

Enjoyed by White Citizens

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Whiteness is invisible in American law. The U.S. Constitution never mentions white people. Indeed, the entirety of constitutional and statutory law, at both the federal and state level, includes only two antidiscrimination statutes that refer explicitly to white people. These Reconstruction-era statutes—42 U.S.C. § 1981 and § 1982—declare that all people shall have the “same right” regarding contracts and property as that “enjoyed by white citizens.”

This Article argues that the unique visibility of whiteness in § 1981 and § 1982 presents an opportunity. The plain language of these statutes exposes whiteness and requires explicit analysis of the contract and property rights that white people enjoy. To remain faithful to the statutory text, courts must consider why white people serve as a statutory benchmark in the first place—a task that forces a reckoning with America’s long history of white supremacy. Further, courts must examine the nature of the contract and property rights that white people “enjoy”—a task that requires them to examine how these rights affirmatively provide pleasure and satisfaction.

The contract and property rights enjoyed by white and nonwhite people remain profoundly unequal, but § 1981 and § 1982 offer a powerful tool for reform. The two statutes provide not only an important avenue for litigation but also a valuable model for legislation and a catalyst for public discourse that openly examines whiteness and the benefits that it confers.

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INTRODUCTION

It is idle to say that a man is free who cannot go and come at pleasure, who cannot buy and sell, who cannot enforce his rights.

—Senator Lyman Trumbull, author of the Civil Rights Act of 1866¹

Whiteness is invisible in American law. The U.S. Constitution never explicitly mentions white people.² On one level this absence is remarkable. After all, the Constitution was written exclusively by white people, to reflect the interests of white people, to protect the rights of white people, and to create a government run by white people.³

Against the backdrop of its drafting, however, the absence of whiteness in the Constitution is entirely unsurprising. A document created at a time of uninterrupted white supremacy did not need to explicitly mention white people.⁴ The Framers of the Constitution believed it self-evident that only white people were entitled to the rights and privileges laid out in America's founding documents.⁵ The superior status of white people was seen as so obvious, natural, and correct that the Framers did not need to recognize it explicitly.⁶

1. CONG. GLOBE, 39th Cong., 1st Sess. 43 (1865) (statement of Sen. Trumbull).

2. See generally U.S. CONST.

3. By *white people*, I actually mean white men, given that women of all races were, at the time, profoundly subordinated to men and lacked basic civil rights such as the ability to vote. Although this Article focuses on race, gender is also relatively unexamined in the original U.S. Constitution and early legislative enactments.

4. Throughout this Article, I use legal scholar Frances Lee Ansley's definition of *white supremacy*: "[A] political, economic and cultural system in which whites overwhelmingly control power and material resources," and in which "white dominance and non-white subordination are daily reenacted across a broad array of institutions and social settings." Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1024 n.129 (1989). As legal scholar Erika K. Wilson has emphasized, "this definition of white supremacy focuses primarily on the institutional arrangements that underlie white supremacy and only secondarily on individual race-based animus." Erika K. Wilson, *The Legal Foundations of White Supremacy*, 11 DEPAUL J. FOR SOC. JUST. 1, 3 (2018). Although for some the phrase *white supremacy* may conjure images of pointed white hoods and shouted epithets, this Article focuses instead on structural conditions that advantage white people as a group. And although white supremacy has both individual and structural manifestations, this Article urges greater attention to systemic aspects of racial inequality rather than a view of white supremacy as a set of individual, overt acts.

5. See, e.g., RICHARD D. BROWN, SELF-EVIDENT TRUTHS: CONTESTING EQUAL RIGHTS FROM THE REVOLUTION TO THE CIVIL WAR 123–38 (2017) (examining white supremacy at the time of the Founding).

6. See, e.g., HENRY WIENCEK, MASTER OF THE MOUNTAIN: THOMAS JEFFERSON AND HIS SLAVES (2012) (cataloging evidence of Jefferson's white supremacist views); Michael J. Klarman, Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell, 81 VA. L. REV. 1881, 1895 (1995) ("The best 'scientific' evidence of the mid-nineteenth century held that racial differences were natural, the supremacy of the white race was self-evident, and racial segregation an imperative for the survival of both races."); Samuel Marcossou, *Colorizing the Constitution of Originalism: Clarence Thomas at the Rubicon*, 16 LAW & INEQUALITY 429, 429–30 (1998) (imagining the dilemma that Justice Thomas would have faced had he been on the Court when *Loving v. Virginia*, was decided, given that "the Framers of the Fourteenth Amendment neither believed nor intended that their handiwork would invalidate State anti-miscegenation laws").

In the years surrounding the Civil War, after sustained and heroic activism by Black people and their white allies,⁷ many legislators and citizens began to believe that nonwhite people deserved protection against some forms of discrimination, and that in some ways, nonwhite people were even equal to white people. Yet the legal texts that arose out of this understanding—the Thirteenth, Fourteenth, and Fifteenth Amendments and several statutes at both the federal and state level—perpetuate the original Constitution’s silence on whiteness. The Thirteenth Amendment prohibits “slavery [and] involuntary servitude” without mentioning race.⁸ The Fourteenth Amendment’s famed Equal Protection Clause guarantees that a state may not “deny to any person within its jurisdiction the equal protection of the laws” without mentioning any specific race.⁹ The Fifteenth Amendment establishes that the right to vote “shall not be denied or abridged . . . on account of race, color, or previous condition of servitude,” again without mentioning any specific race.¹⁰ All of these constitutional provisions are intended to redress grievous racial wrongs: slavery, ongoing racial discrimination, and race-based voter suppression. Yet none of them mentions the white people who committed these wrongs.

Today, the law’s silence about whiteness remains normalized throughout American society. This silence extends not only to the U.S. Constitution but also to federal statutes, state constitutions, and state statutes.¹¹ The rule holds true even among statutes that specifically prohibit discrimination.¹² Although antidiscrimination statutes often guarantee “equality” or prohibit “discrimination on account of race,” they never mention whiteness.

Two antidiscrimination statutes interrupt this legal silence. One statute, 42 U.S.C. § 1981, grants to “all persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens.”¹³ The other, 42 U.S.C. § 1982,

7. *See generally, e.g.*, DAVID W. BLIGHT, FREDERICK DOUGLASS: PROPHET OF FREEDOM (2018); ERICA ARMSTRONG DUNBAR, SHE CAME TO SLAY: THE LIFE AND TIMES OF HARRIET TUBMAN (2019); KELLIE CARTER JACKSON, FORCE AND FREEDOM: BLACK ABOLITIONISTS AND THE POLITICS OF VIOLENCE (2019); FRED KAPLAN, LINCOLN AND THE ABOLITIONISTS: JOHN QUINCY ADAMS, SLAVERY, AND THE CIVIL WAR (2017).

8. U.S. CONST. amend. XIII, § 1.

9. *Id.* amend. XIV, § 1.

10. U.S. CONST. amend. XV.

11. *See infra* Section II.A.

12. *See, e.g.*, Civil Rights Act of 1968, Pub. L. No. 90-284, § 101, 82 Stat. 73, 73–75; Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

13. In full, § 1981 reads as follows:

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

(b) **“Make and enforce contracts” defined** For purposes of this section, the term “make and enforce contracts” includes the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) **Protection against impairment** The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

grants to all persons “the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property.”¹⁴ The two statutes name whiteness explicitly using language seen nowhere else in constitutional or statutory law. Everyone, the statutes declare, has the same rights regarding contracts and property as those “enjoyed by white citizens.”¹⁵

What does the unique language of § 1981 and § 1982 signify? One might argue that the phrasing meant little at the time that the statutes were enacted as part of the Civil Rights Act of 1866 and means nothing today. The legislative history of § 1981 and § 1982 suggests that the phrase was included, at least partly, to address concerns about federalism: some legislators were concerned that the statutes might impose a specific federal vision of substantive rights on reluctant states.¹⁶ The language guaranteeing “the same right . . . as enjoyed by white citizens” was designed to allay that fear. States and localities would not have to provide or protect any particular rights under the statutes. Rather, they simply had to ensure that the rights available at the state level were the same for white and non-white people.

Federalism concerns, however, do not entirely explain the sweeping language of § 1981 and § 1982. The statutory language of § 1981 and § 1982 makes whiteness explicit and visible. Further, the word *enjoyed* introduces an expansive understanding of the rights of contract and property. Both the common understanding of what it means to enjoy and the use of the word in other legal contexts indicate that enjoyment includes not only mere use or possession but also affirmative pleasure and satisfaction.¹⁷

The unique language of § 1981 and § 1982 invites a different analysis by courts and other stakeholders. First, the statutory language makes whiteness visible, while other statutes allow whiteness to disappear into the background as an unspoken default. Second, the language acknowledges the history of white supremacy that made such a statute necessary in the first place. Third, the statutes require a judicial examination of both whiteness and white supremacy, which in

42 U.S.C. § 1981 (2018). As the Article explains in Section II.C, § 1981(b) was added in a 1991 amendment to clarify the scope of the statute.

14. In full, § 1982 reads as follows: “All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.” *Id.* § 1982.

15. *Id.* §§ 1981–1982. Both 42 U.S.C. § 1981 and § 1982 refer to white *citizens*, not just to white people. The role of citizenship as a baseline for rights is an important topic, although it is beyond this Article’s focus on whiteness. I use the phrases *white citizen* and *white person* interchangeably throughout this Article because nearly all of the privileges enjoyed by white citizens that I discuss would be similarly enjoyed by any white person, regardless of the person’s citizenship status.

16. See *infra* Section II.B.

17. See *infra* Sections III.C–D. Moreover, the 1991 amendment to § 1981 reinforced the breadth of the rights at stake by defining the right of contract to include “making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.” Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1071–72 (codified at 42 U.S.C. § 1981(b) (2018)).

turn forces acknowledgement of a racial history that has left behind profound inequality. Fourth, the statutes require courts to closely examine the full scope of rights that white people enjoy with respect to the many fundamental aspects of American life that involve contract and property. And finally, if read properly, § 1981 and § 1982 offer a powerful legal remedy when the rights enjoyed by non-white people fall short of those enjoyed by white people.

The Article proceeds in four parts. Part I draws on sociological research to establish the invisibility of whiteness in American society—a form of racial privilege that benefits white people relative to their nonwhite counterparts.

Part II examines the way that law reinforces white invisibility. I first present the findings of an original and comprehensive survey of constitutional and statutory law at both the federal and state level. The survey reveals that white people are virtually never named in constitutional and statutory law, even law enacted specifically to eliminate racial discrimination. I then turn to the two exceptions: 42 U.S.C. § 1981, which prohibits racial discrimination in contracting, and 42 U.S.C. § 1982, which similarly forbids racial discrimination in transactions involving property. I survey the legislative history of the statutes, which supports an expansive reading, and the constrained way in which courts have subsequently interpreted them.

Part III considers how American society would differ if courts and other legal actors adhered to the plain language of § 1981 and § 1982—that is, if they acknowledged the ways in which white supremacy is deeply ingrained in American society and took seriously what it would mean for nonwhite people to enjoy the same rights of contract and property as white people. A richer understanding of what it means to enjoy rights involving contract and property would elevate both our antidiscrimination laws and our discourse around race.

Finally, Part IV argues that the judiciary should read the plain language of § 1981 and § 1982 to justify increased attention to white supremacy and a more expansive understanding of what it means to enjoy the right of contract and property. Moreover, the approach to the statutory language for which I advocate offers a better way of understanding race and racism in the American legal system and in American society. The Article concludes—perhaps surprisingly—with optimism about the way that the Trump era has made whiteness visible and, ironically, has created a singular opportunity for racial progress.¹⁸

18. See, e.g., Max Boot, *2017 Was the Year I Learned About My White Privilege*, FOREIGN POL'Y: VOICE (Dec. 27, 2017, 1:55 PM), <https://foreignpolicy.com/2017/12/27/2017-was-the-year-i-learned-about-my-white-privilege> (describing himself as “a smart-alecky conservative who scoffed at ‘political correctness,’” and explaining that, for him, “[t]he larger problem of racism in our society was made evident in Donald Trump’s election, despite—or because of—his willingness to dog-whistle toward white nationalists with his pervasive bashing of Mexicans, Muslims, and other minorities”).

I. THE INVISIBILITY OF WHITENESS

Whiteness is invisible in American society.¹⁹ The racial default is white, and whiteness represents the status quo everywhere from entertainment to politics. Indeed, one of the greatest privileges of whiteness is that most of the time white people do not have to think about being white.²⁰ Section I.A surveys social science research and qualitative evidence demonstrating the invisibility of whiteness. Section I.B. reveals that this invisibility is a form of privilege that separates white people and their nonwhite counterparts.

A. DEFAULT WHITE

Researchers have demonstrated that people of all races usually assume that other people—from a character in a fictional story to a boss they have yet to meet—is white unless they are explicitly told that someone is not.²¹ Whiteness as a default thus emerges in a range of contexts. Legal scholar Brant Lee observes that “the standard judge, teacher, student, or customer—the standard person—is imagined to be White.”²² And if white is the default, then anyone who is not white is automatically marginalized. As Robin DiAngelo has written: “White people are just people [W]hile people of color, who are never just people but always most particularly black people, Asian people, etc., can only represent their own racialized experiences.”²³

From an early age, children of all races see images of whiteness as the norm and images of people of other races as the “other” both in and beyond the classroom. Students learn the history of the United States through the lens of whiteness.²⁴ Indeed, the very existence of Black History Month confirms the dominance of the white perspective: such a month would be unnecessary were it not the case that examination of Black perspectives and contributions are outside

19. See, e.g., Barbara J. Flagg, “*Was Blind, but Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993).

20. See Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, 1989 PEACE & FREEDOM, reprinted in RACE, CLASS, AND GENDER IN THE UNITED STATES: AN INTEGRATED STUDY 188, 188–89 (Paula S. Rothenberg ed., 6th ed. 2004).

21. See, e.g., Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2013 (1995) (explaining that “whites tend to regard whiteness as racelessness,” and critiquing workplace norms that adopt a default white perspective); Amanda E. Lewis, “*What Group?*” *Studying Whites and Whiteness in the Era of “Color-Blindness,”* 22 SOC. THEORY 623, 635–36 (2004) (explaining that many white people adopt a color-blind ideology, which in turn ignores the reality of being nonwhite). For a useful article complicating the nature of whiteness, see Camille Gear Rich, *Marginal Whiteness*, 98 CALIF. L. REV. 1497, 1510–14 (2010).

22. Brant T. Lee, *The Network Economic Effects of Whiteness*, 53 AM. U. L. REV. 1259, 1270 (2004) (internal quotation marks omitted).

23. Robin DiAngelo, *White Fragility*, 3 INT’L J. CRITICAL PEDAGOGY 54, 59 (2011).

24. See, e.g., Joe Heim, *Teaching America’s Truth*, WASH. POST (Aug. 28, 2019), <https://www.washingtonpost.com/education/2019/08/28/teaching-slavery-schools/?arc404=true>; Nikita Stewart, “*We Are Committing Educational Malpractice*”: *Why Slavery Is Mistaught—and Worse—in American Schools*, N.Y. TIMES (Aug. 19, 2019), <https://www.nytimes.com/interactive/2019/08/19/magazine/slavery-american-schools.html>.

the norm.²⁵ The way that many classrooms celebrate and read literature by nonwhite authors further reinforces a white default. Although examining racially diverse writers' work is commendable, emphasizing the race of nonwhite authors but not white authors communicates that nonwhite authors' work is not universal—rather, it offers an aberrant perspective as compared to the normal, white perspective. White writers such as Ernest Hemmingway and Mark Twain are writers—we do not distinguish them by their whiteness—but Toni Morrison is a *Black* writer.²⁶ DiAngelo points out that “[t]his also allows white (male) writers to be seen as not having an agenda or any particular perspective, while racialized (and gendered) writers do.”²⁷

Or consider the law school classroom. At most law schools, nearly every case a student reads during their first year is written by a white person, usually a man—and this curriculum is so normalized that no one mentions it.²⁸ As legal scholar Lani Guinier has observed, the portraits hung on any law school's walls depicting accomplished alumni are typically of white men.²⁹ Within that environment, nonwhite students are often defined by their race. Guinier and her colleagues found that students of color—and particularly Black students—are more frequently “‘put on the spot’ to ‘testify’ about their personal experience and to incorporate their racial identity into their answers.”³⁰ Classes on originalism—a technique of constitutional statutory interpretation that looks to the intent of the drafters, who are often or exclusively white men—are seen as objective, impartial, and unbiased.³¹ Meanwhile, critical race theory—a discipline that strives to expose the social and institutional structures that perpetuate racial inequality—is dismissed as inherently ideologically motivated.³² Default whiteness is potent because it is so pervasive that no one notices it.

25. ROBIN DIANGELO, *WHITE FRAGILITY: WHY IT'S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM* 56 (2018). Moreover, white engagement with Black History Month is often antagonistic. *See, e.g.*, Woody Doane, *Rethinking Whiteness Studies*, in *WHITE OUT: THE CONTINUING SIGNIFICANCE OF RACISM* 3, 14 (Ashley “Woody” Doane & Eduardo Bonilla-Silva eds., 2003) (“In the absence of a named ‘White History Month,’ Black History Month is criticized as unnecessary and unequal.”).

26. *See* DIANGELO, *supra* note 25, at 56.

27. *Id.* at 56–57.

28. During my entire first year as a student at Stanford Law School, the only person who mentioned the whiteness of authorship in everything we read was a Latina classmate, who pointed it out while we were eating lunch one day. No professor ever mentioned it.

29. *See* Lani Guinier, *Models and Mentors*, in *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* 85, 85–86 (Lani Guinier, Michelle Fine & Jane Balin eds., 1997).

30. Lani Guinier, Michelle Fine, Jane Balin, Ann Bartow & Deborah Lee Stachel, *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 66 n.170 (1994).

31. *See, e.g.*, Adam Lamparello & Charles E. MacLean, *Originalism and the Criminal Law: Vindicating Justice Scalia's Jurisprudence—And the Constitution*, 50 AKRON L. REV. 227, 232 (2016) (stating, with no citation, that “[o]riginalism has proven to be the most objective and neutral interpretive theory”); Jim Wedeking, *Quaker State: Pennsylvania's Guide to Reducing the Friction for Religious Outsiders Under the Establishment Clause*, 2 N.Y.U. J.L. & LIBERTY 28, 61 (2006) (stating, with no citation, that “[o]riginalism in any form is not a universally adored method of interpretation; it is, however, the most neutral and objective method available”).

32. *See, e.g.*, DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997); Jeffrey Rosen, *The Bloods and the Crits*, *THE NEW REPUBLIC*, Dec. 9, 1996, at 27. More recently, critical race theory has become a flash point in the culture wars—the lack of understanding about critical race theory notwithstanding. *See* Melissa Block,

Beyond these formal environments, the default of whiteness affects the texture of everyday life in countless ways. Consider the question of whose skin is considered “flesh” toned or “nude.” In drug stores, the Band-Aids typically for sale are closest to the skin tones of white people, implying that this is the “normal” color for skin.³³ When it comes to clothing, “nude” undergarments or pantyhose are often closest to the color of white people’s legs.³⁴ When it comes to makeup, the shades described as “nude” are usually the color of white people’s skin.³⁵ White people do not have to think about why the “nude” or “flesh” color is the color of their skin; nonwhite people however, frequently have to think about why it is not.

Whiteness also sets the standard for beauty. In fashion advertisements, most models are still white.³⁶ Some products are specifically designed to help nonwhite people adhere to the white beauty standard, such as the skin-lightening product “Fair and Lovely”³⁷ and eye tape or even eyelid surgery meant for Asian-American women to achieve a double eyelid.³⁸ As writer Danielle Henderson explains: “White beauty standards are . . . the default and it becomes the cultural ideal for beauty. What’s wild is that if you’re white you may not even see it because it’s so pervasive.”³⁹

Agencies, Contractors Suspend Diversity Training to Avoid Violating Trump Order, NPR (Oct. 30, 2020, 5:00 AM), <https://www.npr.org/2020/10/30/929165869/agencies-contractors-suspend-diversity-training-to-avoid-violating-trump-order> [https://perma.cc/23SR-AXZE] (describing limitations on federal agency diversity training, including the prohibition of terms such as “critical race theory,” as “part of a broader culture war”). After President Trump issued an executive order purporting to prohibit critical race indoctrination in federal government workplaces, several other institutions followed suit. *Id.* The hysteria has reached a point where anything about race is automatically classified as “critical race theory.”

33. Cf. Dominique Apollon, *It’s Not About the Band-Aids*, ROOT (Apr. 29, 2019, 4:00 PM), <https://www.theroot.com/it-s-not-about-the-band-aids-1834387539> [https://perma.cc/89JN-RJAP] (explaining what it meant to the author—a Black man—to use a Tru-Colour bandage on his dark skin: “I was taken aback by the sight of the perfect blend created by the brown fabric against my brown skin. . . . This wasn’t the same feeling I’d gotten all these years from traditional ‘flesh-colored’ beige bandages that used some tone of whiteness as the default . . .”).

34. Marie Solis, *Women of Color Point Out the Big Problem with White Beauty Standards*, MIC (May 19, 2016), <https://www.mic.com/articles/143873/women-of-color-point-out-the-big-problem-with-white-beauty-standards> [https://perma.cc/8CYN-N8S7]; see *infra* notes 232–33 and accompanying text.

35. Solis, *supra* note 34; see *infra* notes 232–33 and accompanying text.

36. See, e.g., Cordelia Tai, *Diversity Report: Are Spring 2016 Fashion Ads Still Glossing Over the Issues?*, FASHION SPOT (May 6, 2016), <https://www.thefashionspot.com/runway-news/690669-diversity-report-spring-2016-fashion-ads> [https://perma.cc/78G8-P7DC].

37. See Reuters, *Skin Lightening Cream ‘Fair & Lovely’ to Change Name After Backlash*, NBC NEWS (June 25, 2020, 12:42 PM), <https://www.nbcnews.com/news/asia-america/skin-lightening-cream-fair-lovely-change-name-after-backlash-n1232124> [https://perma.cc/6JM3-CX7N].

38. Cf. Kat Chow, *The Many Stories Behind Double-Eyelid Surgery*, NPR (Nov. 18, 2014, 12:18 PM), <https://www.npr.org/sections/codeswitch/2014/11/18/364670361/the-many-stories-behind-the-double-eyelid-surgery> [https://perma.cc/T5YH-7SXX]; Carson Kessler, *How Three Asian Women Dealt with Their Eyelid Insecurities*, VICE (June 13, 2018, 2:21 PM), <https://www.vice.com/en/article/qvnnjd/how-three-asian-women-dealt-with-their-eyelid-insecurities> [https://perma.cc/SNG5-966S].

39. Solis, *supra* note 34.

The default of whiteness extends to racially correlated characteristics such as hair-style⁴⁰ or accent.⁴¹ Many workplaces and schools continue to prohibit racially correlated hairstyles such as braids, locks, and cornrows.⁴² The effort required to maintain straight or curly hair is much greater for Black women than for most women of other races: scholars such as Wendy Greene have documented the hours of maintenance and thousands of dollars it takes to maintain relaxed hair.⁴³ When it comes to accents, everyone has one—but default whiteness means that certain ways of speaking are seen as “normal” and others, such as those associated with Black, Latino/a/x, and Asian cultures, are seen as non-normative or more difficult to understand even when the people speaking have exactly the same level of English fluency.⁴⁴ Thus, a white person with a southern drawl may be seen as “charming,” while an Asian-American person with a Chinese accent may be labeled “incomprehensible.”

Default whiteness is deeply normalized, resulting in a society that is so closely tailored to the needs and values of white people that white people can go through life unaware that whiteness is the default. Indeed, many may not even think of themselves in racial terms. Researchers Monica McDermott and Frank Samson explain: “College and high school students are often unable to articulate what it means to be white, instead describing it as nothing or a vacuum”⁴⁵ Or, as Barbara Flagg puts it, obliviousness is “a defining characteristic of whiteness: to be white is not to think about it.”⁴⁶ The next Section examines this obliviousness as a form of privilege.

B. DEFAULT PRIVILEGE

White privilege is nothing new. When W.E.B. DuBois described the “public and psychological wage” garnered by even the poorest white workers, he was talking about the premium associated with white privilege.⁴⁷

40. D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do with It?*, 79 U. COLO. L. REV. 1355, 1365–66 (2008).

41. See Lee, *supra* note 22, at 1272–74.

42. See D. Sharmin Arefin, *Is Hair Discrimination Race Discrimination?*, ABA (Apr. 17, 2020), https://www.americanbar.org/groups/business_law/publications/blt/2020/05/hair-discrimination [<https://perma.cc/HJS4-3LCS>]. Such institutions often care enough about maintaining requirements normed around whiteness that they litigate them in federal court. See, e.g., *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 231 (S.D.N.Y. 1981) (litigating over a Black female employee’s right to wear her hair in a “corn row” style).

43. See D. Wendy Greene, *Splitting Hairs: The Eleventh Circuit’s Take on Workplace Bans Against Black Women’s Natural Hair in EEOC v. Catastrophe Management Solutions*, 71 U. MIAMI L. REV. 987, 1012 (2017).

44. See, e.g., Beatrice Bich-Dao Nguyen, Comment, *Accent Discrimination and the Test of Spoken English: A Call for an Objective Assessment of the Comprehensibility of Nonnative Speakers*, 81 CALIF. L. REV. 1325, 1347 (1993) (proposing the use of a standardized test—the Test of Spoken English—as a relatively objective measure of an individual’s comprehensibility).

45. Monica McDermott & Frank L. Samson, *White Racial and Ethnic Identity in the United States*, 31 ANN. REV. SOC. 245, 248 (2005) (citations omitted).

46. Flagg, *supra* note 19, at 969.

47. See W. E. BURGHARDT DU BOIS, *BLACK RECONSTRUCTION: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860-1880*, at 700–01 (1935).

The racial default of whiteness is a component of white privilege. The ability to simply forget about one's race or not to define oneself in racial terms is a privilege unique to white people. Research demonstrates that both white and nonwhite people internalize whiteness as a racial default, with the result that people of color define themselves in terms of their race while white people do not. For example, one study found that “[w]hen people are asked to describe themselves in a few words, Black people invariably note their race and white people almost never do.”⁴⁸

One unstated privilege of whiteness in America is that white people can ignore or disregard nonwhite cultures and norms with minimal or no social cost. Nonwhite people do not have that luxury. For example, nonwhite people who ignore white norms of workplace appearance do so at their peril.⁴⁹ The same is true of school dress codes.⁵⁰ By contrast, if they wish, white people can remain entirely ignorant of nonwhite norms of attire and grooming by seeking out—or even just happening into—predominantly or exclusively white workplaces and other public spaces. Alternatively, white people can dabble in nonwhite cultures, again with little to no social cost, adopting only the aspects of the culture that appeal to them and discarding the culture altogether when doing otherwise becomes boring or inconvenient.⁵¹

The differential in the salience of whiteness compared to other racial identities exacts emotional costs. People of color face constant affective demands that white people do not. Questions such as “Where are you from?”⁵² or “What’s your ethnicity?” are a constant reminder to people of color that they are seen as “different” or “other.” People of color experience constant dilemmas about whether to call out racially clueless remarks: to do so risks offending or having to deal with the emotions of white people; not to do so requires nonwhite people to suppress their own reactions to marginalization.

48. Sylvia A. Law, *White Privilege and Affirmative Action*, 32 AKRON L. REV. 603, 604 (1999).

49. See, e.g., Greene, *supra* note 43, at 990–91 (describing grooming codes that disproportionately affect Black women); Kimberly A. Yuracko, *The Antidiscrimination Paradox: Why Sex Before Race?*, 104 NW. U. L. REV. 1, 4–6 (2010) (noting that courts have refused to protect nonwhite workers from racially discriminatory grooming codes).

50. See, e.g., Jabari Julien, Note, *Leveraging Title VI and the Administrative Complaint Process to Challenge Discriminatory School Dress Code Policies*, 119 COLUM. L. REV. 2205, 2210–13 (2019); Anna-Lisa F. Macon, Comment, *Hair’s the Thing: Trait Discrimination and Forced Performance of Race Through Racially Conscious Public School Hairstyle Prohibitions*, 17 U. PA. J. CONST. L. 1255, 1258 (2015).

51. See, e.g., LAUREN MICHELE JACKSON, *WHITE NEGROES: WHEN CORNROWS WERE IN VOGUE . . . AND OTHER THOUGHTS ON CULTURAL APPROPRIATION* (2019); EVERYTHING BUT THE BURDEN: WHAT WHITE PEOPLE ARE TAKING FROM BLACK CULTURE (Greg Tate ed., 2003); Jeff Guo, *How Iggy Azalea Mastered Her ‘Blaccent,’* Wash. Post (Jan. 4, 2016, 11:29 AM), <https://www.washingtonpost.com/news/wonk/wp/2016/01/04/how-a-white-australian-rapper-mastered-her-blaccent/>; Teryn Payne, *Kim Kardashian West Responds to the Backlash over Her Braids*, Glamour (June 21, 2018), <https://www.glamour.com/story/kim-kardashian-braids-explanation> [<https://perma.cc/W4BW-7FMV>].

52. See, e.g., FRANK H. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* 79–83 (2002) (describing repeated interactions in which he is asked, “Where are you from?” and, instead of accepting his answer, the person will follow up with a question such as, “Where are you *really* from?”).

The vast disparity in racial awareness has significant costs for nonwhite people. Research reveals that the forced, constant awareness of race and racism imposes health costs on nonwhite people. Awareness of racism increases stress levels, or “allostatic load,” that in turn contributes to an array of health problems.⁵³ Arline Geronimus and her colleagues describe the toll of racial awareness as “weathering” and detail consequences for Black people relative to white people, including earlier deterioration of health, greater disability, excess mortality, and greater prevalence of a host of stress-related diseases such as heart disease, liver disease, obesity, hypertension, kidney disease, and diabetes.⁵⁴ In each age group, Black people exhibited a mean health score comparable to white people who were ten years older.⁵⁵ They observed: “The stress inherent in living in a race-conscious society that stigmatizes and disadvantages Blacks may cause disproportionate physiological deterioration”⁵⁶

The toll of racial awareness manifests itself in racial disparities in maternal health and mortality. The maternal mortality for Black women is 3.3 times greater than for white women, and for Native American women, it is 2.5 times greater.⁵⁷ Although some of the disparity is likely attributable to nonwhite women giving birth in lower quality hospitals, many doctors believe that this effect is partially the result of racial stress or “weathering.”⁵⁸ Research suggests that “the discrimination that black women experience in the rest of their lives—the double-whammy of race and gender— . . . may ultimately be the most significant factor in poor maternal outcomes.”⁵⁹

53. Arline T. Geronimus, Margaret Hicken, Danya Keene & John Bound, “Weathering” and Age Patterns of Allostatic Load Scores Among Blacks and Whites in the United States, 96 AM. J. PUB. HEALTH 826, 826 (2006).

54. *Id.* at 826, 831. The disparities that Geronimus and her colleagues documented were not explained by socioeconomic differences, and in fact, Black people who were not poor had a higher allostatic load than poor whites. *Id.* at 830.

55. *Id.* at 831.

56. *Id.* at 826.

57. Emily E. Petersen, Nicole L. Davis, David Goodman, Shanna Cox, Nikki Mayes, Emily Johnston, Carla Syverson, Kristi Seed, Carrie K. Shapiro-Mendoza, William M. Callaghan & Wanda Barfield, *Vital Signs: Pregnancy-Related Deaths, United States, 2011–2015, and Strategies for Prevention, 13 States, 2013–2017*, 68 MORBIDITY & MORTALITY WKLY. REP. 423, 424 (2019), <https://www.cdc.gov/mmwr/volumes/68/wr/pdfs/mm6818e1-H.pdf> [<https://perma.cc/62SR-2DP5>]; see also NICOLE L. DAVIS, ASHLEY N. SMOOTS & DAVID A. GOODMAN, CTRS. FOR DISEASE CONTROL & PREVENTION, PREGNANCY-RELATED DEATHS: DATA FROM 14 U.S. MATERNAL MORALITY REVIEW COMMITTEES, 2008-2017 (2019), https://www.cdc.gov/reproductivehealth/maternal-mortality/erase-mm/MMR-Data-Brief_2019-h.pdf [<https://perma.cc/9XBW-MPNN>]; Myra J. Tucker, Cynthia J. Berg, William M. Callaghan & Jason Hsia, *The Black–White Disparity in Pregnancy-Related Mortality from 5 Conditions: Differences in Prevalence and Case-Fatality Rates*, 97 AM. J. PUB. HEALTH 247, 248 (2007) (finding that Black women were no more likely than white women to develop five pregnancy-related conditions but were two to three times more likely to die from such a condition).

58. See, e.g., Patti Neighmond, *Why Racial Gaps in Maternal Mortality Persist*, NPR (May 10, 2019, 1:32 PM), <https://www.npr.org/sections/health-shots/2019/05/10/722143121/why-racial-gaps-in-maternal-mortality-persist> [<https://perma.cc/ZR3G-LQWE>] (quoting doctors).

59. Nina Martin & Renee Montagne, *Nothing Protects Black Women from Dying in Pregnancy and Childbirth*, PROPUBLICA (Dec. 7, 2017, 8:00 AM), <https://www.propublica.org/article/nothing-protects->

The default of whiteness in American society ultimately reinforces the existence of white privilege. As organizational psychologists L. Taylor Phillips and Brian Lowery observed in their study of the psychology of racial privilege, white individuals are “motivated to maintain either positive self-regard . . . or privileges associated with their group’s dominant status.”⁶⁰ These individual decisions exert social force: “When enough individuals distance themselves from and deny the existence of racial advantages, invisibility emerges at the societal level.”⁶¹ This invisibility is the ultimate white privilege. If white people do not need to think about their own race, they also need not examine the ways in which they have benefited from structural racism, however passively and unintentionally. Nor need they critically examine their own role in perpetuating structural racism, even if that role is entirely through inaction. Whiteness ultimately perpetuates the privilege of racial obliviousness. The next Part examines the way this obliviousness is apparent in the law.

II. INVISIBILITY IN THE LAW

The privilege of racial invisibility associated with whiteness is woven into the legal system. Elected legislators—most of whom are also white⁶²—likewise view whiteness as unimportant to legislation. As Woody Doane has explained, laws do not mention race because “race is defined as an illegitimate topic for conversation.”⁶³ The law’s overwhelming silence on race in general, and whiteness in particular, “rests on the seemingly unassailable moral foundation of ‘equality’”—yet behaving as though the races are equal when they have never been treated that way reinforces institutions that preserve the racial status quo.⁶⁴

Section II.A presents an original survey of whiteness in the U.S. Constitution, federal statutes, state constitutions, and state statutes. The survey reveals that almost no laws explicitly name whiteness. Further, even the statutes that

black-women-from-dying-in-pregnancy-and-childbirth [https://perma.cc/Y3X3-TKJ9] (collecting studies and qualitative data).

60. L. Taylor Phillips & Brian S. Lowery, *Herd Invisibility: The Psychology of Racial Privilege*, 27 CURRENT DIRECTIONS PSYCH. SCI. 156, 156 (2018).

61. *Id.* at 159.

62. Until the most recent November 2020 election, the 116th Congress was the most diverse in history, but even so, only twenty-two percent of the members of the U.S. House of Representatives and Senate were nonwhite, in comparison to thirty-nine percent of the overall U.S. population. Kristen Bialik, *For the Fifth Time in a Row, the New Congress Is the Most Racially and Ethnically Diverse Ever*, PEW RES. CTR. (Feb. 8, 2019), <https://www.pewresearch.org/fact-tank/2019/02/08/for-the-fifth-time-in-a-row-the-new-congress-is-the-most-racially-and-ethnically-diverse-ever> [https://perma.cc/KT2N-R96E]. The 117th Congress has 124 members who identify as Black, Hispanic, Asian/Pacific Islander, or Native American—a total of 23.3% of the 532 members included in the Pew analysis. See Katherine Schaeffer, *Racial, Ethnic Diversity Increases Yet Again with the 117th Congress*, PEW RES. CTR. (Jan. 28, 2021), <https://www.pewresearch.org/fact-tank/2021/01/28/racial-ethnic-diversity-increases-yet-again-with-the-117th-congress> [https://perma.cc/2HSE-JD8Q]. And even this level of diversity is recent: in the 107th Congress, which sat from 2001 to 2003, just under twelve percent of members were nonwhite. See Bialik, *supra*.

63. Doane, *supra* note 25, at 13.

64. *Id.*

explicitly name whiteness almost always use the word *white* as an identifier rather than as a signifier of social status.

Against this backdrop of white invisibility in constitutional and statutory law, Section II.B then turns to the two statutes that are an exception to the rule: 42 U.S.C. § 1981, which requires equal rights in contracting, and 42 U.S.C. § 1982, which requires equal rights in relation to property. Both statutes declare that all people shall have the “same right” as that “enjoyed by white citizens.”⁶⁵ The history and context surrounding § 1981 and § 1982 indicate that, at the time, the reason for the phrasing was federalism as much as racial equality, but the explicit naming of whiteness is still notable.

Section II.C describes the evolution of § 1981 and § 1982 in the courts. Although litigants have relied successfully on the statutes to enforce certain types of civil rights claims, the Supreme Court has read an intent requirement into the statute that is not supported by the text and has paid insufficient attention to the meaning of the word *enjoy*.

A. WHITE ABSENCE

This subpart presents an original survey of whiteness in American constitutional and statutory law—the first survey to do so. The first Section discusses the U.S. Constitution and federal statutory law. The second discusses state constitutions and statutory codes.

1. Federal Law

The U.S. Constitution never refers to white people, and only fourteen federal statutes explicitly mention white people. These statutes fall into four categories.

First, five statutes involve relations between white and indigenous people, referred to in the statutes as “Indian.” These statutes, all enacted more than a century ago, address topics such as whether white men who marry Indian⁶⁶ women acquire rights to tribal property,⁶⁷ the rights of children born to a white man and an Indian woman,⁶⁸ and whether Indians can be paid while at war with the United States or with “white citizens.”⁶⁹ The statutes regulate relations between Indians and white people, and therefore explicit racial identifiers are necessary to distinguish the two groups.⁷⁰

Another category of statutes is both archaic and idiosyncratic. This category includes two statutes. One, enacted in 1890, allows the “establishment and maintenance of such colleges separately for white and colored students.”⁷¹ Another,

65. 42 U.S.C. §§ 1981(a), 1982 (2018).

66. I use the term *Indian* in this Section rather than *Indigenous* or *Native American* because *Indian* is the term used in the statutes that I describe in this category.

67. 25 U.S.C. § 181 (2018) (effective Aug. 9, 1888).

68. *Id.* § 184 (effective June 7, 1897).

69. *Id.* § 128 (effective Mar. 3, 1875).

70. *See id.* § 264 (effective July 31, 1882) (stating that white people cannot be employed as clerks by Indian traders without a license); *id.* § 379 (effective May 27, 1902) (regulating the sale of Indian lands, including land “patented to a white allottee”).

71. 7 U.S.C. § 323 (2018) (effective Aug. 30, 1890).

enacted in 1902, is designed to prevent “white-slave traffic.”⁷² In these two disparate instances, referring explicitly to white people was necessary to make clear the goal of the statute.

A third category includes statutes that create social programs or other public welfare measures. Five such statutes mention “white” people in their factual findings. For example, the Individuals with Disabilities Education Act (IDEA) describes the disproportionate identification of African-American children as having disabilities compared to white children,⁷³ while a federal law establishing the National Center on Birth Defects and Developmental Disabilities requires collection of data by race and ethnicity, including for the group “non-Hispanic whites.”⁷⁴ These statutes, while race conscious, generally use the term *white* in a descriptive or demographic sense.⁷⁵ They acknowledge certain disparities and encourage learning more about them. They do not explicitly acknowledge why these disparities exist or prescribe solutions for them.

The final category of statutes that explicitly mention white people includes just two statutes. These statutes are antidiscrimination statutes passed as part of the Civil Rights Act of 1866: 42 U.S.C. § 1981 requires that “[a]ll persons” have the “same right” to contract as that “enjoyed by white citizens,”⁷⁶ and 42 U.S.C. § 1982 requires that “[a]ll citizens” have the “same right” to property as that “enjoyed by white citizens.”⁷⁷ These statutes do much more than mention whiteness. They not only acknowledge the social status associated with whiteness but also proscribe some forms of racial inequality by requiring that white and non-white people have the same rights.

2. State Law

Surveying the past and present-day constitutions and statutes of the fifty states reveals white invisibility similar to that found throughout most of federal law. Twenty-nine states’ constitutions never mention the word *white*.⁷⁸ An additional

72. 8 U.S.C. § 1557 (2018) (effective June 25, 1910).

73. 20 U.S.C. § 1400 (2018) (effective Oct. 5, 2010).

74. 42 U.S.C. § 247b-4 (2018) (effective July 1, 1944).

75. See 20 U.S.C. § 7231 (2018) (effective Jan. 8, 2002) (discussing magnet schools, and noting that “approximately 2,000,000 students nationwide attend[] such schools, of whom more than 65 percent are non-white”); 29 U.S.C. § 718 (2018) (effective Aug. 7, 1998) (creating programs for people of color with disabilities, and noting that “less money is spent on minorities than on their white counterparts”); 52 U.S.C. § 10305 (2018) (effective Aug. 6, 1965) (stating that voting observers can be appointed when a legal violation is indicated after “considering, among other factors, whether the ratio of nonwhite persons to white persons registered to vote”).

76. 42 U.S.C. § 1981(a) (2018).

77. *Id.* § 1982.

78. The twenty-nine states whose constitutions never explicitly mention whiteness are Alaska, Arizona, Arkansas, California, Colorado, Delaware, Hawaii, Idaho, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Rhode Island, South Dakota, Utah, Vermont, Washington, and Wyoming.

twenty state constitutions referred to white people at some point in the past.⁷⁹ Only one state—Alabama—references white people in the current version of its constitution: the reference resides in a long-overruled provision mandating separate schools for white and “colored” children.⁸⁰ Whiteness is virtually nonexistent in state statutory codes, with the sole exception of two provisions regulating insurance policies and premiums.⁸¹ In sum, at the state level, explicit whiteness resides in a single state constitutional provision, ruled unconstitutional decades ago by the Supreme Court, and in two narrowly focused state statutes.

Tracing the evolution of state constitutions offers insight into the appearance and eventual disappearance of whiteness. In many states, the following pattern emerges: The word *white* does not appear in the first version of the state’s constitution. It later materializes as the result of amendments between 1800 and 1850, often in relation to voting, holding office, bearing arms, or military service, and restricts those rights to white men. Following the Civil War, whiteness disappears as many states radically restructure their constitutions during Reconstruction. Whiteness reemerges in the late 1800s or early 1900s in amendments enforcing segregation—particularly segregated schools—and banning interracial marriage. Whiteness then disappears for good around the time of the civil rights gains of the mid-1900s, including *Brown v. Board of Education*⁸² and *Loving v. Virginia*.⁸³

The Virginia state constitution provides a typical example of this trajectory. Virginia’s first state constitution, adopted in 1776, contained no mention of white people.⁸⁴ In 1830, however, the Virginia constitution was amended to explicitly

79. The twenty states that explicitly referenced white people at some point in the past but no longer do so today are Connecticut, Florida, Georgia, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, West Virginia, and Wisconsin. See CONN. CONST. of 1818, art. VIII (1845); FLA. CONST. of 1885, art. XII, § 12; *id.* art. XVI, § 24; GA. CONST. of 1945, art. VII, § 1, para. IV; *id.* art. VIII, § 1, para. 1; IOWA CONST. art. II, § 1 (amended 1868); *id.* art. III, § 4 (amended 1880); *id.* art. III, § 33 (amended 1868 and repealed 1936); *id.* art. III, §§ 34–35 (amended 1868); *id.* art. VI, § 1 (amended 1868); KAN. CONST. art. V, § 1 (amended 1918); *id.* art. VIII § 1 (amended 1888); LA. CONST. of 1852, tit. II, art. 10; *id.* tit. III, art. 59; *id.* tit. VIII, art. 136; MICH. CONST. of 1835, art. II, § 1; *id.* art. IV, § 3; MINN. CONST. of 1857, art. 7, § 1; *id.* amend. XVI, § 17; MISS. CONST. of 1817, art. III, §§ 1, 8–10; MO. CONST. of 1820, art. III, §§ 3–6, 10, 27–28; N.C. CONST. of 1868, art. IX, § 2 (1876); *id.* art. XIV, § 8 (1876); OHIO CONST. art. V, § 1 (amended 1923); *id.* art. IX, § 1 (amended 1953); OR. CONST. of 1857, art. I, § 31; *id.* art. II, § 2; *id.* art. IV, §§ 5–6; *id.* art. VII, §§ 2, 10, 14; PA. CONST. of 1838, art. III, § I; S.C. CONST. of 1778, arts. XIII, XV; TENN. CONST. of 1834, art. I, § 26; *id.* art. II, § 28; *id.* art. IV, § 1; TEX. CONST. of 1845, art. VIII, § 3 (1845); VA. CONST. of 1830, art. III, § 14; W. VA. CONST. of 1863, art. III, § 1; *id.* art. IV, §§ 4–5, 7–9, 16; *id.* art. VII, § 1–2, 12; *id.* art. VIII § 2; WIS. CONST. of 1848, art. III, § 1.

80. ALA. CONST. art. XIV, § 256 (“Separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race.”).

81. MASS. GEN. LAWS ch. 175 § 122 (2020) (prohibiting discrimination between white and “colored” persons “as to the premiums or rates charged for policies”); MICH. COMP. LAWS ANN. § 500.2082 (West 2020) (same).

82. 347 U.S. 483 (1954).

83. 388 U.S. 1 (1967).

84. *Cf.* VA. CONST. of 1776.

state that only white men who owned property were allowed to vote,⁸⁵ and by 1851, the constitution was further amended to include provisions about whiteness in relation to apportionment, taxation, and record-keeping.⁸⁶ In 1870, after the conclusion of the Civil War, the constitution was amended in a way that removed all reference to white people.⁸⁷ It was amended yet again in 1902 to mandate voting procedures that would keep records of “the white and colored persons separately,” and to direct that “[w]hite and colored children shall not be taught in the same school.”⁸⁸ Finally, in 1972—well after *Brown*—the Virginia constitution was amended in a way that removed all mention of whiteness.⁸⁹

The evolution of the Virginia constitution allows a look into evolving social attitudes about race. Early state constitutions such as Virginia’s sometimes referred explicitly to white men in relation to voting, apportionment, and taxation to make clear—particularly in southern states—that the relevant constituency was white. Sometimes it was obvious that a statute applied only to white people: few people at the time would have advocated for enslaved persons to vote, for instance. But other situations were less obvious: for example, the debate about how to count enslaved persons for purposes of taxation made it reasonable to expect that the state constitution would specify white people as distinguished from slaves. The Civil War was, in some sense, a racial reset, although Jim Crow provisions, such as segregated voting procedures and schools, swiftly emerged. And then, after “separate but equal” was struck down, the state constitution became entirely raceless, and remains so today.

* * *

As this survey demonstrates, both federal and state law rarely acknowledge whiteness, and virtually never in the context of antidiscrimination measures. Yet, against this backdrop of white invisibility, one exception stands out in sharp relief: the Civil Rights Act of 1866, which resulted in the enactment of 42 U.S.C. § 1981 and § 1982. The next Sections examine these two statutes that—alone among federal and state statutes—explicitly expose whiteness as a mechanism of discrimination.

B. THE CIVIL RIGHTS ACT OF 1866

The pervasive invisibility of whiteness in American law makes the unique wording of 42 U.S.C. § 1981 and § 1982 worthy of close examination. Why did legislators explicitly refer to whiteness in these two statutes—particularly given

85. VA. CONST. of 1830, art. III, § 14.

86. VA. CONST. of 1851, art. III, § 2; *id.* art. IV, §§ 24, 34, 36.

87. *Cf.* VA. CONST. of 1870.

88. VA. CONST. of 1902, art. II, § 38; *id.* art. IX, § 140.

89. *Cf.* VA. CONST. Several other states’ constitutions follow this general pattern. *See, e.g.*, GA. CONST. of 1777 art. IX (limiting right to vote to white men); GA. CONST. of 1798, art. I, §§ 7, 25 (specifying how white people shall be counted in a census); GA. CONST. of 1868 (removing all mentions to whiteness); GA. CONST. of 1877, art. VIII, § 1 (specifying that “separate schools shall be provided for the white and colored races”); GA. CONST. of 1945, art. VII, § 1, para. IV (specifying that “endowments to institutions established for white people, shall be limited to white people, and all endowments to institutions established for colored people, shall be limited to colored people”); GA. CONST. (removing all mentions to whiteness).

that they did not do so in any other constitutional or statutory provision designed to eliminate discrimination?

When first introduced as Senate Bill 61 in the 39th Congress, what became the Civil Rights Act of 1866 drew criticism for its breadth.⁹⁰ Senator Lyman Trumbull, the author of the bill, originally introduced the bill as a measure that would “protect all persons in the United States in their civil rights” and protect people of “every race and color.”⁹¹ Other legislators expressed alarm, bolstered by racially regressive public figures such as President Andrew Johnson and the surrounding public discourse. The possibility of interracial marriage was one major concern. Many worried that granting nonwhite people the “same right” to contract would require states to permit nonwhite people to contract to marry white people.⁹² Another concern was the possibility of Black voters or officeholders.⁹³ A third was ostensibly rooted in federalism: some legislators expressed anxiety about the federal government intruding into areas of contract and property law that were previously reserved for the states.⁹⁴

The legislative record suggests that the phrase “enjoyed by white citizens” was introduced primarily to address the third concern—specifically, the federalism objection.⁹⁵ If the proposed statute required only that nonwhite people receive the same rights as white people in a particular jurisdiction, it did not require states and other localities to adopt any particular level of substantive rights. It meant only that everyone had to receive the *same* rights. This gesture at local control reassured some legislators who might otherwise have been hesitant to support the bill. The Civil Rights Act of 1866 would reinforce a balance of power between the federal government and the states, “supplanting state law only to the extent necessary to prohibit discrimination on the basis of race, while allowing localities to determine the terms for exercising contractual and property rights.”⁹⁶

Congress revised the bill’s language from the original phrasing to accommodate these concerns. As introduced, the bill stated that, with respect to contracts

90. See CONG. GLOBE, 39th Cong., 1st Sess. 1115, 1409–11 (1866).

91. *Id.* at 211; see Melvyn J. Kelley IV, *Testing One, Two, Three: Detecting and Proving Intersectional Discrimination in Housing Transactions*, 42 HARV. J.L. & GENDER 301, 356 (2019).

92. See Steven G. Calabresi & Andrea Matthews, *Originalism and Loving v. Virginia*, 2012 B.Y.U.L. REV. 1393, 1455–56.

93. See *id.* at 1435; see also Letter from Andrew Johnson, President of the U.S., to the Senate of the United States (Mar. 27, 1866) [hereinafter President Johnson’s Veto Statement], in 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 405 (James D. Richardson ed., 1902), reprinted in *President Johnson’s Veto Statement of the Civil Rights Act, 1866*, PEARSON EDUC., http://wps.prenhall.com/wps/media/objects/107/109768/ch16_a2_d1.pdf [<https://perma.cc/X7E6-PP63>] (last visited Apr. 13, 2021) (“If it be granted that Congress can repeal all State laws discriminating between whites and blacks in the subjects covered by this bill, why . . . may not Congress repeal in the same way all State laws discriminating between the two races on the subjects of suffrage and office?”).

94. Calabresi & Matthews, *supra* note 92, at 1455.

95. Cf. CONG. GLOBE, 39th Cong., 1st Sess. 211 (1866); *id.* at 1835–36 (statements of Sens. Johnson, Trumbull, and Fessenden); *id.* at 572, 574 (statements of Sen. Henderson); *id.* at 573 (statement of Sen. Williams); *id.* at 158–59 (statements of Reps. Delano, Wilson, and Niblack); *id.* at 1832 (statement of Rep. Lawrence).

96. Kelley IV, *supra* note 91.

and property, “there shall be no discrimination . . . on account of race, color, or previous condition of slavery.”⁹⁷ The Senate then amended the bill to state that “all persons . . . shall have the same right . . . as is enjoyed by white citizens.”⁹⁸ As Representative James F. Wilson put it, the change was made to “perfect” the bill, and Senator Trumbull commented: “I quite agree . . . that these words are superfluous. I do not think they alter the bill.”⁹⁹ The congressional representatives did not see a significant difference between the two phrasings other than that the latter was more protective of state and local autonomy.

The legislative history incompletely addresses the other concerns that legislators and others raised. The concern regarding interracial marriage seems to have been assuaged by the notion that states could provide white and nonwhite citizens the same right to contract *to marry* even if they did not allow them to marry across racial lines.¹⁰⁰ Likewise, the concerns regarding voting and office holding ultimately did not provide a serious impediment to the bill’s passage, perhaps because they were ultimately viewed as sufficiently tenuous in their relation to contract and property.¹⁰¹

The legislative history indicates that the members of Congress did not intend the language “enjoyed by white citizens” to explicitly denounce white supremacy. This is unsurprising: in 1866, white supremacy was a given. The legislators simply wanted to provide an antidiscrimination standard that would still allow local governments to be evaluated by how they treated people of color *in relation to white people*, rather than in any absolute sense. The framing of whiteness as a baseline was incidental, intended to quell fears of federal substantive overreach. Although legislative intent is usually difficult to discern with certainty—one scholar has likened it to “looking into a crowd and seeing your friends”¹⁰²—available evidence indicates that the reason for the change in language was at least partly a concern for local control in a governmental system of federalism.

97. See S. JOURNAL, 39th Cong., 1st Sess. 236 (1866).

98. CONG. GLOBE, 39th Cong., 1st Sess. 1832 (1866); see *id.* at 1115 (statement of Rep. Wilson) (proposing the addition of “as is enjoyed by white citizens”); S. JOURNAL, 39th Cong., 1st Sess. 236 (1866).

99. CONG. GLOBE, 39th Cong., 1st Sess. 1115, 1413 (1866).

100. See Jonathan F. Mitchell, *Textualism and the Fourteenth Amendment*, 69 STAN. L. REV. 1237, 1304–06 (2017) (arguing that “it is unlikely that members of the Reconstruction Congress intended to preempt antimiscegenation laws,” while suggesting that the text of the statute is inconsistent with such laws because it offers at best a “similar right” to marry, not the “same right” (emphases removed)).

101. Although some expressed concerns relating to suffrage, ultimately these did not appear to influence the bill’s fate. Compare, e.g., President Johnson’s Veto Statement, *supra* note 93 (“If it be granted that Congress can repeal all State laws discriminating between whites and blacks in the subjects covered by this bill, why . . . may not Congress repeal in the same way all State laws discriminating between the two races on the subjects of suffrage and office?”), with Barry Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 YALE L.J. 541, 560 n.122 (“Clearly, the ‘conservative’ aspect of this legislation was that it was aimed at securing only ‘civil rights,’ and not ‘political rights’ (such as suffrage) or ‘social rights.’”).

102. George Rutherglen, *The Improbable History of Section 1981: Clio Still Bemused and Confused*, 2003 SUP. CT. REV. 303, 307 (quoting Harold Leventhal, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983)).

C. JUDICIAL INTERPRETATION

Both § 1981 and § 1982 lay mostly dormant for several decades after passage. But the Civil Rights Act of 1964 and the broader social climate led to renewed interest in the statutes as vehicles for civil rights litigation in the 1970s and 1980s.¹⁰³ This Section briefly surveys judicial interpretation of § 1981 and § 1982, considering both the controversy over the statutes' intent requirement and the scope of the conduct regulated by the two statutes.

Section 1982—and by extension, § 1981—reemerged in 1968 in *Jones v. Alfred H. Mayer Co.*,¹⁰⁴ the first significant case to consider the scope of the statutes since their passage. In *Jones*, the Court acknowledged that, by passing the Civil Rights Act of 1866, Congress “was approving a comprehensive statute forbidding *all* racial discrimination affecting the basic civil rights enumerated in the Act.”¹⁰⁵ *Jones* involved a claim by Black plaintiffs who attempted to buy a home in a private subdivision in Missouri against a white defendant who refused to sell to them solely because of their race.¹⁰⁶ The Court interpreted § 1982 as prohibiting discrimination not only by state or local law but also resulting from “custom[] or prejudice” of private citizens.¹⁰⁷ Although the defendants argued that 42 U.S.C. § 1982 should be read to exclude private conduct, the Court emphasized the “broad language” of both § 1981 and § 1982.¹⁰⁸ The Court summarized: “Our examination of the relevant history . . . persuades us that Congress meant exactly what it said.”¹⁰⁹ The text and legislative history of § 1982, the Court concluded, supported a broad reading that would “prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein—including the right to purchase or lease property.”¹¹⁰

Over the next decade, the Court extrapolated from the holding of *Jones* to conclude that § 1982 prohibited a neighborhood swimming pool from offering preferential membership benefits to white people living within three-quarters of a mile but not to Black people.¹¹¹ It likewise held that § 1981 prohibited private employment discrimination as a form of racial discrimination in contracting.¹¹² And it concluded that § 1981 prohibited a private school from denying admission

103. See, e.g., Joanna L. Grossman, *Making a Federal Case Out of It: Section 1981 and At-Will Employment*, 67 BROOK. L. REV. 329, 332 (2001) (“As first enacted, § 1981 was used to challenge the Black Codes used by southern states to limit the rights and opportunities of newly freed [persons who had been enslaved]. But after the 1870s, the statute went largely unused for nearly a century.” (citation omitted)). One early case, *Hurd v. Hodge*, decided in 1948, invalidated a racially restrictive covenant under 42 U.S.C. § 1982 while noting that such covenants were also contrary to public policy. 334 U.S. 24, 30, 34 (1948).

104. 392 U.S. 409 (1968).

105. *Id.* at 435.

106. *Id.* at 412.

107. *Id.* at 423.

108. *Id.* at 422–27.

109. *Id.* at 422.

110. *Id.* at 436.

111. *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 435 (1973).

112. *Johnson v. Ry. Express Agency*, 421 U.S. 454, 459–60 (1975).

to an applicant on the basis of race.¹¹³ Across various contexts, the Court consistently interpreted 42 U.S.C. § 1981 and § 1982 in parallel.¹¹⁴ Their enactment as part of the same bill and their similar language justified a symmetrical interpretation with respect to contract and property rights.

Shortly thereafter, the Court considered an issue critical to defining the reach of the two statutes: whether a plaintiff must show discriminatory intent to prevail on a claim under § 1981 or § 1982. There is nothing in the language of either statute that requires proof of discriminatory intent. Yet the Supreme Court in *General Building Contractors Ass'n v. Pennsylvania* held that 42 U.S.C. § 1981 “reaches only purposeful discrimination.”¹¹⁵ The Court concluded that practices “that had the incidental effect of disadvantaging blacks to a greater degree than whites” should not violate § 1981.¹¹⁶ The Court reasoned that, because the original purpose of § 1981 was to eradicate laws that restricted rights of property and contract, and not to reach every instance of incidental inequality, the two statutes contained an intent requirement.¹¹⁷

The dissent—authored by Justice Marshall and joined by Justice Brennan—objected on grounds of textualism, legislative intent, and pragmatism. It protested that the majority “attaches no significance to the broad and unqualified language of § 1981.”¹¹⁸ The dissent emphasized that “[t]he plain language does not contain or suggest an intent requirement” and that “[a] violation of § 1981 is not expressly conditioned on the motivation or intent of any person.”¹¹⁹ The majority, argued Justice Marshall, also “virtually ignores Congress’ broad remedial purposes and our paramount national policy of eradicating racial discrimination and its pernicious effects.”¹²⁰ The dissent further took a practical approach to its analysis, explaining that even after slavery was abolished by the Thirteenth Amendment, “in reality, Negroes were hardly accorded the employment and other opportunities accorded white persons generally.”¹²¹ The point of § 1981, then—reflected in both text and legislative history—was to “provide *in fact* the rights and privileges that were available to Negroes in theory.”¹²² After *General Building Contractors*, § 1981 and § 1982 claims required a showing of intent.¹²³

113. *Runyon v. McCrary*, 427 U.S. 160, 172 (1976).

114. *See, e.g., id.* at 170–72 (summarizing precedent); *Tillman*, 410 U.S. at 440 (“In light of the historical interrelationship between § 1981 and § 1982, [there is] no reason to construe these sections differently when applied, on these facts, to the claim of Wheaton-Haven that it is a private club.”).

115. 458 U.S. 375, 389 (1982).

116. *Id.* at 388.

117. *Id.* at 387–88. The Court noted Senator Trumbull’s statement that § 1981 “has nothing to do with the political rights or *status* of parties. It is confined exclusively to their civil rights, such rights as should appertain to every free man.” *Id.* at 387.

118. *Id.* at 408 (Marshall, J., dissenting).

119. *Id.* Although he did not join Justice Marshall’s dissent, Justice Stevens agreed with Justice Marshall’s interpretation of the text, stating: “Any violation of [the] guarantee [of § 1981]—whether deliberate, negligent, or purely accidental—would, in my opinion, violate 42 U.S.C. § 1981.” *Id.* at 406 (Stevens, J., concurring in part and concurring in the judgment).

120. *Id.* at 408 (Marshall, J., dissenting).

121. *Id.* at 409.

122. *Id.*

123. *See infra* Section III.A.3.

The Court subsequently grappled with the scope of § 1981: does it apply only to the actual “making” and “enforcing” of contracts, or is there a broader range of behavior at issue? In *Patterson v. McClean Credit Union*, the plaintiff alleged that she suffered workplace harassment, denial of promotion, and termination due to her race, all in violation of § 1981.¹²⁴ The Court in *Patterson* ultimately concluded that the “postformation conduct” of the employer affecting the environment in which the contract was performed—including “imposition of discriminatory working conditions” and racial harassment—could not serve as the basis for a claim of discrimination under § 1981.¹²⁵

Although it limited legal recourse in the short term, *Patterson* ultimately motivated a legislative expansion of § 1981.¹²⁶ With the Civil Rights Act of 1991, Congress added language to 42 U.S.C. § 1981 that made the statute’s broad reach explicit.¹²⁷ The legislation added a crucial definition, stating that “the term ‘make and enforce contracts’ includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.”¹²⁸ Congress thus made clear that the definition of “make and enforce contracts” includes more than just the literal formation of contracts and instead encompasses the entire environment surrounding the contractual circumstances.

Both before and after the 1991 amendments, the case law does not acknowledge the uniqueness of § 1981 and § 1982 in explicitly mentioning whiteness. Likewise, the case law does not explicitly address the meaning of the word *enjoy* within the context of § 1981 and § 1982—that all people shall have the “same right . . . as is *enjoyed* by white citizens.” The term is particularly significant given the expansive definition of contract added to § 1981 by the Civil Rights Act of 1991, and longstanding principles of statutory interpretation counsel that these textual features must mean *something*. The next Part discusses the plain language of § 1981 and § 1982, arriving at a richer and more expansive understanding of their meaning and scope.

III. ENJOYING RIGHTS

This Part considers the proper interpretation of 42 U.S.C. § 1981 and § 1982. Section III.A concludes that the current judicial interpretation of the statutes deviates substantially from the plain language of the text and results in an impoverished understanding of contract and property rights. Section III.B considers how a better reading of the statutes would affect their interpretation, identifying

124. *Patterson v. McClean Credit Union*, 491 U.S. 164, 169 (1989).

125. *Id.* at 177–78.

126. *See, e.g.*, H.R. REP. NO. 102-40, pt. 1, at 92 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 549, 630 (“[T]here is a compelling need for legislation to overrule the *Patterson* decision and ensure that federal law prohibits all race discrimination”); Grossman, *supra* note 103, at 338 (“Congress overruled the Court’s restrictive interpretation of § 1981”).

127. Grossman, *supra* note 103, at 338.

128. 42 U.S.C. § 1981(b) (2018).

several ways in which contract and property rights are not—but could be—enjoyed to the same extent by white and nonwhite people.

A. PLAIN MEANING

The framers of § 1981 and § 1982 probably did not mean to provoke a philosophical examination of what it means to “enjoy.” Nor, likely, did they mean to shine a light on white supremacy with the phrase “enjoyed by white citizens.” Yet the plain meaning of the statutes provides an opportunity to think carefully about these concepts. This Section first discusses the meaning of the word *enjoyed*, next analyzes the idea of enjoyment specifically “by white citizens,” and concludes by discussing implications for the Court’s disputed conclusions regarding the intent requirement.

1. “Enjoyed”

The word *enjoy* was in common usage at the time § 1981 and § 1982 were drafted. The 1828 edition of Webster’s Dictionary defines *enjoy* as “[t]o feel or perceive with pleasure; to take pleasure or satisfaction in the possession or experience of”; “[t]o possess with satisfaction; to take pleasure or delight in the possession of”; or “[t]o have, possess and use with satisfaction; to have, hold or occupy, as a good or profitable thing, or as something desirable.”¹²⁹

The word *enjoy* remains in common usage today. Some modern dictionaries list two definitions of the word. Merriam-Webster says that *enjoy* means “to have for one’s use, benefit, or lot,” or “to take pleasure or satisfaction in.”¹³⁰ Most dictionaries emphasize the second of these meanings. The *Oxford English Dictionary* defines *enjoy* as “[t]o experience pleasure, be happy; now chiefly, to find pleasure in an occasion of festivity or social intercourse, in a period of recreation”¹³¹—notably, that dictionary specifies that this definition was also in use well before 1866. And the Cambridge Dictionary says that *enjoy* means “to feel happy because of doing or experiencing something.”¹³²

Even the narrowest of these definitions, which focuses on “hav[ing] for one’s use,” requires that the same rights secured to white citizens be available to nonwhite citizens. That is, individuals would not only have the same rights on paper but would also be able to *use and benefit* from them in the same way. And the second, more widely used definition provides an even more robust understanding of enjoyment. That definition requires that nonwhite people should be able to *take pleasure and satisfaction* in their rights the same way that white people do. Fidelity to the latter definition means that nonwhite people are not merely

129. *Enjoy*, 1 AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse 1828).

130. *Enjoy*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/enjoyed?utm_campaign=sd&utm_medium=serp&utm_source=jsonld [<https://perma.cc/7CGW-X2UQ>] (last visited Apr. 15, 2021).

131. *Enjoy*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

132. *Enjoy*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/enjoy> [<https://perma.cc/75BG-SVfy>] (last visited Apr. 15, 2021).

formally guaranteed the same rights as white people. Rather, they would be able to use them to the same extent to achieve pleasure and satisfaction.

The second, more robust conception of enjoyment resonates with our Founding documents. The Declaration of Independence itself spoke of “the pursuit of happiness” as an “unalienable right[]” and contended that “governments are instituted among men” to “secure these rights.”¹³³ *The Federalist Papers* likewise envision a society that meets the conditions for affirmative enjoyment. *Federalist No. 45*, for example, mentions happiness no fewer than five times in the first two paragraphs.¹³⁴ “Were the plan of the convention adverse to the public happiness,” Madison wrote, “my voice would be, Reject the plan. Were the Union itself inconsistent with the public happiness, it would be, Abolish the Union.”¹³⁵ And *Federalist No. 62* asserts boldly that “the object of government . . . is the happiness of the people.”¹³⁶

The concept of enjoyment has deep roots in property law. There, the covenant of quiet enjoyment means more than mere possession. Rather, it is an implied warranty of fitness for the intended use of the property.¹³⁷ The quiet enjoyment covenant has come to include a right to enjoy the conditions normally associated with premises of the type in question.¹³⁸ Courts have extended the covenant of quiet enjoyment to find breach in a wide range of conditions: failure to silence smoke alarms in a timely fashion,¹³⁹ lack of heat and hot water,¹⁴⁰ removal of a large sign advertising a business,¹⁴¹ “unbearable” noise,¹⁴² and inadequate parking.¹⁴³ The particular scope of the covenant of quiet enjoyment varies from state to state, but most importantly, it includes not only mere possession but also the features that make real property functional, satisfactory, and pleasurable to occupy.

The concept of enjoyment similarly surfaces in tort law. In calculating pain and suffering, a recognized category of damages in both federal and state courts is “loss of enjoyment of life”¹⁴⁴ or “impaired enjoyment of life.”¹⁴⁵ Courts across

133. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

134. See THE FEDERALIST NO. 45, at 234–35 (James Madison) (Ian Shapiro ed., 2009).

135. *Id.* at 235.

136. THE FEDERALIST NO. 62, at 316 (James Madison) (Ian Shapiro ed., 2009).

137. See 3 MILTON R. FRIEDMAN, FRIEDMAN ON LEASES § 29.1 (4th ed. 1997). Although the covenant originally meant that the landlord could not disturb tenants by actual eviction, as the covenant evolved from application to land to more complex application in urban spaces involving buildings, the covenant grew to include the additional responsibilities described here. *Id.*

138. See *id.* § 29.2.

139. See *Manzaro v. McCann*, 519 N.E.2d 1337, 1341 (Mass. 1988).

140. See *Baker v. Equity Residential Mgmt., L.L.C.*, 390 F. Supp. 3d 246, 267 (D. Mass. 2019).

141. See *Petroleum Collections Inc. v. Swords*, 122 Cal. Rptr. 114, 116, 118 (Ct. App. 1975).

142. See *Bocchini v. Gorn Mgmt. Co.*, 515 A.2d 1179, 1181, 1190 (Md. Ct. Spec. App. 1986).

143. See *Coleman v. Rotana, Inc.* 778 S.W.2d 867, 872–73 (Tex. App. 1989) (entertaining the idea that inadequate parking could constitute breach, but ultimately concluding that these particular plaintiffs did not shown such inadequacy in this case).

144. See, e.g., *Dugas v. Kan. City S. Ry. Lines*, 473 F.2d 821, 827–28 (5th Cir. 1973) (confirming “loss of enjoyment of life” as an includible item in measuring damages); *Huff v. Tracy*, 129 Cal. Rptr. 551, 553 (Ct. App. 1976) (“A majority of American jurisdictions recognize the compensability of loss of enjoyment of life, some as a component of the pain and suffering award, others as a distinct item of

many states have held that the loss of many different life activities can establish a claim for loss of enjoyment of life. Examples include walking on the beach, playing with one's children, fishing, golfing, mushroom hunting, family picnics, having the ability to smell, shopping, ice skating, skiing, hunting, participating in judo, dancing, bicycling, boating, and many others.¹⁴⁶ Parallel to property law, the concept of enjoyment includes more than just existence and access to the barest necessities of life.

2. "By White Citizens"

If the term *enjoy* means more than merely use and includes pleasure or satisfaction, then how should courts interpret "enjoyed *by white citizens*"? The prevailing definition of *enjoyed* counsels that courts should look not only at the rights of contract and property that white citizens formally possess. Rather, courts should also look at the ways in which these rights affirmatively provide white citizens with pleasure and satisfaction.¹⁴⁷

Consider a simple example, which is clearly covered by the right to contract under 42 U.S.C. § 1981: enjoying a meal in a nice restaurant. Such an experience involves a contract to order, receive, and consume the food in exchange for paying the bill. If a restaurant refused to serve nonwhite people, it would violate § 1981.¹⁴⁸

The contractual benefit "enjoyed by white citizens" in such situations is not simply entering the restaurant, sitting at a table, receiving food, eating it, and paying for it. There is much more to the experience of *enjoying* a meal: the ambiance of the restaurant, the greeting by a smiling server who describes the night's specials, the presentation of the food, the pretty flowers on the table, the pacing of the meal, and the anticipation of small needs such as a refilled water glass.

damage."); *Fetzer v. Wood*, 569 N.E.2d 1237, 1244 (Ill. App. Ct. 1991) ("[T]he concept of loss of the enjoyment of life is a relevant consideration in determining damages for pain and suffering.").

145. *See, e.g.*, *Hall v. N. Am. Indus. Servs., Inc.*, No. 1:06-cv-0123 OWW SMS, 2008 WL 789895, at *7 (E.D. Cal. 2008) ("Non-economic damages do not consist of only emotional distress and pain and suffering. They include invasion of a person's bodily integrity (i.e., [sic] the fact of the injury itself), disfigurement, disability, impaired enjoyment of life, susceptibility to future harm or injury, and shortened life expectancy."); *Burchell v. Faculty Physicians & Surgeons of the Loma Linda Univ. Sch. of Med.*, 269 Cal. Rptr. 3d 44, 55 (Ct. App. 2020) (upholding a sizeable noneconomic damages award that included consideration of the plaintiff's "impaired enjoyment of life"); *Ford v. City of Des Moines*, 75 N.W. 630, 631 (Iowa 1898) (reviewing jury instructions directing that the plaintiff could recover for "pain, inconvenience, and impairment of enjoyment").

146. *See* Annotation, *Loss of Enjoyment of Life as a Distinct Element or Factor in Awarding Damages for Bodily Injury*, 34 A.L.R.4th 293 (1984).

147. Congress bolstered this broad interpretation with the 1991 amendment to § 1981, which stated that "'make and enforce contracts' include the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b) (2018); *see supra* Section II.C.

148. *See, e.g.*, *Miales v. McDonald's Rests. of Colo., Inc.*, 438 F. Supp. 2d 1297, 1299 (D. Colo. 2006) (restaurant staff refused to take plaintiff customer's order, and manager called plaintiff a "black bitch"); *Thomas v. Freeway Foods, Inc.*, 406 F. Supp. 2d 610, 616 (M.D.N.C. 2005) ("Plaintiffs asked for service during this time, but no employees acknowledged them although other white customers were being waited on and served around them. During [their] third visit . . . , Plaintiffs did not place an order and left the Salisbury restaurant without receiving anything to eat or drink.").

Suppose that a nonwhite customer was granted entrance to a restaurant but not greeted by a server; was kept waiting for forty-five minutes before being seated while white patrons who arrived later were seated sooner; was kept waiting another forty-five minutes before ordering while white patrons who arrived later ordered earlier; was seated at a plain table with no tablecloth in a dark and chilly corner of the restaurant, unlike every other table in the restaurant; and was met with eye-rolling in response to simple requests. The nonwhite customer would not have enjoyed the same right to eat in the restaurant as that enjoyed by the white customer, even if both the white and the nonwhite customers were literally served food in exchange for money.

As this example demonstrates, contracting to eat at a restaurant involves more than the exchange of food for money. Not every such exchange fulfills the same right of enjoyment. Rather, enjoyment of particular rights is a robust concept that courts and commentators should give substantive meaning. Coupled with the explicit mention of “white citizens,” the text of 42 U.S.C. § 1981 and § 1982 requires courts to examine with precision exactly what it is that white people are enjoying and how their enjoyment might differ from nonwhite people—an inquiry that inherently necessitates examination of America’s history of white supremacy and its obvious, as well as more subtle, consequences.

3. Misinterpreting Intent

The text of § 1981 and § 1982 also reveals that neither statute requires a showing of discriminatory intent. The plain language of the two statutes provides a straightforward guarantee of the “same right” of contract and property as “enjoyed by white citizens.” It does not matter whether the same right was withheld from nonwhite people on purpose or by accident: the statute allows recovery either way.

The plain language of § 1981 and § 1982 thus supports the conclusion of the dissent in *General Building Contractors Ass’n v. Pennsylvania*.¹⁴⁹ Justice Marshall’s dissenting opinion relied on the text of the statutes, emphasizing that “[t]he plain language does not contain or suggest an intent requirement,” and “[a] violation of § 1981 is not expressly conditioned on the motivation or intent of any person.”¹⁵⁰ It criticized the majority for “attach[ing] no significance to the broad and unqualified language of § 1981.”¹⁵¹ Moreover, the dissent emphasized that Congress enacted § 1981 and § 1982 to ensure that nonwhite citizens received equal treatment in practice, not merely in principle.¹⁵² The statutes were meant to “provide *in fact* the rights and privileges that were available to Negroes in theory.”¹⁵³ Read in the context of the statute as a whole, requiring plaintiffs to

149. 458 U.S. 375 (1982).

150. *Id.* at 408 (Marshall, J., dissenting).

151. *Id.*

152. *Id.* at 409 (“[I]n reality, Negroes were hardly accorded the employment and other opportunities accorded white persons generally.”).

153. *Id.*

demonstrate intent conflicts with an expansive understanding of enjoyment as pleasure and satisfaction rather than mere existence. The concern of § 1981 and § 1982 is that white and nonwhite people should enjoy the same rights. Whether someone intentionally prevented nonwhite people from doing so is beside the point.

The Court's decision in *General Building Contractors* to require a showing of discriminatory intent has attracted harsh criticism.¹⁵⁴ One commentator describes the standard as "onerous."¹⁵⁵ Another argues that it falls among the precedents that "restrict or distort the process" of enforcing "the national project of equality and dignity."¹⁵⁶ Although others have argued that the intent requirement as articulated in *General Building Contractors* is not an unduly high burden because it allows an inference of the requisite intent from disparate impact plus circumstantial evidence,¹⁵⁷ it remains an requirement that is often fatal to plaintiffs' cases.

Following the commentators and the plain language of the statutes, this Article takes the position that *General Building Contractors* wrongly invented an intent requirement with respect to § 1981 and § 1982. Neither the language, history, nor context of the statute supports the intent requirement, and the remainder of the Article proceeds on that understanding.

The next Section takes up the invitation contained in the plain language of 42 U.S.C. § 1981 and § 1982. This Article examines how law and society would be profoundly different if we took seriously what it meant for people of all races to enjoy the same rights as white citizens.

B. ENJOYING CONTRACTS AND PROPERTY

This Section examines closely the ways in which white people enjoy contract and property rights. Although there are myriad ways in which nonwhite people do not enjoy the same right to contract as white people, here I focus on four that are part of the texture of everyday life: the food we eat, the medical care we seek, the transportation we use, and the clothes we wear. I then turn to property, demonstrating that nonwhite people also do not enjoy the same rights as white people with respect to their very homes. In keeping with the plain language of § 1981

154. See, e.g., Matt Graves, *Purchasing While Black: How Courts Condone Discrimination in the Marketplace*, 7 MICH. J. RACE & L. 159, 166 n.39 (2001); see also Peter Brandon Bayer, *Rationality—And the Irrational Underinclusiveness of the Civil Rights Laws*, 45 WASH. & LEE L. REV. 1, 117–18 (1988); Valerie P. Mahoney, Note, *Environmental Justice: From Partial Victories to Complete Solutions*, 21 CARDOZO L. REV. 361 (1999).

155. Mahoney, *supra* note 154, at 192.

156. Bayer, *supra* note 154, at 4 & n.6; see *id.* at 79 n.243 ("[W]ithholding coverage in disparate impact cases severely limits section 1981 from achieving its liberating purposes. The Court in *General Building Contractors* did limit otherwise expansive Federal court interpretation of civil rights." (citations omitted)).

157. See, e.g., John Valery White, *Vindicating Rights in a Federal System: Rediscovering 42 U.S.C. § 1985(3)'s Equality Right*, 69 TEMP. L. REV. 145, 178–79 (1996) ("The Court's first cases interpreting § 1981 and § 1982 do not necessarily require specific intent, as Justice Rehnquist insists, but they do necessitate some form of intent as a limit on the broad reach of the statute.").

and § 1982, I do not distinguish between enjoyment disparities caused by intentional acts and those where intent is uncertain or lacking.¹⁵⁸

1. Enjoying Food

Food is literally a requirement for survival. Moreover, for many, it is a source of great enjoyment. One need only consider the enormous number of cooking shows on television: “Food Network is distributed to nearly 100 million U.S. households and draws over 46 million unique web users monthly.”¹⁵⁹ And the affectionate moniker “food porn” recognizes the link between food and pleasure.¹⁶⁰ The Supreme Court recognizes the importance of food. Although it has not held that food is a right per se, it has held that insufficient food conditions can *violate* rights—for example, in cases involving badly fed prisoners under the Eighth Amendment.¹⁶¹

Obtaining food often involves the right to contract under § 1981, whether the food in question is purchased at a grocery store or restaurant. For nonwhite people to enjoy the same right to contract to obtain food as enjoyed by white citizens, nonwhite people would first require equal access to opportunities to purchase food. Such access would have to involve the same amount, variety, and quality of food at prices comparable to those offered to white people. Moreover, white and nonwhite people should have the same right to obtain food that enables them to take pleasure and satisfaction in eating—that is, to prepare recipes they like, to make choices about food related to ethical considerations or health-related dietary restrictions, and to consume food in a way that provides pleasure rather than merely nutrition.¹⁶²

Yet, practically speaking, nonwhite people cannot enjoy food in the same way as white people. Many communities of color are affected by what experts call

158. See *supra* Section III.A.3. In practice, some claims may be more suitable for immediate litigation than others due to the presence or absence of intent. For purposes of this Article’s exploration of enjoyment, however, I do not attempt to articulate precisely which claims would be actionable, which, in any event, would involve a fact-specific inquiry into the intent of a particular defendant.

159. *About*, FOOD NETWORK, <https://www.foodnetwork.com/site/about-foodnetwork-com> [https://perma.cc/YL78-FR7S] (last visited Apr. 18, 2021).

160. See generally Cari Romm, *What ‘Food Porn’ Does to the Brain*, ATLANTIC (Apr. 20, 2015), <https://www.theatlantic.com/health/archive/2015/04/what-food-porn-does-to-the-brain/390849> [https://perma.cc/2LX7-Q3QU] (describing the origins of the term *food porn* and the science behind the body’s reaction to pictures of food).

161. See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (explaining that, under the Eighth Amendment, “prison officials must ensure that inmates receive adequate food”); *Keenan v. Hall*, 83 F.3d 1083, 1091 (9th Cir. 1996) (“Adequate food is a basic human need protected by the Eighth Amendment.”); *Dearman v. Woodson*, 429 F.2d 1288, 1290 (10th Cir. 1970) (holding that a claimed Eighth Amendment violation for a fifty-and-one-half-hour deprivation of food would survive a motion to dismiss).

162. Comparable amount, variety, quality, price, and opportunities for choice regarding food is necessary but not sufficient to allow nonwhite people equality in the food that they actually consume. When nonwhite people are socioeconomically disadvantaged relative to white people, even comparable access to food along all the axes that I have described does not guarantee that their experience of shopping and eating will be the same. Still, these comparable conditions of access are a prerequisite to food equality.

“food deserts.” The U.S. Department of Agriculture has described a food desert as an area “where people have limited access to a variety of healthy and affordable food.”¹⁶³ Food deserts have a disproportionate effect on nonwhite people: the greater the percentage of people in a community who are nonwhite, the more likely the area is to be food desert.¹⁶⁴ Nareissa Smith has collected research demonstrating the inferior quality of food available in poor neighborhoods,¹⁶⁵ which are disproportionately populated by people of color.¹⁶⁶ For example, the same chain store will stock better food in high-income neighborhood stores than low-income neighborhood stores.¹⁶⁷ One study, conducted in Augusta, Georgia, found that fruit was almost twice as likely to be rotten when obtained from a chain store in a low-income neighborhood—in fact, three participants so flatly refused to taste the food from the low-income markets that those participants had to be dropped from the study.¹⁶⁸ As Smith summarizes: “The fact that some of the participants deemed the subject food unfit for consumption speaks volumes about what the poor encounter in grocery stores on a regular basis.”¹⁶⁹

The food options available to poor people—who are disproportionately people of color—are further affected by agricultural subsidies. As Lawrence Dempsey has written, certain agricultural products in the United States receive substantial subsidies.¹⁷⁰ Corn farmers, for example, received nearly \$85 billion in federal subsidies between 1995 and 2012.¹⁷¹ These subsidies have led to a sharp increase in the production and use of products such as high-fructose corn syrup, corn starch, and corn oil, which appear in many inexpensive foods because they provide a cheaper alternative to conventional ingredients such as sugar.¹⁷² In turn,

163. PAULA DUTKO, MICHELE VER PLOEG & TRACEY FARRIGAN, U.S. DEP’T OF AGRIC., ECON. RES. REP. NO. 140, CHARACTERISTICS AND INFLUENTIAL FACTORS OF FOOD DESERTS, at i, 1 (2012), https://www.ers.usda.gov/webdocs/publications/45014/30940_err140.pdf [<https://perma.cc/TFJ2-RGRG>].

164. *See id.* at 9–11.

165. *See* Nareissa Smith, *Eatin’ Good? Not in This Neighborhood: A Legal Analysis of Disparities in Food Availability and Quality at Chain Supermarkets in Poverty-Stricken Areas*, 14 MICH. J. RACE & L. 197, 209–14 (2009).

166. Michael H. Schill, *Assessing the Role of Community Development Corporations in Inner City Economic Development*, 22 N.Y.U. REV. L. & SOC. CHANGE 753, 762 (1996–97) (“Residents of extremely poor neighborhoods in central cities are overwhelmingly nonwhite.”); *Overview of Community Characteristics in Areas with Concentrated Poverty*, U.S. DEP’T HEALTH & HUM. SERVS.: OFFICE OF THE ASSISTANT SECRETARY FOR PLAN. & EVALUATION (May 1, 2014), <https://aspe.hhs.gov/report/overview-community-characteristics-areas-concentrated-poverty/racial-and-ethnic-minorities-are-overrepresented-concentrated-poverty-population-and-concentrated-poor-communities-metropolitan> [<https://perma.cc/S2HS-QBG4>] (“[F]our out of every five people living in metropolitan concentrated poverty communities are black or Hispanic.”).

167. Smith, *supra* note 165, at 214.

168. Richard Topolski, Kimberly A. Boyd-Bowman & Heather Ferguson, *Grapes of Wrath: Discrimination in the Produce Aisle*, 3 ANALYSES SOC. ISSUES & PUB. POL’Y 111, 115 tbl.1, 116 (2003).

169. Smith, *supra* note 165, at 212.

170. Lawrence F. Dempsey, *Feeding the Racial Disparity in Disease: How Federal Agricultural Subsidies Contribute to a Racial Disparity in the Prevalence of Diet Related Illness*, 7 N.C. CENT. UNIV. SCI. & INTELL. PROP. L. REV. 109, 114 (2014).

171. *Id.* at 115.

172. *Id.* at 120–21.

increased consumption of foods containing these ingredients leads to increased risk of serious health conditions including diabetes, heart disease, high blood pressure, stroke, and many types of cancer.¹⁷³ Partially due to government agricultural subsidies, the foods most economically available to disproportionately impoverished nonwhite people are those most strongly associated with disease.

Moreover, even among poor communities, those that are predominantly nonwhite are more likely to have few food options. Research led by Kelly Bower, for example, demonstrates that predominantly Black and Hispanic neighborhoods have fewer large supermarkets and more small grocery stores—which tend to be stocked with unhealthy food options and lack fresh fruits and vegetables—than neighborhoods that are poor but not predominantly minority.¹⁷⁴ This is why activist Karen Washington prefers the term “food apartheid” rather than “food desert”: the former phrase captures “the root cause of some of the problems around the food system.”¹⁷⁵

It is not a coincidence that nonwhite people lack access to large grocery stores. Rather, it is the product of intentional decisions by supermarkets—some arguably economically rational (to locate in wealthy rather than poor areas) but others irrational and inexplicable by anything other than race (to locate in a poor, white area rather than a poor, nonwhite area). These decisions by grocery stores mean that people of color lack the same right to contract for good food as that enjoyed by white citizens.

Beyond issues directly related to health, lack of access to large grocery stores limits the ways in which nonwhite people can choose what they eat. One survey found that many people of color wish to eat a mostly or entirely plant-based diet. For example, three percent of American adults identified as vegan, but the number rose to eight percent among African-Americans.¹⁷⁶ Another survey found that nine percent of nonwhite Americans, compared to three percent of white Americans, consider themselves to be vegetarian.¹⁷⁷ Even though nonwhite people are more interested in eating a vegetarian or vegan diet than white people are, the disparity in food availability¹⁷⁸ paradoxically makes it less possible for them

173. Cf. *Obesity*, MAYO CLINIC, <http://www.mayoclinic.org/diseases-conditions/obesity/basics/definition/CON-20014834?p=1> [<https://perma.cc/9SJ4-JNBY>] (last visited Apr. 20, 2021) (describing many health conditions related to obesity).

174. Kelly M. Bower, Roland J. Thorpe Jr., Charles Rohde & Darrell J. Gaskin, *The Intersection of Neighborhood Racial Segregation, Poverty, and Urbanicity and Its Impact on Food Store Availability in the United States*, 58 PREVENTIVE MED. 33, 35–36, 35 tbl.2 (2014).

175. Anna Broneš, *Food Apartheid: The Root of the Problem with America's Groceries*, GUARDIAN (May 15, 2018, 12:59 PM), <https://www.theguardian.com/society/2018/may/15/food-apartheid-food-deserts-racism-inequality-america-karen-washington-interview> [<https://perma.cc/Z93B-HDA9>].

176. See Laura Reiley, *The Fastest-Growing Vegan Demographic Is African Americans. Wu-Tang Clan and Other Hip-Hop Acts Paved the Way.*, WASH. POST (Jan. 24, 2020, 6:30 AM), <https://www.washingtonpost.com/business/2020/01/24/fastest-growing-vegan-demographic-is-african-americans-wu-tang-clan-other-hip-hop-acts-paved-way/>.

177. Zach Hrynowski, *What Percentage of Americans Are Vegetarian?*, GALLUP (Sept. 27, 2019), <https://news.gallup.com/poll/267074/percentage-americans-vegetarian.aspx> [<https://perma.cc/MB2W-HDKS>].

178. See, e.g., *supra* notes 167–68 and accompanying text.

to do so. Nonwhite people do not enjoy the same right as white people to contract to buy and consume the foods necessary for a vegetarian, vegan, or simply plant-based diet.

A final disparity arises in the experience of shopping for food. Marginalizing experiences for nonwhite people permeate the act of seeking and buying food itself. What we might call white ethnic food—pierogis, Greek salads, and so on—are usually included in the main part of the grocery store. Meanwhile, many nonwhite ethnic foods—Asian, Hispanic, and so on—are consigned to a specific aisle, suggesting that they are “other.”¹⁷⁹ This is true even of basic foods associated with a nonwhite ethnic culture, such as rice, noodles, and beans, which most Americans eat at least occasionally.¹⁸⁰ Some nonwhite ethnic foods are difficult to find other than delivery via the Internet, which can be both time consuming and expensive.¹⁸¹ Assuming that nonwhite people are somewhat more likely to want to eat nonwhite ethnic foods than white people are, the result is a shopping experience that disproportionately and continuously marginalizes nonwhite people while they purchase the foods that they like to eat. From the variety of available food to the quality of the food to the experience of purchasing, nonwhite people do not enjoy the same right to contract for food as that enjoyed by white citizens.

2. Enjoying Health

Health is a key determinant of happiness. Research has long linked good health with happiness, and although the relationship between the two is complex, studies have suggested that good health helps create happiness, as well as, likely, the reverse.¹⁸² Although health care has not been recognized by the Supreme Court as a constitutional right, Americans view health care as critically important, as demonstrated by the growing support for Medicare-for-all and similar health care plans,¹⁸³

179. See Tim Carman, *To David Chang, the ‘Ethnic’ Food Aisle Is Racist. Others Say It’s Convenient.*, WASH. POST (Sept. 30, 2019, 12:00 PM), <https://www.washingtonpost.com/news/voraciously/wp/2019/09/30/to-david-chang-the-international-food-aisle-is-a-last-bastion-of-racism-others-see-it-differently>.

180. See *Ethnic Foods – Statistics & Facts*, STATISTA (Dec. 1, 2020), <https://www.statista.com/topics/2313/ethnic-foods-statistics-and-facts> [<https://perma.cc/F42G-B2RL>].

181. See Katie Okamoto, *Stock Your Pantry with Ingredients from Around the World, Care of These Online Shops*, EATER (May 5, 2020, 5:38 PM), <https://www.eater.com/2020/4/22/21230359/where-to-buy-global-pantry-ingredients-online> [<https://perma.cc/GV7B-Y526>] (listing online sources for hard-to-find “ethnic” foods, while noting that, “[u]nfortunately, there are entire culinary regions that have been omitted from this list”).

182. See, e.g., Nathan W. Hudson, Richard E. Lucas & M. Brent Donnellan, *Healthier and Happier? A 3-Year Longitudinal Investigation of the Prospective Associations and Concurrent Changes in Health and Experiential Well-Being*, 45 PERSONALITY & SOC. PSYCH. BULL. 1635, 1635–36 (2019).

183. See, e.g., Lunna Lopes, Liz Hamel, Ashley Kirzinger, Audrey Kearney & Mollyann Brodie, *KFF Health Tracking Poll – November 2019: Health Care in the 2020 Election, Medicare-for-All, and the State of the ACA*, KAISER FAM. FOUND. (Nov. 20, 2019), <https://www.kff.org/health-reform/poll-finding/kff-health-tracking-poll-november-2019> [<https://perma.cc/54R2-GVCD>] (finding that fifty-three percent of Americans support Medicare-for-all and that sixty-five percent support a government-run, public option).

as well as by the high priority Americans place on health care as a political issue.¹⁸⁴

Seeking out and receiving health care involves the right to contract in several ways: signing up for a particular insurance plan, paying out of pocket or seeking reimbursement through covered care, and the conditions of such care all involve making and enforcing contracts within the meaning of § 1981. To have the same right to enjoy health care as that enjoyed by white citizens, nonwhite people should pay the same amount for the same care, receive the same care under the same conditions, receive the same treatment for the same health issues, and have comparable choices about where and from whom to receive care.

Research has documented disparities in the health treatment that white and nonwhite patients receive. Many such disparities arise in the context of care for pain.¹⁸⁵ Studies show that Black patients are more likely to receive referrals for substance abuse assessment, less likely to be referred to a pain specialist, and more likely to be subjected to a urine analysis for drugs.¹⁸⁶ During emergency room visits, white patients were more frequently prescribed opioids for pain than nonwhite patients were.¹⁸⁷

Moreover, health care outcomes differ significantly for white people and nonwhite people. For members of Medicare health maintenance organizations, researchers found disparities between Black and white people in blood pressure, cholesterol, and glycosylated hemoglobin control.¹⁸⁸ Both Black and Asian-American patients have a higher rate of death after injury than white patients.¹⁸⁹ Disparities such as these are instantiated and amplified by emerging technology. An algorithm widely used to predict which patients would benefit from additional medical care underestimated the health care needs of Black people.¹⁹⁰ Researchers uncovered that “Black patients incurred about \$1,800 less in medical costs per year than white patients with the same number of chronic conditions;

184. *Public's 2019 Priorities: Economy, Health Care, Education and Security All Near Top of List*, PEW RES. CTR. (Jan. 24, 2019), <https://www.pewresearch.org/politics/2019/01/24/publics-2019-priorities-economy-health-care-education-and-security-all-near-top-of-list> [https://perma.cc/LP45-CQ2N].

185. See *Disparities in Pain Care: Bias in Pain Treatment*, NAT'L INSTS. HEALTH: NAT'L INST. OF NEUROLOGICAL DISORDERS & STROKE, <https://www.ninds.nih.gov/sites/default/files/DisparitiesPainCare.pdf> [https://perma.cc/VKB6-ERWP] (last visited Apr. 23, 2021).

186. Leslie R.M. Hausman, Sasha Gao, Edward S. Lee & C. Kent Kwoh, *Racial Disparities in the Monitoring of Patients on Chronic Opioid Therapy*, 154 PAIN 46, 48 (2013).

187. Karen O. Anderson, Carmen R. Green & Richard Payne, *Racial and Ethnic Disparities in Pain: Causes and Consequences of Unequal Care*, 10 J. PAIN 1187, 1189 (2009). Other research suggests that disparities in opioid prescription have narrowed overall. Jordan M. Harrison, Pooja Lagisetty, Brian D. Sites, Cui Guo & Matthew A. Davis, *Trends in Prescription Pain Medication Use by Race/Ethnicity Among US Adults with Noncancer Pain, 2000–2015*, 108 AM. J. PUB. HEALTH 788, 789–90 (2018).

188. David A. Ansell & Edwin K. McDonald, *Bias, Black Lives, and Academic Medicine*, 372 NEW ENG. J. MED. 1087, 1088 (2015).

189. Melanie Arthur, Jerris R. Hedges, Craig D. Newgard, Brian S. Diggs & Richard J. Mullins, *Racial Disparities in Mortality Among Adults Hospitalized After Injury*, 46 MED. CARE 192, 195 (2008).

190. Carolyn Y. Johnson, *Racial Bias in a Medical Algorithm Favors White Patients over Sicker Black Patients*, WASH. POST (Oct. 24, 2019, 2:00 PM), <https://www.washingtonpost.com/health/2019/10/24/racial-bias-medical-algorithm-favors-white-patients-over-sicker-black-patients>.

thus the algorithm scored white patients as equally at risk of future health problems as black patients who had many more diseases.”¹⁹¹ And the COVID-19 pandemic has provided devastating evidence of inequality in health care access and health outcomes between white people and nonwhite people—particularly those who are Black and brown.¹⁹²

Some disparities are less dire but still affect the ability of nonwhite people to enjoy health. For example, Black and Latino/a/x people wait twenty-five percent longer to be seen in hospitals and clinics than white people do.¹⁹³ When these wait times are compounded by longer trips to seek care due to fewer accessible medical facilities in nonwhite communities,¹⁹⁴ they present a substantial disparity in the time investment required of nonwhite people to maintain their health.

Even the categories that doctors use to administer medical care often demean nonwhite people relative to white people. Researchers argue that geographic patterns of genetic variation demonstrate the inaccuracy of many commonly used ethnic labels.¹⁹⁵ Until 2003, for example, medical reports were catalogued in some databases using nineteenth-century racial categories such as “Caucasoid,” “Negroid,” “Monogolid [sic],” and “Australoid.”¹⁹⁶ Even when racial categories used in medicine are not themselves offensive, socially constructed racial categories do not map onto biology or genetics, meaning that the use of such categories can result in misclassification of patients and subsequent inferior care.

A tragic complement to the many statistics documenting health care disparities is the massive underrepresentation of Black people among doctors—that is, Black people do not even enjoy an equal right to contract to *give* health care to others. For instance, “[a] 2010 study showed that among faculty members who had been hired [at U.S. medical schools] in 2000, blacks were less likely to have been retained than any other demographic group.”¹⁹⁷ Similarly, Black faculty “are less likely than their white counterparts to be promoted, to hold senior faculty or administrative positions, and to receive research awards from the National

191. *Id.*

192. See *COVID-19 Racial and Ethnic Health Disparities*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 10, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/racial-ethnic-disparities/index.html> [<https://perma.cc/AZ3T-YHRL>].

193. See Kristin N. Ray, Amalavoyal V. Chari, John Engberg, Marnie Bertolet & Ateev Mehrotra, *Disparities in Time Spent Seeking Medical Care in the United States*, 175 JAMA INTERNAL MED. 1983, 1985 (2015).

194. See Akilah Johnson, *Lack of Health Services and Transportation Impede Access to Vaccine in Communities of Color*, WASH. POST (Feb. 13, 2021, 5:26 PM), <https://www.washingtonpost.com/health/2021/02/13/covid-racial-ethnic-disparities>.

195. Lundy Braun, Anne Fausto-Sterling, Duana Fullwiley, Evelyn M. Hammonds, Alondra Nelson, William Quivers, Susan M. Reverby & Alexandra E. Shields, *Racial Categories in Medical Practice: How Useful Are They?*, 4 PLOS MED. 1423, 1424 (2007).

196. *Id.*

197. Ansell & McDonald, *supra* note 188, at 1089; see Quinn Capers IV, Daniel Clinchot, Leon McDougale & Anthony G. Greenwald, *Implicit Racial Bias in Medical School Admissions*, 92 ACAD. MED. 365, 366 (2017) (describing implicit white preference during the medical school admissions process).

Institutes of Health.”¹⁹⁸ In 2011, thirty-one percent of white faculty at U.S. medical schools were full professors, while only eleven percent of Black professors were full professors.¹⁹⁹ The effects of the disparity are not limited to the doctors themselves: research has shown that Black patients are more likely to trust Black doctors and that Black doctors are more likely to accurately diagnose problems that disproportionately affect Black patients.²⁰⁰ In short, Black people cannot even contract to help others improve their health to the same extent that is enjoyed by white people.

Thus, from the type of care that they receive to its ultimate effect on their health, nonwhite people do not enjoy the same right to contract for medical care as do white people. Accessing medical care, and thereby enjoying health, remains an area of inequality between white and nonwhite people.

3. Enjoying Mobility

The many books, movies, and other cultural texts celebrating the freedom of movement cement mobility as a fundamental American value.²⁰¹ The Constitution itself establishes a right to travel. In *Saenz v. Roe*, the Supreme Court wrote:

For the purposes of this case, therefore, we need not identify the source of [the right to travel] in the text of the Constitution. The right of “free ingress and regress to and from” neighboring States, which was expressly mentioned in the text of the Articles of Confederation, may simply have been “conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.”²⁰²

Despite the constitutional protection for mobility, nonwhite people often struggle to enjoy mobility at all, let alone at the same level as white people. To enjoy the same right to contract to move from place to place as enjoyed by white citizens, nonwhite people would have to be able to access transit as easily, travel as comfortably, pay equally, and arrive as punctually. Yet research shows that, in the aggregate, significant disparities affect the ability to contract for travel.

The struggle for mobility has deep historical roots. During the shameful era of slavery, enslaved persons could not travel lawfully in much of the country, and after the Civil War, Black people continued to encounter hostility and outright danger if they attempted to travel. During the first part of the twentieth century,

198. Ansell & McDonald, *supra* note 188, at 1089.

199. *Id.*

200. See Marcella Alsan, Owen Garrick & Grant C. Graziani, *Does Diversity Matter for Health? Experimental Evidence from Oakland* 8, 19–20 (Nat'l Bureau of Econ. Research, Working Paper No. 24787, 2018), <https://www.nber.org/papers/w24787> [<https://perma.cc/XF2W-WGFQ>] (finding that Black men were more likely to select preventive services when paired with a Black doctor, which could reduce death from heart disease by nineteen percent).

201. See Nancy Leong, *The Open Road and the Traffic Stop: Narratives and Counter-Narratives of the American Dream*, 64 FLA. L. REV. 305 (2012).

202. *Saenz v. Roe*, 526 U.S. 489, 501 (1999) (footnote omitted) (quoting *United States v. Guest*, 383 U.S. 745, 758 (1966)).

The Negro Motorist Green Book informed Black travelers of towns, restaurants, and hotels that were hospitable to Black people.²⁰³ With heartbreaking optimism, the 1949 edition of the guide prophesied: “There will be a day sometime in the near future when this guide will not have to be published. That is when we as a race will have equal opportunities and privileges in the United States.”²⁰⁴ Seventy years later, evidence shows that such equal opportunities and privileges have not yet materialized.

Black people commonly report difficulty hailing taxi cabs, even wealthy and otherwise privileged Black people such as Eddie Murphy and Barack Obama.²⁰⁵ Some have advanced arguably rational explanations for this behavior by taxi drivers: perhaps the driver is not racist but thinks a Black passenger will be more likely to want to go to a dangerous or distant neighborhood, and the driver would not want to make that trip for a passenger of any color.²⁰⁶ Regardless of the explanation, however, if Black people experience greater difficulty hailing cabs than white people, one cannot say they enjoy the same right to contract for travel by cab as white citizens.

Some heralded the rise of ride-hailing apps like Uber and Lyft as the answer to the taxicab problem. Yet research has shown that these apps come with their own problems. The racial identity of both drivers and passengers is often immediately visible to the other party,²⁰⁷ potentially allowing discrimination in the same manner as with taxicabs. This possibility plays out in practice. For example, Black riders face longer wait times and more cancellations than white riders.²⁰⁸ The National Bureau of Economic Research found in 2016 that UberX drivers in Boston were “nearly three times as likely to cancel a ride on a male passenger upon seeing that he has a ‘black-sounding’ name.”²⁰⁹ The same study found that, in Seattle, Black passengers waited up to thirty-five percent longer for a ride as compared to white passengers.²¹⁰

Whatever else ride-hailing apps have done—and they may well have improved things for some passengers in some locations—they have not entirely done away with the problem. As Justin Phillips wrote recently: “It turns out ride-hailing apps

203. For a discussion of the *Green Book*, see Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L.J. 1271 (2017).

204. THE NEGRO MOTORIST GREEN BOOK: AN INTERNATIONAL TRAVEL GUIDE 1 (1949 ed.).

205. See Shaunna Murphy, *This Heartbreaking Story About ‘SNL’ Reveals an Ugly Truth About Racism*, MTV (Oct. 20, 2014), <http://www.mtv.com/news/1968463/eddie-murphy-saturday-night-live-racism/> [<https://perma.cc/EF8A-8WKN>]; Sandra Sobieraj Westfall, *The Obamas: How We Deal with Our Own Racist Experiences*, PEOPLE (Dec. 17, 2014, 6:30 AM), <https://people.com/celebrity/the-obamas-how-we-deal-with-our-own-racist-experiences/> [<https://perma.cc/4RAM-VTMP>].

206. RICHARD THOMPSON FORD, *THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE* 67–68 (2008).

207. See Leong & Belzer, *supra* note 203, at 1287–88.

208. Yanbo Ge, Christopher R. Knittel, Don MacKenzie & Stephen Zoepf, *Racial and Gender Discrimination in Transportation Network Companies* 18–19 (Nat’l Bureau of Econ. Research, Working Paper No. 22776, 2016), <https://www.nber.org/papers/w22776> [<https://perma.cc/3FN7-THN4>].

209. *Id.* at 19.

210. *Id.* at 2.

like Uber have done little to mitigate that same discrimination that plagued the taxi industry decades ago.”²¹¹ Further, some academics have suggested that Black drivers may *also* face discrimination on ride hailing apps in the form of lower ratings and lower tips.²¹² One might ask whether knowing of the problems facing Black riders and drivers and not fixing them might even establish intent to discriminate on the part of Uber and Lyft,²¹³ although this Section does not attempt to establish that element.

Nonwhite people are also denied the same right to contract as enjoyed by white people while using other forms of transit. Although quantitative analyses of this phenomenon by those outside the airline industry are difficult to undertake, stories about racially disparate practices by Transportation Security Administration agents at airports are legion.²¹⁴ But some of the worst treatment takes place at the hands of airlines themselves.²¹⁵ Thus, while people of color can certainly buy plane tickets just as white people can, that does not guarantee them the same right to enjoy all the privileges associated with that contractual exchange.²¹⁶

Nonwhite people also face widespread discrimination when it comes to transportation more generally. Nonwhite workers are two to three times as likely as white workers to lack a private vehicle at home and are therefore disproportionately likely to commute using mass transit systems.²¹⁷ Indeed, “Latino workers are almost 3 times as likely, and Asian-American and African-American workers

211. Justin Phillips, *Does Uber Care About Its Black Passengers?*, S.F. CHRON. (Jan. 21, 2020, 2:14 PM), <https://www.sfchronicle.com/opinion/article/Does-Uber-care-about-its-black-passengers-14982026.php>.

212. Cf. ALEX ROSENBLAT, KAREN LEVY, SOLON BAROCAS & TIM HWANG, *DISCRIMINATING TASTES: CUSTOMER RATINGS AS VEHICLES FOR BIAS 7* (Patrick Davison ed., 2016), https://datasociety.net/pubs/ia/Discriminating_Tastes_Customer_Ratings_as_Vehicles_for_Bias.pdf [<https://perma.cc/8CZM-RQXN>] (“A plethora of social science research has established that racial and gender bias commonly ‘creeps into’ ratings of all sorts.”).

213. See Leong & Belzer, *supra* note 203, at 1313–14.

214. See, e.g., Gaby Del Valle, *How Airport Scanners Discriminate Against Passengers of Color*, VOX (Apr. 17, 2019, 3:00 PM), <https://www.vox.com/the-goods/2019/4/17/18412450/tsa-airport-full-body-scanners-racist> [<https://perma.cc/TJH4-ZJXF>]; Brenda Medina & Thomas Frank, *TSA Agents Say They’re Not Discriminating Against Black Women, but Their Body Scanners Might Be*, PROPUBLICA (Apr. 17, 2019, 5:00 AM), https://www.propublica.org/article/tsa-not-discriminating-against-black-women-but-their-body-scanners-might-be?utm_content=buffer9d49d&utm_medium=social&utm_source=twitter&utm_campaign=buffer [<https://perma.cc/6LV3-BLBW>] (“The futuristic full-body scanners that have become standard at airports across the United States are prone to false alarms for hairstyles popular among women of color.”).

215. For example, in an incident that attracted much media scrutiny, an Asian-American doctor, David Dao, was forcefully dragged off a United Airlines jet after he refused to leave his seat without being provided an explanation. Daniel Victor & Christopher Drew, *United Airlines Reaches Settlement with Passenger Who Was Dragged Off Plane*, N.Y. TIMES (Apr. 27, 2017), <https://www.nytimes.com/2017/04/27/business/united-david-dao-settlement.html>.

216. Cf. 42 U.S.C. § 1981(b) (2018) (defining “make and enforce contracts” to include “the enjoyment of all benefits [and] privileges . . . of the contractual relationship”).

217. See ALGERNON AUSTIN, DEMOS, *TO MOVE IS TO THRIVE: PUBLIC TRANSIT AND ECONOMIC OPPORTUNITY FOR PEOPLE OF COLOR* 6, 9 (2017), <https://www.demos.org/sites/default/files/publications/Public%20Transit.pdf> [<https://perma.cc/5BXR-QB4V>]; see also FED. TRANSIT ADMIN. & FED. HIGHWAY ADMIN., U.S. DEP’T OF TRANSP., *2010 STATUS OF THE NATION’S HIGHWAYS, BRIDGES, AND TRANSIT: CONDITIONS & PERFORMANCE 1-4* (2010), <https://www.fhwa.dot.gov/policy/2010cpr/pdfs/cp2010.pdf> [<https://perma.cc/2CKL-S3Q9>]; Monica Anderson, *Who Relies on Public Transit in the U.S.*, PEW RES.

are almost 4 times as likely as white workers to commute by public transit.²¹⁸ Yet, mass transit often fails to serve communities of color to the same degree as white communities: nonwhite people are more likely to have commutes of over an hour as compared to white people,²¹⁹ and in recent years, research has found that the percentage of nonwhite people who live near their jobs has decreased more rapidly than the percentage of white people.²²⁰ Nonwhite people also disproportionately experience discrimination while using mass transit. In a highly publicized event, Sherrilyn Ifill—the head of the NAACP’s Legal Defense Fund—was recently asked to move from her Amtrak seat without explanation.²²¹ That a powerful, well-educated Black woman who heads a civil rights organization might still be treated as though she does not belong in a certain area of an Amtrak train demonstrates the gap between white and nonwhite people when it comes to enjoying the right to contract to travel.

4. Enjoying Fashion

For many people, fashion is a source of pleasure and even joy. Legal scholar Gowri Ramachandran has documented the importance of self-presentation in shaping identity.²²² The freedom and ability to present oneself to the world implicates important values of identity and self-presentation.²²³ Fashion literally shapes what others see as we move through the world each day.²²⁴

Participating in fashion involves the right to contract under § 1981. For nonwhite people, enjoying the same right as white people to contract around fashion requires the ability to purchase clothing that is functional and well fitting and that accords reasonably well with their aesthetic preferences. Nonwhite people must be able to purchase hair, makeup, and other grooming products without undue difficulty. And nonwhite people must be able to contract in relation to fashion without hostility or harassment.

CTR. (Apr. 7, 2016), <https://www.pewresearch.org/fact-tank/2016/04/07/who-relies-on-public-transit-in-the-u-s/> [<https://perma.cc/6EQ4-DXCD>].

218. AUSTIN, *supra* note 217, at 9.

219. *Id.* at 12–13.

220. ELIZABETH KNEEBONE & NATALIE HOLMES, *THE GROWING DISTANCE BETWEEN PEOPLE AND JOBS IN METROPOLITAN AMERICA* 9 (2015), https://www.brookings.edu/wp-content/uploads/2016/07/Srvy_JobsProximity.pdf [<https://perma.cc/H5QW-KGBU>] (“The number of jobs near the typical Hispanic (-17 percent) and black (-14 percent) resident in major metro areas declined much more steeply than for white (-6 percent) residents . . .”).

221. Kim Bellware, *Amtrak Faces Pressure to Explain Why a Conductor Asked NAACP Legal Defense Fund President to Give Up Her Seat*, WASH. POST (Jan. 18, 2020, 12:07 PM), <https://www.washingtonpost.com/travel/2020/01/18/amtrak-sherrilyn-ifill-seat>.

222. See Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11, 30–59 (2006). See generally BODY DRESSING (Joanne Entwistle & Elizabeth Wilson eds., 2001) (describing how attire shapes the self both physically and psychologically); RUTHANN ROBSON, *DRESSING CONSTITUTIONALLY: HIERARCHY, SEXUALITY, AND DEMOCRACY FROM OUR HAIRSTYLES TO OUR SHOES* (2013) (discussing the intersection of constitutional rights and freedom of dress).

223. Ramachandran, *supra* note 222, at 31–32.

224. See Paul Sweetman, *Shop-Window Dummies? Fashion, the Body, and Emergent Socialities*, in BODY DRESSING, *supra* note 222, at 59, 66.

Yet nonwhite people often encounter significant difficulties in their attempts to enjoy fashion as white people do. The difficulty of finding both products and stylists for Black hair demonstrates this disparity. Most drug stores carry thousands of products for white hair yet dedicate only a small portion of one aisle to products for Black hair²²⁵—despite the value of the Black hair care market in the United States being \$2.5 billion.²²⁶ Although the Internet has solved some of the practical difficulty in accessing products for Black hair, a Black woman in a hurry who tries to find a usable product at a chain drug store has much lower odds of doing so than her white counterpart: in one study, one in four Black women reported difficulty finding the right products for her hair.²²⁷ Put in the language of § 1981, Black women do not enjoy the same right to contract because there are fewer and less satisfactory options for them to buy.

Black women struggle to contract around hair style in other ways as well. Although a straightened or relaxed hairstyle is expensive and time-consuming to create and maintain,²²⁸ one survey found that twenty-nine percent of Black women straightened their hair anyway,²²⁹ and about twenty percent of Black women felt social pressure to relax their hair for work in order to be perceived as more “professional.”²³⁰ These results are perhaps unsurprising, given that employers have litigated in federal court to prohibit certain hairstyles and courts have validated the employers’ preferences.²³¹

Cosmetics are another site of unequal enjoyment. Fashion magazines have documented the disparity in availability of makeup for darker skin. Although beauty brands have developed a greater range of makeup shades in the past few years, a disparity remains because most brands are not available in drugstores,

225. See Jessica Schiffer, *Lagging in Diversity, Haircare Targets Black Customers*, VOGUE BUS. (Nov. 6, 2020), <https://www.voguebusiness.com/beauty/lagging-in-diversity-haircare-targets-black-customers> [https://perma.cc/94Q5-EJW]. And in some areas, Black haircare products are even likely to be locked up, while products not designed for Black hair are not. See Caroline Kitchener, *Walmart and CVS Made Splashy Pledges to Stop Locking up Black Beauty Products. Why Did They Do It in the First Place?*, LILY (June 16, 2020), <https://www.thelily.com/walmart-and-cvs-made-splashy-pledges-to-stop-locking-up-black-beauty-products-why-did-they-do-it-in-the-first-place> [https://perma.cc/Q6MW-GFDE].

226. *Naturally Confident: More Than Half of Black Women Say Their Hair Makes Them Feel Beautiful*, MINTEL (Oct. 9, 2018), <https://www.mintel.com/press-centre/beauty-and-personal-care/naturally-confident-more-than-half-of-black-women-say-their-hair-makes-them-feel-beautiful> [https://perma.cc/7SX3-N7Z7].

227. ALEXIS MCGILL JOHNSON, RACHEL D. GODSIL, JESSICA MACFARLANE, LINDA R. TROPP & PHILLIP ATIBA GOFF, PERCEPTION INST., THE “GOOD HAIR” STUDY: EXPLICIT AND IMPLICIT ATTITUDES TOWARD BLACK WOMEN’S HAIR 11 (2017), <https://perception.org/wp-content/uploads/2017/01/TheGood-HairStudyFindingsReport.pdf> [https://perma.cc/9VG7-K5JW].

228. See Greene, *supra* note 43.

229. JOHNSON ET AL., *supra* note 227, at 6.

230. *Id.* at 12.

231. See, e.g., *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 231 (S.D.N.Y. 1981) (addressing plaintiff employee’s claim “against enforcement of a grooming policy . . . that prohibits employees in certain employment categories from wearing an all-braided hairstyle”); *supra* note 42.

which remain the most convenient and affordable options for many women.²³² If nonwhite women cannot purchase appropriate and reasonably priced makeup that matches their skin at a nearby drugstore, they must either (1) spend more money at a boutique; (2) pay for online shopping and delivery, which does not allow the same in person inspection of the products; or (3) drive a significant distance to purchase cosmetics. Nonwhite women thus face obstacles to contracting to purchase makeup that white women do not.

Labeling of fashion items in a way that marginalizes nonwhite people is so common that it often barely registers with consumers—both white and nonwhite. “Nude” pantyhose or underwear, for example, often refers to underwear that is the color of white women’s skin.²³³ This sends a message to nonwhite women that they are outsiders to the experience of fashion that they are trying to enjoy.

Similarly, the way that clothing is sized—particularly for women²³⁴—creates a disparity between white and nonwhite people. Thus, nonwhite people struggle disproportionately to purchase suitable clothing—that is, to enjoy the same right as white citizens when it comes to fashion.

For women, this racial disparity is particularly unsurprising because most women’s clothing is normed to white bodies. This practice has a lengthy history. When standardized sizing was first initiated, it was keyed to white women’s bodies.²³⁵ A 1941 study by Ruth O’Brien and William Shelton, *Women’s*

232. See Tynan Sinks, *What Are Drugstores Doing to Factor Inclusivity into Their Makeup Aisles?*, ALLURE (Nov. 10, 2018), <https://www.allure.com/story/drugstore-foundation-range-inclusivity-in-the-makeup-aisle> [https://perma.cc/73UD-AGQT]. Although the choices for women with darker skin have increased in recent years, options at the drugstore price point are scarcer. For example, Rihanna’s Fenty Beauty line offers foundation in an impressive fifty shades, but a 1.08-ounce container costs \$36, while a lipstick costs \$22. See *Pro Filtr Soft Matte Longwear Foundation*, FENTY BEAUTY, <https://www.fentybeauty.com/pro-filtr-soft-matte-longwear-foundation/22827.html?lang=default> [https://perma.cc/RP9R-JS2J] (last visited Apr. 28, 2021); *Slip Shine Sheer Shiny Lipstick*, FENTY BEAUTY, https://www.fentybeauty.com/slip-shine-sheer-shinylipstick/FB40026.html?dwvar_FB40026_color=FB4086&cgid=makeup-lip-lipstick [https://perma.cc/4GKU-6SL3] (last visited Apr. 28, 2021). For many with modest incomes, these prices are simply impracticable.

233. For example, Hanes “nude” pantyhose are a light color. See *Hanes Silk Reflections Control Top Reinforced Toe Pantyhose*, HANES, <https://www.hanes.com/hanes-silk-reflections-control-top-reinforced-toe-pantyhose.html> [https://perma.cc/6KX6-9YN5] (last visited Apr. 28, 2021). Hue “natural” tights are likewise a light color. See *Sheer Tights with Grippers*, HUE, <https://hue.com/sheer-tights-with-grippers> [https://perma.cc/M7PL-6R6H] (last visited Apr. 28, 2021). Many brands also advertise “nude” and “natural” pantyhose that are light in color. See, e.g., *Donna Karan the Nudes Pantyhose*, NORDSTROM, https://shop.nordstrom.com/s/donna-karan-the-nudes-pantyhose/2877520/lite?siteid=tv2R4u9rImYT14ZbVRpC7mp3nEicuYbg&utm_source=rakuten&utm_medium=affiliate&utm_campaign=tv2R4u9rImY&utm_content=1&utm_term=747644&utm_channel=low_nd_affiliates&sp_source=rakuten&sp_campaign=tv2R4u9rImY [https://perma.cc/95Z5-QD9D] (last visited Apr. 28, 2021).

234. Men face various sizing obstacles as well. I am focusing on women’s fashion because it tends to amplify such obstacles for a number of reasons. Women face more pressure to look a certain way. Fit issues are amplified because women’s clothing tends to be more form fitting. And women face more social pressure about the meaning of their clothes: Is this too sexy for work? Is this too modest for a first date?

235. Christopher Ingraham, *The Absurdity of Women’s Clothing Sizes, in One Chart*, WASH. POST (Aug. 11, 2015, 11:40 AM), <https://www.washingtonpost.com/news/wonk/wp/2015/08/11/the-absurdity-of-womens-clothing-sizes-in-one-chart>.

Measurements for Garment and Pattern Construction, “recorded the weight and 58 measurements of primarily middle-class, young, white women.”²³⁶ The study, which focused on white women’s bodies, became the basis for women’s clothing sizes after World War II.²³⁷ As one commentator put it, “postwar mainstream clothing was dominated by a silhouette made for young white women wearing girdles.”²³⁸ This exclusion tracked the overall dismissiveness toward clothing for nonwhite people at the time. Traci Parker has documented, for example, that Black people were not allowed to try on clothing in dressing rooms at many stores and could not return clothes if they did not fit.²³⁹

The norming of fashion to white bodies continues today. An average American woman, taking into account all races, is about 5’4” tall and weighs 171 pounds, with a 39-inch waist.²⁴⁰ But this statistic elides differences between white women and nonwhite women. With proportions that vary roughly with weight, the average Black woman weighs 186.1 pounds, the average white woman weighs 170.9 pounds, the average Hispanic woman weighs 169.0 pounds, and the average Asian-American woman weighs 132.4 pounds.²⁴¹

These considerable differences translate to clothing sizes. The average American woman wears a size 16 or 18; the average Black woman, however, is a size 18–20.²⁴² The result is that roughly sixty-eight percent of women wear size 14 or above,²⁴³ yet so-called plus sizes remain underrepresented at most stores even though a supermajority of American women wear them. At JCPenney, for example, only 16% of dresses on the website are plus size, and on Nordstrom’s website, the percentage drops to 8.5%, with a smaller number of items available

236. Tracy E. Robey, *Anyone with a Body Knows that Clothing Sizes Are Flawed. Could There Be a Fix?*, VOX (Oct. 17, 2019, 7:00 AM), <https://www.vox.com/2019/10/17/20898585/sizing-fit-prediction-clothing-bodyscan-made-to-order> [https://perma.cc/P7RA-LX7D].

237. *Id.*

238. *Id.*

239. TRACI PARKER, *DEPARTMENT STORES AND THE BLACK FREEDOM MOVEMENT: WORKERS, CONSUMERS, AND CIVIL RIGHTS FROM THE 1930S TO THE 1980S*, at 3 (2019).

240. Cheryl D. Fryar, Deanna Kruszon-Moran, Qiuping Gu & Cynthia L. Ogden, *Mean Body Weight, Height, Waist Circumference, and Body Mass Index Among Adults: United States, 1999–2000 Through 2015–2016*, NAT’L HEALTH STAT. REP., Dec. 20, 2018, at 1, 2–3, <https://www.cdc.gov/nchs/data/nhsr/nhsr122-508.pdf> [https://perma.cc/ZJ3R-GXWY].

241. *Id.* at 6 tbl.2. Racial differences also emerge in specific dimensions: The average Black woman is just over 5’4”, the average white woman is 5’4”, the average Hispanic woman is just under 5’2”, and the average Asian-American woman is just over 5’1”. *Id.* at 8 tbl.4. The average Black woman has a waist circumference of 40.2 inches, the average white woman’s waist is 38.4 inches, the average Hispanic woman’s waist is 39.4 inches, and the average Asian-American woman’s waist is 33.7 inches. *Id.* at 10 tbl.6.

242. Deborah A. Christel & Susan C. Dunn, *Average American Women’s Clothing Size: Comparing National Health and Nutritional Examination Surveys (1988–2010) to ASTM International Misses & Women’s Plus Size Clothing*, 10 INT’L J. FASHION DESIGN, TECH. & EDUC. 129, 132 (2016).

243. Leo Aquino, *As a Plus-Size Woman, I’m Done Shopping at Brick-and-Mortar Stores for Good*, HELLO GIGGLES (Aug. 6, 2019, 11:18 AM), <https://helloworldgiggles.com/fashion/why-i-stopped-shopping-brick-and-mortar-plus-size> [https://perma.cc/G3D3-4GES].

at each successively larger size.²⁴⁴ At brick-and-mortar stores, larger sizes are often even scarcer.²⁴⁵ The net effect is that a woman who wears a size 0–12 can usually walk into a store and find clothing that fits, while a woman who wears a size 14 or greater cannot. This disparity has a disproportionate effect on nonwhite women, who are more likely to wear larger sizes. The failure of clothing manufacturers and retailers to address the disconnect between availability of clothing and the sizes of the women who wear that clothing results in a racial disparity given that women who wear above a size 14 are disproportionately Black and brown. Both in brick-and-mortar stores and online, then, Black and brown women cannot enjoy fashion as white women do. In the language of 42 U.S.C. § 1981, they do not have the same right to contract to buy clothing as that enjoyed by white citizens.

And, for nonwhite people, the shopping experience itself often deviates from that enjoyed by white people. Black and brown people continue to face unwarranted suspicion while shopping for makeup and clothing.²⁴⁶ One study of African-American residents of New York City found that eighty percent report experiencing “racial stigma and stereotypes” while shopping.²⁴⁷ Fifty-nine percent believe that they were treated as a potential shoplifter, while fifty-two percent reported at least one experience in which a salesperson assumed that they were “too poor to be able to make a purchase.”²⁴⁸ Even Black celebrities such as Oprah and Forest Whitaker have been subjected to suspicion while shopping²⁴⁹—that is, neither fame nor wealth insulates Black people from suspicion while shopping.

The totality of the experiences that I have described indicate a straightforward conclusion: nonwhite people lack the same right to contract in relation to fashion as that enjoyed by white citizens.

244. Marc Bain, “*Plus Size*” Is a Meaningless Term, and Brands Should Start to Do Away with It, QUARTZ (May 18, 2016), <https://qz.com/680850/plus-size-is-an-alienating-term-and-brands-should-start-to-do-away-with-it> [<https://perma.cc/H5UE-N92Y>]. As of February 18, 2021, Nordstrom offered 1,825 items in size 18 but just 360 items in size 28W. See *Plus-Size Clothing*, NORDSTROM, <https://www.nordstrom.com/browse/women/clothing/plus-size?breadcrumb=Home%2FWomen%2FClothing%2FPlus-Size%20Clothing> [<https://perma.cc/42AY-KKGY>].

245. See Aquino, *supra* note 243.

246. See, e.g., Michelle Singletary, *Shopping While Black. African Americans Continue to Face Retail Racism.*, WASH. POST (May 17, 2018, 7:46 AM), <https://www.washingtonpost.com/news/get-there/wp/2018/05/17/shopping-while-black-african-americans-continue-to-face-retail-racism>.

247. Cassi Pittman, “*Shopping While Black*”: Black Consumers’ Management of Racial Stigma and Racial Profiling in Retail Settings, 20 J. CONSUMER CULTURE 3, 6, 8 (2017).

248. *Id.* at 8, 9 tbl.1.

249. See, e.g., Caroline Bankoff, *Forest Whitaker Wrongly Accused of Shoplifting on the Upper West Side*, N.Y. MAG.: INTELLIGENCER (Feb. 17, 2013), <https://nymag.com/intelligencer/2013/02/whitaker-wrongly-accused-of-shoplifting-on-uws.html> [<https://perma.cc/TW5C-Q59E>]; Tanya Ballard Brown, *Why Didn’t the Store Just Let Oprah Buy the \$38,000 Handbag?*, NPR (Aug. 10, 2013, 4:38 AM), <https://www.npr.org/sections/codeswitch/2013/08/10/210574193/why-didnt-the-store-just-let-oprah-buy-the-38-000-handbag> [<https://perma.cc/TL5E-V5C4>].

5. Enjoying Home

For many Americans, owning a home for the first time is a major milestone. Homeownership signifies financial stability and steady employment and often accompanies family formation. Many see it as part of the American dream. The sanctity of the home is enshrined in the Fourth Amendment's prohibition on "unreasonable searches and seizures" involving "persons, houses, papers, and effects,"²⁵⁰ as well as by the entire common law of real property.

To enjoy their homes as white people do, nonwhite people must be able to access a home of the same quality for the same amount of money. Moreover, they must be able to enjoy all the same privileges of home ownership, including comfort, relaxation, and quiet enjoyment. The home itself must be in a broader environment of comparable desirability: safe, aesthetically satisfying, and environmentally hospitable. As the data show, however, nonwhite people often fall far short of enjoying these basic property rights.

The availability and terms of financing are one fundamental area of inequality. Such discrimination in housing financing has been a part of American history for decades. Between 1934 and 1962, white people received ninety-eight percent of the loans insured by the Federal Housing Administration.²⁵¹ The Home Owners' Loan Corporation, which was established to help "refinance [the] millions of mortgages in default as a result of the Great Depression, prepared 'neighborhood security maps' to assess underwriting risk."²⁵² The practice of redlining emerged, in which predominantly nonwhite neighborhoods were designated as ineligible for various government refinancing programs.²⁵³ Prior to the passage of the Fair Housing Act in 1968, as Douglas Massey and Nancy Denton explain, "Americans made a series of deliberate decisions to deny blacks access to urban housing markets and to reinforce their spatial segregation."²⁵⁴

Unsurprisingly, private lenders also engaged in discriminatory practices.²⁵⁵ For example, litigation has uncovered instances of underwriting discrimination²⁵⁶—the process by which a lender determines the risk that a mortgage-holder will default on repayment. *Reveal* from the Center for Investigative Reporting analyzed thirty-one million home mortgage disclosures in sixty-one metropolitan areas over the course of a year and found that African-American and Latino/a/x

250. U.S. CONST. amend. IV.

251. Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, PROPUBLICA (June 25, 2015, 1:26 PM), <https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law> [<https://perma.cc/L2KY-KDXY>].

252. Alex Gano, *Disparate Impact and Mortgage Lending: A Beginner's Guide*, 88 U. COLO. L. REV. 1109, 1118 (2017).

253. *See id.*

254. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 19 (1993).

255. *See Gano, supra* note 252, at 1121–28.

256. *See, e.g.,* *Watson v. Pathway Fin.*, 702 F. Supp. 186, 188–89 (N.D. Ill. 1988) (finding an inference of underwriting discrimination where defendant mortgage company rejected the residential mortgage loan application of a Black plaintiff couple for delinquent credit card accounts, even though defendant had approved applications from white borrowers with similar delinquencies).

applicants are often denied conventional mortgage loans, even at rates far higher than white people and even when controlling for applicants' income, loan amount, and neighborhood.²⁵⁷ Another study, by real estate listing site Zillow, found that six percent of Black people are turned down for a pre-approval, compared with three percent of white people, and thirty-two percent of Black people face challenges in qualifying for their loans, compared with twenty-two percent of white people.²⁵⁸

Redlining—a practice in which a lender refuses to extend loans in predominantly nonwhite areas—has likewise been documented through litigation.²⁵⁹ Although some think of redlining as a sordid historical practice, the discriminatory effects of residential segregation linger today, resulting in a host of negative consequences for nonwhite individuals and families who live in predominantly Black areas, including “reduced buying power, increased welfare dependence, high rates of family disruption, elevated crime rates, housing deterioration, elevated infant mortality rates, and decreased educational quality.”²⁶⁰

And redlining has not been universally denounced even today; for example, 2020 presidential candidate Michael Bloomberg pointed to restrictions on redlining as a partial cause of the 2008 financial crisis.²⁶¹ In recent years, the concern of “reverse redlining” has increasingly gained prominence. Predatory lending—where lenders offer members of vulnerable groups, who are disproportionately nonwhite, loans on substantially less favorable terms²⁶²—has long existed but became exponentially more prominent in the years leading up to the Great Recession.²⁶³

257. Aaron Glantz & Emmanuel Martinez, *Kept Out: For People of Color, Banks Are Shutting the Door to Homeownership*, REVEAL (Feb. 15, 2018), <https://www.revealnews.org/article/for-people-of-color-banks-are-shutting-the-door-to-homeownership> [<https://perma.cc/PD7Y-KVJ5>] (“The analysis— independently reviewed and confirmed by The Associated Press—showed black applicants were turned away at significantly higher rates than whites in 48 cities, Latinos in 25, Asians in nine and Native Americans in three. In Washington, D.C., the nation’s capital, Reveal found all four groups were significantly more likely to be denied a home loan than whites.”).

258. *Finding Home as a Person of Color*, ZILLOW GROUP, <https://www.zillow.com/report/2017-highlights/finding-home-person-color> [<https://perma.cc/H6LM-QCP2>] (last visited May 2, 2021).

259. See, e.g., *Harrison v. Otto G. Heinzerth Mortg. Co.*, 430 F. Supp. 893, 896 (N.D. Ohio 1977) (finding for plaintiff where mortgage company refused to offer racially neutral financing terms for the purchase of a house located in racially mixed neighborhood).

260. E.g., Douglas S. Massey, *American Apartheid: Segregation and the Making of the Underclass*, 96 AM. J. SOC. 329, 342 (1990).

261. See FORA.tv, *Michael Bloomberg - Origins of the Economic Crisis*, YOUTUBE (Sept. 23, 2008), <https://www.youtube.com/watch?v=wXhND01U734> (suggesting that limits on redlining by banks were a partial cause of the 2008 recession); see also Christopher J. Brooks, *Redlining’s Legacy: Maps Are Gone, but the Problem Hasn’t Disappeared*, CBS News (June 12, 2020, 8:25 AM), <https://www.cbsnews.com/news/redlining-what-is-history-mike-bloomberg-comments> [<https://perma.cc/EZ2Y-KMVS>].

262. See, e.g., *Fair Lending Enforcement Program*, U.S. DEP’T JUST. (Jan. 2001), <http://www.justice.gov/crt/fair-lending-enforcement-program> [<https://perma.cc/CK9Z-EWA9>] (“One of our principal concerns is that lenders have targeted vulnerable populations . . .”).

263. See Colin McArthur & Sarah Edelman, *The 2008 Housing Crisis*, CTR. FOR AM. PROGRESS (Apr. 13, 2017, 9:00 AM), <https://www.americanprogress.org/issues/economy/reports/2017/04/13/430424/2008-housing-crisis> [<https://perma.cc/C38D-8J3U>] (“There is near consensus among experts

Given the effects of intergenerational wealth disparities, the experience of becoming a homeowner is less common for people of color. According to information released by the housing website Zillow, as of 2017 less than one quarter of homes nationwide were owned by nonwhite people, despite the fact that nearly one third of U.S. households were nonwhite.²⁶⁴ In particular, Black and Latino/a/x people represent thirteen percent each of all U.S. households but comprise only eight percent and nine percent of U.S. homeowners, respectively.²⁶⁵

Part of the enjoyment of home financing is purely hedonic. Some might argue that obtaining a mortgage on financially viable terms is simply a formality necessary to own a home. Surely a reasonable mortgage is a prerequisite to homeownership, but for people who have not always been well off—who did not have parents who casually “lent” them the money for a down payment in their early twenties—approval for a mortgage can be something much more significant. It represents an achievement of a major financial milestone and, for some, an attainment of a more prosperous class of life for themselves and their families. Because nonwhite people are less likely than identically situated white people to access the milestone that home financing represents, they fail to enjoy both the tangible and intangible benefits of that milestone.

Enjoyment of property also extends to the occupancy of the property itself. Whether they occupy property by renting or owning, nonwhite people cannot enjoy the place that they call home to the same extent as white people do. At the most extreme, nonwhite people are not *safe* in their homes. In one recent case, Botham Jean, a Black man, was gunned down while unarmed in his own home by Amber Guyger, a white Dallas police officer who shot him after she entered his apartment thinking it was her own.²⁶⁶ In Fort Worth, a white police officer shot Atatiana Jefferson, a Black woman who had been playing video games with her eight-year-old nephew.²⁶⁷ Jefferson apparently heard sounds outside her house, removed a gun—which she legally owned and was licensed to carry—from her purse, and pointed it at the window in self-defense.²⁶⁸ And in Louisville, officers executing a no-knock warrant shot and killed Breonna Taylor in her own

that the housing crisis was caused primarily by the rise of predatory lending and products with exotic features marketed to consumers without adequate information or preparation and sometimes using fraudulent information . . .”).

264. *Finding Home as a Person of Color*, *supra* note 258 (finding that seventy-six percent of homeowners are white, meaning that only twenty-four percent of homes are owned by nonwhite people even though thirty-three percent of households are nonwhite).

265. *Id.*

266. Bobby Allyn, *Amber Guyger, Ex-Officer Who Killed Man in His Apartment, Given 10 Years in Prison*, NPR (Oct. 2, 2019, 5:08 PM), <https://www.npr.org/2019/10/02/766454839/amber-guyger-ex-officer-who-killed-man-in-his-apartment-given-10-years-in-prison> [<https://perma.cc/8UGJ-N2S3>].

267. Dana Branham & Jennifer Emily, *Atatiana Jefferson Pointed Gun at Window Before Fort Worth Officer Killed Her, Nephew Told Authorities*, DALL. MORNING NEWS (Oct. 15, 2019, 11:07 AM), <https://www.dallasnews.com/news/crime/2019/10/15/atatiana-jefferson-pointed-gun-out-window-before-fort-worth-officer-killed-her-nephew-told-authorities> [<https://perma.cc/V7N9-FH83>].

268. *Id.*

home.²⁶⁹ These examples are particularly recent and horrific, but they are hardly isolated. Although statistics are scarce—indeed, we don’t even have a reliable figure for the *total* number of people shot by police each year²⁷⁰—such incidents are easy to locate. The fear of being killed *in one’s own home* is definitionally incompatible with enjoyment of home.

Additionally, Black people are often targeted by neighbors and law enforcement for suspicion, making home a place where they cannot fully relax. In a highly publicized event, Henry Louis Gates Jr., one of Harvard’s most prominent scholars of African-American history, was arrested at home by an officer investigating a report of a robbery.²⁷¹ Gates, who returned home midday from a two-week trip to find his front door jammed, forced the door open and a few minutes later was confronted by a police officer reportedly following up on a call by a white female caller.²⁷² After Gates accused the officer of behaving in a racist manner, the officer eventually arrested and handcuffed Gates, who was then held at police headquarters for hours.²⁷³

Suspicion is further enabled by apps such as NextDoor, Ring’s Neighbor, and Citizen, where residents of a particular neighborhood post reports of “suspicious” individuals, who—in at least some cases—are simply nonwhite residents of a predominantly white neighborhood. These individuals attract attention and suspicion because they look “out of place.”²⁷⁴ Indeed, the popularity of what Rani Molla calls “fear-based social media” has risen even as crime has fallen,²⁷⁵ meaning that nonwhite people who live in predominantly white neighborhoods are at increased—and increasingly unjustified—risk of suspicion.

People of color are also disproportionately likely to live in areas that are environmentally hazardous. Scientists have documented hundreds of disparities. For example, nonwhite people are much more likely to live near pollution sources and to breathe polluted air.²⁷⁶ Communities living below the poverty line—which

269. Richard A. Opiel Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor’s Death*, N.Y. TIMES (Dec. 29, 2020), <https://www.nytimes.com/article/breonna-taylor-police.html>.

270. Wesley Lowery, *How Many Police Shootings a Year? No One Knows*, WASH. POST (Sept. 8, 2014, 3:22 PM), <https://www.washingtonpost.com/news/post-nation/wp/2014/09/08/how-many-police-shootings-a-year-no-one-knows>.

271. Abby Goodnough, *Harvard Professor Jailed; Officer Is Accused of Bias*, N.Y. TIMES (July 20, 2009), <https://www.nytimes.com/2009/07/21/us/21gates.html>.

272. *Id.*

273. *Id.*

274. Rani Molla, *The Rise of Fear-Based Social Media Like Nextdoor, Citizen, and Now Amazon’s Neighbors*, VOX (May 7, 2019, 12:30 PM), <https://www.vox.com/recode/2019/5/7/18528014/fear-social-media-nextdoor-citizen-amazon-ring-neighbors> [<https://perma.cc/3T54-2RCA>].

275. *Id.*; see John Gramlich, *What the Data Says (and Doesn’t Say) About Crime in the United States*, PEW RES. CTR. (Nov. 20, 2020), <https://www.pewresearch.org/fact-tank/2020/11/20/facts-about-crime-in-the-u-s> [<https://perma.cc/448R-NRAH>] (presenting data showing that many Americans believe crime rates are increasing even though they have fallen).

276. See Ihab Mikati, Adam F. Benson, Thomas J. Luben, Jason D. Sacks & Jennifer Richmond-Bryant, *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, 108 AM. J. PUB. HEALTH 480, 480–81 (2018).

are disproportionately nonwhite—are exposed to thirty-five percent more harmful particulate matter from industrial, transit, and other emissions than the overall population.²⁷⁷ When researchers studied race specifically, they found that nonwhite people overall had a twenty-eight percent higher health burden, and Black people had a fifty-four percent higher burden than the population at large.²⁷⁸ Hispanic, Black, and Asian-American women were exposed to more air pollution during pregnancy than were white women.²⁷⁹ Blood lead levels are higher for Black children than for white children.²⁸⁰ In at least some regions, hydraulic fracturing oil wells are more likely to be located in communities of color.²⁸¹ It seems almost too obvious to state that nonwhite people do not have the same right to enjoy their communities as enjoyed by white people.

And finally, nonwhite people do not always enjoy the same right to enjoy vacation—that is, to enjoy a home away from home. Online platforms such as Airbnb and Vrbo, which allow people who own rental properties to connect with people who want a place to stay, offer an attractive and often less expensive alternative to a hotel. Yet, the vacation rental sector of the platform economy is not free from race discrimination. For example, research reveals that Airbnb properties listed by Black people earn twelve percent less in rental income than otherwise comparable properties listed by white people.²⁸² And the same is true on the other side of the transaction: Airbnb users with distinctively Black-identified names were sixteen percent less likely to be accepted to rent a property.²⁸³

Similar to contracts, property remains an area in which nonwhite people do not yet enjoy the same rights as enjoyed by white citizens. Whether attempting to purchase a home, using a home they own, or attempting to access a vacation home, nonwhite people face substantial obstacles to their enjoyment. Serious inequality must be corrected before nonwhite people can achieve the same right to enjoy property that white people already enjoy. As this Section demonstrates, with respect to many areas of both contracts and property, nonwhite people do not yet enjoy the same rights as those already enjoyed by white citizens.

277. See *id.* at 481–82, 482 tbl.1.

278. *Id.*

279. Michelle L. Bell & Keita Ebusu, *Environmental Inequality in Exposures to Airborne Particulate Matter Components in the United States*, 120 ENVTL. HEALTH PERSP. 1699, 1702 (2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3546368/pdf/ehp.1205201.pdf> [<https://perma.cc/8WKP-RU5K>].

280. See *Childhood Lead Poisoning*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://perma.cc/BS67-CFMA> (last visited May 4, 2021) (“For example, 3% of black children, compared to 1.3% of white children, have elevated blood lead levels.”).

281. Jill E. Johnston, Emily Werder & Daniel Sebastian, *Wastewater Disposal Wells, Fracking, and Environmental Injustice in Southern Texas*, 106 AM. J. PUB. HEALTH 550, 553 (2016).

282. Benjamin Edelman & Michael Luca, *Digital Discrimination: The Case of Airbnb.com 3* (Harvard Bus. Sch., Working Paper No. 14-054, 2014), https://www.hbs.edu/ris/Publication%20Files/Airbnb_92dd6086-6e46-4eaf-9cea-60fe5ba3c596.pdf [<https://perma.cc/Y8FN-3BWD>].

283. Benjamin Edelman, Michael Luca & Dan Svirsky, *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, 9 AM. ECON. J.: APPLIED ECON. 1, 1–2 (2017).

IV. SEEING WHITE

This Part considers the lessons of a close reading of § 1981 and § 1982. Analyzing the plain language of these statutes has important implications for some of our most influential institutions. Courts, legislatures, and public discourse will reflect a richer, more nuanced, and more equitable understanding of race if they take seriously the idea that everyone is entitled to the same right regarding contracts, property, and many other areas of law as that enjoyed by white citizens.

A. COURTS

A close examination of the text of 42 U.S.C. § 1981 and § 1982 reveals several ways in which courts' interpretation of these statutes should change. First, courts should follow the plain language of the statute and overturn *General Building Contractors*, which held that plaintiffs must prove discriminatory intent to prevail.²⁸⁴ As discussed in Section II.B, the legislative history demonstrates that the Congress that enacted § 1981 and § 1982 meant to impart a broad guarantee of substantive rights to combat widespread discrimination at the time that the statutes were enacted.²⁸⁵ Importing an intent requirement runs counter to the text, history, and egalitarian concern of the statute. The Supreme Court should instead follow the approach of the dissenters in *General Building Contractors* and remove the hurdle of discriminatory intent.²⁸⁶

The demise of the intent requirement in 42 U.S.C. § 1981 and § 1982 would also prompt a broader conversation about the requirement of discriminatory intent for antidiscrimination plaintiffs more generally. In the context of the Equal Protection Clause, for instance, the Court has held that plaintiffs must show discriminatory intent to prevail.²⁸⁷ Legal scholars have long criticized the discriminatory intent requirement, arguing that the requirement does not capture unintentional racism and implicit bias, nor does it capture serious disparities that cannot be traced to a smoking gun of discriminatory intent.²⁸⁸ Although federal statutory law does not dictate constitutional interpretation, the plain language analysis is properly used to reject the intent requirement for § 1981 and § 1982.

Separate from the trajectory of the intent requirement, courts can and should impart a more robust meaning to the word *enjoy* in the text of § 1981 and § 1982. The word *enjoy* means more than just *have*. A robust interpretation comports

284. *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 389 (1982).

285. *See supra* Section II.B.

286. *See Gen. Bldg. Contractors*, 458 U.S. at 408 (Marshall, J., dissenting) ("The plain language does not contain or suggest an intent requirement."); *cf. id.* at 406 (Stevens, J., concurring in part and concurring in the judgment) ("Any violation of [the] guarantee [of § 1981]—whether deliberate, negligent, or purely accidental—would, in my opinion, violate 42 U.S.C. § 1981.")

287. *See, e.g., Washington v. Davis*, 426 U.S. 229, 245, 248 (1976) (holding that laws that have a disparate impact but that were not adopted with discriminatory intent do not violate the Fourteenth Amendment).

288. *See, e.g., Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319 (1987).

with the plain meaning of the word *enjoy*.²⁸⁹ It is further supported by the Civil Rights Act of 1991, which resulted in the addition of § 1981(b), and specified that the statute “includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.”²⁹⁰

Courts should therefore scrutinize the scope of the rights of contract and property more closely, relying on the plain meaning of the term *enjoy*. Enjoying the rights of contract and property means more than the bare ability to form contracts or transact property.²⁹¹ An honest and detailed analysis of contract and property rights will provide a richer understanding of the large and small ways that race remains a part of everyday life. As Justice Sonia Sotomayor put it: “The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.”²⁹²

Although the language of enjoyment and white visibility appears only in § 1981 and § 1982 among federal statutes, courts should also use the enriched understanding of those rights to inform its Equal Protection Clause doctrine. Although overnight change is unlikely, the fuller understanding of rights fostered by § 1981 and § 1982 can and should be incorporated into the Court’s equal protection doctrine.²⁹³

As just one example, consider the Court’s affirmative action jurisprudence, which allows public institutions of higher education to use race-conscious admissions programs holistically in furtherance of the compelling interest of diversity.²⁹⁴ A better understanding of the different lived experiences of white and nonwhite people will help the Court articulate the permissible scope of affirmative action programs. For instance, although the Court has explicitly renounced the remedial rationale for affirmative action, lingering disparities between white and nonwhite experience—as acknowledged in the plain language of § 1981 and § 1982—flow from inequalities of the past. The Court can explicitly acknowledge this past and describe how a history of racial disparities contributes to diverse experiences in the present.

289. See *supra* Section III.A.1.

290. 42 U.S.C. § 1981(b) (2018).

291. See *supra* Section III.B.

292. *Schuetz v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 381 (2014) (Sotomayor, J., dissenting).

293. See *Mitchell*, *supra* note 100, at 1242 (“There is in fact plenty of textual support for the Supreme Court’s modern equality decisions—and it comes not from the Equal Protection Clause, but from the congressional civil rights enactments that require racial minorities to be treated as full and equal citizens.”).

294. See *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2210 (2016) (reiterating the diversity rationale for affirmative action in higher education); *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (same).

B. LEGISLATURES

Future federal and state antidiscrimination legislation should acknowledge white supremacy by including language similar to the language of § 1981 and § 1982. Everyone should have the “same right[s] . . . enjoyed by white citizens,”²⁹⁵ not only in relation to contracts and property but also at school, in the workplace, on the Internet, and in any space open to the public.

Attention to the nature of the right “enjoyed by white citizens” in any particular circumstance will improve the factual findings supporting any antidiscrimination legislation guiding congressional or state legislative research. The question is not a free-floating inquiry into the current scope of rights. It is an examination of the rights currently enjoyed by white people in the aftermath of a long history of white supremacy. Inquiring not into abstract concepts of equality but rather into the practical scope of the rights enjoyed by white citizens will also improve the debate over the legislation itself. It will require legislators to grapple with the existence of white supremacy and structural racism as they determine the appropriate substantive scope of any antidiscrimination statute.

To select one example, consider how legislators concerned about health care disparities along racial lines might legislate differently if they wished to remedy the disparity on the ground. I have argued that many of the disparities should already be able to be remedied under 42 U.S.C. § 1981.²⁹⁶ However, to the extent that the judicially imposed intent requirement of § 1981 proves an obstacle to full recognition of racial disparities through contract equality or to the extent a legislature wishes to acknowledge and address the specific disparity in health care through targeted legislation, § 1981 provides valuable lessons in future drafting.

A statute designed to recognize and remedy racial health care disparities should include the language that all people should have the right to medical care as enjoyed by white people. Moreover, to give the statute maximum impact, the legislature should include a non-exhaustive list of areas in which health care must be equal. Waiting time, time spent with doctors, prescriptions for pain, recommended treatment, and consistency of follow-up treatment are a few possibilities. Although the legislature should make clear that these areas are exemplary rather than exhaustive, a list of examples such as these would both call attention to existing disparities and demonstrate how they interfere with the equal enjoyment of health. Drafting in such a way would make whiteness visible and its benefits obvious.

More thoughtfully drafted legislation will also prompt greater awareness by health care providers. Many facilities or individual practitioners may be unaware of the ways in which they may provide unequal care to those of different races. Legislation to correct such inequalities will prompt recordkeeping and increased attention to any disparities. For example, a doctor who realizes that she is, hypothetically, twenty percent more likely to prescribe pain medication to a white

295. See 42 U.S.C. §§ 1981–1982.

296. See *supra* Section III.B.2.

patient may take the time to examine her past practices to determine whether the disparity was objectively justified. Legislation to prompt such awareness in health care providers may ultimately lead to more equitable care for everyone.

The legislative approach that I propose is not limited to health care. Imagine a version of Title VII that guaranteed the same rights to all workers as enjoyed by white employees.²⁹⁷ Such legislation would prohibit discrimination based on racially correlated features, such as a worker's preferred hairstyle, style of dress, or accent. The same approach would apply equally well to more specific legislation regulating the clothing stocked at the mall, the food sold in grocery stores, or the protocols that ride share companies must follow in serving passengers. In each situation, the language in question would prompt a careful examination of the rights that white people enjoy rather than a fuzzy assessment of equality.

C. DISCOURSE

Famed philosopher of language J.L. Austin introduced the idea of “performative utterances”—that is, statements that not only describe facts about the world but also, when spoken under certain circumstances, are tantamount to performing a certain kind of action.²⁹⁸ For example: “I now pronounce you husband and wife.” The words are not merely descriptive of the world; when uttered at a wedding ceremony, they actually *change* the world.²⁹⁹

Consider the following phrase in a judicial opinion: “Counsel for the defendant did not raise the argument.” The phrase is more than merely descriptive. It is critical: counsel should have raised the argument. It is performative: because counsel did not raise the argument, the court will not consider it. And, of course, it is predictive: because counsel did not raise the argument, the defendant will not prevail upon it. Taken in context, then, this simple declarative sentence embodies far more about the world than the raw meaning of its individual words.

This example provides a ready analogy to the phrase *enjoyed by white citizens*. Consider once more § 1981, which declares: “All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts”³⁰⁰ The phrase is similarly a performative utterance rather than a purely descriptive one. It is critical: that nonwhite people lacked the same right as white people to contract is wrong. It is performative: nonwhite people now have the same right to contract as enjoyed by white citizens. And perhaps most importantly, it too is predictive: going forward, nonwhite people and white people will have the same right. Although judicial enforcement of an antidiscrimination statute doubtless will be more complicated

297. Cf. 42 U.S.C. § 2000e-2 (prohibiting discrimination by covered employers on the basis of “race, color, religion, sex, or national origin”).

298. See J. L. AUSTIN, HOW TO DO THINGS WITH WORDS (J. O. Urmson & Marina Sbisa eds., 2d ed. 1975).

299. I do not detail here Austin's complex and fascinating theory of “illocutionary acts,” as distinct from other kinds of speech acts, or the notion of an “illocutionary force.” See *generally id.* The basic notion that speech may be constitutive rather than merely descriptive will suffice for present purposes.

300. 42 U.S.C. § 1981(a) (2018).

than a marriage solemnization or a holding that an argument was waived, the language of the statute wields the power to shape the future scope of rights.

The phrase *enjoyed by white citizens* further has the ability to shape discourse. Whether used in a statute, a judicial decision, a scholarly article, or a popular media piece, it introduces the idea that everyone should be treated like white citizens. This notion inherently encompasses another idea worthy of discussion: that everyone has not been treated as well as white citizens in the past, and that everyone is not treated as well as white citizens now. To obey the statute is inherently to confront the conditions that made the statute necessary in the first place. This examination of discrimination past and present makes whiteness visible, pushing back against the unspoken default of whiteness discussed in Part I.

Considerable research documents that conversations about white supremacy make white people anxious, uncomfortable, or defensive.³⁰¹ This is one reason that such conversations are so important. Further, conversations about our country's racial history disrupt the narrative of white racial innocence that often prompts individual defensiveness and prevents attention to pressing structural problems.³⁰² Attention to the clear meaning of this language by legal scholars, journalists, educators, and the general public will improve our discourse around race relations and the history that has led us to where we are today.

CONCLUSION

This Article demonstrates the many benefits of reading 42 U.S.C. § 1981 and § 1982 according to their plain language. And an explicit examination of whiteness is uniquely appropriate for the current historical moment.³⁰³ Just eight years after Americans elected the first Black president and many claimed that America was now truly colorblind, Americans elected a man who advanced racist birther conspiracy theories against the first Black president,³⁰⁴ described white supremacists as “very fine people,”³⁰⁵

301. See, e.g., Margaret L. Andersen, *Whitewashing Race: A Critical Perspective on Whiteness*, in *WHITE OUT: THE CONTINUING SIGNIFICANCE OF RACISM*, *supra* note 25, at 21, 23; see also EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* 9, 54 (3d ed. 2010) (describing stylistic language tools used by white people when discussing race, including “avoidance of direct racial language” to express their views on race and “verbal parachutes to avoid dangerous discussions or to save face”).

302. See, e.g., Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 481–89 (2014) (discussing the harmful implications of the narrative of white innocence).

303. See generally TIM WISE, *COLOR-BLIND: THE RISE OF POST-RACIAL POLITICS AND THE RETREAT FROM RACIAL EQUITY* (2010) (addressing the rise in colorblind rhetoric following President Barack Obama's election).

304. See, e.g., German Lopez, *Trump Is Still Reportedly Pushing His Racist “Birther” Conspiracy Theory About Obama*, VOX (Nov. 29, 2017, 10:40 AM), <https://www.vox.com/policy-and-politics/2017/11/29/16713664/trump-obama-birth-certificate> [<https://perma.cc/8CF8-AZ5E>].

305. See Jack Shafer, *How Trump Changed After Charlottesville*, POLITICO (July 18, 2019), <https://www.politico.com/magazine/story/2019/07/18/donald-trump-racist-rally-227408> [<https://perma.cc/T3JL-4E73>].

expressed a fondness for confederate memorials,³⁰⁶ and upon suffering a resounding loss in the 2020 presidential election baselessly and transparently attempted to have ballots cast in predominantly nonwhite areas discarded.³⁰⁷ Emboldened by his behavior, high ranking government officials excuse, tolerate, or even advocate white supremacy in a way that they have not for decades.³⁰⁸

Ironically, the increased attention to explicit bias presents an opportunity.³⁰⁹ White supremacists marching in Charlottesville represent a chance to talk about the country's shameful history of oppressing anyone who is not white. Furor over removal of confederate monuments provides a reason to discuss the precise reason for the Civil War—slavery—and the reason the monuments were put in place. Amid the turmoil of escalating racial tensions, 42 U.S.C. § 1981 and § 1982 supply a touchstone for examining the rights that people enjoy and a methodology for remedying disparities among white and nonwhite people. Of course, America needs much more than a few statutes to heal the racial wounds of centuries. But properly read, the statutes can help show the way.

306. See Danielle Kurtzleben & Miles Parks, *Trump Defends 'Beauty' of Confederate Memorials*, NPR (Aug. 17, 2017, 10:43 AM), <https://www.npr.org/2017/08/17/544137751/trump-defends-beauty-of-confederate-memorials> [<https://perma.cc/PB2F-M7DX>].

307. Trump's legal challenges focused on areas with greater Black populations, including Milwaukee, Detroit, Pittsburgh, Philadelphia, and Savannah. Jacob Shamsian & Sonam Sheth, *Trump and His Allies Filed More than 40 Lawsuits Challenging the 2020 Election Results. All of Them Failed.*, BUS. INSIDER (Feb. 22, 2021, 5:03 PM), <https://www.businessinsider.com/trump-campaign-lawsuits-election-results-2020-11>.

308. See, e.g., Simon Clark, *How White Supremacy Returned to Mainstream Politics*, CTR. FOR AM. PROGRESS (July 1, 2020, 9:02 AM), <https://www.americanprogress.org/issues/security/reports/2020/07/01/482414/white-supremacy-returned-mainstream-politics> [<https://perma.cc/2N4H-83KT>]; William Cummings, *'Let Them Call You Racist': What Steve Bannon's Remarks Reveal About the Once-Powerful Label*, USA TODAY (Mar. 16, 2018, 4:58 PM), <https://www.usatoday.com/story/news/2018/03/16/bannon-racist-badge-honor/417286002> [<https://perma.cc/5AGF-Z5EY>].

309. Cf. Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505 (2018) (documenting the continued prevalence of explicit bias, and arguing that courts should not overlook explicit bias).