply to payment processors, payment networks, credit card companies, and networks in addition to banks and insurers.[122]

These inconsistencies between states highlight a significant challenge: ensuring uniform and comprehensive civil rights protections across the United States. Furthermore, even if *all* states adopted these laws, it remains

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118. *See* H.R. 2687, 116th Cong. (2019).

119. *See* Fair Access to Financial Services Act of 2022, S. 5023, 117th Cong. (2022). This bill was introduced on July 26, 2022, in a previous session of Congress, but it did not receive a vote.

120. *See* Singer, *supra* note 115, at 1290.

121. *See* H.B. 2100, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023) (codification in Tennessee); H.B. 3, 2023 Leg., Reg. Sess. (Fla.) (codification in Florida); *see also* HB 3 Implementation for Financial Services Providers, FLA. OFF. OF FIN. REGUL., https://www.flofr.gov/divisions-offices/division-of-financial-institutions/non-deposit-trust-companies/hb3-implementation-for-financial-services-providers [https://perma.cc/8XTY-WLNL] (describing H.B. 3 implementation for financial services providers).

122. *See* S.B. 1167, 56th Leg., 2d Reg. Sess. (Ariz. 2024); H.B. 1205, 2023-2024 Leg., Reg. Sess. (Ga. 2024); H. 669, 67th Leg., 1st Reg. Sess. (Idaho 2023); S.B. 28, 123d Gen. Assemb., 2d Reg. Sess. (Ind. 2024); H.F. 2409, 90th Gen. Assemb., Reg. Sess. (Iowa 2024); H.B. 452, 2024 Leg., Reg. Sess. (Ky. 2024); H.B. 914, 2024 Leg., Reg. Sess. (La.); H.B. 1247, 99th Leg., Reg. Sess. (S.D. 2024).

unclear whether courts will interpret them as prohibiting discrimination in contractual performance.

B. Causation

Beyond advocating for a wider interpretation of laws to address discrimination in contract enforcement, this Article urges courts to employ a more empirical method in establishing causation in discrimination lawsuits. First, it suggests that courts should move away from the traditional intent-based requirement in favor of an evidence-based "but-for" causation standard grounded in scientific analysis. Second, it suggests that courts should be more receptive to statistical evidence, such as regression analyses, in demonstrating causation. Third, because the feasibility of such data-driven methods hinges on the availability of relevant data, this Article recommends that regulators require sellers to systematically gather and disclose data on policy deviations, including information on consumer demographics. This approach would modernize legal strategies against discrimination and enhance transparency and accountability in sellers' interactions with consumers.

1. Moving Beyond Intent

To establish a racial discrimination case under § 1981, plaintiffs must demonstrate causation, proving that their race *caused* the disparate treatment they received.[123] Courts have traditionally interpreted this causation requirement as demanding proof of intent to discriminate.[124] This

123. *See, e.g.*, Baker v. McDonald's Corp., 686 F. Supp. 1474, 1481 (S.D. Fla. 1987); Mian v. Donaldson, Lufkin & Jenrette Sec. Corp., 7 F.3d 1085, 1481 (2d Cir. 1993) (emphasizing that an essential element of a § 1981 cause of action is that the alleged discrimination occurred because of the individual's race); Thomas v. St. Luke's Health Sys., Inc., 869 F. Supp. 1413, 1427 (N.D. Iowa 1994) (observing that the Court held that "§ 1981 is limited to claims involving "a refusal to enter into an employment contract on the basis of race").

124. *See, e.g.*, Kate Sablosky Elengold, *Consumer Remedies for Civil Rights*, 99 B. U. L. REV. 587, 595 (2019). For illustrative and relatively recent cases, see *Webster v. CarMax*, No. 13-CV-999, 2014 WL 2003021, at *4 (N.D. Ga. May 14, 2014), which held that "[i]n order for a plaintiff to recover under § 1981, he must demonstrate that . . . he suffered intentional race discrimination which affected him in the making and performance of a contract"; *Spencer v. Bloomingdale's King of Prussia*, No. 17-CV-3775, 2017 WL 6525797, at *3 (E.D.

Article proposes that courts should move away from the intent requirement, at least in the context of discrimination in contractual performance when plaintiffs can prove disparate treatment. For example, disparate treatment could be minority consumers receiving different treatment compared to similarly situated majority consumers who entered the same contract with the same seller.

Admittedly, abandoning the intent requirement might be desirable in other types of discrimination cases, especially given the growing understanding that discrimination often results from implicit biases or prejudice rather than from explicit animus or clear intention to discriminate.[125] However, it is particularly important in the context of discrimination in sellers' performance of their agreements (or policies). In the context of discrimination in contractual performance, requiring plaintiffs to prove intent to discriminate becomes even more burdensome and problematic for three main reasons.

First, discrimination in contractual performance of sellers' form contracts or policies often results from unconscious biases, implicit prejudices, or assumptions about correlations between consumers' immutable characteristics and their expectations, behavior, or value to the seller, rather than explicit animus or conscious intent to discriminate. Research indicates that even well-intentioned decision makers may possess unconscious or implicit biases regarding certain groups. In the context of contractual performance, sellers' agents might be driven by implicit

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Pa. Dec. 21, 2017), which similarly required intent to discriminate; and *Shugri v. Home Depot USA*, No. 14-CV-3443, 2015 WL 1746637, at *2 (D. Minn. Apr. 16, 2015), which required "race-based animus."

125. Indeed, research indicates that even the most well-intentioned decision makers may possess unconscious or implicit biases against certain groups. *See, e.g.*, MAHZARIN BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE xii–xv (2016) (reviewing the evidence that even the most well-intentioned decision makers might harbor unconscious or implicit biases against certain groups); *see also* Nicholas Kristof, *Is Everyone a Little Bit Racist?*, N.Y. TIMES (Aug. 27, 2014), https://www.nytimes.com/2014/08/28/opinion/nicholas-kristof-is-everyone-a-little-bit-racist.html [https://perma.cc/EP2K-L5MW] ("Research in the last couple of decades suggests that the problem is not so much overt racists. Rather, the larger problem is a broad swath of people who consider themselves enlightened, who intellectually believe in racial equality, who deplore discrimination, yet who harbor unconscious attitudes that result in discriminatory policies and behavior.").

assumptions about minority consumers' socio-economic status or buying power.

In fact, research suggests that people often associate race with class,[126] which is closely intertwined with what it means to be "Black" or "white."[127] If sellers' agents typically believe that white customers are wealthier than Black customers and thus more valuable, they might treat white customers more favorably. There is also strong evidence that store clerks tend to be generally more suspicious of Black customers, particularly Black men, and that they unfairly target Black customers with surveillance and calls to the police.[128]

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126. *See, e.g.*, Susan T. Fiske, Amy J. C. Cuddy, Peter Glick & Jun Xu, *A Model of (Often Mixed) Stereotype Content: Competence and Warmth Respectively Follow from Perceived Status and Competition*, 82 J. PERSONALITY & SOC. PSYCH. 878, 885-89 (2002) (reporting on a study of how a variety of social groups clustered together, and finding that white and middle-class people were closely clustered, as were Black people and blue-collar workers); Andrew M. Penner & Aliya Saperstein, *Engendering Racial Perceptions: An Intersectional Analysis of How Social Status Shapes Race*, 27 GENDER & SOC'Y 319, 320, 326, 331–32 (2013) (finding that people who became unemployed, incarcerated, or impoverished in a given wave of a longitudinal survey were more likely to be classified by the interviewer as Black and less likely to be perceived as white regardless of how they had been classified in previous waves of the same survey).

127. *See, e.g.*, Jonathan B. Freeman et al., *Looking the Part: Social Status Cues Shape Race Perception*, PLOS ONE 1, 2, 7 (2011) (finding that social and contextual factors guide the perception of race); Zachary W. Brewster, *Racialized Customer Service in Restaurants: A Quantitative Assessment of the Statistical Discrimination Explanatory Framework*, 82 SOCIO. INQUIRY 3, 5 (2012); Zachary W. Brewster, Jonathan R. Brauer & Michael Lynn, *Economic Motivations and Moral Controls Regulating Discrimination Against Black and Hispanic Diners*, 56 SOCIO. Q. 506, 517 (2015) (finding significant associations between servers' beliefs that Blacks are low-value customers and their self-reported propensity to racially profile Black consumers by providing them lower quality service).

128. *See, e.g.*, Shaun L. Gabbidon & George E. Higgins, *Public Opinion on the Use of Consumer Racial Profiling to Identify Shoplifters: An Exploratory Study*, 36 CRIM. JUST. REV. 201 (2011); John Rappaport, *Criminal Justice, Inc.*, 118 COLUM. L. REV. 2251, 2290 (2018); George E. Schreer, Saundra Smith & Kirsten Thomas, *"Shopping While Black": Examining Racial Discrimination in a Retail Setting*, 39 J. APPLIED SOC. PSYCH. 1432, 1432-44 (2009). This general suspicion of Black customers has been documented in a laboratory setting. In a 2000 study, survey participants—all undergraduate marketing students in Minnesota—were asked to imagine that they were the "managers of tomorrow's retail

This could also explain differential treatment in contractual performance, such as refusing to accept returns. Namely, retail clerks might perceive minority customers as less likely to complain, influencing their decisions on concessions. Similarly, mortgage lenders may assume that residents of affluent, predominantly white neighborhoods are more likely to repay their debts, waiving foreclosure rights more often for these borrowers.

Second, discriminatory contract performance cases and disparities in treatment typically result from the cumulative decisions of numerous agents (i.e., sellers' employees or representatives) interacting with various consumers, rather than from a single decision maker's discriminatory actions. It is unclear what the intent requirement would mean in these circumstances. If several agents showed intent to discriminate but others did so unconsciously, would that suffice to meet the intent requirement?

The interaction of the doctrine of *respondeat superior* with the intent requirement in discrimination claims also complicates matters. Under *respondeat superior*, employers can be held responsible for the actions of their employees that occur within the scope of employment.[129] However, when an employee's use of discretion, decisions that deviate from company policy, or mistakes, lead to discriminatory behavior, it becomes challenging to attribute intentionality to the corporate employer.[130] In such scenarios, if

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establishments." When asked about the "typical shoplifter," most participants described a young Black male, even though law enforcement statistics in the area showed that the typical shoplifter was a white female. *See* Jo Ann L. Asquith & Dennis N. Bristow, *To Catch a Thief: A Pedagogical Study of Retail Shoplifting*, 75 J. EDUC. FOR BUS. 271, 271-73 (2000).

129. RESTATEMENT (THIRD) OF AGENCY § 2.04 (AM. L. INST. 2006); *see also* Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 563 (1987) (applying economic analysis to assess the rationale and limits of vicarious liability, particularly the scope of employment doctrine); Rebecca H. White, *Vicarious and Personal Liability for Employment Discrimination*, 30 GA. L. REV. 509, 509-16 (1996) (examining the interplay between employer vicarious liability and individual liability in employment discrimination cases). For a case demonstrating this doctrine, see, for example, *Halpert v. Manhattan Apartments, Inc.*, 580 F.3d 86, 88 (2d Cir. 2009) (holding that a company may be held liable if an independent contractor improperly discriminates against applicants on the basis of age, when authorized to make decisions on behalf of the company).

130. That is because, under *respondeat superior*, an employer is liable only for employee actions within the scope of employment. In the context of

the discriminatory conduct originates from a personal judgment or error rather than a clear policy directive, it may be more difficult for plaintiffs to demonstrate that the employer *intentionally* facilitated that misconduct.[131] This uncertainty can significantly impact the outcomes of discrimination cases, as establishing the employer's intent is often a critical component of the plaintiff's burden of proof.[132]

Third, sellers might argue that their policies are uniform, granting employees discretion to deviate based on legitimate business interests. This could lead to a disparate impact claim but not to intentional disparate treatment prohibited under § 1981. For instance, stores might claim that discretionary deviations from return policies aim to satisfy disappointed customers. Similarly, airlines might allow discretion for employees to waive fees for missed flights to distinguish between those who missed flights through no fault of their own and those who were at fault. As such, even if plaintiffs can show that these policies result in minority consumers receiving, on average, less lenient treatment, this "disparate impact" is not sufficient to establish a § 1981 discrimination claim.

As this discussion illustrates, the intent requirement complicates race discrimination cases, particularly in contractual performance. Disparities in these cases are typically the result of the aggregate impact of multiple decision makers making inferences (whether "rational" or biased). Further, sellers might justify discretionary policies that are uniform at face value yet result in a disparate impact. A broader interpretation of § 1981 is thus needed to address these subtler forms of discrimination effectively.

In cases concerning discrimination in contractual performance,[133] this Article advocates for replacing the intent prerequisite in § 1981 with a "disparate treatment" standard. Given the potential for discrimination by multiple decision makers and the possibility of sellers masking

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employment discrimination, see, for example, *Staub v. Proctor Hospital*, 562 U.S. 411 (2011) (discussing challenges of attributing discriminatory intent to employers when bias stems from individual employee decisions rather than official policy).

131. *See* White, *supra* note 129, at 528-38.

132. *See* Gen. Bldg. Contractors Ass'n v Pennsylvania, 458 U.S. 375, 390-91 (1982) (applying the requirement of intentional discrimination); *see generally* Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279 (1997) (discussing the Court's approach to proving intentional discrimination).

133. Discarding the intent requirement might be desirable in other contexts, but this is beyond the scope of the analysis in this Article.

discriminatory practices,[134] a redefined causation test focusing on racial disparities in treatment rather than intent offers a more effective measure of accountability.[135]

#### 2. The *Comcast* Supreme Court Ruling and the Intent Requirement

The question regarding the proper interpretation of the causation standard in § 1981 discrimination claims recently reached the Supreme Court in *Comcast Corp. v. National Association of African American-Owned Media*.[136] In that case, the National Association of African American-Owned Media and its owner, Byron Allen, sued Comcast Corporation, alleging that Comcast discriminated against them based on race by refusing to carry their television channels.[137] The plaintiffs argued that this decision violated § 1981, which guarantees that all persons within the United States have the same right to make and enforce contracts as white citizens.[138] The central legal question was whether a plaintiff must prove that race was the "but-for" cause of the injury in a § 1981 claim, or if it is sufficient to show that race was a motivating factor.[139]

On March 23, 2020, in a unanimous opinion authored by Justice Neil Gorsuch, the Supreme Court ruled that a plaintiff must prove that racial

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134. To address these complexities, some jurisdictions have implemented a burden-shifting framework whereby once a plaintiff establishes a *prima facie* case of racial discrimination, the defendant must provide a legitimate, non-discriminatory reason for its actions. As the courts have determined, however, sellers can then shift the burden back to the plaintiff by asserting that deviations from standard contracts were motivated by legitimate business interests, such as accommodating good-faith buyers. *See* Dirden v. Dep't of Hous. & Urb. Dev., 86 F.3d 112, 114 (8th Cir. 1996); Mian v. Donaldson, Lufkin & Jenrette Sec. Corp., 7 F.3d 1085, 1087 (2d Cir.1993).

135. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 521 (2015) (recognizing that "unconscious prejudices and disguised animus [might] escape easy classification as disparate treatment").

136. Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 589 U.S. 327 (2020). The case concerned a media company's claim that Comcast, one of the nation's largest cable television companies, refused to carry its channels because it was "100% African-American-owned . . . ." *Id.* at 330.

137. *Id.* at 329.

138. *Id.* at 330.

139. *Id.* at 332.

discrimination was the "but-for" cause of the contractual harm to prevail under § 1981, not just that race was a motivating factor.[140]

Several scholars and commentators have critiqued the *Comcast* ruling, arguing that it imposes a more stringent burden of proof on plaintiffs in racial discrimination cases under § 1981.[141] This debate, while important, is beyond the scope of this Article. Nonetheless, this Article suggests that even if the "but-for" causation test remains the standard in § 1981 cases, it should be reinterpreted to require only evidence of differential treatment based on race, not direct evidence of *intent* to discriminate. This proposed interpretation would better align with the evolving understanding of discrimination and enhance the legal system's ability to address racially disparate treatment. It also aligns well with the textual meaning of the "but-for" test and with the court's reasoning in *Comcast.*

Importantly, the *Comcast* court did not equate the "but-for" test with an intent requirement. Rather, the Supreme Court made clear that the central inquiry in a § 1981 case (and similarly in other cases where the "but-for" principle is applicable) should revolve around a straightforward and factual question: Would the outcome have been different if not for the plaintiff's race? This approach directs attention to a counterfactual scenario, as articulated by the Court: "What would have happened if the plaintiff had been white?"[142]

This Article suggests that the Supreme Court's framing in *Comcast* invites a reinterpretation of "but-for" causation that transcends explicit animus or intent to discriminate.[143] In other words, the "but-for" principle

140. *Id*. at 341.

141. *See, e.g.*, Alexandra D. Lahav, *Why Justice Gorsuch Was Wrong About Causation in* Comcast, 23 GREEN BAG 2D 205 (2020); Hillel J. Bavli, *Causation in Civil Rights Legislation*, 73 ALA. L. REV. 159, 161 (2021) ("[T]he but-for test is overly restrictive. In the context of complex and multifaceted employment decisions, the stringent requirements of but-for causation frequently end claims of disparate treatment before they begin.").

142. *Comcast Corp.*, 589 U.S. at 333 ("The guarantee that each person is entitled to the 'same right . . . as is enjoyed by white citizens' directs our attention to the counterfactual—what would have happened if the plaintiff had been white?" (alteration in original)).

143. For a similar observation in the general context of race discrimination, see, for example, Eyer, *supra* note 1, at 1626-27; Deborah A. Widiss, *Proving Discrimination by the Text*, 106 MINN. L. REV. 353, 391 (2021); Noelle N. Wyman, *Because of* Bostock, 119 MICH. L. REV. ONLINE 61, 63-64 (2021) (suggesting that the traditional causation model should be abandoned or substantially revised).

should be viewed as a true disparate-treatment principle. It does not focus on what the decision maker thought or intended, but rather on whether the decision would have differed "but for" the plaintiff's protected class. As Kate Eyer argues, this principle "offers an opportunity to center anti-discrimination law around a true disparate treatment principle, rather than one focused on discriminatory intent."[144]

Importantly, adopting a "but-for" standard should not mean plaintiffs must prove that race was the sole cause of the adverse treatment they suffered. It is unreasonable to impose an often insurmountable burden on plaintiffs to disprove the influence of other causal factors or to demonstrate that race was the primary reason behind the discriminatory contract performance.[145] Discriminatory decision-making typically arises from multiple factors, complicating the endeavor to show that race was the only cause. Even instances of intentional discrimination within contract performance can involve several underlying reasons.

A review of various cases reveals that U.S. circuit and district courts frequently interpret the defining language of most anti-discrimination statutes to require a demonstration that the outcome would have been different "but for" the plaintiff's protected class status. For example, in *Abdallah v. Mesa Air Group*, the plaintiffs contended that their flight was canceled due to their race and national origin.[146] The defendants argued that, since all passengers were affected by the cancellation, there was no disparate treatment.[147] Nonetheless, the Fifth Circuit accepted the plaintiffs' position, holding that the "simple test" for determining whether disparate treatment has occurred is "whether the evidence shows treatment of a

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144. Eyer, *supra* note 1, at 1642.

145. *See, e.g.,* Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181, 289 (2023) (Gorsuch, J., concurring) ("A defendant's actions need not be the primary or proximate cause of the plaintiff's injury to qualify. Nor may a defendant avoid liability 'just by citing some other factor that contributed to' the plaintiff's loss."); Bostock v. Clayton County, 590 U.S. 644, 655-58 (2020) (making clear that protected class status under the "but for" standard need not be the sole, or even primary cause).

146. Abdallah v. Mesa Air Grp., Inc., 83 F.4th 1006, 1014 (5th Cir. 2023).

147. *Id.* at 1014 ("The contention is that because all passengers experienced the same flight cancellation, no disparate treatment occurred, so plaintiffs' § 1981 claim must fail.").

person in a manner which but-for that person's [protected characteristic] would be different."[148]

The U.S. District Court of Columbia has similarly addressed the "but-for" causation standard in *Adetoro v. King Abdullah Academy*,[149] where—applying the *Comcast* test, it determined that plaintiffs failed to show that "but for not being of 'Arabic Middle Eastern descent'—they would have remained employed at the Academy."[150]

Yet, some district and circuit courts continue to confuse the "but for" test with an intent requirement. For example, in *Sharifi Takieh v. Banner Health*,[151] the U.S. District Court for the District of Arizona has held that, "[t]o plausibly allege a § 1981 claim, a plaintiff 'must show intentional discrimination on account of race'" in addition to proving that "but for race, it would not have suffered the loss of a legally protected right,"[152] citing the Supreme Court in *Comcast*. Similarly, in *Johnson v. Schulte Hospital Group, Inc.*,[153] the plaintiff, a frequent Marriott guest, claimed racial discrimination and retaliation after his stay at the Sheraton Hotel, alleging inhospitable treatment, proof-of-membership demands, dirty bedding, and police involvement after he complained. The district court ruled in favor of the Hotel, granting summary judgment, while finding its actions justified by COVID-19 policies and unrelated to discrimination or retaliation. The Eighth Circuit affirmed the district court's decision. While the court cited *Comcast* and explained that, "[t]o prevail on a § 1981 claim, 'a plaintiff must initially plead and ultimately prove that, but for race, it would not have suffered the loss of a legally protected right,'"[154] it went on to explain that, "[t]o establish a prima facia case of racial discrimination under § 1981, a plaintiff must show . . . discriminatory intent on the part of defendant,"[155] and concluded that the plaintiff "cannot show discriminatory intent on the part of the

148. *Id.* at 428-29 The court also dismissed the airline's argument that § 1981 does not apply when a discretionary term of the contract is invoked, affirming that if discrimination is a "but-for" reason for denying or restricting a discretionary contract benefit, § 1981 is applicable. *Id.* at 430.

149. 585 F. Supp. 3d 78 (D.D.C. 2020).

150. *Id.* at 83.

151. Sharifi Takieh v. Banner Health, 515 F. Supp. 3d 1026 (D. Ariz. 2021).

152. *Id.* at 1034.

153. 66 F.4th 1110 (8th Cir. 2023).

154. *Id.* at 1118.

155. *Id.*

hotel."[156] Indeed, even when courts rule in favor of plaintiffs in § 1981 cases, they often use the "but-for" test and "discriminatory intent," either interchangeably or as cumulative requirements.[157]

This Article suggests that the "but-for" test should be interpreted as obviating the prior intent requirement. By centering anti-discrimination law on a true disparate-treatment principle, we can move towards a more equitable application of § 1981, better protecting the rights of minority consumers in commercial transactions.

### 3. Streamlining Evidence Collection: Disclosure Mandates

Even with a broad interpretation of the "but for" standard, satisfying its evidentiary requirement remains a challenge. For plaintiffs to succeed in cases of discriminatory contractual performance, access to relevant data is crucial. Yet, direct evidence showing that the customer's race influenced a certain decision or outcome is often unavailable. The evidence necessary to support these claims is usually controlled by the seller-defendant or their agents, not the consumer-plaintiff.[158]

In *Madison v. Courtney*,[159] for example, a Texas district court allowed a Black passenger to seek redress under § 1981 after he was denied services available to white passengers.[160] The passenger, who was upgraded to first class due to his frequent-flyer status, alleged racial discrimination, claiming the flight attendant did not offer him coat service (as she did all other first-class passengers, who were white) and spat in his drink. The court

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156. *Id.*

157. *See, e.g.*, Blash v. City of Hawkinsville, 856 Fed. App'x 259, 268 (11th Cir. 2021) ("To succeed on his § 1981 claim against Cape in this context, Blash must prove that Cape purposefully discriminated against him, and that Cape would not have terminated his employment if he had been white."); Clemente v. Allstate Ins. Co., 647 F. Supp. 3d 356, 368, 371, 374 (W.D. Pa. 2022) ("The elements of a section 1981 claim are: (1) that the plaintiff is a member of a protected class; (2) intent to discriminate based on race; (3) discrimination that concerns the right "to make and enforce contracts"; and (4) but-for causation.").

158. *See, e.g.*, Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law,* 94 GEO. L.J. 489, 515-16 (2006) ("[T]he fact in question . . . occurs entirely inside the decisionmaker's head."); Dare v. Wal-Mart Stores, Inc., 267 F. Supp. 2d 987, 991 (D. Minn. 2003).

159. 365 F. Supp. 3d 768 (N.D. Tex. 2019).

160. *Id.* at 774.

determined that this conduct fell within the ambit of § 1981 since it impaired his ability to fully enjoy the contractual benefits of a first-class ticket.[161] The jury, however, ultimately found in favor of the defendant, concluding that the plaintiff did not prove intentional discrimination or interference with his contractual rights.[162]

One practical solution, recently proposed by Manisha Padi,[163] would require sellers to systematically collect and disclose data about their contract terms and instances where these terms were deviated from or where discretion was used.[164]

In the age of digital commerce, sellers use automated systems that automatically collect vast amounts of data, so it might be possible to piggyback on that collection.[165] Policymakers could require sellers to share the data with the public, with regulatory bodies, or both, thereby facilitating plaintiffs' ability to uncover patterns and practices of discrimination.

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161. *Id*. at 772.

162. Verdict Form at 1, Madison v. Courtney, No. 18-CV-671 (N.D. Tex. Jan. 30, 2019), 2019 WL 633552.

163. Padi, *supra* note 11, at 872.

164. For a similar suggestion to oblige employers to disclose information to employees to facilitate workplace discrimination and harassment lawsuits, see Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 355-57 (2011); and Lisa J. Bernt, *Workplace Transparency Beyond Disclosure: What's Blocking the View?*, 105 MARQ. L. REV. 73, 76-77 (2021).

165. *See* Bernt, *supra* note 164, at 74; Yonathan A. Arbel & Roy Shapira, *Theory of the Nudnik: The Future of Consumer Activism and What We Can Do to Stop It*, 73 VAND. L. REV. 929, 962 (2020) (discussing how consumer data is increasingly shared among multiple sellers, typically by data brokers, who collect and sell information about consumers' demographics, locations, and financial and social status to sellers); Amy J. Schmitz, *Secret Consumer Scores and Segmentations: Separating Consumer "Haves" from "Have-Nots"*, 2014 MICH. ST. L. REV. 1411, 1419-33; Rory Van Loo, *Rise of the Digital Regulator*, 66 DUKE L.J. 1267, 1283 (2017) ("[C]ompanies purchase . . . information to estimate a consumer's overall net worth."); Natasha Singer, *Secret E-Scores Chart Consumers' Buying Power*, N.Y. TIMES (Aug. 18, 2012), https://www.nytimes.com/2012/08/19/business/electronic-scores-rank-consumers-by-potential-value.html [https://perma.cc/A8BA-8SWB]; Nate Cullerton, *Behavioral Credit Scoring*, 101 GEO. L.J. 807, 816 (2013) (describing how lenders increasingly adopt ratings technologies currently used to predict consumers' social influence and online reputation).

Note that regulatory mandates for data disclosure are not unprecedented.[166] Various industries already require disclosures about product ingredients, credit terms, and warranties.[167] This proposed mandate, however, would focus on how contracts and policies are implemented in practice.

Admittedly, this proposal has several hurdles that should be seriously considered and addressed. First, implementing these disclosure mandates would impose additional costs on sellers, potentially affecting consumer prices.[168] In many markets, sellers already collect relevant information for business purposes,[169] so the additional cost would primarily arise from distributing this data, likely a minimal increase.[170]

Second, to the extent that sellers are also required to collect and share data about consumers (including their demographics), there is a risk that consumer data could be used for purposes beyond the scope of the contract or that such information might inadvertently highlight consumers' immutable characteristics, potentially worsening discrimination. However,

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166. Frederick Schauer, *Transparency in Three Dimensions*, 2011 U. ILL. L. REV. 1339, 1340 (observing that "transparency, it appears these days, is everywhere"); Arthur G. Fraas & Randall Lutter, *How Effective Are Federally Mandated Information Disclosures?*, 7 J. BENEFIT-COST ANALYSIS 326, 326 (2016) ("Mandates to disclose information have become a standard government response to problems of asymmetric information in most industrialized countries.").

167. OMRI BEN-SHAHAR & CARL SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 3 (2014) (noting that mandated disclosure may be the "most common" regulatory technique in U.S. law, while noting its limitations).

168. The observation that disclosure mandates might translate into higher prices for consumers has been raised by several scholars. *See, e.g.*, OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS 42 (2012) (noting that the "costs [to sellers] of collecting, compiling, and distributing the information . . . will be borne by consumers as sellers increase prices to cover the added cost of the disclosure regulation").

169. This model of tracking and reporting data can be adapted to different industries to minimize costs. For example, in retail, tracking policy deviations may not add significant burden as data collection is already standard practice. In regulated sectors like mortgage lending, existing data-collection infrastructure could fulfill new reporting requirements with minimal additional expense.

170. For a similar observation in a different context ("product-use" disclosure), see, for example, BAR-GILL, *supra* note 168, at 42.

it is important to note that sellers often already possess this data, so that risk already exists.[171]

Policymakers must carefully balance the benefits of collecting data to enhance transparency and support anti-discrimination enforcement against the potential costs and risks associated with such disclosure mandates. The collection of detailed demographic data can aid in identifying and addressing discriminatory practices, thus promoting fairness and accountability. This sort of data management also poses challenges, however, including privacy and surveillance concerns, administrative burdens, and the risk of misuse or misinterpretation of the data. Therefore, any policy mandating data disclosure should be designed with robust safeguards to protect individuals' privacy and to ensure that the data is used appropriately and effectively.

## Conclusion

This Article illuminates a previously overlooked form of marketplace discrimination: the discriminatory performance of sellers' form contracts. Evidence drawn from various industries reveals that minority consumers often receive less favorable treatment compared to majority consumers when it comes to the enforcement of sellers' form contracts or policies. Drawing on this evidence, this Article advocates for prohibiting discrimination in the performance of consumer contracts or policies. Ideally, this would involve enacting specific legislation targeting this issue. However, the Article posits that existing laws, particularly § 1981, could be interpreted to address discriminatory practices in contractual performance. The Article acknowledges the challenges of this approach and offers strategies to overcome these obstacles. This approach would ideally also encourage sellers to implement bias-reduction strategies that have been proven effective in other domains. If successfully adopted, this proposed solution could significantly diminish discrimination in contractual performance. By pursuing this approach, policymakers and legal

171. *See* Jason I. Pallant et al., *When and How Consumers Are Willing to Exchange Data with Retailers: An Exploratory Segmentation*, 64 J. RETAILING & CONSUMER SERVS. 1, 1 (2022) ("It is common for retailers to acquire, store, and use customer data to generate insights and produce market intelligence"); Kirk Plangger & Matteo Montecchi, *Thinking Beyond Privacy Calculus: Investigating Reactions to Customer Surveillance*, 50 J. INTERACTIVE MKTG. 32, 32 (2020) ("As interactive technologies become more pervasive, firms are increasingly conducting customer surveillance—the acquisition, usage, and storage of consumers' personal data").

practitioners can work towards ensuring a fairer marketplace for all consumers.

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