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From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce

ABSTRACT. The American workplace has undergone a fundamental transformation as businesses increasingly have replaced traditional employees with independent contractors. Yet many of these individuals fall outside federal employment law, including Title VII's antidiscrimination protections. This Note addresses the legal gap in coverage and proposes using 42 U.S.C. § 1981, a Reconstruction-era provision that forbids race discrimination in "mak[ing] and enforc[ing] contracts," to modernize the workplace antidiscrimination regime to cover these workers. Drawing on the history and original purpose of the provision, the Note proposes reforms to § 1981 that would leave it structurally, doctrinally, and theoretically sound.

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INTRODUCTION

Over the past several decades, the American workplace has undergone a fundamental transformation.¹ Gone are the stable, long-term employment relationships that prevailed during most of the twentieth century; today, firms increasingly hire “contingent workers”: independent contractors, temporary and leased workers, and part-time employees.² While many businesses have reaped benefits from these new arrangements, workers themselves frequently have suffered. Contingent workers earn less on average than their traditionally employed counterparts, generally do not receive health insurance or pension benefits, and enjoy little to no job security.³ Moreover, many fall outside the critical social and economic protections of labor and employment laws.⁴ In distinguishing between “employees,” whom these laws protect, and “independent contractors,” whom they do not, courts have applied to these modern work relationships legal definitions of employment developed in other eras and for other purposes.⁵ As a result, the broad swath of contingent workers legally classified as “independent contractors”—largely because their

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1. See KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 67 (2004).
 2. See U.S. COMM’N ON THE FUTURE OF WORKER-MGMT. RELATIONS, THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS—FINAL REPORT 61 (1994), available at http://digitalcommons.ilr.cornell.edu/key_workplace/2 (“The use of independent contractors and part-time, temporary, seasonal, and leased workers has expanded tremendously in recent years.”); Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 366-67 (2002).
 3. See BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS 4, 6 (2005) [hereinafter BLS 2005], available at <http://www.bls.gov/news.release/pdf/conemp.pdf>; STONE, *supra* note 1, at 70-83; Kathleen Barker & Kathleen Christensen, *Charting Future Research*, in CONTINGENT WORK: AMERICAN EMPLOYMENT RELATIONS IN TRANSITION 306, 316 (Kathleen Barker & Kathleen Christensen eds., 1998) [hereinafter CONTINGENT WORK]; Roberta Spalter-Roth & Heidi Hartmann, *Gauging the Consequences for Gender Relations, Pay Equity, and the Public Purse*, in CONTINGENT WORK, *supra*, at 69, 85, 89. One study, for example, found that contingent workers earn 52% of what noncontingent workers earn. See Barker & Christensen, *supra*, at 316-17.
 4. See Anthony P. Carnevale et al., *Contingent Workers and Employment Law*, in CONTINGENT WORK, *supra* note 3, at 281, 281; Virginia L. duRivage et al., *Making Labor Law Work for Part-Time and Contingent Workers*, in CONTINGENT WORK, *supra* note 3, at 263, 263-80.
 5. At common law, the employee/independent contractor distinction governed the availability of vicarious liability, and it was later imported into statutory interpretation. See Richard R. Carlson, *Why the Law Still Can’t Tell an Employee When It Sees One and How It Ought To Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 301-14 (2001).

employers exert less control over the manner in which they perform their duties⁶—has been excluded entirely from critical workplace regulations.⁷

Title VII of the Civil Rights Act of 1964,⁸ considered one of the most important pieces of legislation of the past century, offers fundamental protections for American workers. Yet courts have interpreted Title VII, which circularly defines those it covers as “individual[s] employed by an employer,”⁹ not to cover those classified as “independent contractors.”¹⁰ The Age Discrimination in Employment Act (ADEA)¹¹ and the Americans with Disabilities Act (ADA)¹² share Title VII’s definition and are thus similarly limited. Because the legal test to distinguish protected “employees” from independent contractors is complex, and because statistics about the contingent workforce do not address that dichotomy, it is impossible to identify precisely how many American workers lack coverage. But given the trends indicated by existing data, contingent workers, including independent contractors, likely represent a substantial and growing portion of the population.¹³

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6. To determine coverage under most employment and labor laws, courts use the “common law agency” test. See discussion *infra* notes 61-66 and accompanying text. Note that those individuals who fit the legal definition frequently would not describe themselves as “independent contractors” in ordinary parlance. See *infra* note 67.
 7. Those contingent workers not legally considered “independent contractors,” while still facing challenges in gaining labor and employment law protection, are not categorically excluded in the same way. Part-time workers, for example, are “employees,” see Befort, *supra* note 2, at 368, while leased and temporary workers, who are the employees of a temporary or leasing agency but work on-site at client companies, are considered “employees” of the agency, the client, or both, see George Gonos, *The Contest over “Employer” Status in the Postwar United States: The Case of Temporary Help Firms*, 31 LAW & SOC’Y REV. 81 (1997); Donald F. Kiesling, Jr., *Title VII and the Temporary Employment Relationship*, 32 VAL. U. L. REV. 1 (1997).
 8. 42 U.S.C. § 2000e (2000).
 9. *Id.* § 2000e(f).
 10. See, e.g., *Spirides v. Reinhardt*, 613 F.2d 826, 829 (D.C. Cir. 1979).
 11. 29 U.S.C. §§ 621-634 (2000).
 12. 42 U.S.C. §§ 12,101-12,213 (2000).
 13. See Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work*, 24 BERKELEY J. EMP. & LAB. L. 153, 158-59 (2003) (summarizing data on the “large and growing group” of contingent workers). Estimates of the size of the contingent workforce have ranged from 5% to almost 30% of the total workforce. GEN. ACCOUNTING OFFICE, CONTINGENT WORKERS: INCOMES AND BENEFITS LAG BEHIND THOSE OF THE REST OF WORKFORCE 10 (2000), available at <http://www.gao.gov/new.items/00076.pdf>. The Bureau of Labor Statistics (BLS) identified 10.3 million self-described “independent contractors,” representing 7.4% of the workforce. BLS 2005, *supra* note 3, at 4. For a more detailed discussion of the limitations of these findings, see *infra* note

Moreover, contingent workers have the demographic characteristics of those who most need antidiscrimination protection. First, they are more likely than traditional workers to be female and to be black or Hispanic, making them readier targets of workplace discrimination.¹⁴ Second, because they are lower-paid, they are at greater risk of falling into poverty if they lose their jobs.¹⁵ Nonetheless, Title VII provides no recourse if an employer treats an independent contractor differently because of her race or sex by, for example, refusing to hire her, terminating her contract, paying her lower wages, or harassing her. The ADA and ADEA similarly lack protections for independent contractors treated differently because of disability or age.

Independent contractors are not entirely without legal remedy, however. Section 1981, a provision of the Civil Rights Act of 1866 that remains good law,¹⁶ forbids discrimination in the making and enforcing of contracts.¹⁷ Though the Reconstruction Congress passed the statute to alleviate the plight of freed blacks in the post-Civil War South, courts have breathed new life into the provision over the past half-century.¹⁸ At present, § 1981 provides protection roughly equivalent to that of Title VII to a subset of the independent contractors whom Title VII excludes: those who suffer race-based disparate treatment discrimination. Because § 1981 leaves untouched a range of discriminatory conduct, including nonracial discrimination and disparate impact discrimination, and because it has a number of procedural limitations, § 1981 remains an imperfect remedy.¹⁹ But the statute's language, origins, and applications suggest it might be revamped to fill critical gaps in workplace antidiscrimination law's coverage of independent contractors.

In this Note, I analyze the failure of the federal workplace antidiscrimination regime to protect independent contractors, and I propose using a modernized § 1981 to address that failure. In Part I, I explore the

67 and accompanying text. See also Lewis L. Maltby & David C. Yamada, *Beyond "Economic Realities": The Case for Amending Federal Employment Discrimination Laws To Include Independent Contractors*, 38 B.C. L. REV. 239, 243, 245 (1997).

14. See BLS 2005, *supra* note 3, at 3 (describing the demographics of those defined as "contingent workers," though not of those described as "independent contractors"); Anne E. Polivka, *A Profile of Contingent Workers*, MONTHLY LAB. REV., Oct. 1996, at 10, 11, available at <http://www.bls.gov/opub/mlr/1996/10/art2full.pdf>; see also Gillian Lester, *Careers and Contingency*, 51 STAN. L. REV. 73, 104 (1998); Spalter-Roth & Hartmann, *supra* note 3, at 84.
15. See *infra* note 37 and accompanying text.
16. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1981(a) (2000)).
17. 42 U.S.C. § 1981(a).
18. See *infra* Section II.A.
19. See *infra* Section III.A.

characteristics of the contingent workforce and describe how Title VII excludes those considered to be “independent contractors.”²⁰ In Part II, I describe the origins of § 1981 and how it has evolved to provide partial coverage for some independent contractors who fall outside Title VII’s scope. In Part III, I discuss why § 1981’s structural and doctrinal limitations currently render it an inadequate solution to the plight of independent contractors. Finally, in Part IV, I propose a revised vision of § 1981 that both reflects its original purpose and extends practical antidiscrimination coverage to independent contractors.

I. THE RISE OF CONTINGENT WORK

A. *The Contracting-Out Phenomenon*

The American workplace is in the midst of a change so profound that some have called it a “crisis of work.”²¹ The model of career employment, characterized by workers’ orderly progression through the internal labor markets of single firms, has given way to shorter-lived and less secure contingent jobs.²² Instead of hiring additional traditional employees, companies today increasingly outsource tasks to peripheral workers, including temporary and leased workers (whom they procure from a supplying agency) and independent contractors (who operate by themselves).²³ The economic incentives to contract out are substantial. For many businesses, the greatest advantage of these nontraditional arrangements is their tremendous flexibility. Temporary or contract workers are easy to hire and easy to dismiss because they have short-term contracts and no expectation of continued employment.²⁴ Unlike core employees, whom employers can fire only with difficulty, contracted workers can be terminated with minimum hassle, at virtually no

20. To streamline my analysis, I refer frequently in this Note to “Title VII” as shorthand for Title VII, the ADA, and the ADEA. Title VII is the oldest and most frequently invoked of the three. See *infra* note 75.

21. Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523, 523 (1997).

22. See Lester, *supra* note 14, at 74; see also STONE, *supra* note 1, at 92 (describing the contemporary workforce as “boundaryless”).

23. See, e.g., STONE, *supra* note 1, at 67; Mark Berger, *Unjust Dismissal and the Contingent Worker: Restructuring Doctrine for the Restructured Employee*, 16 YALE L. & POL’Y REV. 1, 5-6 (1997); Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 539-40 (2001).

24. See Berger, *supra* note 23, at 8, 35.

cost, and with little fear of legal repercussions.²⁵ Firms therefore can respond quickly to rises and falls in demand, minimizing the number of extra workers on their payrolls.²⁶ Contingent workers also cost employers less because their wages are usually lower than core employees' and they do not receive benefits.²⁷ Businesses hire contingent workers for a variety of positions—for example, as janitors, secretaries, construction workers, security guards, technology consultants, truck drivers, insurance agents, and agricultural laborers.²⁸

While most scholars recognize that the contingent workforce is sizable and growing, little reliable information exists about the current number of contingent workers.²⁹ Using a conservative measure, the Bureau of Labor Statistics (BLS) reported in 2005 that contingent workers now account for up to 4.1% of the workforce and that workers in “alternative arrangements” (an overlapping category) account for 10.7%.³⁰ Many scholars have criticized the BLS definition of contingency, which relied on *perceived* job insecurity instead of the inherent insecurity of the work arrangement, and have found the measurements generally underinclusive.³¹ Other researchers, using a work-arrangement-based definition, have found that contingent workers represent at

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25. Modern legal developments in the at-will employment doctrine have made it more difficult to fire core employees, who now may sue for unjust dismissal in most state courts. See STONE, *supra* note 1, at 84. Contracted workers, however, may not. See Berger, *supra* note 23, at 8.
 26. See Lester, *supra* note 14, at 97 (stating that contracted workers grant employers “‘numerical’ flexibility” because their “episodes of employment can be initiated and terminated, or hours of work varied, without costly violations of legal rules or customary norms of the workplace”).
 27. See *id.* at 98.
 28. Cf. BLS 2005, *supra* note 3, at 13 tbl.4 (listing occupations and industries of contingent workers).
 29. See Befort, *supra* note 13, at 158-59; Spalter-Roth & Hartmann, *supra* note 3, at 69 (suggesting the dearth of reliable data). But see BLS 2005, *supra* note 3, at 1 (reporting that, under BLS measures, proportions of certain contingent work arrangements had not changed significantly since 2001).
 30. BLS 2005, *supra* note 3, at 1. Note that the 10.7% figure represents the sum of the percentages of the four types of alternative arrangements the BLS measured.
 31. See, e.g., STONE, *supra* note 1, at 73-74; Barker & Christensen, *supra* note 3, at 307 (noting that the “distinction between contingent and nonstandard may eventually provide clarity, but it complicates the popular understanding of the term ‘contingent’, which is often equated with nonstandard relationships that are inherently insecure”); Lester, *supra* note 14, at 82.

least 16% of the labor force and possibly as much as 29%.³² Because of definitional ambiguities and methodological challenges, counting contingent workers has proven highly difficult,³³ and disagreement over their numbers is likely to persist.

Contingent workers are a diverse group in terms of their occupation, level of skill, pay, and demographic characteristics.³⁴ Nevertheless, certain trends are observable across studies. First, contingent workers are less secure than their traditionally employed counterparts in terms of job stability and socio-economic status.³⁵ To be sure, the flexibility of alternative work arrangements substantially advantages some workers: parents who wish to work while they raise children, students while they attend school, the elderly while in semi-retirement, and the inexperienced while acquiring human capital.³⁶ Yet these workers are also at risk of arbitrary dismissal, as contingent relationships are easier to terminate than traditional employment.³⁷ Moreover, even when they are working, contingent workers tend to be lower-paid and receive fewer benefits than classic employees,³⁸ rendering them less able to cope with the

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32. Spalter-Roth & Hartmann, *supra* note 3, at 77-78. The 29% figure is obtained by adding the 16% figure for contingent workers to the 13% of workers the authors deem “questionable.” *Id.*; see also Barker & Christensen, *supra* note 3, at 308; Richard S. Belous, *The Rise of the Contingent Workforce: The Key Challenges and Opportunities*, 52 WASH. & LEE L. REV. 863, 867-68 (1995) (estimating that 25% to 30% of the workforce was contingent between 1980 and 1993).
33. See STONE, *supra* note 1, at 72-74 (“The empirical debate reflects . . . [both] disagreement about what constitutes precarious employment and disagreement about how to measure it.”); Barker & Christensen, *supra* note 3, at 306 (“No universally accepted definition of contingency exists.”).
34. See Michael J. Hely, *The Impact of Sturgis on Bargaining Power for Contingent Workers in the U.S. Labor Market*, 11 WASH. U. J.L. & POL’Y 295, 300-01 (2003); Stewart J. Schwab, *The Diversity of Contingent Workers and the Need for Nuanced Policy*, 52 WASH. & LEE L. REV. 915, 916-20 (1995).
35. See Barker & Christensen, *supra* note 3, at 317 (stating that contingent workers “are at particular economic risk”).
36. See Befort, *supra* note 13, at 161; Lester, *supra* note 14, at 74-75 (describing the view that “contingent work is a symptom of a well-functioning labor market that matches individuals’ skills, preferences, and aptitudes with the needs of employers”); *id.* at 94 (describing the view that contingent work promotes acquisition of human capital and allows workers to supplement income in retirement).
37. See Lester, *supra* note 14, at 107 (describing the vulnerability of contingent workers to arbitrary employment actions); Eileen Silverstein & Peter Goselin, *Intentionally Impermanent Employment and the Paradox of Productivity*, 26 STETSON L. REV. 1, 29 (1996) (stating that “[p]rotection against arbitrary dismissal under the developing common law of wrongful termination” is “unavailable” to part-time workers).
38. See sources cited *supra* note 3.

unwanted periods of unemployment they are more likely to experience.³⁹ In light of the economic gap between contingent and noncontingent work, scholars have begun to describe the American labor force as “two-tiered,”⁴⁰ with one tier motivated by “prospects of advancement, participation, and job security” and the other by “insecurity and fear.”⁴¹

Second, contingent workers are more likely than traditional employees to be female and to be black or Hispanic.⁴² A standard explanation for the prevalence of women in the contingent workforce is that they choose more flexible schedules to accommodate their family responsibilities.⁴³ A parallel argument for minorities is that they choose contingent work to gain skills.⁴⁴ Yet these accounts are undermined by the finding that most contingent workers would prefer stable, long-term employment over the jobs they have.⁴⁵ A more disturbing hypothesis is that women and minorities have been segregated into the increasingly contingent low-skilled, low-paid jobs.⁴⁶ Whatever the cause, the two-tiered workforce appears to be organized along race and gender lines—leading one scholar to call it a caste system.⁴⁷

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39. Cf. Spalter-Roth & Hartmann, *supra* note 3, at 92-94 (describing contingent workers' disproportionate dependence on welfare).
40. Befort, *supra* note 13, at 178; see also Alison Davis-Blake & Brian Uzzi, *Determinants of Employment Externalization: A Study of Temporary Workers and Independent Contractors*, 38 ADMIN. SCI. Q. 195, 195 (1993) (“Extensive reliance on temporary workers may create two classes of employees: permanent workers with relatively secure, high-paying employment and temporary workers who have only sporadic, low-paying work.”).
41. Jonathan P. Hiatt, *Policy Issues Concerning the Contingent Work Force*, 52 WASH. & LEE L. REV. 739, 744 (1995) (describing American employment as “more and more becoming a tale of two cities”); Lester, *supra* note 14, at 105 (describing the segmentationist view that there are “good” and “bad” jobs with structural barriers between them).
42. See *supra* note 14. There is also evidence that in some areas independent contractors in particular are more likely to be disabled than are traditional employees. Peter David Blanck et al., *The Emerging Workforce of Entrepreneurs with Disabilities: Preliminary Study of Entrepreneurship in Iowa*, 85 IOWA L. REV. 1583, 1596 (2000) (citing a study to that effect).
43. See Lester, *supra* note 14, at 93-94 (describing the benefits of the flexibility of contingent work); Spalter-Roth & Hartmann, *supra* note 3, at 89.
44. See Lester, *supra* note 14, at 94.
45. See BLS 2005, *supra* note 3, at 3; see also Lester, *supra* note 14, at 77 (“In the absence of a stronger explanation of . . . persistent [wage] gaps, we are left to speculate that there is a nontrivial class of workers who, despite genuine motivation and capabilities, are unable to secure stable employment, and have lower pay, benefits, and opportunities for advancement than other workers with the same preferences, human capital, and endowments.”).
46. Lester, *supra* note 14, at 104; see also Spalter-Roth & Hartmann, *supra* note 3, at 89.
47. RICHARD S. BELOUS, *THE CONTINGENT ECONOMY: THE GROWTH OF THE TEMPORARY, PART-TIME AND SUBCONTRACTOR WORKFORCE* 68 (1989); see also Befort, *supra* note 13, at 178

Though contingent workers are a heterogeneous group, data show that they tend to be precariously employed, socio-economically vulnerable, female, or nonwhite. In other words, they are a population for whom antidiscrimination protection is likely to be critical. As the next Section describes, however, the sizable subset of this workforce that courts deem “independent contractors” has no recourse under Title VII, the ADA, or the ADEA. As the number of such workers mounts, this antidiscrimination law “black hole” will become an increasingly urgent problem.⁴⁸

B. Independent Contractors and the Antidiscrimination Law “Black Hole”

A wide range of labor and employment legislation extends only to “employees,” leaving “independent contractors” outside the regulatory zone. For example, most unemployment insurance⁴⁹ and workers’ compensation plans⁵⁰ do not cover independent contractors; those hiring independent contractors do not make payroll tax payments for them;⁵¹ the Fair Labor Standards Act (FLSA) does not mandate certain working conditions or overtime pay for them;⁵² and the National Labor Relations Act (NLRA) does not protect their unionization.⁵³ Similar restrictions apply to the Family and Medical Leave Act (FMLA),⁵⁴ the Occupational Safety and Health Act

(suggesting that contingent work may be seen as “second-class citizenship”); Hiatt, *supra* note 41, at 744 (noting the division of the workforce along race and gender lines).

48. See Befort, *supra* note 13, at 164; see also Henry H. Perritt, Jr., *Should Some Independent Contractors Be Redefined as “Employees” Under Labor Law?*, 33 VILL. L. REV. 989, 994 (1988) (“[I]f the existing legal definitions of employee continue to apply, labor and employment law will apply to a diminishing universe of legal relations.”).
49. For example, the federal definition of employee for the purposes of unemployment benefits would not include most independent contractors. See I.R.C. § 3306(i) (2000).
50. See Carlson, *supra* note 5, at 367 n.381 (noting that courts in many states restrict workers’ compensation coverage to common law employees). For a sampling of state laws, see CAL. LAB. CODE § 5705 (West 2003); and N.Y. WORKERS’ COMP. LAW § 2(4) (McKinney 2005).
51. See *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187, 1190 & n.2 (9th Cir. 1996), *aff’d on reh’g en banc*, 120 F.3d 1006 (9th Cir. 1997).
52. 29 U.S.C. § 203(e)(1) (2000) (extending coverage to “any individual employed by an employer”); see *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729-30 (1947) (applying the common law test for distinguishing between independent contractors and employers under the FLSA).
53. 29 U.S.C. § 152(3) (2000) (explicitly excluding from protection “any individual having the status of an independent contractor”).
54. 29 U.S.C. § 2611(3) (2000) (defining “employee” to have the same meaning as under the FLSA); see Carnevale et al., *supra* note 4, at 297.

(OSHA),⁵⁵ and the Employee Retirement and Income Security Act (ERISA).⁵⁶ And despite expansive application in many other respects, Title VII, the ADA, and the ADEA have been interpreted to guarantee only to traditional employees, and not to independent contractors, the right to be free from workplace discrimination.⁵⁷ Because complying with this elaborate regulatory structure is burdensome and costly, money-conscious firms have incentives to hire independent contractors who fall outside the system's legal strictures.⁵⁸ The unfortunate result for workers, however, is that they do not get the rights, benefits, and work conditions—including a discrimination-free workplace—that the statutes were designed to ensure. With regard to Title VII, this phenomenon is at odds with Congress's ambitious goal in enacting the statute: to guarantee all Americans access to a workplace free from discriminatory barriers.

Determining who is an "employee" under Title VII and who is an "independent contractor" is a complicated task—so much so that many workers and even their employers cannot be sure which label applies. Because the statute defines those subject to its coverage circularly as "individual[s] employed by an employer,"⁵⁹ courts have grappled with several tests for distinguishing covered from uncovered workers.⁶⁰ Until fairly recently, courts had split over whether to apply the "common law agency" test, which focused on the putative employer's right to control the worker,⁶¹ or the more expansive "economic realities" test, which considered a wide range of factors tending to

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55. 29 U.S.C. § 652(6) (2000) (defining "employee" as anyone "who is employed in a business of his employer which affects commerce").
56. 29 U.S.C. § 1002(6) (2000) (extending coverage to "any individual employed by an employer").
57. See, e.g., *Spirides v. Reinhardt*, 613 F.2d 826, 829 (D.C. Cir. 1979); see also Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 75 (1984).
58. See, e.g., Befort, *supra* note 13, at 163 n.82; Gonos, *supra* note 7, at 83-84 (describing the legal vacuum as critical to the proliferation of these work arrangements); Jennifer Middleton, *Contingent Workers in a Changing Economy: Endure, Adapt, or Organize?*, 22 N.Y.U. REV. L. & SOC. CHANGE 557, 571 (1996).
59. 42 U.S.C. § 2000e(f) (2000).
60. See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) (describing ERISA's definition of "employee," which is identical to Title VII's, as "completely circular" and noting that it "explains nothing").
61. See, e.g., *Cobb v. Sun Papers, Inc.*, 673 F.2d 337, 339-41 (11th Cir. 1982); *Smith v. Dutra Trucking Co.*, 410 F. Supp. 513, 516 (N.D. Cal. 1976), *aff'd*, 580 F.2d 1054 (9th Cir. 1978). For an excellent history of the origins of the common law agency test, see Carlson, *supra* note 5, at 302-34.

demonstrate a worker's economic dependence on the putative employer.⁶² In 1992, the Supreme Court intervened to impose the more restrictive common law agency test, ruling that this test should apply whenever statutes failed to define "employee" specifically, regardless of the statute's purpose.⁶³ Though *Nationwide Mutual Insurance Co. v. Darden* concerned ERISA's definition of "employee," subsequent courts have adopted its reasoning in the context of Title VII and other employment discrimination statutes.⁶⁴

Many civil rights and labor scholars have decried the common law test as underinclusive and counter to Title VII's broad, remedial purpose.⁶⁵ In practice, courts applying the test have frequently characterized antidiscrimination plaintiffs as "independent contractors" and thus denied them coverage.⁶⁶ Once a court finds an individual to be an independent contractor, its inquiry ends, no matter how egregious the alleged conduct or how well substantiated the claim of discrimination.

Though it is virtually impossible to obtain data on the population of individuals who would be deemed independent contractors under the common law agency test,⁶⁷ it seems reasonable to assume that they share many

62. See, e.g., *Armbruster v. Quinn*, 711 F.2d 1332, 1340 (6th Cir. 1983) (applying the economic realities test to Title VII); *Spirides*, 613 F.2d at 831-32.

63. *Darden*, 503 U.S. at 322-23.

64. E.g., *Alexander v. Rush N. Shore Med. Ctr.*, 101 F.3d 487 (7th Cir. 1996) (Title VII); *Wilde v. County of Kandiyohi*, 15 F.3d 103, 105-06 (8th Cir. 1994) (same); *Frankel v. Bally, Inc.*, 987 F.2d 86, 90 (2d Cir. 1993) (ADEA); see also *Maltby & Yamada*, *supra* note 13, at 253 ("The *Darden* decision has significantly influenced judicial interpretations under Title VII and ADEA.").

65. See Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 COMP. LAB. L. & POL'Y J. 187, 187-88 (1999) ("To interpret the definition of the class of workers protected by modern labor legislation without mentioning the statutory purposes, but solely by reference to eighteenth- and nineteenth-century judicial doctrine determining the scope of liability of coach owners for the injuries inflicted by horse owners' drivers on third parties, may seem like a hell of a way to run a twenty-first century railroad . . ."); see also *Carnevale et al.*, *supra* note 4, at 291 (stating that *Darden* "fails to reflect the economic realities of today's marketplace"); *Dowd*, *supra* note 57, at 76 ("[T]he common law test fundamentally conflicts with the prophylactic goals of Title VII.").

66. See, e.g., *Eisenberg v. Advance Relocation & Storage, Inc.*, 237 F.3d 111 (2d Cir. 2000); *Alexander*, 101 F.3d 487; *EEOC v. Catholic Knights Ins. Soc'y*, 915 F. Supp. 25, 27-28 (N.D. Ill. 1996); *Dutra Trucking Co.*, 410 F. Supp. 513; *infra* note 142 (providing examples of female independent contractors excluded from Title VII because of this test).

67. Because the test is complicated and fact-sensitive, it is difficult to determine a survey respondent's status based on the answers to specific questions. As a result, it is near-impossible to produce precise statistics about how many workers would be considered independent contractors by law. While some studies have generated data about those who

characteristics of the contingent workforce as a whole: in particular, that a significant portion is female or nonwhite. If these generalizations hold, Title VII not only fails to protect vulnerable workers, but also creates incentives for businesses to place even greater numbers of workers in that vacuum. So long as current law permits employers to evade antidiscrimination liability by contracting out instead of hiring employees, it is economically rational for them to do so. While the majority of employers, who do not intend to discriminate, nonetheless might structure their work relationships in this way because they fear frivolous lawsuits,⁶⁸ some might hire independent contractors so that they can discriminate with impunity.⁶⁹ This phenomenon betrays Title VII's promise to protect "every American's right . . . to get a job . . . without arbitrary discrimination."⁷⁰

self-describe as independent contractors in the conventional (not legal) sense or those who consider themselves self-employed, these groups fall far short of the universe of workers the common law agency test excludes from employment protections. The BLS, for example, has attempted in periodic studies to gather information about the population who described themselves as "independent contractors, independent consultants, [and] freelance workers." BLS 2005, *supra* note 3, at 2 tbl.A. The data in the study, while helpful, fall far short of describing the population of people whom courts would consider to be independent contractors. See Sharon R. Cohany et al., *Counting the Workers: Results of a First Survey, in* CONTINGENT WORK, *supra* note 3, at 41, 45 ("[N]o attempt was made to identify the legal aspects of persons' employment relationships."); Maltby & Yamada, *supra* note 13, at 245 ("[B]ecause the BLS survey was not designed with statutory enforcement in mind, it is impossible to determine whether those who fall into the group labeled by the BLS as independent contractors would be similarly labeled under the current tests used by courts in determining coverage under discrimination laws."). Spalter-Roth and Hartmann performed a study using more descriptive categories of work arrangement and a richer data source and found, for example, that roughly equal numbers of men and women are "self-employed" contingent workers. Spalter-Roth and Hartmann, *supra* note 3, at 84. This study also does not address the *legal* status of workers.

68. Employment discrimination lawsuits are proliferating. See Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 432 (2004); John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 983-84 (1991).
69. Another possibility is that employers themselves do not intend to discriminate but fear that they cannot control potentially discriminatory supervisors. Cf. RESTATEMENT (SECOND) OF AGENCY § 216 (1958) (describing a principal's liability even for unauthorized tortious conduct by an agent). Either way, contracting out diminishes a business's legal risk. The argument for contracting out minority and female workers is remarkably similar to the argument for contracting out toxic industrial processes: both, when performed "in-house," expose the firm to liability that does not arise when these functions are "outsourced." Cf. Richard R.W. Brooks, *Liability and Organizational Choice*, 45 J.L. & ECON. 91, 92 (2002) ("[I]ncreases in liability will encourage firms to contract out risky activities . . .").
70. Special Message to the Congress on Civil Rights and Job Opportunities, 1963 PUB. PAPERS 483, 493 (June 19, 1963); see also Civil Rights Act of 1964, Pub. L. No. 88-352, tit. 7, 78 Stat.

Scholars have criticized courts' treatment of independent contractors across the spectrum of labor and employment law,⁷¹ proposing a variety of alternative approaches for sensibly determining which independent contractors warrant which type of protection.⁷² When it comes to antidiscrimination policy, however, there is a strong consensus that no salient differences exist between independent contractors and employees, or among independent contractors, that resonate with the regime's expansive remedial goals.⁷³ These goals, rooted in today's firmly entrenched antidiscrimination principle, dictate that there should be no categories of workers against whom employers can discriminate with impunity.⁷⁴ But while the American commitment to a discrimination-free workplace has matured only in recent decades, it is a concept with earlier origins.

241, 253 (labeling Title VII of the Act "Equal Employment Opportunity"); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-31 (1971) (stating that Congress's objective in enacting Title VII was the "removal of artificial, arbitrary, and unnecessary barriers to employment" based on race).

71. See Linder, *supra* note 65, at 190 ("[Adjudicators] routinely draw the line between covered employees and excluded non-employees without considering why they are engaged in charting and policing these boundaries, why some workers fall on one side rather than the other, or what the real-world consequences are to those whom they place beyond the pale.").
72. See Carlson, *supra* note 5, at 358-60 (discussing ERISA); *id.* at 360-63 (FLSA); Maria O'Brien Hylton, *The Case Against Regulating the Market for Contingent Employment*, 52 WASH. & LEE L. REV. 849 (1995) (advocating caution in general); Linder, *supra* note 65, at 224, 227-28 (NLRA); Perritt, *supra* note 48, at 1024-25 (NLRA).
73. See Hylton, *supra* note 72, at 861 ("One may properly infer from the existence of, for example, the ADA and Title VII, that a national consensus exists about the importance of bias-free workplaces—that is, about the availability of employment without discrimination to all Americans. One cannot draw the same conclusion about benefits from, for example, ERISA This is a critical distinction."); Maltby & Yamada, *supra* note 13, at 265 ("[G]eneralized arguments against regulation [of independent contractors] do not apply with the same force, if at all, to discrimination law."); Perritt, *supra* note 48, at 1024 (calling antidiscrimination law the "clearest case for broadening the definition of employee to include independent contractors").
74. See MICHAEL I. SOVERN, *LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT* 7 (1966) (describing "the premise that the law can and should be invoked against racial discrimination in employment," to which "[o]ur nation now seems irreversibly committed . . . and rightly so").

II. SECTION 1981 AND THE RIGHT TO CONTRACT

While Title VII is the country's most frequently invoked workplace antidiscrimination law,⁷⁵ it is neither the only one nor the oldest. Enacted in the Reconstruction era, the Civil Rights Act of 1866⁷⁶ granted citizenship to the freed slaves and provided the following guarantee, as codified today at 42 U.S.C. § 1981(a):

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.⁷⁷

Following its enactment, the section's sweeping prohibitions "underwent nearly a century of desuetude,"⁷⁸ overshadowed by the Fourteenth Amendment and limited to prohibitions on state action.⁷⁹ In a pair of cases in the 1960s and 1970s, however, the Supreme Court "spectacularly revived" the provision by extending it to purely private conduct.⁸⁰ In the years since, § 1981's "make and enforce contracts" clause has played an active role in modern

75. See Donohue & Siegelman, *supra* note 68, at 985 n.3 (stating that Title VII claims represented roughly 80% of total employment discrimination claims during the period studied).

76. 14 Stat. 27. The Act also included a provision, now codified at 42 U.S.C. § 1982 (2000), forbidding discrimination related to the ownership and sale of property. The Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, 13, contained a provision, now codified at 42 U.S.C. § 1983 (2000), providing a federal civil remedy for certain violations of constitutional rights.

77. 42 U.S.C. § 1981(a). Note that this is not the precise wording in the original Civil Rights Act. In response to concerns that it was not authorized by the Thirteenth Amendment, Congress reenacted the provision after the Fourteenth Amendment's ratification in the Enforcement Act of 1870, ch. 114, §§ 16, 18, 16 Stat. 140, 144. The 1870 reenactment differed from the original 1866 Act in two important respects: it substituted the words "all persons" for "citizens, of every race and color," and it omitted the language about equal property rights, which was reenacted separately in what is now § 1982. *Id.*; see *Doe v. Kamehameha Sch.*, 416 F.3d 1025, 1031 (9th Cir. 2005).

78. *Kamehameha Sch.*, 416 F.3d at 1032.

79. George Rutherglen, *The Improbable History of Section 1981: Clio Still Bemused and Confused*, 2003 SUP. CT. REV. 303, 305.

80. In *Jones v. Mayer*, 392 U.S. 409, 413 (1968), the Court extended § 1982 to private action; in *Runyon v. McCrary*, 427 U.S. 160, 170 (1976), it similarly extended § 1981.

antidiscrimination law, where it serves primarily as a supplement to many race-based Title VII claims.⁸¹ Yet because the statute applies on its face more broadly to all contractual relationships, its literal coverage also reaches independent contractors who lack a valid “employment” relationship under Title VII doctrine. The provision therefore grants some of those individuals the opportunity to bring the precise claims that Title VII currently denies them. A survey of recent discrimination suits reveals that independent contractors indeed have begun bringing such claims, sometimes successfully.⁸²

As this handful of successful claims illustrates, § 1981 provides a partial remedy to the gap in Title VII’s coverage of independent contractors. Because of structural and doctrinal constraints, § 1981, in its current form, cannot fill that gap entirely. But the provision may be reshaped to fit the modern workplace by embracing the ideal of § 1981’s original proponents: the protection of personal dignity and equal citizenship.

A. Section 1981’s Origins

While the Civil War and the Thirteenth Amendment formally abolished slavery, blacks in the post-war South remained largely unable to enjoy their newly acquired freedom. The Black Codes enacted by many Southern states, combined with persistent private prejudice, imposed such “onerous disabilities and burdens”⁸³ that many freedmen continued to live under conditions of near-servitude. Confronted by reports of exploitation and degradation of former slaves, Senator Lyman Trumbull introduced the Civil Rights Act of 1866, declaring: “This measure is intended to give effect to [the Thirteenth

81. Karen M. Blum, *Section 1981 Revisited: Looking Beyond Runyon and Patterson*, 32 HOW. L.J. 1, 12-13 (1989).

82. After conducting exhaustive case searches, I reviewed more than one hundred cases involving § 1981 claims brought by plaintiffs whose employee/independent contractor status was in doubt. Though I did not conduct an empirical analysis of my results, I draw general conclusions throughout the Note based on this study. As far as I know, no one else has analyzed these cases as a body.

83. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 70 (1872); see also CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866), reprinted in *THE RECONSTRUCTION AMENDMENTS’ DEBATES* 95, 121 (Alfred Avins ed., 1967) [hereinafter DEBATES] (statement of Sen. Trumbull) (“[T]he insurrectionary States have passed laws relating to the freedmen They deny them certain rights, subject them to severe penalties, and still impose upon them the very restrictions which were imposed upon them in consequence of the existence of slavery, and before it was abolished.”).

Amendment] and secure to all persons within the United States practical freedom.”⁸⁴

In many respects, the Act’s proponents focused on the practical and immediate goal of alleviating Southern blacks’ poverty, an effect of the lingering and pervasive discrimination that denied them economically productive work.⁸⁵ As the Reconstruction Congress was well aware, intolerable labor conditions prevailed throughout the South, posing severe barriers for freed slaves who attempted to sell their labor for wages.⁸⁶ Frequently, their former masters refused to contract with them altogether, sometimes acting in concert with other local landowners.⁸⁷ When Southern whites did contract with freedmen, many used the labor contract itself to restore conditions as onerous as those under slavery.⁸⁸ Using the contracts as vehicles, landowners fixed wages, forbade laborers from pursuing work elsewhere, and coerced work through corporal punishment.⁸⁹ The framers of the Civil Rights Act were acutely aware of these contract-related abuses and understood that they nullified in practice the freedom that the Thirteenth Amendment guaranteed in principle: “Do you call that man free who cannot choose his own employer, or

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84. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866), *reprinted in* DEBATES, *supra* note 83, at 121 (statement of Sen. Trumbull).
85. *See id.* at 1159, *reprinted in* DEBATES, *supra* note 83, at 171 (statement of Rep. Windom) (“[The Act’s] object is to secure to a poor, weak class of laborers the right to make contracts for their labor, the power to enforce the payment of their wages, and the means of holding and enjoying the proceeds of their toil.”).
86. *See* CARL SCHURZ, REPORT OF MAJ. GEN. CARL SCHURZ ON CONDITION OF THE SOUTH, S. EXEC. DOC. NO. 39-2 (1865) [hereinafter SCHURZ REPORT], *reprinted in* DEBATES, *supra* note 83, at 87; *see also* Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 485-86 (1989).
87. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1159-60 (1866), *reprinted in* DEBATES, *supra* note 83, at 171 (statement of Rep. Windom); Jean R. Sternlight, *Compelling Arbitration of Claims Under the Civil Rights Act of 1866: What Congress Could Not Have Intended*, 47 U. KAN. L. REV. 273, 286-91 (1999); Barry Sullivan, *Reconstructing Reconstruction: Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 YALE L.J. 541, 552 (1989).
88. Sullivan, *supra* note 87, at 554; *see also* REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, H.R. REP. NO. 39-30, at 123 (1st Sess. 1866) (“There is a disposition on the part of [white] citizens to secure, as far as possible, the same control over the freedmen by contracts which [the whites] possessed when they held them as slaves.”).
89. *See* SCHURZ REPORT, *supra* note 86, at 21-22, *reprinted in* DEBATES, *supra* note 83, at 89 (describing “ingenious” contractual schemes used to “make free labor compulsory”); Sullivan, *supra* note 87, at 554-55; VanderVelde, *supra* note 86, at 487-88.

name the wages for which he will work?”⁹⁰ By guaranteeing the freedmen the same right to “make and enforce contracts” as white citizens, the Act made such practices illegal. Ultimately, proponents hoped to usher in a new Southern labor regime, in which the labor contract could facilitate blacks’ “practical freedom” instead of their oppression.⁹¹

Yet the framers of the Civil Rights Act of 1866 had an even loftier goal: guaranteeing to blacks the fundamental rights of citizenship.⁹² The freedman’s inability to work was but a visible and painful manifestation of his deeper problem—the negation of his human dignity. When Senator Trumbull first presented the bill to the Senate, he spoke little of the economic condition of freed slaves. Rather, he invoked the Declaration of Independence, the original Constitution, the Thirteenth Amendment, and Blackstone’s *Commentaries* to enunciate an ideal of civil liberty: “the liberty to which every citizen is entitled,” the deprivation of which is “an unjust encroachment upon his liberty” and “a badge of servitude which, by the Constitution, is prohibited.”⁹³ The right to make and enforce contracts, as well as the rights to sue, to give evidence, to buy and sell property, and others, were “necessary incidents” to the fundamental rights of life, liberty, security, and property.⁹⁴ For the state to guarantee these rights to some of its citizens and not to others constituted an active intrusion into the rightful freedom of the deprived citizens.⁹⁵ In the eyes of the Act’s proponents, it brought to fruition the Thirteenth Amendment’s abolition of slavery, which they claimed provided the authority for its enactment.⁹⁶

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90. CONG. GLOBE, 39th Cong., 1st Sess. 1160 (1866), *reprinted in* DEBATES, *supra* note 83, at 171 (statement of Rep. Windom); *see id.* at 632, *reprinted in* DEBATES, *supra* note 83, at 140 (statement of Rep. Moulton) (“The object of the bill is to provide . . . [that] where a State says, as many do in the South, that the black man shall not make contracts, that the black man shall not enjoy the fruits of his labor, . . . that such discrimination shall not exist . . .”).
91. *Id.* at 474, *reprinted in* DEBATES, *supra* note 83, at 121 (statement of Sen. Trumbull); *see* Sullivan, *supra* note 87, at 549; *cf.* VanderVelde, *supra* note 86, at 437 (presenting a comprehensive “labor vision” of the Thirteenth Amendment).
92. *See* CONG. GLOBE, 39th Cong., 1st Sess. 599–600 (1866), *reprinted in* DEBATES, *supra* note 83, at 136–37 (statement of Sen. Trumbull) (“[The bill is] intended to . . . guaranty to every person of every color the same civil rights. . . . [A]ll its provisions are aimed at the accomplishment of that one object.”).
93. *Id.* at 474, *reprinted in* DEBATES, *supra* note 83, at 121 (statement of Sen. Trumbull). Other members of Congress shared his vision. *See, e.g., id.* at 1152, *reprinted in* DEBATES, *supra* note 83, at 169 (statement of Rep. Thayer).
94. *Id.* at 1833, *reprinted in* DEBATES, *supra* note 83, at 207 (statement of Rep. Lawrence).
95. *See id.* at 474, *reprinted in* DEBATES, *supra* note 83, at 121 (statement of Sen. Trumbull).
96. *See id.* (“Liberty and slavery are opposite terms . . .”); *cf.* Karst, *supra* note 21, at 531 (“The legal conditions of free men . . . came to be defined in contrast to slavery. . . . [W]ork was a medium through which a free man might demonstrate that he was a citizen.”).

Congress as a whole, however, disputed the Act's constitutionality. Throughout the debate, detractors argued that the Thirteenth Amendment ended slavery but did no more, and that the Act's capacious guarantees unconstitutionally intruded upon state sovereignty.⁹⁷ Though the defenders prevailed and enacted the law, Congress subsequently took measures to ensure that the Act rested upon an incontrovertible constitutional foundation: it passed the Fourteenth Amendment and, after ratification, reenacted the Civil Rights Act of 1866 in the Enforcement Act of 1870.⁹⁸

Because of this intertwined history, scholars have looked to the Civil Rights Act of 1866 to help give meaning to the Fourteenth Amendment.⁹⁹ In particular, some contend that the Amendment's Privileges or Immunities Clause was intended to constitutionalize those rights enumerated in the 1866 Act, which it merely expressed in a more "compendious"¹⁰⁰ or even "delphic"¹⁰¹ manner. During the first century of § 1981's existence, judicial interpretation tied the statute to its Fourteenth Amendment counterpart—and thus similarly limited the Act's reach to state (and not private) action.¹⁰² This "triumph of the state action interpretation" of the 1866 Act went virtually unquestioned for almost 100 years, severely limiting the utility of the rights it guaranteed.¹⁰³

In 1968, the Supreme Court suddenly brought the provisions of the Civil Rights Act of 1866 "back to life."¹⁰⁴ In *Jones v. Alfred H. Mayer Co.*, the Court

97. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1121 (1866), reprinted in DEBATES, *supra* note 83, at 166 (statement of Rep. Rogers) (arguing that Congress had no power to "enter the domain of a State, and destroy its police regulations with regard to the punishment inflicted upon negroes").

98. Enforcement Act of 1870, ch. 114, 16 Stat. 140 (codified as amended at 42 U.S.C. §§ 1981-1982 (2000)).

99. See, e.g., John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1410-25 (1992); Rutherglen, *supra* note 79, at 313 (calling "undeniable" that Section 1 of the Amendment and section 1 of the Act have "common goals and structure").

100. Rutherglen, *supra* note 79, at 313.

101. Harrison, *supra* note 99, at 1409.

102. The *Civil Rights Cases*, 109 U.S. 3 (1883), struck down the Civil Rights Act of 1875 because it reached private conduct, which the Fourteenth Amendment did not give Congress authority to regulate. In *Bowman v. Chicago & Nw. Ry. Co.*, 115 U.S. 611, 615-16 (1885), the Court applied this reasoning to limit the scope of the 1866 Act.

103. Rutherglen, *supra* note 79, at 322. Other than a few cases, "it does not appear that any . . . Supreme Court decision before 1952 focused on the question of whether private discrimination in the making or enforcement of contracts is actionable under § 1981." Jack M. Beerermann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981, 996 (2002).

104. Rutherglen, *supra* note 79, at 330.

broke the link between the 1866 Act and the Fourteenth Amendment, finding that § 1982 (codifying the Act's prohibition on discrimination in the sale or rental of property) extended to "all racial discrimination, private as well as public," and was "a valid exercise of the power of Congress to enforce the Thirteenth Amendment."¹⁰⁵ Several years later, in *Runyon v. McCrary*, the Court explicitly applied its analysis to § 1981.¹⁰⁶ In both opinions, the Court relied on the provisions' sweeping language and the 1866 Act's legislative history to confirm Congress's intent to reach the private business transactions of individuals.¹⁰⁷ Since *Jones* and *Runyon*, the Court repeatedly has endorsed this interpretation of sections 1981 and 1982.¹⁰⁸ The importance of *Jones* and *Runyon* to § 1981's development cannot be overstated; it is "the fulcrum on which the history of Section 1981 turns."¹⁰⁹

B. Section 1981 Today

With its application to private discrimination firmly settled, § 1981 has played a critical and increasing role in race-based employment discrimination litigation. Following *Runyon*, plaintiffs began bringing § 1981 claims as complements to other statutory claims of race discrimination; a handful even invoked the provision's protection against discrimination in contractual relationships to which Title VII did not apply.¹¹⁰ The provision's utility suffered a setback when the Supreme Court interpreted it to apply only to contract formation and enforcement, and not to post-formation discriminatory conduct, such as discharge or harassment.¹¹¹ Congress promptly overrode the decision with the Civil Rights Act of 1991.¹¹² Today, § 1981's "visionary principles" stand poised, doctrinally speaking, to play a highly active role in

^{105.} 392 U.S. 409, 413 (1968).

^{106.} 427 U.S. 160, 168, 170-71 (1976) ("[A] Negro's . . . right to 'make and enforce contracts' is violated if a private offeror refuses to extend to a Negro, solely because he is a Negro, the same opportunity to enter into contracts as he extends to white offerees.").

^{107.} See *id.* at 170-72; *Jones*, 392 U.S. at 427-29.

^{108.} *E.g.*, *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660-62 (1987).

^{109.} *Rutherglen*, *supra* note 79, at 307; see also *Beerermann*, *supra* note 103, at 997.

^{110.} See, *e.g.*, *Zaklama v. Mt. Sinai Med. Ctr.*, 842 F.2d 291 (11th Cir. 1988); *Nanavati v. Burdette Tomlin Mem'l Hosp.*, Civil Nos. 83-0794, 84-1790, 1986 U.S. Dist. LEXIS 23822 (D.N.J. June 23, 1986); *Gutierrez v. Aero Mayflower Transit Co.*, No. C 78-1863 SC, 1979 U.S. Dist. LEXIS 12727 (N.D. Cal. Apr. 27, 1979).

^{111.} *Patterson v. McLean Credit Union*, 491 U.S. 164, 179-82 (1989).

^{112.} 42 U.S.C. § 1981(b) (2000).

ensuring racial equality. Yet it remains a provision whose “theoretical coverage vastly exceeds its actual application.”¹¹³

In the fifteen years since Congress reaffirmed the importance of § 1981, the provision’s role in antidiscrimination law has been pervasive but supplementary. From 1988 to 2003, for example, of the 19% of all employment discrimination cases that featured a § 1981 claim, only 0.7% involved a § 1981 claim standing alone.¹¹⁴ Civil rights plaintiffs most frequently invoke the section’s contract clause in conjunction with Title VII claims for workplace race discrimination.¹¹⁵ Courts presented with both claims generally analyze the § 1981 claim in tandem with, and using the same framework as, the companion statutory claim.¹¹⁶ In other words, if the plaintiff’s evidence meets the legal standards used to enforce the primary claim, he also prevails on his § 1981 claim.¹¹⁷ For disparate treatment suits under Title VII, the appropriate legal framework is the burden-shifting scheme the Court has set forth under *McDonnell Douglas Corp. v. Green* and its progeny.¹¹⁸ Because most § 1981 claims are brought with Title VII claims, the *McDonnell Douglas* scheme has become the dominant doctrinal test for both. For the relatively rarer workplace harassment suit under Title VII, courts instead evaluate a companion § 1981 claim according to harassment doctrine.¹¹⁹ In either case, “the substantive

113. Rutherglen, *supra* note 79, at 350.

114. E-mail from Laura Beth Nielsen, Research Fellow, Am. Bar Found., and Assistant Professor of Sociology, Nw. Univ., to author (May 26, 2006, 17:33 EST) (on file with author). The e-mail reports preliminary findings from a national study of employment civil rights claims filed in federal court from 1988 to 2003. The study analyzed data obtained from the Administrative Office of the United States Courts.

115. See Blum, *supra* note 81, at 12-14.

116. See, e.g., *Bratton v. Roadway Package Sys., Inc.*, 77 F.3d 168, 176 (7th Cir. 1996); *Wright v. State Farm Mut. Auto. Ins. Co.*, 911 F. Supp. 1364, 1376 (D. Kan. 1995); see also Blum, *supra* note 81, at 14; Maltby & Yamada, *supra* note 13, at 256.

117. See Blum, *supra* note 81, at 13.

118. 411 U.S. 792 (1973); see *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981). For a description of the framework, see *infra* notes 163-165 and accompanying text.

119. To constitute a violation of Title VII, harassment based on sex or race must be so severe and pervasive as to alter adversely the conditions of the victim’s employment and create an abusive working environment. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); see also *Danco, Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8, 16 (1st Cir. 1999) (applying this framework to a racial harassment claim brought by an independent contractor). Section 1981 has a similarly chameleonic nature when it accompanies constitutional equal protection claims. See, e.g., *Gratz v. Bollinger*, 539 U.S. 244, 276 (2003).

scope of [§ 1981] is generally viewed as coextensive with Title VII in the employment context."¹²⁰

Though § 1981 offers little independent substantive benefit to plaintiffs alleging race discrimination in employment, it can confer other significant advantages.¹²¹ Unlike Title VII, § 1981 has no damage caps on compensatory and punitive damages and so permits much larger awards.¹²² Section 1981 has no administrative exhaustion requirement.¹²³ For many types of suits in certain jurisdictions, § 1981 has a longer statute of limitations than does Title VII.¹²⁴ Finally, § 1981 specifies no minimum number of employees a defendant employer must have to fall within the statute's jurisdiction.¹²⁵ Because of these procedural differences, a plaintiff occasionally has only a § 1981 claim, even though a Title VII claim otherwise would be appropriate.¹²⁶ If the plaintiff brings the § 1981 claim without a companion statutory claim to provide a doctrinal framework, the court nonetheless analyzes the § 1981 claim as it would the phantom claim.¹²⁷ In other words, for the large majority of instances in which § 1981 is invoked, courts do not theorize it independently from Title VII in any meaningful way.

120. Blum, *supra* note 81, at 13.

121. For an excellent summary of these advantages, see Maltby & Yamada, *supra* note 13, at 256-57.

122. 42 U.S.C. § 1981a(b) (2000) (limiting awards under Title VII); see *Johnson v. Ry. Express Agency*, 421 U.S. 454, 460 (1975) (describing remedies under § 1981).

123. See, e.g., *Randolph v. IMBS, Inc.*, 368 F.3d 726, 732 (7th Cir. 2004).

124. For formation-related contract claims under § 1981, which were available even before the Civil Rights Act of 1991, courts continue to apply state statutes of limitations (in contrast to post-formation contract claims, which are governed by the four-year statute of limitations in 28 U.S.C. § 1658(a) (2000)). See *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382 (2004); see also *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, No. 97-00300, 2005 U.S. Dist. LEXIS 4875 (N.D. Cal. Mar. 21, 2005). Linking § 1981 to state statutes of limitations sometimes provides procedural advantages to § 1981 litigants (for example, when the state statute of limitations permits more time than the federal statute), but it also makes bringing § 1981 claims more complex because it is difficult for plaintiffs to know which statute to apply to their own cases.

125. 42 U.S.C. § 1981(a) (2000); *Johnson*, 421 U.S. 454 (assuming that § 1981 covers contracts of small employers exempt from Title VII).

126. Such a situation would arise if, for example, Title VII's shorter statute of limitations barred a claim while § 1981's statute did not. See, e.g., *Patterson v. McLean Credit Union*, 805 F.2d 1143, 1144 n.* (4th Cir. 1986), *aff'd in part and vacated in part*, 491 U.S. 164 (1989).

127. See, e.g., *Riley v. Emory Univ.*, 136 F. App'x 264, 266 (11th Cir. 2005); *Perry v. Woodward*, 199 F.3d 1126, 1135 (10th Cir. 1999).

C. Independent Contractor Plaintiffs and § 1981

While plaintiffs alleging discrimination most frequently invoke § 1981 in conjunction with, or as a substitute for, a valid Title VII claim, a growing number of independent contractors have brought § 1981 discrimination claims when their status has rendered them wholly outside Title VII's coverage. Though one commentator speculated in 1991 that bringing a § 1981 discrimination suit for private business conduct was "[a]t best . . . an academic exercise," litigation over the past fifteen years has demonstrated otherwise.¹²⁸ With increasing frequency, independent contractors are bringing discrimination suits under § 1981, and courts are reaching the merits of discrimination claims that they would have dismissed under Title VII. A small but not insubstantial number of independent contractors have prevailed on these claims.¹²⁹

In *Carey v. FedEx Ground Package System, Inc.*, for example, an African-American independent contractor who was denied a FedEx delivery route sued for discrimination under § 1981.¹³⁰ Don Carey had expressed his interest in obtaining a route, made a number of preparations, and received repeated assurances from FedEx that he would receive his route shortly.¹³¹ Yet the company held him off for eighteen months, while awarding to white applicants routes that became available.¹³² Because Carey was not an applicant for employment, his suit could not have gone forward under Title VII. The court analyzed his claim under § 1981, however, and found that Carey's evidence was sufficient to survive the defendant's motion for summary judgment. The case settled shortly before trial.¹³³ Similarly, in *Danco, Inc. v. Wal-Mart Stores, Inc.*, a Hispanic independent contractor sued Wal-Mart under § 1981, alleging that the company had created a hostile work environment.¹³⁴ The plaintiff and his small staff had been hired to maintain the parking lots at a Wal-Mart store. Shortly after he started working, his supervisor and other employees spray-painted a derogatory comment on the parking lot (and would not let him paint

128. Robert E. Suggs, *Racial Discrimination in Business Transactions*, 42 HASTINGS L.J. 1257, 1287 (1991). Suggs made this comment after *Patterson* and before the passage of the Civil Rights Act of 1991.

129. See *infra* note 184.

130. 321 F. Supp. 2d 902 (S.D. Ohio 2004).

131. *Id.* at 905-12.

132. *Id.*

133. See Notice of Voluntary Dismissal, *Carey*, 321 F. Supp. 2d 902 (No. 2:02-CV-01052).

134. 178 F.3d 8 (1st Cir. 1999).

over it), used racial slurs, and told him that they did not like “[his] kind.”¹³⁵ Eventually, Wal-Mart terminated his contract.¹³⁶ Because the plaintiff was not an employee, a Title VII hostile work environment claim never would have reached a jury. Yet the jury that heard this contractor’s § 1981 claim awarded him \$650,000.¹³⁷

Carey and *Danco* suggest that § 1981 has filled the gaps in Title VII’s coverage successfully for a subset of independent contractors. Even when independent contractors do not prevail on their § 1981 claims, the opportunity to receive meaningful judicial review represents a vast improvement over Title VII’s indifference.

III. SECTION 1981 AS AN IMPERFECT SOLUTION

A. Section 1981’s Structural Limitations

In the above cases and a handful of others, § 1981, practically speaking, has extended Title VII employment discrimination principles to independent contractors beyond that statute’s reach. But § 1981 in its current form remains an imperfect solution to the coverage shortfalls of Title VII.

The most glaring problem with § 1981 as interpreted is that it prohibits only discrimination based on race or ethnicity and not discrimination based on sex, national origin, religion, age, or disability—all protected classifications under Title VII, the ADA, and the ADEA.¹³⁸ Section 1981’s failure to reach national origin claims has proven the least significant of these, as at least some courts have applied a broad conception of race that includes both ethnicity and national origin.¹³⁹

135. *Id.* at 10–11.

136. *Id.* at 11.

137. *Id.* at 10.

138. *E.g.*, 42 U.S.C. § 2000e-2(a) (2000) (Title VII).

139. *See Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (holding that § 1981 protects against discrimination on the basis of “ancestry or ethnic characteristics”); *see also MacDissi v. Valmont Indus.*, 856 F.2d 1054, 1060 (8th Cir. 1988) (applying § 1981 to individuals of Lebanese origin); *Rigodon v. Deutsche Bank Sec., Inc.*, No. 04-2548, 2004 U.S. Dist. LEXIS 22385, at *14 (S.D.N.Y. Nov. 1, 2004) (Haitian origin); *Franchitti v. Bloomberg*, No. 03-7496, 2004 U.S. Dist. LEXIS 21071, at *10 (S.D.N.Y. Oct. 20, 2004) (French origin); *Aggarwal v. New York City Health & Hosps. Corp.*, No. 98-5063, 2000 U.S. Dist. LEXIS 1367, at *5 (S.D.N.Y. Feb. 10, 2000) (Indian origin). *But see Pisharodi v. Valley Baptist Med. Ctr.*, 393 F. Supp. 2d 561, 574 (S.D. Tex. 2005) (finding that national origin is not a basis for a § 1981 claim).

In contrast, the bar on § 1981 claims for sex discrimination has been unforgiving. While § 1981's companion from the Reconstruction era, the Fourteenth Amendment, has been interpreted to extend to sex discrimination, the language of § 1981 is explicitly raced: all persons shall have the same rights "as [are] enjoyed by *white* citizens."¹⁴⁰ In *Runyon v. McCrary*, the Supreme Court noted in dicta that the provision did not cover discrimination based on sex;¹⁴¹ other courts accepted this position as definitive.¹⁴² Given the statute's language and the large body of precedent, courts mostly likely will not depart from this interpretation.¹⁴³ The result for independent contractors cannot be overstated.¹⁴⁴ It is perfectly legal, under federal statutes such as Title VII, the ADA, and the ADEA, to discriminate against an independent contractor simply because she is a woman¹⁴⁵ or because of her religion,¹⁴⁶ age,¹⁴⁷ or disability.¹⁴⁸

140. 42 U.S.C. § 1981(a) (2000) (emphasis added).

141. 427 U.S. 160, 168 (1976).

142. See, e.g., *Saint Francis Coll.*, 481 U.S. at 609; *Zemsky v. City of New York*, 821 F.2d 148, 150 (2d Cir. 1987); *Keating v. Carey*, 706 F.2d 377, 383 n.9 (2d Cir. 1983) (noting the lack of intent to cover sex discrimination); *DeFrank v. Pawlosky*, 480 F. Supp. 115, 118 & n.9 (W.D. Pa. 1979).

143. In the context of reverse discrimination, the Supreme Court stretched the literal language of § 1981. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 287 (1976) (applying § 1981 to reverse discrimination and explaining that the phrase "as is enjoyed by white citizens" is intended merely to "emphasiz[e] the racial character of the rights being protected" (citations omitted)).

144. Female independent contractors may in some states be covered by state workplace antidiscrimination law. See, e.g., Pennsylvania Human Relations Act, 43 PA. CONS. STAT. ANN. §§ 951-963 (West 1991 & Supp. 2006).

145. See, e.g., *Wheeler v. Hurdman*, 825 F.2d 257 (10th Cir. 1987); *Dardar v. Potter*, No. 02-3802, 2004 U.S. Dist. LEXIS 3512 (E.D. La. Mar. 4, 2004); *Currie v. Brown & Joseph, Ltd.*, No. 02-6646, 2003 U.S. Dist. LEXIS 12566 (N.D. Ill. July 21, 2003); *Alfred v. Tenn. Farmers Mut. Ins. Co.*, 8 F. Supp. 2d 1024 (E.D. Tenn. 1997); *Chapelle v. Beacon Commc'ns Corp.*, No. 92-8987, 1993 U.S. Dist. LEXIS 15979 (S.D.N.Y. Nov. 10, 1993); *Barnes v. Colonial Life & Accident Ins. Co.*, 818 F. Supp. 978 (N.D. Tex. 1993). Some courts have gone to great lengths to find that female plaintiffs on the border between employee and independent contractor status are in fact "employees" in order to avoid this harsh result. See, e.g., *Velez v. Roche*, 335 F. Supp. 2d 1022 (N.D. Cal. 2004). Excluding gender discrimination from § 1981's coverage also harms women who allege intersectional race and gender claims, because their gender claims cannot be aggregated with their race claims. See generally Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

146. See *Runyon*, 427 U.S. at 167; see also *Elkhatib v. Dunkin' Donuts, Inc.*, No. 02-8131, 2004 U.S. Dist. LEXIS 23066 (N.D. Ill. Nov. 12, 2004) (dismissing a religious discrimination claim brought under § 1981 because the plaintiff was not an employee).

In addition to confining the protected classes to which § 1981 extends, courts have limited the types of discrimination to which it applies. In *General Building Contractors Ass'n v. Pennsylvania*, the Supreme Court held that § 1981 does not prohibit disparate impact discrimination, which occurs when a facially neutral policy or practice has a disproportionate impact on a protected class; rather, the statute forbids only disparate treatment, which requires evidence of discriminatory motive.¹⁴⁹ Because disparate impact theory allows plaintiffs to prevail without having to produce proof that a party actually intended to discriminate, closing off such relief has proven a “major blow[]” to § 1981’s utility.¹⁵⁰ In addition, § 1981 provides only a private right of action; unlike its powers with regard to Title VII, the Equal Employment Opportunity Commission (EEOC) may not receive, process, and vindicate claims under § 1981,¹⁵¹ a potential obstacle for individuals who cannot afford their own attorneys.¹⁵² Finally, § 1981 plaintiffs cannot invoke the provision against state employers.¹⁵³

Combined, these limitations severely restrict the universe of plaintiffs with viable § 1981 claims and the circumstances under which they can bring them. Yet even those independent contractor plaintiffs whose claims arose under theories and conditions suitable for § 1981 resolution have not obtained widespread relief under the statute. There are several explanations for this phenomenon. First, § 1981 is simply under-invoked. Because plaintiffs and their attorneys are much more familiar with Title VII than with § 1981, many

147. See, e.g., *Tyrrell v. City of Scranton*, 134 F. Supp. 2d 373, 380, 387 (M.D. Pa. 2001) (dismissing an age discrimination claim brought under the ADEA and § 1981 because the defendant was not considered an “employer” and because § 1981 does not extend to age).

148. See, e.g., *Anyan v. N.Y. Life Ins. Co.*, 192 F. Supp. 2d 228 (S.D.N.Y. 2002). Section 1981’s limited coverage disadvantages even women (and the disabled, and older workers, and so on) who are traditional employees, because they are denied the procedural advantages of combining their statutory claims with § 1981 claims.

149. 458 U.S. 375, 387-88 (1982).

150. Joanna L. Grossman, *Making a Federal Case out of It: Section 1981 and At-Will Employment*, 67 BROOK. L. REV. 329, 335 (2001).

151. 42 U.S.C. § 2000e-5(a) (2000) (authorizing the EEOC to enforce violations of Title VII).

152. Lack of access to the EEOC also might be an obstacle for plaintiffs with monetary claims that are too small to be attractive to private attorneys. Michael Selmi, *The Value of the EEOC: Reexamining the Agency’s Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 3 (1996).

153. See *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 735 (1989) (finding that § 1983 provided the “exclusive federal damages remedy for the violation of the rights guaranteed by § 1981 when the claim is pressed against a state actor”).

independent contractors sue only under Title VII.¹⁵⁴ When those plaintiffs' claims fail because courts find that they are independent contractors, they have no § 1981 claims on which to fall back.¹⁵⁵ A recent Fifth Circuit decision, however, may make it easier for independent contractor plaintiffs to add § 1981 claims after filing initial complaints containing only Title VII claims.¹⁵⁶

Some courts also seem not to understand that § 1981 may protect independent contractors even when Title VII does not. In *Wortham v. American Family Insurance Co.*, Maria Wortham, an independent contractor insurance agent, alleged race (as well as age and sex) discrimination by her company.¹⁵⁷ After stating that the same legal framework applied to analyze the plaintiff's Title VII, § 1981, and other statutory claims, the district court concluded that because Title VII does not reach independent contractors, the defendant was entitled to "judgment as a matter of law on *all* of Wortham's claims."¹⁵⁸ This statement profoundly misunderstood § 1981, for the fact that the plaintiff was an independent contractor would not entitle the defendant to summary judgment on her § 1981 race discrimination claim.¹⁵⁹ Though infrequent, such errors occur often enough to signify a problem.¹⁶⁰

Despite § 1981's broad "make and enforce contracts" language and expansive original goals, it currently offers functional coverage only to the very limited subset of independent contractors who allege disparate treatment based on race, and even those individuals rarely prevail. In practice, then, the number

154. See Selmi, *supra* note 152, at 45 (attributing "[t]he failure of private attorneys to develop claims" under § 1981 in part to "a fair amount of either ignorance or laziness on the part of attorneys, albeit laziness that is fostered by the existing institutional structure" and to their comparative "familiarity with Title VII and its procedures").

155. See, e.g., *Lockett v. Allstate Ins. Co.*, 364 F. Supp. 2d 1368, 1384 (M.D. Ga. 2005) (dismissing the Title VII claim of an independent contractor insurance agent who did not file a § 1981 claim).

156. *Johnson v. Crown Enters.*, 398 F.3d 339, 342 (5th Cir. 2005) (permitting an independent contractor plaintiff whose original complaint alleged only a Title VII claim to amend it to include a § 1981 claim even though the statute of limitations had run, because the latter claim related back to the former).

157. No. 6:01-02067 (N.D. Iowa Oct. 22, 2003), *aff'd on other grounds*, 385 F.3d 1139, *reh'g denied*, No. 03-3955, 2004 U.S. App. LEXIS 24264 (8th Cir. Nov. 19, 2004).

158. *Id.*, slip op. at 5 (emphasis added).

159. The appellate court in *Wortham* noted precisely this error. 385 F.3d at 1141.

160. See, e.g., *Holtzman v. World Book Co.*, 174 F. Supp. 2d 251, 258 (E.D. Pa. 2001) (summarily dismissing a § 1981 claim after finding that "no reasonable jury could conclude that plaintiff was an employee as defined by Title VII" and that § 1981 claims are "analyzed under the same framework as Title VII" claims); *Gonzalez v. Trinity Marine Group*, No. 94-2838, 1996 U.S. Dist. LEXIS 10104 (E.D. La. July 16, 1996) (similar); *Roscoe v. Aetna Cas. & Sur. Co.*, No. 88-0882, 1988 U.S. Dist. LEXIS 17468 (N.D. Ala. Nov. 8, 1988) (similar).

of independent contractors obtaining meaningful judicial scrutiny of their claims through § 1981 is small.

B. Section 1981's Doctrinal Limitations

Section 1981's problems extend beyond the constraints on those who may and do bring claims under it. Even independent contractors who bring § 1981 claims are frequently denied a fair shot at relief because the Title VII doctrine with which courts have applied § 1981—borrowed wholesale from the employment context—is not closely tailored to the work experiences of independent contractors. While Title VII-style coverage is far better than no coverage, the case law shows that it may not be the best independent contractors can get.

The ties between Title VII and § 1981 are close and important. Title VII immediately preceded and likely spurred § 1981's judicial rebirth,¹⁶¹ and it has since served as a model for its rejuvenated form.¹⁶² Given this relationship, it is unsurprising that courts have analyzed § 1981 claims virtually in lockstep with Title VII claims. Specifically, courts evaluate circumstantial evidence of discrimination under § 1981 using the three-step burden-shifting framework set forth in *McDonnell Douglas*. First, the plaintiff must make out a prima facie case of discrimination;¹⁶³ second, the defendant must articulate a “legitimate, nondiscriminatory reason” for its action;¹⁶⁴ and, finally, the plaintiff must show that the defendant's stated reason “was in fact pretext.”¹⁶⁵ If the plaintiff

161. George Rutherglen argues that modern civil rights legislation made the extension of § 1981 to private discrimination less drastic, as the modern legislation already reached most private conduct—primarily in the fair housing and employment contexts. Rutherglen, *supra* note 79, at 332; see also *Runyon v. McCrary*, 427 U.S. 160, 191 (1976) (Stevens, J., concurring) (remarking that recent congressional policy evidenced an intent to “eliminat[e] racial segregation in all sectors of society”). The 1960s statutes also provided political support for the Court's decisions because they endorsed broad federal power over civil rights even at the expense of states' rights. Rutherglen, *supra* note 79, at 334-36.

162. See Rutherglen, *supra* note 79, at 336 (stating that the decisions, “by abandoning the Fourteenth Amendment as the model for interpreting sections 1981 and 1982, . . . necessarily adopted the modern civil rights laws as a substitute”).

163. This step has four elements: the plaintiff must show that (1) he was a member of a protected class; (2) he was qualified for the position in question; (3) he was nonetheless denied the position (or fired); and (4) a similarly situated person outside his class was granted the position (or was maintained) instead. See *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

164. *McDonnell Douglas*, 411 U.S. at 802.

165. *Id.* at 804.

does so by a preponderance of the evidence, a fact-finder may infer intentional discrimination in violation of Title VII.¹⁶⁶

When *Patterson* first applied the *McDonnell Douglas* scheme to § 1981 claims alleging employment discrimination, the Court reasoned only that the provisions were “analogous” and the system was a “sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.”¹⁶⁷ Though this step was perfectly reasonable at the time, the analogy begins to break down today in the independent contracting context—one that the Justices could not then have foreseen. Nonetheless, rigid adherence to precedent has left courts loath to reconsider § 1981 doctrine, and judges now apply it in all circumstances as a “special” Title VII with some vestigial procedural quirks. Because Title VII doctrine does not map precisely onto contracting relationships, this treatment has posed particular challenges to independent contractors seeking to prove discrimination by way of the *McDonnell Douglas* framework.

The first point in the inquiry at which independent contractors are more likely to stumble than employees is at the prima facie stage. Though ordinarily the burden of making out a prima facie case should not be onerous,¹⁶⁸ some courts have applied the test in such a way as to cause independent contractors substantial difficulty. One element of the showing requires a plaintiff to identify similarly situated individuals outside her protected group who obtained the precise positions for which she applied and was rejected.¹⁶⁹ Independent contractors and other contract-based contingent workers, however, often neither apply to formal positions nor go through formal application procedures, and the decisions about their hiring, firing, and tasks

166. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 509, 511 (1993). After the Supreme Court's decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), plaintiffs also may prevail if they can demonstrate that discrimination was one motive for the employment action, even if the employer had other, nondiscriminatory motives. *Id.* at 101. Prior to *Desert Palace*, plaintiffs had to produce direct evidence to get a mixed-motive jury instruction. Demonstrating “mixed motives” limits the plaintiff's remedies, however. 42 U.S.C. § 2000e-5(g)(2)(B) (2000).

167. 491 U.S. 164, 186 (1989) (citation omitted).

168. *Burdine*, 450 U.S. at 253; see also *St. Mary's Honor Ctr.*, 509 U.S. at 506 (describing the “minimal requirements of such a prima facie case”).

169. *McDonnell Douglas*, 411 U.S. at 804. The “similarly situated” standard also would apply to other employment actions, such as if the plaintiff were demoted and others outside her class were not. Note that courts differ in the precise formulation of this standard, but the underlying concept of finding a comparator outside the class remains constant.

tend to be more subjective and decentralized.¹⁷⁰ As a result, plaintiffs have a harder time finding—and courts have a harder time accepting—“similarly situated” comparators. For example, in one case, a company refused to renew its contract with a black independent contractor who sold security alarm systems.¹⁷¹ The independent contractor was the only black dealer, and he alleged that a sales manager had called him a “nigger” and that another had admonished him only to hire white telemarketers.¹⁷² Nonetheless, the court found that he had not made out a prima facie case because he could not provide evidence that he was “treated any differently than similarly situated white dealers.”¹⁷³ In other cases, courts have dismissed the claims of independent contractor truck drivers because their proposed comparators were not sufficiently similar: for example, because the comparator was both a truck owner *and* a dispatcher,¹⁷⁴ or because the comparator drove his own truck while the plaintiff did not.¹⁷⁵ But such variation in particulars is standard for independent contractor relationships. In other words, these plaintiffs faced particular difficulty making a prima facie showing because of the nature of independent contractor relationships.

Most challenging for independent contractors, however, has been the pretext phase. Though traditional employees tend to have trouble with this stage as well,¹⁷⁶ the problems that independent contractors face are exacerbated. Because the independent contractor relationship is, by design, more precarious than employment, it is harder to prove that a firm’s decision

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170. Cf. STONE, *supra* note 1, at 165, 171-72 (explaining how, in the new workplace, decisions are ad hoc, decentralized, and unsystematic).
171. *Fair v. Prime Sec. Distribs.*, No. 94-CV-70324-DT, 1996 U.S. Dist. LEXIS 11230 (E.D. Mich. June 7, 1996).
172. *Id.* at *16-17.
173. *Id.* at *15, *18.
174. *Green v. Rediehs Transit Line*, No. 00-2422, 2000 U.S. App. LEXIS 27977, at *4 (7th Cir. Nov. 1, 2000); *see also id.* at *1-2 (finding that the dispatcher gave his own trucks better assignments than he gave the plaintiff and used the phrase “black nigger”).
175. *Taylor v. ADS, Inc.*, 327 F.3d 579, 581 (7th Cir. 2003). For another case in which the claim of an independent contractor truck driver was dismissed for failing to show that other drivers were “similarly situated,” *see Bratton v. Roadway Package Sys., Inc.*, 77 F.3d 168 (7th Cir. 1996).
176. *See Guerrero v. Ashcroft*, 253 F.3d 309, 313 (7th Cir. 2001) (“Creating a triable pretext issue with indirect evidence is a difficult task . . .”); *see also* STONE, *supra* note 1, at 157 (noting that intentional discrimination is becoming harder to prove even for traditional employees because “[t]he diffused and decentralized authority structure of the new boundaryless workplace can give rise to bias and favoritism that is more subtle than discrimination in internal labor markets”).

to terminate the contract or not to renew it (among other actions) was discriminatory. Some employers hire independent contractors precisely because they want the ability to shrink their workforces later, with a minimum of hassle or delay.¹⁷⁷ In other words, it is easy and credible for an employer to provide an unsophisticated economic and nondiscriminatory reason to terminate (or fail to initiate) an independent contractor relationship. Under any circumstances, courts are reluctant to scrutinize business-related decisions,¹⁷⁸ but this hesitancy is particularly strong in independent contractor cases.

In *Crabtree v. DMJM-Phillips Reister Haley, Inc.*, for example, the African-American plaintiff contracted with a construction company to install guardrails.¹⁷⁹ While the company routinely waived bonding requirements for other subcontractors, it did not do so for the plaintiff and terminated his contract when he could not make bond. The court found that the defendant defeated a showing of pretext because it “present[ed] business justifications for the situations in which it did waive bond.”¹⁸⁰ Similarly, in *Hairston v. AT&T Co.*, the plaintiff, whose bid to perform an outsourced element of AT&T’s switching business was rejected, endeavored to show pretext by questioning the company’s economic rationale.¹⁸¹ The court stated that the plaintiff’s “evidence on the issues of finances and operations amounts to no more than a challenge to AT&T’s business decisions.”¹⁸² While independent contractor plaintiffs may challenge defendants’ business-related explanations, they will find it difficult to persuade a court that these explanations are illegitimate.

Only a small number of independent contractors have taken § 1981 claims far enough to get judicial scrutiny under *McDonnell Douglas*.¹⁸³ As the cases described above reveal, Title VII doctrine presents unique challenges to

177. See discussion *supra* notes 24–27 and accompanying text.

178. See *Nix v. WLCY Radio/Rahall Commc’ns*, 738 F.2d 1181, 1187 (11th Cir. 1984) (holding that an employer may take an action “for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason”).

179. No. 91-1160, 1992 U.S. App. LEXIS 25203 (10th Cir. Sept. 30, 1992).

180. *Id.* at *6.

181. No. 94 C 1213, 1995 U.S. Dist. LEXIS 12637 (N.D. Ill. Aug. 28, 1995).

182. *Id.* at *16; see also *Wortham v. Am. Family Ins. Co.*, No. C01-2067, slip. op. at 8 (N.D. Iowa Oct. 22, 2003) (holding that the plaintiff failed to prove pretext in the defendant’s argument that the plaintiff’s insurance agency was not “profitable”), *aff’d on other grounds*, 385 F.3d 1139, *reh’g denied*, No. 03-3955, 2004 U.S. App. LEXIS 24264 (8th Cir. Nov. 19, 2004).

183. See *supra* note 82. Little information exists about the frequency of these cases, so this conclusion is based on my research.

independent contractors, and its mechanical application may bar relief. Yet when independent contractors' § 1981 claims do survive summary judgment, they occasionally have reached satisfactory outcomes. Some plaintiffs have received substantial jury awards,¹⁸⁴ and others have settled out of court.¹⁸⁵ This pattern implies that if the doctrine is applied more forgivingly, fact-finders can find independent contractors' discrimination claims compelling.

Though § 1981 suffers from both structural and doctrinal limitations, it also holds the promise of meaningful coverage for today's independent contractors. To fulfill this promise, however, the provision must be updated for the modern workplace.

IV. RETHEORIZING § 1981

Section 1981 stands at a critical crossroads in its "improbable history."¹⁸⁶ Passed with the ambitious and noble goal of granting freed slaves full and equal citizenship, it was inextricably linked to, and immediately overshadowed by, its constitutional counterpart, the Fourteenth Amendment. After a long period of neglect, courts yoked § 1981 to the next great round of visionary civil rights legislation passed in the 1960s.¹⁸⁷ Meanwhile, far from the courtroom, the American workforce was changing, as firms moved away from the internal labor markets of the past and toward a contingent workforce composed in part of independent contractors. Section 1981 today unites these phenomena, but it still has far to go. Updating the provision will require Congress and the courts both to draw on Title VII and to separate it from § 1981. Ultimately, § 1981 can provide critical and integrated antidiscrimination protection for the new workforce.

184. See *Bains, LLC v. ARCO Prods. Co.*, 405 F.3d 764 (9th Cir. 2005); *Danco, Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8 (1st Cir. 1999); *Zaklama v. Mt. Sinai Med. Ctr.*, 842 F.2d 291 (11th Cir. 1988).

185. See, e.g., *Turner v. Mony Life Ins. Co.*, No. 04 C 3065, 2004 U.S. Dist. LEXIS 21174 (N.D. Ill. 2004); *Minute Entry, Turner*, 2004 U.S. Dist. LEXIS 21174 (filed Apr. 25, 2005); *Carey v. FedEx Ground Package Sys., Inc.*, 321 F. Supp. 2d 902 (S.D. Ohio 2004) (defeating the defendant's motion for summary judgment); *Notice of Voluntary Dismissal, Carey*, 321 F. Supp. 2d 902 (No. C-2-02-1052); *Pritchett-Evans v. State Farm Ins. Co.*, No. 4:01-CV-97, 2003 U.S. Dist. LEXIS 2870 (W.D. Mich. Feb. 28, 2003); *Stipulation and Order, Pritchett-Evans*, 2003 U.S. Dist. LEXIS 2870 (filed July 9, 2003).

186. Rutherglen, *supra* note 79, at 303.

187. See *supra* Section II.A.

A. *Why Protect Independent Contractors?*

As an initial matter, reforming § 1981 will require convincing courts and legislatures that the independent contractors now excluded from Title VII are a population deserving of antidiscrimination protection and cannot, as some claim, fend for themselves. Though a number of scholars have warned against the wholesale inclusion of independent contractors within the totality of federal labor and employment law,¹⁸⁸ however, no one has made a cogent argument for excluding them from antidiscrimination law in particular.¹⁸⁹ In other contexts, the case for leaving independent contractors outside regulatory schemes rests on three premises. The first is that independent contractors, unlike employees, have equal bargaining power with those who hire them, and thus do not require government intervention.¹⁹⁰ The second is that, because the independent contractor market is fluid and can respond quickly to changing conditions, labor market forces gradually will purge economically irrational discrimination even without regulation.¹⁹¹ And the third is that giving independent contractors a cause of action for discrimination would increase unnecessarily the already rising number of employment discrimination lawsuits.

These arguments do not hold water in today's labor market. First, like employees, most independent contractors have only fictitious bargaining

188. See Samuel Estreicher, *The Dunlop Report and the Future of Labor Law Reform*, 12 LAB. LAW. 117, 131 (1996); Hylton, *supra* note 72, at 850; Perritt, *supra* note 48, at 1039; Schwab, *supra* note 34, at 916.

189. Some have recommended more piecemeal expansion of coverage to independent contractors. See, e.g., Dowd, *supra* note 57, at 85 (suggesting that independent contractors with employees of their own might not require protection); Maltby & Yamada, *supra* note 13, at 268 (describing "fixed ceiling" and "factor tests" approaches that would exempt from protection independent contractors with a fixed number of employees or with more employees than the defendant, respectively).

190. See Silverstein & Goselin, *supra* note 37, at 23 ("[T]he law assumes that there is a defining difference between . . . 'employees,' who lack control over their work and their destinies, and 'non-employees,' [including] independent contractors, . . . who choose the risks and rewards of individual endeavor through self-employment, professional or educational distinction, or non-exclusive work arrangements."); see also Befort, *supra* note 13, at 171; Carlson, *supra* note 5, at 356 ("[L]awmakers may assume that . . . there is no valid argument for interfering with bargaining between independent businesses . . .").

191. For the quintessential exposition of this argument in the employment context, see RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992).

power and are highly economically dependent on the firms that hire them.¹⁹² Equal bargaining power or not, the rationale for permitting discrimination against independent contractors is nonetheless elusive: as one author asked, why should antidiscrimination law “prohibit a plumbing contractor from refusing to hire a plumber merely because he or she is black, female, disabled, or old, while permitting a textile manufacturer to refuse services from a solo plumbing contractor on the basis of the same prejudices?”¹⁹³ Second, market forces are as unlikely to drive out discrimination in the independent contracting market as they have been in the employment market, where evidence from the past forty years suggests that eradicating discrimination requires government intervention.¹⁹⁴ Third, the argument that extending coverage to independent contractors will increase litigation is possibly untrue and certainly a red herring.¹⁹⁵ Employment discrimination litigation is rising steadily across the board;¹⁹⁶ to stem that tide would require broad structural changes. Decreasing litigation by excluding an entire class of workers—some

192. See *Wheeler v. Hurdman*, 825 F.2d 257, 273-74 (10th Cir. 1987) (“[I]nequality of bargaining power, the dominant ability to perpetuate or terminate a business relationship and otherwise to dictate terms, probably characterizes most dealings between large corporations and independent contractors.”); cf. *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 127 (1944) (“Inequality of bargaining power . . . may as well characterize the status of [independent contractors] as of [employees]. The former, when acting alone, may be as helpless in dealing with an employer, as dependent . . . on his daily wage and as unable to leave the employ and to resist arbitrary and unfair treatment as the latter.” (internal citations omitted)). Employees and independent contractors frequently have near-identical work experiences. See Befort, *supra* note 13, at 171; Carlson, *supra* note 5, at 298, 300.

193. Linder, *supra* note 65, at 223.

194. The argument of Title VII’s opponents that an unimpeded labor market will tend to correct for employment discrimination on its own has been largely discredited. See John J. Donohue III, *Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583, 1592-96 (1992) (reviewing EPSTEIN, *supra* note 191) (providing a summary of empirical research disproving the claim that federal legislative intervention was largely irrelevant to improving the status of black workers); see also John J. Donohue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411, 1431 (1986) (casting Title VII as “wealth-maximizing legislation,” or, in other words, as “a tool to perfect the market response to employer discrimination”). There is no reason why the argument should apply with any greater force in the independent contracting context. See Befort, *supra* note 13, at 174 (“[I]t will not unduly distort labor market competition by extending the anti-discrimination ban to [independent contractors].”); Perritt, *supra* note 48, at 1039 (stating that antidiscrimination statutes “have no particular concern with labor market competitive forces”).

195. Some commentators in fact have argued that extending coverage would *reduce* litigation by eliminating uncertainty about the status of workers who currently fall in the “zone of ambiguity.” Carlson, *supra* note 5, at 365; see also *id.* at 301 (discussing “wasteful litigation of the employee status issue”); Maltby & Yamada, *supra* note 13, at 266.

196. See *supra* note 68.

with nonfrivolous claims of discrimination – forces independent contractors to pay the price for systemic flaws.

In a fundamental way, these arguments miss the point of antidiscrimination law. Title VII and its companion statutes exist to safeguard the human dignity of workers,¹⁹⁷ a symbolic goal with overwhelming public support.¹⁹⁸ Because arbitrary discrimination harms the personal development and integrity of an independent contractor as much as an employee, the same rationale that justifies regulating the employment market also justifies regulating independent contractual relationships.

B. Why Section 1981?

There is a growing consensus among scholars, policymakers, and workers that independent contractors must receive the benefits of modern employment discrimination law. Even assuming clear support for extending antidiscrimination protection, however, there would be a number of means by which to do so. This Note argues that updating § 1981 is the most theoretically, doctrinally, and practically appropriate solution to the condition of independent contractors, but it recognizes that other options also might go a long way toward providing meaningful relief.

For example, some scholars have urged a return, either judicially or legislatively, to the economic realities test for employment that *Darden* repudiated.¹⁹⁹ While this step would extend antidiscrimination coverage to more independent contractors than does the common law agency test, it still would exclude a large portion of the independent contractor workforce – without any finding that those excluded are less deserving of protection against discrimination. Another option would be to leave the federal statutes as they are and to rely on state statutory and common law to fill the gaps in coverage.

197. See Alfred W. Blumrosen, *Responses to Epstein*, 8 YALE L. & POL'Y REV. 320, 320 (1990) (“[C]ivil rights laws [are] precisely what they are called, ‘rights’ laws.”); Marion Crain, *Rationalizing Inequality: An Antifeminist Defense of the “Free” Market*, 61 GEO. WASH. L. REV. 556 (1993) (reviewing EPSTEIN, *supra* note 191); Nancy Dowd, *Liberty vs. Equality in Defense of Privileged White Males*, 34 WM. & MARY L. REV. 429 (1993) (reviewing EPSTEIN, *supra* note 191).

198. See *supra* note 74 and accompanying text (describing the public consensus behind the antidiscrimination principle). Even Richard Epstein recognizes that “a broad antidiscrimination principle lies at the core of American political and intellectual understandings of a just and proper society” and that it enjoys “unchallenged social acceptance.” EPSTEIN, *supra* note 191, at 1, 3; see also *id.* at 499.

199. See, e.g., Carnevale et al., *supra* note 4, at 293; Dowd, *supra* note 57, at 77. For a discussion of the economic realities test, see *supra* note 62 and accompanying text.

At least a few states have antidiscrimination statutes that cover independent contractors,²⁰⁰ and, as some commentators have suggested, many states have existing common law remedies that could be used to target discrimination in contractual relationships.²⁰¹ This idea is an intriguing one for the future, but these doctrines are not sufficiently developed today to provide widespread and meaningful relief.²⁰² Moreover, common law varies from state to state and so cannot provide nationwide protection along the Title VII model.²⁰³ At best, contract and tort remedies might supplement, not substitute for, the federal statutory protection that protected classes of employees enjoy.²⁰⁴

Yet another avenue of reform would involve legislatively amending Title VII, the ADA, and the ADEA to include independent contractors, either by altering the definitions of “employee” to include independent contractors²⁰⁵ or by adding independent contractors as an additional covered category separate from employees.²⁰⁶ Those changes would close the existing coverage gap considerably. Leaving Title VII, the ADA, and the ADEA as they are, however, and instead amending § 1981 to extend it to the other nonracial classes protected by those statutes would provide a number of advantages—both concrete and symbolic—that this course of action would not.

The first major advantage of extending § 1981 is a theoretical one, as the provision is uniquely suited to the plight of the modern-day independent contractor. Ironically, the statute’s 150-year-old origins—potentially seen as rendering the statute anachronistic because of the immense changes in American society—give it theoretical vitality today. First, in a remarkable

200. See *supra* note 144.

201. See Neil G. Williams, *Offer, Acceptance, and Improper Considerations: A Common-Law Model for the Prohibition of Racial Discrimination in the Contracting Process*, 62 GEO. WASH. L. REV. 183 (1994); Jason E. Pirruccello, Note, *Contingent Worker Protection from Client Company Discrimination: Statutory Coverage, Gaps, and the Role of the Common Law*, 84 TEX. L. REV. 191 (2005).

202. See Williams, *supra* note 201, at 218 (describing the common law’s limitations); Pirruccello, *supra* note 201, at 208, 219 (same).

203. Cf. Pirruccello, *supra* note 201, at 219 (describing Texas’s refusal to recognize the covenant of good faith and fair dealing).

204. The common law also may shape *how* federal law is applied to independent contractors. See *infra* notes 236–253 and accompanying text.

205. See Carnevale et al., *supra* note 4, at 293 (proposing the legislative extension of Title VII, the ADA, and the ADEA to independent contractors); Perritt, *supra* note 48, at 1039 (proposing a similar extension but only to independent contractors without their own employees); see also Linder, *supra* note 65, at 223 (proposing that employee status be eliminated as a coverage requirement altogether).

206. See Maltby & Yamada, *supra* note 13, at 266.

example of history coming full circle, some aspects of the workplace of 2006 resemble the workplace of 1866 more closely than they do the workplace of 1964. Just as the freed black slaves of the Reconstruction era went individually from landowner to landowner, contracting to peddle their labor, today's independent contractors move from employer to employer, using the business contract to market their skills. Though the barriers to productive employment for blacks in the 1860s were more severe than those they and other subordinated groups face today, both cohorts have seen arbitrary discrimination frustrate the free functioning of the labor market. And both, therefore, require the same guarantee of a fair work experience.²⁰⁷

Second, the visionary purpose of the Civil Rights Act of 1866 remains profoundly timely: the right to contract is today as fundamental an element of freedom and citizenship as it was then.²⁰⁸ In some ways, the tendency of modern doctrine (including antidiscrimination law) to sanctify the employment relationship—after all, just one subset of contracts—has distracted from this core concept. As scholars and modern legislators have noted, productive work is critical to full participation in society and “unquestionably resounds with our constitutional values of liberty, equal citizenship, and national union.”²⁰⁹ But as the framers of the 1866 Act recognized, it is not just the practical ramifications of a contract (in other words, the exchange of labor for money) that confer human dignity; it also is the very right to enter into a contract, and have society honor that contract equally with others, that does so.²¹⁰ To the extent that modern antidiscrimination law fails to understand that the *contract*, not just “employment” in the usual sense, is “constitutive of citizenship, community, and even personal identity,”²¹¹ § 1981—updated to preserve its practical relevance—is a perfect avenue by which to reintroduce the concept.

In addition to its theoretical elegance, protecting independent contractors via § 1981 also offers doctrinal advantages over Title VII. Existing cases demonstrate that many independent contractor claims evaluated under the

207. See generally *supra* Section II.A.

208. See *supra* note 93 and accompanying text (describing Senator Trumbull's invocation of founding principles).

209. Karst, *supra* note 21, at 557; see also ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION 3 (1977) (“[T]he job makes the person.”); Karst, *supra* note 21, at 529 (“[W]ork has been one major arena in which America's basic constitutional values of liberty, equality, and national union have been either validated or frustrated.”).

210. See discussion *supra* notes 92–96 and accompanying text.

211. Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1886 (2000).

McDonnell Douglas burden-shifting framework have not fared well.²¹² In particular, a rigid application of the prima facie and pretext phases of the scheme has worked to disadvantage independent contractors as a group.²¹³ While current Title VII doctrine seems unable to bridge the divide between employment and independent contracting, § 1981 is more of a doctrinal blank slate. As it seems that courts have analyzed the provision under *McDonnell Douglas* primarily out of convenience,²¹⁴ § 1981 is susceptible to doctrinal innovation both in how *McDonnell Douglas* is applied and in the potential influence of common law principles.²¹⁵

Perhaps most importantly, § 1981 is available right now, at least for some independent contractors, and therefore has a great deal of practical value. Legislative amendments frequently take time and effort to enact, even with a broad consensus and active sponsors. While broader legislative projects move toward fruition, attorneys can begin urging clients alleging race-based disparate treatment discrimination to file the § 1981 claims already available to them. Simultaneously, courts can familiarize themselves with discrimination claims by independent contractors and experiment with alternative doctrinal approaches that are fairer to those plaintiffs.

Updating § 1981 would reconnect modern civil rights law to the fundamental guarantees of the Reconstruction legislation at a time when millions of Americans sorely need it. But because § 1981 currently is both structurally flawed and underdeveloped, implementing this new vision will require legislative and judicial effort. If successful, this effort will produce a § 1981 modernized in form and resuscitated in spirit.

C. Implementing the New § 1981

Section 1981 stands poised to help independent contractors to face a host of discriminatory barriers, not just race-based ones. There is no reason to believe that women, the elderly, the disabled, and members of minority religions—all groups Congress has protected in the workplace because of their history of subordination—are any less likely to experience discrimination in independent

212. See *supra* Section III.B (describing how independent contractors stumble when courts apply the *McDonnell Douglas* framework).

213. See *supra* Section III.B.

214. See *supra* note 167 and accompanying text.

215. For a more detailed discussion of this point, see *infra* notes 239-253 and accompanying text. See also Steven J. Burton, *Racial Discrimination in Contract Performance: Patterson and a State Law Alternative*, 25 HARV. C.R.-C.L. L. REV. 431, 434 (1990).

contractor relationships than they are in employment relationships. Thus, the principal legislative change must be to expand § 1981's coverage to these groups.²¹⁶

Section 1981 has both constitutional and statutory models for this revision. Congress passed the Fourteenth Amendment, like the Civil Rights Act of 1866, to end racial discord in the post-Civil War era. Despite that original race-focused purpose, courts have updated the Fourteenth Amendment since its ratification to cover classifications other than race (most notably sex).²¹⁷ While courts are unlikely to expand the categories covered by § 1981,²¹⁸ the provision's identity as the "statutory penumbra"²¹⁹ of the Fourteenth Amendment suggests that Congress might update § 1981 in similar ways. In recent decades, Congress has extended national protection legislatively to the elderly and the disabled, a forceful demonstration of the modern consensus behind the antidiscrimination principle.²²⁰ And in 1991, when Congress expanded some of Title VII's remedies to resemble more closely those available under § 1981 (namely, adding some compensatory and punitive remedies),²²¹ it did so in part to eliminate disparities between victims of race discrimination, who could claim such remedies under § 1981, and victims of other kinds of discrimination, who could not.²²² In taking this practical step, Congress reaffirmed its continuing commitment to the symbolic import of § 1981, as it has done in the past.²²³

216. See *infra* note 224 for a discussion of a possible legislative framework.

217. See *Frontiero v. Richardson*, 411 U.S. 677 (1973).

218. See *supra* notes 141-143 and accompanying text. *But cf.* Jay I. Sabin, *Clio and the Court Redux: Toward a Dynamic Mode of Interpreting Reconstruction Era Civil Rights Laws*, 23 COLUM. J.L. & SOC. PROBS. 369 (1990) (suggesting dynamic statutory interpretation of § 1981 on the pre-versus post-formation question).

219. Rutherglen, *supra* note 79, at 351.

220. See Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (2000); Americans with Disabilities Act, 42 U.S.C. §§ 12,101-12,213 (2000).

221. Civil Rights Act of 1991, Pub. L. No. 102-166, § 1977A, 105 Stat. 1071, 1072 (codified at 42 U.S.C. § 1981a(b) (2000)).

222. See S. COMM. ON LABOR & HUMAN RES., THE CIVIL RIGHTS ACT OF 1990, S. REP. NO. 101-315, at 7 (1990).

223. At least twice, Congress has considered and rejected the possibility of subsuming § 1981 into modern civil rights legislation. When Congress enacted the Equal Opportunity Act of 1972, the Senate entertained an amendment to make the Equal Pay Act and Title VII the exclusive federal remedies for employment discrimination. In response to the amendment, a Senator stated: "The law against employment discrimination did not begin with [T]itle VII and the EEOC, nor is it intended to end with it. . . . [This amendment would] repeal the first major piece of civil rights legislation in this Nation's history. We cannot do that." 118 CONG. REC.

These factors suggest that Congress might be amenable to expanding § 1981 to cover other categories of discrimination. In 1994, Senator Howard Metzenbaum introduced legislation that essentially would have accomplished this.²²⁴ Though the bill failed, a similar effort today might fare substantially better. For one thing, Senator Metzenbaum's bill expanded not just antidiscrimination protections to contingent workers but also minimum wage, collective bargaining, and occupational safety and health guarantees—all more controversial than antidiscrimination alone.²²⁵ More importantly, the public landscape has changed dramatically since 1994. The number of independent contractors has soared, so it is likely that members of Congress have growing numbers of contingent workers among their constituents. A poll in 2000 found that more than three in five of those surveyed either had been in contingent positions themselves or knew someone who had in the past ten years. More than two-thirds found it unfair for companies to treat contingent workers worse than regular employees, and 60% would vote for a congressional candidate who promised to secure equal treatment of contingent workers.²²⁶ The time is ripe for legislative action.

Congress also should amend § 1981 to reach discrimination beyond mere disparate treatment. As under Title VII, § 1981 plaintiffs should be able to file disparate impact lawsuits—a critical tool in light of increasing difficulties in proving intentional discrimination.²²⁷ Additionally, Congress should take steps to bring § 1981 in line with Title VII procedurally: it should authorize the

S. 3371 (daily ed. Feb. 9, 1972) (statement of Sen. Williams). The second time was when Congress debated the Civil Rights Act of 1991. S. REP. NO. 101-315, at 12 (calling § 1981 “a critically important tool used to strike down racially discriminatory practices in a broad variety of contexts”).

224. See Contingent Workforce Equity Act, S. 2504, 103d Cong. (1994). The bill would have amended § 1981 to protect the right to contract free from “discrimination based on race, color, religion, sex, national origin, age, or disability”; for substantive legal content, the bill referred to Title VII, the ADA, and the ADEA. *Id.* §§ 102-103, 302-303. This bill built upon an earlier proposal by Senator Patricia Schroeder, first introduced in 1987, to extend health and pension benefits to contingent workers. See Part-Time and Temporary Workers Protection Act of 1987, S. 1309, 100th Cong. (1987).

225. S. 2504, §§ 101, 104-105; see also *supra* notes 72-73 and accompanying text (describing scholars' views that antidiscrimination protection is less controversial than other types of labor protections).

226. N. Am. Alliance for Fair Employment, *Contingent Workers Fight for Fairness*, http://www.fairjobs.org/fairjobs/contingent/cwffe_poll.php (last visited Sept. 26, 2006).

227. See discussion *supra* note 150 and accompanying text. The Supreme Court could undo its own decision not to extend § 1981 to disparate impact suits, but in light of the longstanding precedent and Congress's explicit choice not to override that decision in the Civil Rights Act of 1991, see Rutherglen, *supra* note 79, at 346, such an act seems unlikely.

EEOC to enforce § 1981, permit suits to go forward against state employers, and regularize the applicable statutes of limitations across the country and for all types of § 1981 claims.²²⁸

Though § 1981 should be made consistent with Title VII from a procedural perspective, the courts (and Congress, if necessary to break with precedent) also should revamp the § 1981 doctrine to better protect those who seek to contract. Doing so likely will not require entirely dismantling the *McDonnell Douglas* scheme, which, as the *Patterson* Court acknowledged, is a “sensible” means of dealing with the circumstantial evidence that tends to prove subtle discrimination.²²⁹ Yet the mechanistic application of *McDonnell Douglas*, which the Supreme Court itself has decried,²³⁰ has frustrated the objectives of the provision in whose service it has been deployed.

As they develop doctrine for applying the new § 1981 to independent contractors, courts will have to alter Title VII doctrine in at least some respects. Given that the rigid application of the prima facie and pretext requirements tends to stymie independent contractor cases, a moderate option would be to encourage a more flexible *McDonnell Douglas* analysis. For example, instead of hewing so closely to the prima facie requirements when an independent contractor cannot find another independent contractor “similarly situated” enough to act as a comparator for her prima facie case, the court could accept a less similarly situated comparator or, if the plaintiff’s evidence were strong, dispense with that requirement altogether. In *Williams v. Travelers Indemnity Co.*, for example, the court found that the plaintiff, an independent contractor, had made out a prima facie case even though he could not show “that his treatment differed in any way from other agents similarly situated.”²³¹ The court went on to find that the defendant’s proffered legitimate nondiscriminatory reason was unpersuasive and that the plaintiff’s evidence of discrimination was sufficient to survive summary judgment.²³² Courts could

228. Congress also could consider legislatively overruling *Domino’s Pizza, Inc. v. McDonald*, 126 S. Ct. 1246 (2006), a recent Supreme Court case holding that only individuals with rights under existing or proposed contracts have causes of action under § 1981. Permitting nonparties with distinct injuries also to bring suit would expand the universe of individuals with standing under § 1981, though it is not clear the extent to which *Domino’s Pizza* currently lets “discriminatory acts . . . go unpunished.” *Id.* at 1251.

229. *Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989) (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)).

230. *Furnco*, 438 U.S. at 577 (stating that the *McDonnell Douglas* framework “was never intended to be rigid, mechanized, or ritualistic”); see also *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 519 (1993) (citing *Furnco*).

231. No. 87 C 6098, 1989 U.S. Dist. LEXIS 9049, at *14 (N.D. Ill. July 25, 1989).

232. *Id.* at *16.

reach a similar result by replacing the burden-shifting scheme with a “basic” approach whereby the fact-finder simply evaluates the plaintiff’s proof, direct or otherwise; evaluates the defendant’s proof that it did not discriminate; and evaluates the evidence as a whole.²³³

To address the challenges independent contractors face in the pretext phase, courts should look more skeptically at defendants’ purported business reasons for failing to contract with plaintiffs, terminating their contracts, or otherwise mistreating them. Those who hire independent contractors can claim easily that they terminated a contract with an individual simply because they could and they wanted to—a primary reason employers hire independent contractors in the first place. Yet courts must look behind the face of such explanations. One technique would be to apply in the § 1981 context an expansive reading of *Desert Palace, Inc. v. Costa*, which held that Title VII plaintiffs could survive summary judgment by providing sufficient proof of “mixed motives” (in other words, that discrimination was a motivating factor, if not the only one).²³⁴ For independent contractors, a broad conception of the mixed-motive framework would mean a significantly lighter burden in the pretext phase because they could show merely that discrimination was one reason that existed alongside the defendant’s proffered business justification, rather than the only reason.²³⁵

In light of § 1981’s language and history, which have ties to the common law, courts may wish to draw not only from discrimination doctrine but also

233. See, e.g., Denny Chin & Jodi Golinsky, *Moving Beyond McDonnell Douglas: A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 BROOK. L. REV. 659, 673 (1998). As Chin and Golinsky note, *McDonnell Douglas* has been criticized widely even in the context of classic employment discrimination litigation. *Id.* at 659-60.

234. 539 U.S. 90 (2003). The case has left Title VII courts and commentators confused over the scope of its holding. See Matthew R. Scott & Russell D. Chapman, *Much Ado About Nothing—Why Desert Palace Neither Murdered McDonnell Douglas Nor Transformed All Employment Cases into Mixed-Motive*, 36 ST. MARY’S L.J. 395 (2005); Jeffrey A. Van Datta, “Le Roi Est Mort; Vive Le Roi!”: *An Essay on the Quiet Demise of McDonnell Douglas and the Transformation of Every Title VII Case After Desert Palace, Inc. v. Costa into a “Mixed-Motives” Case*, 52 DRAKE L. REV. 71, 79 (2003).

235. In the Title VII context, proving “mixed motives” limits the plaintiffs’ remedies to declaratory and injunctive relief and attorney’s fees and costs, as the Civil Rights Act of 1991 requires. 42 U.S.C. § 2000e-5(g)(2)(B) (2000). Courts that borrow the mixed-motive framework in applying § 1981, however, need not adopt the remedies limitations, as they would not be bound by the statutory language. They should be especially wary of doing so if a large portion of independent contractor cases were to become mixed-motive cases, depriving independent contractor plaintiffs of the full damages to which they are entitled.

from the common law of contracts, torts, and corporations.²³⁶ Scholars have urged courts to look to the common law as an accepted and valuable source of norms and rules for updating statutes at risk of becoming obsolete.²³⁷ Section 1981 is particularly open to the influence of the common law because the provision, not establishing any substantive contractual rights on its own, by necessity refers to extrinsic contract law.²³⁸ In determining whether a defendant has violated § 1981, either in the pretext phase of *McDonnell Douglas* or independent of it, courts should consult principles and standards borrowed from the common law and, if they find the conduct in question actionable, interpret § 1981 to forbid it.

Several commentators have suggested that contract remedies could provide a rich source of protections against discrimination in contractual relationships, independent of federal statutory causes of action.²³⁹ Neil Williams has argued, for example, that the duty-to-serve doctrine, which requires public service companies to serve all members of the public without distinction,²⁴⁰ could support an implied contractual promise not to discriminate in “those instances in which members of a community can reasonably expect to be free from discrimination.”²⁴¹ Another avenue of contractual relief involves the covenant of good faith and fair dealing, which a party breaches by engaging in “bad faith” conduct that “violate[s] community standards of decency, fairness or reasonableness.”²⁴² While plaintiffs and their attorneys should of course work to develop these independent causes of action, they also could supply standards for courts to apply through the prism of § 1981. If a § 1981 defendant’s conduct would be illegitimate under the common law of contracts, that suggests that

236. Looking to the common law to influence § 1981 doctrine is different from relying on common law remedies themselves to alleviate discrimination, which would be problematic. See *supra* note 201 and accompanying text.

237. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES 2* (1982); see also Burton, *supra* note 215, at 434 (suggesting that “the formalistic chasm between statutory and common law” should be bridged).

238. Burton, *supra* note 215, at 446.

239. See *id.* at 446-47; Emily M.S. Houh, *Critical Interventions: Towards an Expansive Equality Approach to the Doctrine of Good Faith in Contract Law*, 88 CORNELL L. REV. 1025 (2003); Williams, *supra* note 201; Pirruccello, *supra* note 201.

240. Williams, *supra* note 201, at 202-03.

241. *Id.* at 208.

242. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981); see also Houh, *supra* note 239, at 1088; Williams, *supra* note 201, at 214; Pirruccello, *supra* note 201, at 218-20. Steven Burton has developed an analogous contract law argument that relies on the lawful performance doctrine, which implies into the terms of a contract the statutory framework existing at formation. Burton, *supra* note 215, at 473-74.

the defendant has deprived the plaintiff of his statutorily guaranteed right to make and enforce contracts without discriminatory barriers.

Because § 1981 sounds in tort as well,²⁴³ courts also should consult that body of common law for remedies for discrimination in contractual relationships. Under the common law of tort, an independent contractor who has faced discrimination at the hands of someone other than the person who hired him, such as an employee of that person, might have a claim for tortious interference with his contract with the principal.²⁴⁴ The standard for evaluating such claims is whether the interferer's conduct was "improper[],"²⁴⁵ which has been read to mean "malicious"²⁴⁶—certainly a concept expansive enough to include discrimination. For harassment in the context of a contractual relationship, a discrimination victim also may have an action for intentional infliction of emotional distress.²⁴⁷ Under the *Restatement (Second) of Torts*, one is liable if his "extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another."²⁴⁸ Like the standards for contract law violations, these analyses could inform the application of § 1981.

Finally, the business judgment rule from the corporations context could provide content to the evaluation of § 1981 discrimination claims. When shareholders sue corporate officers and directors for breach of fiduciary duty, the business judgment rule shields the defendants from judicial scrutiny of the soundness of their business decisions, as long as the defendants act in good faith and with the honest belief that their actions are in the best interest of the company.²⁴⁹ In practice, the rule serves as an evidentiary presumption, and in that sense resembles the burden-shifting in stages two and three of the *McDonnell Douglas* analysis. Under the rule, however, even decisions for which directors can offer a sound, persuasive business rationale are not insulated if the plaintiff shows that they conceal an improper motive.²⁵⁰ At least one scholar has argued that decisions based on racial discrimination or stereotyping fit this

243. See *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 661 (1987) (suggesting that § 1981 sounds in tort because racial discrimination is a "fundamental injury to the individual rights of a person").

244. Pirruccello, *supra* note 201, at 206.

245. RESTATEMENT (SECOND) OF TORTS § 766 (1979).

246. *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 717 (Tex. 2001).

247. See Pirruccello, *supra* note 201, at 215.

248. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

249. See *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

250. See *Miller v. AT&T Co.*, 507 F.2d 759, 762 (3d Cir. 1974) (finding no protection for illegal activity); *Abrams v. Allen*, 74 N.E.2d 305, 307 (N.Y. 1947) (stating that actions against public policy receive no protection).

category and should not receive the protection of the rule.²⁵¹ In the § 1981 context, courts could evaluate defendants' proffered nondiscriminatory reasons for their treatment of independent contractors in the same way they currently examine business judgments in corporate fiduciary duty suits – in other words, by reviewing decisions for evidence of improper motives.

The principal advantage of borrowing from contract, tort, and corporate law is that the analysis of the proposed common law claims is far more flexible than Title VII doctrine.²⁵² Under the Title VII burden-shifting framework, a plaintiff must rebut a defendant's proffered legitimate, nondiscriminatory reason for its action with particularized evidence of pretext. Under these common law doctrines, however, a plaintiff must show only a violation of community standards of decency, fairness, or reasonableness (covenant of good faith and fair dealing), improper or malicious conduct (tortious interference), extreme and outrageous conduct (intentional infliction of emotional distress), or improper motive (business judgment rule). Of course, plaintiffs still would have to meet their burden of persuasion on these matters, and many, if not most, would be unlikely to do so. But "[i]t often will be easier to convince a jury that a plaintiff was treated indecently, unfairly, or unreasonably . . . than to prove the motivation giving rise to the mistreatment."²⁵³ With the added flexibility of these alternative doctrines, plaintiffs might survive summary judgment and present their evidence to fact-finders.

Section 1981 offers a rare opportunity to innovate new doctrine for a new type of worker. If they collaborate, Congress and the courts can bring this project to fruition. Congress, for its part, should amend the statute to include the types of discrimination currently covered by workplace discrimination law and should regularize it procedurally. Then courts should work to adapt the provision's application to the circumstances of independent contractors. Section 1981's doctrine should reflect its unique position at the intersection of antidiscrimination regulation and the common law.

CONCLUSION

The contracting-out phenomenon has created a new and vulnerable population of workers: independent contractors with insecure jobs, low pay,

251. See Leonard M. Baynes, *Racial Stereotypes, Broadcast Corporations, and the Business Judgment Rule*, 37 U. RICH. L. REV. 819, 871-72 (2003).

252. See Williams, *supra* note 201, at 228.

253. *Id.*

and no rights or benefits under the federal labor and employment law regime. Unlike their traditionally employed counterparts, they also lack the critical protection of the widely accepted, symbolically and practically important modern antidiscrimination laws such as Title VII. Section 1981's "make and enforce contracts" clause creates a cause of action for some of these individuals but leaves many of them—including women, the disabled, the elderly, and victims of disparate impact discrimination—without recourse. Yet § 1981's broad language and noble history leave it poised to make a greater difference in these workers' lives. If Congress and the courts expand its coverage, regularize its procedures, and develop its doctrine, § 1981 may provide a meaningful safeguard for independent contractors who face discrimination in the workplace.

Of course, full relief for these individuals must be holistic and comprehensive, not merely legal. Advocates on behalf of contingent workers are already engaged in extrajudicial projects (such as unionization) aimed at securing decent and humane work experiences for independent contractors and other contingent workers.²⁵⁴ But society has recognized that the law is a necessary ingredient in the process of bringing justice to workers. Title VII's success²⁵⁵ and the political support that led to the ADA and ADEA testify to this fact. Moreover, legal norms shape social understanding. Independent contractors need a strong backbone of legal antidiscrimination protection not only as a practical means to bring and enforce claims but also as a symbol of their dignity and equality as autonomous participants in the labor market.

Section 1981 has long been the battleground for struggles over discrimination and the role of antidiscrimination law.²⁵⁶ Today it stands again at the forefront of major sociological, economic, and legal change, as courts and legislatures struggle to apply labor and employment law to a profoundly transformed workplace. Yet during this era of flux, the mission of the framers of the Civil Rights Act of 1866 remains both timely and fundamentally important. As in 1866, individuals today suffer at the hands of those with whom they contract because of characteristics they cannot control and for which society has decided they should not be denied opportunity. With careful and considered updates, § 1981 may again become a powerful practical and symbolic tool for eradicating discrimination.

254. See Patricia Ball, *The New Traditional Employment Relationship: An Examination of Proposed Legal and Structural Reforms for Contingent Workers from the Perspectives of Involuntary Impermanent Workers and Those Who Employ Them*, 43 SANTA CLARA L. REV. 901, 931-38 (2003); Middleton, *supra* note 58, at 589-613.

255. See *supra* note 194.

256. See Rutherglen, *supra* note 79, at 351-52.