DEMANDING THE IMPOSSIBLE: NATIONAL ASSOCIATION OF AFRICAN AMERICAN OWNED MEDIA V. COMCAST CORP AND THE FUTURE OF CONTRACTUAL DISCRIMINATION CASES UNDER THE CIVIL RIGHTS ACT OF 1866[*]

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I. Introduction

The United States of America has a nuanced history replete with contradictions. At its inception, the United States of America proclaimed to the world that America stood for liberty and justice for all.[1] The United States of America guarantees its citizens the right to be free to practice the religion of one's choosing,[2] freedom from search and seizure without probable cause,[3] and in the event that one is brought before a judicial body on criminal charges, the right to due process of law.[4] Going further, the United States of America offers a trial with freedom from self-incrimination, the right to confront witnesses against you, and most importantly, the presumption of innocence until the entry of a guilty verdict, by an impartial tribunal or jury of one's peers, beyond a reasonable doubt.[5] Additionally, the United States of America guarantees its citizens the right to make and enforce contracts regardless of race.[6]

Although publicly aiming to meet these archetypes, hypocritically, America's favorite pastime is a continuous

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[1] U.S CONST. art. 1 (1791).
[2] U.S CONST. amend. I (1791).
[3] U.S CONST. amend. IV (1791).
[4] U.S CONST. amend. V (1791).
[5] U.S CONST. amend. V – VI (1791).
[6] Act of April 9, 1866, ch. 31, 14 Stat. 27, § 1 (reenacted by Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144 (1870)) (codified as amended at 42 U.S.C. §§ 1981-1982 (1987).

onslaught of brutality, oppression and denaturalization[7] of the descendants of freedmen.[8] The United States of America has exercised complete control over the destiny of freedmen, from determining where he may lay down roots, to controlling what is known about his history, image, and collective narrative.[9]

The results have been catastrophic: the illusion of economic inclusion, leading to a universally accepted finding that the average Black family's net worth is projected to approach zero dollars by 2050 as compared to nearly all other ethnic groups.[10] The continuing mutation of chattel slavery[11], as sanctioned by the

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[7] *See, e.g., Plessy v. Ferguson*, 163 U.S. 537 (1896) (establishing doctrine of "separate but equal", a policy of racial segregation in the use of public facilities so long as the segregated facilities were "equal" in quality. The decision emboldened several state legislatures to resurrect laws reinforcing segregationist policies enacted in the post-reconstruction south) (*de facto overruled* by *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954)).

[8] One who was set free from a state of bondage; an emancipated slave. The word is used in the same sense in the United States, respecting Negroes who were formerly slaves. *Fairfield v. Lawson*, 50 Conn. 501, 513 (1883) (discussing the use of the term "freedmen" to apply to the lately emancipated slaves and their descendants); *Davenport v. Caldwell*, 10 S.C. 317, 333 (1878) (same).

[9] Just as the Khazaria-descending Semitic population created an organization of attorneys dedicated to the eradication of anti-Semitism in politics, cinema, literature, historical contexts, and every medium in between, descendants of freedmen ought to have the same control over their image and place in history. Hence, the freedmen need an anti-defamation league dedicated solely to protecting the origin, history, image, and collective narrative of the freedmen and their descendants – an organization with both the fortitude and capability to initiate legal process against those who would dare distort it.

[10] *See, e.g.,* DEDRICK ASANTE-MUHAMMAD ET AL, THE ROAD TO ZERO WEALTH: HOW THE RACIAL WEALTH DIVIDE IS HOLLOWING OUT THE MIDDLE CLASS, (Prosperity Now & Institute for Policy Studies eds., 2017) (arguing that black net worth, if left undisturbed, will plummet to zero dollars by 2053); DARRICK HAMILTON, WILLIAM DARITY, JR., ANNE E. PRICE, VISHNU SRIDHARAN & REBECCA TIPPETT, UMBRELLAS DON'T MAKE IT RAIN: WHY STUDYING AND WORKING HARD ISN'T ENOUGH FOR BLACK AMERICANS (Insight for Community Economic Development, 2015) (making the case that the racial wealth divide stems not from personal choice based on statistics showing that persists particularly in black households regardless of educational attainment or family structure).

[11] RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (Liveright Publishing Corporation, a division of W.W. Morton & Company eds., 1st ed. 2017) (making the argument that the policies enacted by federal, state

United States government into the creation of privatized prisons owes its existence to former Senator and Vice President Joseph R. Biden's 1994 Crime Bill.[12]

This article explores the history of the Civil Rights Act of 1866, as well as the body of case law that has shaped Section 1981 as we knew it prior to the current case. In addition, this article offers an analysis of the Comcast v. NAAAOM decision by the Supreme Court of the United States of America and a perspective on the ramifications of this decision on the viability of future Section 1981 contract enforcement cases.

II. Legislative History of the Civil Rights Act of 1866

The legislative history of Section 1981 suggests that Congress enacted the Civil Rights Act of 1866 with the intent to outlaw "racial harassment, terror, discrimination in the workplace, and all forms of racial discrimination at that time and in future times."[13] 1865 was a signal to the world that the United States of America would attempt to grapple with the sins of slavery within its borders, and the consequent harm to the Black race. It marked the end of the bloodiest four years in the nation's history,[14] the end of the institution of slavery.

Following the end of the Civil War, the Joint Congressional Committee on Reconstruction was formed to evaluate the plight of the freedman in the post-Civil War South.[15] The testimony it

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and local governments merged to form a system of government-sanctioned segregation).

[12] An Act to Control and Prevent Crime, 42 U.S.C. §§ 13701 *et seq.* (1994) (provided for 100,000 new police officers, $9.7 billion in funding for prison infrastructure, enhanced sentencing for drug offenses involving crack- versus powder- cocaine, among others. The 1994 crime bill is widely recognized as the catalyst of the destruction of the Black American nuclear family).

[13] John Hope Franklin, *The Civil Rights Act of 1866 Revisited*, 41 HASTINGS L. J. 1135, 1141 (1989-1990) (discussing the origins, legislative history, and impact of the Civil Rights Act of 1866).

[14] AMERICAN BATTLEFIELD TRUST, *Civil War Casualties*, https://www.battlefields.org/learn/articles/civil-war-casualties (last visited 21 Jan. 2020) (estimating 620,000 me lost their lives in the line of duty, and arguing that as a percentage of today's American population, the toll would have risen to six million dead).

[15] *See* Barry Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 Yale L. J. 541, 548 n.53 (1988-1989) (discussing the establishment of the Joint Congressional

received was shocking.[16] The Committee learned the freedmen became sharecroppers,[17] often for their former masters and mistresses.[18] The former slaves were subject to unconscionable[19] lifelong contracts, paying pennies for backbreaking labor.[20] History has exposed the intentions and ill will of former slave masters, who "harassed and discriminated against freedmen to prevent them from contracting with third-parties…other [former] slave masters," and routinely went to nearly any lengths to "assure that the Freedman was unable to lease or buy land on any terms whatever."[21]

Committee on Reconstruction and Congress' increasing reliance on standing committees post-Civil War).

[16] *Id.* The Committee's report noted the existence of "a disposition on the part of [white] citizens to secure [to whatever extent] possible, the same control over the freedmen by contracts which [the whites] possessed when they held them as slaves." REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, 39TH CONG., 1ST SESS., pt. ii at 228, pt. iii at 80 (1866).

[17] Practice in post-Civil War south in which landowner, often a former slaveholder, leases land, equipment, tools, etc. to tenants (often freedmen) who grow crops and provide a portion of the crops as rent to the landowner. *Sharecropper Definition*, BLACK'S LAW DICTIONARY (7th ed. 1999). "Sharecroppers would become caught in continual debt…once in debt, sharecroppers were forbidden by law to leave the landowner's property until their debt was paid, effectively placing them in a state of slavery to the landowner. *Discussion of Debt Slavery*, BRITANNICA.COM, https://www.britannica.com/topic/debt-slavery (last visited 8 June 2020).

[18] Franklin, *supra* at 1141. *See also*, STEPHANIE E. JONES ROGERS, THEY WERE HER PROPERTY: WHITE WOMEN AS SLAVE OWNERS IN THE AMERICAN SOUTH (Yale University Press 2019).

[19] Unconscionability in contract law is defined as a "degree of unreasonableness and unfairness of a contract or deal prompting a court to modify or nullify it. *Unconscionability Definition*, THE LAW DICTIONARY.ORG, https://thelawdictionary.org/unconscionability/ (last visited 8 June 2020).

[20] *See* E. MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES DURING THE PERIOD OF RECONSTRUCTION 74-81 (1880). *See also* ROBERT J, KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS 1-20 (1985).

[21] Octavia Latrease Carson, *Civil Rights Act of 1866: Salvaging Equal Rights Under the Law for the Contemporary Minority Small Business Owner*, 41 T. JEFFERSON L. REV. 238, 243 (quoting Barry Sullivan, *Review Essay and Comment: Reconstructing Reconstruction: Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 YALE L.J. 541, 552 (1989)).

The enactment of the Black codes in 1865-66 codified a desire for continued control over the freedmen.[22] The Black codes imposed complete control over Black citizens with no federal oversight. John Hope Franklin notes that in many instances, Black children were apprenticed to their former masters – both in their movement throughout society and their employment.[23] However, the focus of the Committee's hearings was not solely on reforming anti-freedmen laws. Rather, the focus was on cruelties by private white landowners[24] "as these were the persons who committed the most numerous acts violating the most basic rights of their former slaves."[25]

With these acts in mind, the framers of the Civil Rights Act of 1866 drafted the legislation with the clear intent of allowing victims of racial discrimination to assert claims of interference with their right to contract.[26] The bill, passed on April 9, 1866, declared:

> That all persons born in the United Stated and not subject to any foreign power…are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude…shall have the same right, in every State and Territory in the United States to make and enforce contracts; to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of

[22] Sullivan, *supra* note 5, at 555.
[23] Franklin, *supra* 1141.
[24] *Id.* (citing Sullivan, *supra* note 5, at 555.).
[25] *Id.* at 1141.
[26] Carson, *supra* 243. The intent that this statute remain unaltered is evident in the passage of the Civil Rights Act of 1964, which addressed specific deprivations black Americans faced under Jim Crow segregation.

> person and property, as is enjoyed by white citizens…[27]

Immediately, the Act endured intense scrutiny from President Andrew Johnson. Johnson probed the constitutionality, and thus legitimacy of the Act.[28] Johnson vetoed the Act, attempting to impose arbitrary requirements on the citizenship of freedmen, such as a horrendous five-year probationary period before citizenship is granted, and an exhibition of strong moral attachment "to the principles of our Constitution."[29] Johnson did not realize that the freedmen "had been on probation in this country for more than two centuries,"[30] fought in every American war, provided the free labor that built the Nation's Capitol, not to mention the country, and transformed it into an economic superpower. Despite Johnson's considerable opposition (his veto required an override by two-thirds of each chamber of Congress), the Act was signed into law. Section 1981 remained largely undisturbed, with no challenges to its scope or applicability from the legislative or judicial branches of government for over 120 years.[31]

III. Judicial Interpretation and Application of the Civil Rights Act of 1866

Jurisprudence suggests that while the *prima facie* elements of a Section 1981 claim are constant,[32] the pleading standard is at best

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[27] Act of April 9, 1866, ch. 31, 14 Stat. 27, § 1 (reenacted by Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144 (1870)) (codified as amended at 42 U.S.C. §§ 1981-1982 (1987).

[28] Franklin, 41 HASTINGS L. J. 1135 (1989-1990).

[29] CONG. GLOBE, 39th Cong., 1st Sess. 1679 (1866).

[30] Franklin, *supra* at 1136.

[31] Carson, *Civil Rights Act of 1866: Salvaging Equal Rights Under the Law for the Contemporary Minority Small Business Owner*, 41 T. JEFFERSON L. REV. 238, note 16, at 242 (quoting John Hope Franklin, *The Civil Rights Act of 1866 Revisited*, 41 HASTINGS L. J. 1135, note 15 for the premise that the Civil Rights Act of 1866 came to be regarded as a necessary part of the fabric of American jurisprudence, intended to permanently protect all citizens from the injustices of its recent past).

[32] A plaintiff must allege (1) that plaintiff is a member of a racial minority; (2) the defendant possessed an intent to discriminate on the basis of race; and (3) the discrimination concerned activities enumerated in the statute (i.e. right to make and enforce contracts, sue and be sued, give evidence, etc.). *Mian v. Donaldson, Lufkin & Jenrette Secs. Corp.,* 7 F.3d 1085, 1087 (2d. Cir. 1993). *See* Carson *supra* notes 39-44, at 245 (noting that in contractual disputes under Section 1981, some courts have limit standing to the named parties in the contract; others have utilized principles of statutory interpretation to determine third party standing, if

impulsive, depending on the composition of the Supreme Court at the time a challenge is made.[33] The majority of the Court's effort in Section 1981 challenges has been spent on defining standing within the scope of the Act.[34] American courts have adopted, analyzed, dispensed with, and recreated tests to determine standing based on a combination of legislative history, principles of statutory text interpretation, and policy-based reasoning to justify their chosen course of action.[35] Generally, approaches vary

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any, while the Supreme Court has relied on Section 1981(b)'s reference to a contractual relationship when defining standing to sue – often utilizing tests in contracts and corporate law to determine whether an actionable relationship exists between the litigants).

[33] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973) (upon prima facie showing of the elements of a Title VII employment discrimination claim, burden shifts to defendant-employer to show clear and convincing non-discriminatory reasons for adverse action); *Texas Dept. of Commun. Affairs v. Burdine*, 450 U.S. 248, 253-55 (1981) (same); *Patterson*, 491 U.S. at 186-87 (holding that the burden-shifting framework developed under Title VII employment discrimination cases applies to claims brought under Section 1981); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (applying motivating factor test with burden shifting, reasoning the approach is necessary because the more stringent, but-for test at times "demands the impossible"); *cf. Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009) (stating claim under Age Discrimination in Employment Act of 1967 requires pleading but-for causation); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 346 (2013) (plaintiff asserting a Title VII retaliation claim must allege retaliation is a but-for cause of his injury…plaintiff must also show that harm would not have occurred in the absence of the defendant's conduct); *Bachman v. St. Monica's Congregation*, 902 F.2d 1259, 1262-63 (7th Cir. 1990) (for Section 1981 claim to be actionable, racial prejudice must be a but-for cause of the refusal to contract); *Calloway v. Miller*, 147 F.3d 778 (8th Cir. 1998) (same).

[34] *See, e.g., Annuity Welfare & Apprenticeship Skill Improvement & Safety Funds of the Union of Operating Engr's. v. Tightseal Construction*, 2018 U.S. Dist. LEXIS 138041, at *11-12 (S.D.N.Y. Aug. 14, 2018); *Domino's Pizza v. McDonald*, 546 U.S. 470 (2006); *Macedonia Church v. Lancaster Hotel*, 560 F. Supp2d 175 (D. Conn. 2008); *O'Connor v. R.F. Lafferty*, 965 F.2d 983 (10th Cir. 1992); *Gomez v. Alexian Bros. Hospital*, 698 F.2d 1019 (9th Cir. 1983); *Shumate v. Twin tier hosp.*, 655 F. Supp 2d 521, 536 (M.D. Pa. 2009); *Domino's Pizza v. McDonald*, 546 U.S. 470 (2006); *Faraca v. Clements*, 506 F.2d 956 (5th Cir. 1975) (all utilizing differing contract, tort, or corporate theories to analyze standing).

[35] Carson, *supra* at 246.

between the intended third party beneficiary test, corporate agency theory, and tort theory to analyze standing.[36]

There were instances, albeit fleeting, where the collective judiciary interpreted the Act consistent with the extraordinary will it took to become the law of the land.[37] The most recent example is the case of *Runyon v. McCrary*, where an African-American child had been denied admission to a private daycare in Virginia on the basis of race.[38] When the matter reached the Supreme Court, it ruled that Section 1981 may be used to seek redress for harm caused from discrimination by private actors.[39] The *Runyon* court opined that the defendant-school's premise – that Section 1981 does not reach private acts of discrimination – was entirely at odds with the Court's understanding and interpretation of the legislative history of Section 1981.[40] In arriving at this conclusion, the *Runyon* court reasoned that while it is a constitutional right to select private, individualized education for one's children, it is unreasonable to maintain that the right exists without reasonable government regulation. The Court went on to state that the Government's protection against the exclusion of children solely on racial grounds is an example of reasonable governmental regulation.[41]

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[36] For a more thorough discussion of the Supreme Court's attempts to define standing under Section 1981, see Carson, *supra* at 245-55.

[37] *See, e.g., In re Turner*, 24 F. Cas. 337, 337-38 (C.C.D. Md. 1867)(No. 14,247)(Supreme Court held that an employment contract violated the Civil Rights Act of 1866 when it failed to include a guarantee that an indentured black apprentice be taught to read – a State law requirement of the Employer to all white apprentices); *Stevens v. Richmond, Fredericksburg, and Potomac R.R. Co.*, Judge John C. Underwood Papers, Scrapbook 193, 203, 205, 227 (United States District Court for the District of Virginia upheld the right of a black woman to ride in the first class train car as provided for by the ticket she held); *Blyew v. United States*, 80 U.S. 581, 593 (1871)(Supreme Court upheld constitutionality of the act by insisting the act was designed to protect blacks from the "prejudices [that] existed against the colored race, which naturally affected the administration of justice in the State Courts, and operated harshly when one of that race was a party accused…"); *United States v. Rhodes*, 27 F. Cas. 785, 793 (C.C.D. Ky. 1866) (No. 16,151) (suggesting an even-handed nature of the Act by insisting it secured the rights of blacks and whites alike).

[38] 427 U.S. 160 (1976).

[39] *Id.* at 168-75.

[40] *Id.* at 173.

[41] *Id.* at 178-79.

If *Runyon* is recognized as a step forward in the fight to erase racial discrimination,[42] *Patterson v. McLean Credit Union*[43] must be considered two steps backward, regressing in the direction of the *status quo* of the pre-Civil War south. *Patterson* marked a renewed vigor by federal government to narrow the scope of the Act – a Supreme Court recast with three recently confirmed conservative-leaning justices, longing for the chance to revisit the *Runyon* holding.[44] In *Patterson*, the plaintiff was a Black woman

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[42] Franklin, supra at 1138 (arguing that Congress viewed *Runyon* "as being consonant with its own views and intentions" to the point that it rejected attempts to pass legislation designed to limit or wholly overrule judicial interpretation of Section 1981).

[43] 109 S. Ct 2363, 491 U.S. 164, 171 (1989).

[44] The basis for the renewed attack on this otherwise dormant legislation is a portion of an address given by Congressman James F. Wilson when introducing the act in the House of Representatives. Of the act, Wilson stated:

> It provides for the equality of citizens of the United States in the enjoyment of "civil rights and immunities." What do these terms mean? Do they mean that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal? By no means can they be so construed. Do they mean that all citizens shall vote in the several States? No; for suffrage is a political right which has been left under the control of the several States, subject to the action of Congress only when it becomes necessary to enforce the guarantee of a republican form of government (protection against a monarchy). Nor do they mean that all citizens shall sit on the juries, or that their children shall attend the same schools. The definition given to the term "civil rights" in Bouvier's Law Dictionary is very concise, and is supported by the best authority. It is this: "Civil rights are those which have no relation to the establishment, support, or management of government."

Congressional Globe, House of Representatives, 39th Congress, 1st Session, p. 1117 (March 1, 1866). Indeed, Congressman Wilson, in his opening address on the Civil Rights Act of 1866, provided a running list of all the subject matter not covered by the legislation to his opponents–

hired by McLean Credit Union in 1972 as a teller and file coordinator.[45] Patterson alleged she was constantly harassed – from racial slurs inexplicably hurled at her by supervisors, to being required to perform remedial tasks not required of similarly-situated white employees, to not receiving information on career advancement opportunities that was provided to white employees – until her termination nearly ten years later.[46] As a result, Patterson sued for damages for mental anguish, mental and emotional distress, and attorney's fees.[47] The Supreme Court narrowed Section 1981 for the first time in history when it found that the statute applied only to State action, and then only to allegations of discrimination prior to contract formation.[48] This is despite the long-understood recognition just a decade earlier in *Runyon* that freedmen suffered economic injustices at the hands of both private citizens and the government.[49] Indeed, Congress amended Section

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and thus provided a roadmap to areas where the statute is open to attack and manipulation. In doing so, the Congressman provided an Edgar Cayce-esque foreshadowing of the civil rights struggles of black Americans over the next one hundred years.

[45] *Patterson,* 109 S. Ct. at 2368-69.

[46] *Id.* at 2391. Indeed, in the year prior to her termination, Patterson was denied merit raises. *Id.* at 2373.

[47] *Id.*

[48] *See* Carson, *supra* at 242 (noting that the Supreme Court billed Title VII to operate as a ceiling on the scope of Section 1981, rather than reading both statutes as complimenting each other in the fight to end discrimination).

[49] *Patterson v. McLean Credit Union*, 491 U.S. 164, 171, 179 (1989). *See also* JANIS SARRA AND CHERYL L. WADE, PREDATORY LENDING AND THE DESTRUCTION OF THE AFRICAN-AMERICAN DREAM (highlighting that the Obama Department of Justice offered settlements to those predators for a fraction of the revenue gained from the employment of predatory schemes. In many instances, the settlement relief was allocated to real estate investors, rather than the defrauded homeowners who lost everything as a result of the aforementioned practices, laying the groundwork for an argument that this act constituted a Government-sanctioned economic deprivation); *The Real Story of how "Untouchable" Wall Street Execs Avoided Prosecution*, BUSINESSINSIDER.COM, https://www.businessinsider.com/why-wall-street-execs-werent-prosecuted-2013-1 (last visited 10 June 2020). Private, government-backed economic injustices include the burning of black, economically self-sustaining communities, such as "wall streets" in Tulsa, OK (eyewitness accounts charge that 300 black citizens slain by white citizens deputized by Tulsa law enforcement officers, who handed out weapons from the city's armory); Durham, NC (Hyati community divided by freeway, disguised as "urban renewal"); Richmond, VA (Jackson Ward community destroyed by all-white city council displacing black families with urban renewal, housing, and adding a Section of

1981 only once (in 1991)[50] to *expand* the Supreme Court's recent attempt to narrow the scope of civil rights protections in *Wards Cove Packing v. Atonio*.[51] In *Atonio*, respondents, a class of majority Black workers in unskilled "cannery" positions at petitioners' facilities, filed suit under Title VII of the Civil Rights Act of 1964. Respondents alleged that petitioners' hiring and promotion practices were responsible for the workforce's racial stratification, and had denied them employment in the more advantageous, skilled, and thus better paying "noncannery" positions on the basis of race.[52] The trial court rejected respondents' claims, finding that unskilled cannery jobs were oversaturated by Black workers due to an agreement to fill those jobs with members of a nonwhite union. The Court of Appeals reversed, holding that respondents had made out a prima facie case of disparate impact in hiring for both skilled and unskilled noncannery jobs. In reversing the lower holding, the Court of Appeals relied solely on respondents' statistics which highlighted a disparity in the percentage of nonwhite workers in cannery jobs as compared to the percentage of such workers in noncannery positions.[53]

On appeal, the Supreme Court of the United States remanded. The Court held that if, on remand, respondents establish a prima facie disparate impact case regarding petitioners' practices, the burden of producing evidence of a legitimate business justification for those practices shifts to petitioners, with the caveat that the burden of persuasion remains with respondents at all times.[54] The Court further held that in disparate treatment cases the plaintiff bears the burden of disproving an employer's assertion that the adverse employment practice was based solely on a legitimate, neutral consideration.[55] The ruling was viewed in many respects as an extreme narrowing of Section 1981.[56]

Interstate 95 running through the community). *The Other Black Wall Streets*, https://www.theroot.com/the-other-black-wall-streets-1823010812 (last visited 4 February 2020 at 9:36PM).

[50] CIVIL RIGHTS ACT OF 1991, 1991 Enacted S. 1745, 102, Enacted S. 1745, 105 Stat. 1071.

[51] 490 U.S. 642 (1989).

[52] *Id.*

[53] *Id.* at 643.

[54] *Id.*

[55] *Id.* at 658-61 (*citing* Burdine, 450 U.S. at 256-258).

[56] Based on the Supreme Court's attempted narrowing of Section 1981 in *Atonio*, the act was amended and its rationale discussed at length. CIVIL RIGHTS ACT OF 1991, S. 1745, 137th Cong. 1071, 1072 ("[T]he decision of the Supreme Court in *Wards Cove Packing co. v. Atonio*, 490 U.S. 642

IV. Comcast Corporation v. National Association of African American-Owned Media

Respondent National Association of African American Owned Media, on behalf of Entertainment Studios Networks (collectively referred to as "ESN" or "Respondent")[57] brought suit stemming from troublesome dealings with Petitioner Comcast during contract negotiation. Respondent alleges that it has attempted to secure a contract with Petitioner Comcast Corporation ("Comcast") to carry ESN's programming on its cable distribution platform.[58] According to ESN, Comcast has refused every attempt to contract with ESN, despite false promises of carriage since at least 2008.[59] Comcast has represented that although ESN's channels meet its standards for carriage, ESN needed to get support in the field from Comcast's regional offices and management.[60] ESN gained the support Comcast requested, and Comcast, in a reversal, stated that it no longer mattered.[61] Comcast then advised ESN to get support from Comcast's various Division offices.[62] Upon reaching out to Comcast's Division offices, the Divisions told ESN that they defer to the decision of the corporate office.[63] As a result, ESN incurred hundreds of thousands of dollars in travel, marketing, and other costs for what amounted to a fool's errand.[64]

Continuing the charade, Comcast then told ESN its channels were on the short list for carriage, but that Comcast lacked the capacity to carry the channels. Meanwhile, Comcast launched more than eighty networks – some of which were lesser-known, white-owned channels – since 2010.[65] Finally, upon a

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(1989) has weakened the scope and effectiveness of Federal civil rights protections…[the purpose of Civil Rights Act of 1991 is] to respond to recent decisions of [the] Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination."). Indeed, Congress ensured no questions would arise regarding its intent in the likely event of another challenge.

[57] ESN is a privately-owned corporation wholly owned by Allen Media, LLC. ESN is a member organization of NAAAOM, a coalition of African American-owned medical companies devoted to ensuring its members are afforded the same right to contract as enjoyed by white-owned corporations. *See* Respondent Brief at ii.

[58] Respondent Brief at 3.

[59] *Id.* at 3.

[60] *Id.* at 4

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

confrontation of this glaring hypocrisy, Comcast came clean: one executive candidly explained to ESN that it was "not trying to create any more Bob Johnsons."[66] ESN alleges that this comment is indicative of Comcast's true intent for refusing to contract with ESN in that Comcast did not want to support an African-American owned media company who would compete against the white-owned networks Comcast owned and/or carried.[67]

Petitioner Comcast has a different recollection. While Comcast agrees that the parties met to discuss a carriage agreement, Comcast counters that it "was not alone in its determination that ESN's offerings did not show sufficient promise to merit its limited bandwidth."[68] Comcast posits that large distributors, such as Charter Communications, Time Warner Cable, DirecTV and AT&T declined carriage for similar reasons.[69] Comcast's brief emphasized the apparent lunacy of ESN's claim that the collective rejection of carriage of its channels by the world's biggest distributors of media suggests a conspiracy against the only 100% African-American owned media company in the United States.[70] Instead Comcast focused on its legitimate non-discriminatory reason of "concern about ESN's ability to generate interest among [Comcast's] subscribers,[71] in addition to the pointers it gave ESN to improve the viability of its application, despite its ultimate denial of ESN's application for carriage.[72]

a. Procedural History

This dispute led ESN to file a lawsuit against Comcast in the Central District of California,[73] alleging racial discrimination in contracting in violation of 42 U.S.C. § 1981. Comcast filed a motion to dismiss based on Federal Rule of Civil Procedure 12(b)(6), which the District court granted.[74] ESN then filed the

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[66] *Id* . at 4-5. Notably, the Bob Johnson allegation was inadvertently dropped from the Second Amended Complaint, the subject matter of this case.
[67] *Id.* at 5.
[68] Petitioner's Brief 6.
[69] *Id.*
[70] *Id. But see fn.* 66 (concerning "no more Bob Johnsons" which a reasonable person can infer the comment to mean "no more black billionaires").
[71] *Id.*
[72] *Id.*
[73] Resp. Br. 5.
[74] *Id*. In its opinion, the District Court devoted two paragraphs to whether Respondents adequately alleged a section 1981 claim, alleging that ESN had "failed to allege any plausible claim for relief." *Id.* at 6.

First Amended Complaint, dropping its conspiracy claim.[75] Comcast filed another motion to dismiss, which the District Court again granted.[76] Respondents filed a Second Amended Complaint, the subject of this litigation. ESN added multiple paragraphs to show the ESN channels offered for carriage were in high demand, and that Comcast's refusal to contract is intentional racial discrimination.[77] Comcast filed a third motion to dismiss, which the District Court granted, reasoning the new allegations were "opaque benchmarks" that showed possible, not plausible, discrimination.[78]

ESN appealed the dismissal to the Ninth circuit Court of Appeals.[79] Comcast argued that ESN must allege facts showing the lesser-known, white-owned networks launched by Comcast were similarly situated to ESN.[80] Comcast also argued that it presented race-neutral reasons for refusing to contract with ESN, and thus did not violate Section 1981.[81] A three-judge panel unanimously reversed the District Court's dismissal, holding that a plaintiff need only allege that race was a motivating factor in Comcast's refusal to contract.[82] The Ninth Circuit found that ESN adequately alleged a Section 1981 claim, reasoning that ESN's allegations that (1) Comcast expressed interest followed by repeated refusals to contract, (2) Comcast's practice of expressing varied methods of securing support for carriage only to reverse its position once ESN had taken those steps, (3) Comcast carried every network of the approximately 500 that were also carried by Comcast's competitors, *except* ESN's channels, and (4) Comcast's decision to offer carriage contracts to "lesser known, white-owned " networks at the same time it informed ESN that it had no

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[75] *Id.* at 6.

[76] *Id.* The District Court again did not identify the governing legal standards for pleading intentional discrimination in contracting. Rather, the District Court focused on one allegation – ratings growth for one ESN channel – finding that it was "hardly compelling evidence" of intentional discrimination. *Id.* at 6 (citing Appellate Record at 76a).

[77] *Id.* at 6.

[78] *Id.* at 7 (citing App. 6a).

[79] *Id.* at 7.

[80] *Id.*at 8. The Ninth Circuit rejected this argument, holding that it required a fact-intensive inquiry that is inappropriate at the pleading stage.

[81] *Id.* The Ninth Circuit also rejected this claim, holding that the reasons presented by Comcast are not so compelling to render ESN's theory of racial animus so implausible to justify a grant of a 12(b)(6) motion. *Id.* at 8-9.

[82] *Id.* at 7.

bandwidth or carriage capacity.[83] The Ninth Circuit denied Comcast's petition for panel rehearing and rehearing en banc.[84] This appeal to the Supreme Court of the United States ensued.

b. Arguments of Counsel

The choice before the Court is to choose between two pleading standards for causation in Section 1981 cases: (1) a motivating factor/burden shifting approach[85]; or (2) a but-for causation approach.[86] Comcast asked the Supreme Court to reconsider the Ninth Circuit's decision that a plaintiff need only plead that race is a motivating factor in the refusal to contract to meet the causation standard under Section 1981. Comcast instead argued for a more stringent burden - that a plaintiff must plausibly allege that race is a but-for cause for the denial in contracting; a plaintiff who pleads anything less that but-for causation is not entitled to move beyond the pleading stage to conduct discovery.[87]

Comcast argued that a Section 1981 plaintiff must plausibly plead a prima facie case of discrimination, as well as facts that plausibly undercut potential race-neutral reasons for the defendant's refusal to contract to survive a motion to dismiss.[88] In

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[83] *Id. at 8.*

[84] *Nat'l Ass'n of African American-Owned Media V. Comcast Corp.*, 914 F.3d 1261 (9th Cir. 2019).

[85] Allegations demonstrating that the decision not to contract was motivated, at least in part, by race or another form of impermissible discrimination. Upon meeting this standard, the burden shifts to the alleged perpetrator of the discrimination to demonstrate a permissible motive for its decision. For a technical discussion highlighting American jurists' struggles with this standard, *See* Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L. J. 1106, 1141 (2017-2018).

[86] Allegations demonstrating that had the impermissible discriminatory factor not been present, the parties would have contracted. Stated another way, the decision not to contract was *entirely based* on impermissible discrimination. *Id.* at 1137.

[87] *See* Petitioner's Brief 1; Resp. Br. 10.

[88] Pet. Br. 14. This is both Comcast's and the Department of Justice's position despite the body of case law in direct opposition to this stance. See, e.g., *Jones v. Bock*, 549 U.S. 199, 211-12, 216 (2007) (to service motion to dismiss, plaintiff is not required to plead absence of a defense); *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 84 (2d Cir. 2015) (under *McDonnel Douglas* framework, a plaintiff is only required to plead facts that lend "plausible support to a minimal inference of discriminatory motivation" (internal citations omitted)); *Body by Cook, Inc. v. State Farm Mut. Auto. Ins.*, 8609 F.3d 381, 386-87 (5th Cir. 2017) (although not required, a plaintiff that pleads a *prima facie* case under

support of its position, Comcast posited that but-for causation was the default standard of common law tort at the time of Section 1981's enactment.[89]

In response to Comcast's argument that burden-shifting does not apply for Section 1981 claims, NAAAOM's position was that the choice before the court is "enormously important" because the Supreme Court's determination will impact Section 1981 litigation moving forward.[90] If the court applies a but-for test, many potentially meritorious cases would be dismissed at the pleading stage.[91] Conversely, a motivating factor standard would allow cases more likely to be meritorious to proceed to discovery, based on pleadings plausibly alleging intentional racial discrimination.[92] NAAAOM argues precedent,[93] the statutory text,[94] and legislative

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McDonnell Douglas has alleged an inference of discrimination to state a claim under Section 1981).

[89] Pet. Br. 17. NAAAOM counters that Comcast relies on 19th century torts cases involving negligence rather than intentional torts. Resp. Br. 15.

[90] Resp. Br. 11.

[91] *Id.* See also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 264 (1989) (recognizing that the but-for test as both a pleading standard and burden of proof, at times, "demands the impossible").

[92] *Id.* at 11. On this point, NAAAOM argues that under the Supreme Court's decision in *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002), which held that a Section 1981 plaintiff is not required to plead a *prima facie* case to survive a motion to dismiss, a plaintiff is not required to plead facts that that may negate a defendant's potential race-neutral reasons.

[93] *See* Resp. Br. 13 (citing *Patterson v. McLean Credit Union,* 491 U.S. 164, 186-87 for Supreme Court's holding that burden-shifting framework under Title VII applies to claims brought under Section 1981, reasoning the approach served as a "sensible orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination."). Respondents argue that Congress effectively endorsed the use of the burden-shifting framework for Section 1981 "when it abrogated a different holding of *Patterson* but left the burden-shifting holding untouched." *Id. See, e.g., Gross*, 557 U.S. at 174 ("when Congress amends one statutory provision but not another, it is presumed to have acted intentionally."); *Kimble v. Marvel Entm't, LLC,* 135 S. Ct 2401, 2409 (2015) (Supreme Court applies *stare decisis* interpreting statutes with "enhanced force.").

[94] Respondents posit that Section 1981 requires African-Americans have the same right to contract as whites; however, African-Americans are not afforded this "same", i.e., identical, right if race was used as a motivating factor in a refusal to contract. Moreover, but-for causation is justified in the event a statute contains the words "because", "because of", "based on" and the like, such as the use of these words in the ADEA for

history[95] of Section 1981 supports the burden-shifting framework, and is thus "consistent with the broad, remedial framework" of Section 1981.[96]

The United States Department of Justice came out in support of Comcast, although it acknowledged that if burden-shifting were appropriate in this case, the Ninth Circuit's decision-below would be correct, even if the lower court's reasoning remains overbroad.[97]

c. Amicus Curiae Briefs

The foremost concern of those who filed briefs in support of ESN was to caution the Court against overruling the Ninth Circuit's holding, and thus prevent the erasure of what it characterized as a century and a half of progress.[98] Amicus curiae filers argued that the 9th circuit's decision-below was an accurate understanding of the legislative history of the Civil Rights Act of 1866.[99] As discussed above, many rehashed the post-Civil War experiences of the freedmen that spurred Congress to take immediate, deliberate steps to eliminate racial harassment, terror, and discrimination in the workplace at that time and into the future.[100]

d. The Decision

The unanimous opinion, delivered by recent appointee Justice Neil Gorsuch, the Court elected to base the pleading standard on what must be ultimately proven at trial, and thus held that a Section 1981 plaintiff must plausibly allege that race was a but-for

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retaliation claims under Title VII. Section 1981 contains no such terms. Resp. Br. 14.

[95] Section 3 of the Civil Rights Act of 1866 was express in it s requirement that courts reject the common law where it is "deficient" in providing "suitable remedies. Resp. Br. 15. Congress, respondents contend, was thus clear in its intent to deviate from the common law to ensure all racial minorities have the same right to contract. *Id.*

[96] Resp. Br. P. 13. NAAAOM argues that the purpose of Section 1981 is to allow plausible, well-pled cases to proceed to discovery, as it was enacted to allow sweeping, comprehensive prohibition of racial discrimination in contracting. *Id.* at 15-16.

[97] *See* Brief for the United States as Amicus Curiae Supporting Petitioner [hereinafter "U.S. Br."] 29.

[98] *See* Brief of Tort Scholars as Amicus Curiae In Support of Respondents [hereinafter, "Tort Br."] at 16.

[99] Tort Br. at 17

[100] *Id.*

cause of the defendant's refusal to contract.[101] The Court was critical of ESN's position, rejecting its assertion that Section 1981 creates an exception at the pleading stage by requiring facts showing race was a motivating-factor in its decision not to contract, and therefore, a burden-shifting approach is appropriate.[102]

V. Analysis

Justice Gorsuch, a vocal proponent of textualism[103] reasons that although rules bear exceptions, the statutory text, legislative history, and precedent follow this general rule.[104] Of the Statute's text, the Court acknowledged that Section 1981 does not expressly identify a standard for causation before relying on the ordinary meaning of a single word – "same" – within the context of the phrase "same right…as enjoyed by white citizens" to justify its employment of but-for causation.[105] According to the majority, this reading of the statute, when viewed with the understanding that common law in 1866 required a showing of but-for causation as a requisite to a tort suit provides further support for this position.[106]

Next, the Court selectively applies portions of Section 1981's legislative history – specifically, Congress' enactment of criminal sanctions in a neighboring Section of the statute that would later become Section 1982, and that provision's use of the phrases "on

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[101] Opinion, No. 18-1171, pp. 3-13. This reasoning is flawed because even the Court recognizes that Plaintiff's burden to satisfy these elements increases from Complaint to trial. *Id.*

[102] *Id.* at 4.

[103] Textualism follows the dogma that the meaning of a law turns on its words and their plain meaning, not the intention of the drafters of the legislation.

[104] *Id.* This is a most illuminating prospect, given that just three months later, in *Bostock v. Clayton County, Georgia*, a case asking the Supreme Court to recognize that Title VII prohibits discrimination based on sexual orientation, Gorsuch took the opposite position regarding statutory interpretation. Slip Op., Majority at 12. While this is undoubtedly a resounding victory for the LGBTQ+ community, it raises several issues with his opinion here – specifically his refusal to recognize the clear intent of the drafters to eradicate all discrimination based on the badges and incidents of slavery in contractual situations. Gorsuch's ruling highlights a certain duality in his willingness to strictly adhere to the statutory text, its ordinary meaning, and its legislative history in one instance, while wholly ignoring those sources in another.

[105] *Id.* at 5.

[106] *Id.*

account of" that person's color or race, and "by reason of" that person's prior condition of slavery – to support the use of but-for causation in Section 1981.[107]

The Court then considered precedent indicating a similar treatment of Sections 1981 and 1982. In so doing, the Court holds that, because Section 1982 was enacted as a part of the Civil Rights Act of 1866, employs similar language conveying "the same right", and coupled with Supreme Court precedent has held that a Section 1982 plaintiff must show that challenged conduct was done "because of" race, no less should be required of a Section 1981 plaintiff.[108]

Of ESN's argument to borrow Title VII of the Civil Rights Act of 1964's motivating factor test, the Court reasons that due to the differing legislative histories of Title VII and Section 1981 and the fact that Section 1981 says nothing about motivating factors, there is no evidence that Congress intended for the two statutes to contain the same causation standard.[109] The Court also relied on Congress' simultaneous amendment of Title VII to add the motivating factor test at the same time it amended Section 1981 with differing language to hold that Congress' use of differing language implies differences in meaning.[110]

a. Criticism of Decision

As noted by scholars on this issue,[111] the Supreme Court's desire to reconsider the burden of proof at the pleading stage of a discriminatory contracting case under section 1981, regardless of the decision, has two effects. First, it challenges the soundness of the Civil Rights Act of 1866 by implicitly questioning the wisdom of the 39th Congress in enacting the statute to begin with.[112] This creates a break from precedent, as the Supreme Court has routinely stated it is not the Court's place to question the wisdom of the

[107] *Id.* at 6.
[108] *Id.* at 8.
[109] *Id.* at 9.
[110] *Id.* at 10, *citing Gross*, 557 U.S. at 174-175; *Russello v. U.S.*, 464 U.S. 16, 23 (1983).
[111] Carson, *supra* at 1143.
[112] *Id*.

legislature.[113] This position also legitimizes the arguments of proponents of Section 1981's absolute repeal.[114]

Secondly, it challenges the very deliberate attempt of American society to craft a more constructive approach to the problem of race in the United States, created with the institution of chattel slavery and subsequent racial and genealogical caste system rampant today.[115] That the burden of proof is even being considered in this case highlights a growing sentiment among Americans and immigrants alike of resentment toward entitlement programs and specific provisions for Black Americans - the entire basis for the Civil Rights Act of 1866. Indeed, the Court's *sua sponte* reconsideration of the pleading standard of Section 1981 evinces the Court's zeal to temper the scope of its *Runyon* holding that Section 1981 applies to private contracts, by limiting the pleading standard for which one may state a claim under this statute.[116]

Seemingly recognizing the way the wind is blowing, Justice Ginsburg, while concurring in part in the majority's judgment, offers some important pushback against the Court's refusal to address Comcast's attempt to limit the scope of 1981 to the *final* contractual terms, rather than the *entire bargaining process* as a whole. In doing so she provides thoughtful guidance regarding future challenges to this area of Section 1981 litigation.

The majority's assertion that but-for causation is consistent with tort principles is misguided. The "all-or-nothing" approach inherent in a but-for causation analysis fails to account for the very likely possibility that multiple causes merge to cause the injury.[117] Indeed, a basic understanding of motive alone dispels the majority's reasoning. *Assuming arguendo* that the but-for test is

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[113] *Noble State Bank v. Haskell*, 219 U.S. 104 (1911); *Trop v. Dulles*, 356 U.S. 86, 120 (1958) (Frankfurter, J., dissenting).

[114] *See, e.g.*, Richard A. Epstein, *Paradox of Civil Rights*, 8 YALE L. & POL'Y. REV. 299 (1990) (arguing that civil rights laws do nothing to advance the interests of black Americans, decreases the viability of American businesses, and is the antithesis of healthy competition in a free-market).

[115] *Id.*

[116] Carson, *supra* at 1148.

[117] *University of Texas v. Nassar*, 570 U.S. 338, 383 (2013) (citing 1 Restatement (Third) of Torts §27, Comment *a*, p.385 (2005) ("noting near universal agreement that the but-for standard is inappropriate when multiple sufficient causes exist"); Restatement of Torts §9, Comment *b*, p. 18 (1934) ("legal cause is a cause that is a substantial factor in bringing about the harm").

appropriate in some areas of tort law, its application to Section 1981 cases would require courts to look beyond physical forces to those "mind-related characteristics" that invariably factor into a consideration of motive, yet too often remain unaccounted for under a "sole cause" approach.[118] As the dissent in *Nassar* accurately pointed out, applying but-for causation to such considerations equates to engaging in a hypothetical inquiry about what would have happened had the defendant's thoughts and other circumstances been different.[119] With this understanding of tort law as a backdrop, it is clear that strict but-for causation is ill-suited for discrimination cases.

The majority's scapegoating of Section 1982 to impose a strict but-for causation standard in Section 1981 is equally unavailing. The majority ignores the fact that Section 1982 is a criminal statute, requiring proof beyond a reasonable doubt to convict. Hence, it is logically sufficient that a higher standard of proof is appropriate given it is utilized in a criminal prosecution. Contrarily, it defies logic that the majority would conflate Congress' enactment of criminal sanctions in a neighboring Section of the statute, and the accompanying standard of proof in criminal law, and that criminal provision's use of the phrases "on account of" that person's color or race, and "by reason of" to support the use of but-for causation in a civil action merely because the statutes were enacted at the same time.

Additionally, the canons of statutory interpretation do not support the majority's holding. Throughout the majority opinion, the Court in interpreting key provisions of Section 1981 makes several references to what an ordinary speaker would take a specific word or phrase to mean.[120] This indicates the Court interpreted Section 1981 using the plain meaning rule.[121] While the plain meaning rule can be a useful canon of statutory

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[118] *Id.* at 385.

[119] *Id.* (internal citations omitted). This approach leaves courts tasked with confronting this problem to consider hypothetical, improper motives that mirror the feared Orwellian "thoughtcrime" of the acclaimed novel *1984*.

[120] "This focus fits naturally with the ordinary rule that a plaintiff must prove but-for causation. If the defendant had responded the same way to the plaintiff even if he had been white, *an ordinary speaker of English would say that the Plaintiff received the 'same' legally protected right as a white person*." Opinion at 2, 5, 598 U.S. ____ (2020).

[121] The plain meaning rule dictates "if the language of a statute has a plain meaning, it must be followed." P. NEWELL AND T.J. PETERKIN, THE JOURNEY TO EXCELLENCE IN LEGAL WRITING, 36-37 (2011).

interpretation, several sources indicate its utilization is proper only when there is no ambiguity within the four corners of the statutory text.[122] The use of the plain meaning rule in itself indicates the Court did not deem any portion of the statutory text to be ambiguous, a feat of imagination given that a case that, distilled to its bare essence, asks the court to interpret certain textual arrangements within the statute. In other words, the presence of ambiguity within the meaning of the statute should have precluded the use of the plain meaning rule.

Instead, the more appropriate canon is the mischief rule. The mischief rule indicates that

> A statute is to be read in light of some assumed purpose or objective. Every law should be construed, if possible, to give effect to all its provisions. In addition, when words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretense of pursuing the spirit of the law.[123]

Of the former, Section 1981 should have been read by the court in a manner to give effect to its purpose of "breaking down all discrimination…[concerning] basic civil rights."[124] Concerning the latter, regarding a statute that is "free and clear of all ambiguity", such is not the case here, again, given that there was a split among federal circuits regarding the correct pleading standard.

Moreover, as the dissenting opinion in *University of Texas v. Nassar* points out, a statute's use of words and phrases such as "same", "because", "on account of" and "by reason of" does not irrevocably require but-for causation at the pleading stage "at the exclusion of all other causation formulations."[125] Tort law recognizes that in an "overdetermined" event – one in which two forces create an injury that each alone would be sufficient to cause – a plaintiff may prevail by showing that either sufficient condition

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[122] *Id.* ("If there is no ambiguity within the four corners of the text, the court's sole function is to enforce the statute according to its terms").
[123] *Id.*
[124] *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 432-33 (1968).
[125] *Nassar*, 570 U.S. at 383.

created the harm.[126] The approach of the court in this case fails to recognize that dichotomy, as a Section 1981 Plaintiff cannot establish liability if the decision not to contract is motivated by both legitimate and illegitimate factors.[127] As Justice O'Connor's concurring opinion in *Price Waterhouse*[128] noted of the but-for standard of causation:

> In the area of tort liability…the law has long recognized that in certain civil cases[,] leaving the burden of persuasion on the plaintiff to prove but-for causation would be both unfair and destructive of the deterrent purposes embodied in the concept of duty of care. Thus, in multiple causation cases, where a breach of duty has been established, the common law of torts has long shifted the burden of proof to …defendants to prove that their negligent actions were not the but-for cause of the plaintiff's injury.[129]

Indeed, Justice O'Connor recognized the disconnect between the but-for standard of causation and the common law tort doctrines the *Comcast* court seems to ignore. In that same case, Justice Brennan, writing for the plurality, explained that under the but-for standard, "neither of two sufficient forces would constitute cause even if either one aloe would have led to the injury"; he remarked, "we need not leave our common sense at the doorstep when we interpret a statute."[130]

Justice O'Connor's position is summed up in the Amicus Curiae brief of the Tort Scholars.[131] As the Tort Scholars wrote:

> Tort doctrine in the 19th century drew on different approaches to causation depending on the moral questions at stake in different torts.

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[126] *Id.* (citing Restatement (Third) §27, at 376-77).
[127] *Id.* at 384.
[128] 490 U.S. at 282, 286-87.
[129] *Id.* (citing *Summers v. Tice*, 199 P.2d 1, 3-4 (1948) (internal quotations omitted)).
[130] *Nassar*, 570 U.S. at 384 (internal citations omitted).
[131] Tort Br. at 21.

> For many intentional torts, damage causation was presumed. These included the tots most similar to the conduct covered by Section 1981. Some intentional torts that required proof of damage adopted causation rules that made it possible to establish damage in the absence of but-for causation. In negligence cases, courts often did not allow recovery in the absence of but-for causation, but even here the law dropped the *sine qua non* requirement when the situation warranted. When jurists addressed causation doctrine, they tailored it to the moral considerations appropriate to the circumstances of the torts in question.[132]

The majority's refusal to read Title VII and Section 1981 together based on their differing legislative histories and dates of passage does not persuade. Again, turning to the canons of statutory interpretation, there is an argument to seriously consider reading the statutes in conjunction. The canon of *in pari materia* instructs us:

> Statutes on the same subject are to be interpreted together *even though they may have been passed at different times*. While there may be differences between statutes, courts will attempt to interpret them as consistent with each other. However, when statutes are inconsistent, then the more recent or more particular statute will usually control over the earlier or more general statute.[133]

Here, although Section 1981 and Title VII were passed nearly a century apart, both acts were passed with the same purpose of fighting and eradicating discrimination within the American

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[132] *Id.*

[133] P. NEWELL AND T.J. PETERKIN, THE JOURNEY TO EXCELLENCE IN LEGAL WRITING, 36-37 (2011) (emphasis added).

workplace and beyond.[134] As such, rather than using one as a ceiling on another[135], both should have been read together as consistent, thus allowing for a more serious consideration of a burden-shifting approach before an outright rejection of it.

As the concurrence noted, Comcast's belief that Section 1981 visages racial discrimination so long as it occurs in advance of the final contract-formation decision is also troubling.[136] Just as troubling is the Court's refusal to resolve this position, despite discussing it at length within the majority opinion.[137] It's refusal invites corporations to potentially discriminate in a way that defeats the statute's purpose of "breaking down all discrimination…[concerning] basic civil rights"[138] by discriminating in the pre-contract formation process. As Justice Ginsburg illustrates:

> A plaintiff hindered from enjoying those opportunities may be unable to effectively form a contract, and a defendant able to impair those opportunities can avoid contracting without refusing a contract outright. It is implausible that a law intended to secure practical freedom, would condone discriminatory barriers to contract formation. [To the contrary], the statute defines 'make and enforce contracts' to 'include the making, performance, modification, and termination of contracts and the enjoyment of all benefits, privileges, terms, and conditions of the

[134] *Compare* FRANKLIN, *The Civil Rights Act of 1866 Revisited*, 41 HASTINGS L. J. 1135, 1141 (1989-1990)(Section 1981 enacted with the intent to eliminate "racial harassment, terror, discrimination in the workplace, and all forms of racial discrimination at that time and in future times") *with* National Archives, July 2,1964 speech of President LBJ ("the purpose of this law is simple…those who are equal before God shall now also be equal in the polling booths, in the classrooms, in the factories, and in hotels, restaurants, and movie theatres, and other spaces that provide services to the public"). See also Carson, *supra* at 242 (noting that Title VII was an instrument "created by Congress to fight discrimination").

[135] *See fn. 39.*

[136] Concurring Opinion (Ginsburg, J.) at 2.

[137] Opinion at 10-11.

[138] *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 432-33 (1968).

> contractual relationship. That encompassing definition ensures that §1981 'applies to all incidents of the contractual relationship.'[139]

This understanding of congressional intent weakens the majority's position and offers irreproachable evidence that a pleading plausibly alleging facts giving rise to an inference of discrimination is all that is required to survive a motion to dismiss.[140] As the concurring opinion notes, ESN has pled allegations of racial harassment during contract formation.[141] "If race accounts for Comcast's conduct, Comcast should not escape liability for injuries inflicted during the contract formation process."[142]

Further, as a matter of policy, such an approach will have catastrophic consequences. A standard where a case is decided based on a sole cause standard renders Section 1981 inept, incapable of achieving its original purpose of eradicating the badge and incidents of previous servitude upon the everyday life of Black Americans, and thus produces absurd results. Again, we are reminded that several other canons of statutory interpretation could have been used to come up with a result more aligned with what the framers intended, such as the golden rule.[143] Common sense dictates that life rarely comes down to one single consideration. As one senator put it, [i]f anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of."[144]

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[139] Concurring Opinion (Ginsburg, J.) at 2 (quoting *Jones*, 392 U.S. at 431 (internal citations omitted); *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 302 (1994); H.R. Rep. Mo. 102-40, pt. 2, p. 37 (1991) ("The Committee intends this provision to bar all racial discrimination in contracts").

[140] *Id.* at 3.

[141] *Id*.

[142] *Id.* at 4.

[143] P. NEWELL AND T.J. PETERKIN, THE JOURNEY TO EXCELLENCE IN LEGAL WRITING, 36-37 (2011) ("Do not follow the literal meaning of a statute when the literal meaning would produce absurd results")).

[144] 110 Cong. Rec. 2728, 13838 (1964). While this comment by Senator Clifford P. Case was made in opposition to imposing a but-for standard of causation for Title VII, it is nonetheless applicable in a causation discussion under Section 1981.

b. Impact of this decision on future § 1981 cases

From a practical standpoint, the majority opinion is flawed because Court itself recognized that in this type of case, meeting what you must prove at trial often cannot be done without the supplement of discovery to build a case. This requires litigators to plead facts they may not know to be true, flying in the face of civil procedure and potentially opening them up to sanctions based on frivolous lawsuits in the event that the "smoking gun" is not present. This is significant because under this higher standard of pleading, attorneys may expose themselves to sanctions by taking a Section 1981 case without a "smoking gun". Under the Federal Rules of Civil Procedure, an attorney's signature on a pleading represents that the factual contentions within the pleading "have…or are likely to have evidentiary support after a reasonable opportunity for…discovery." [145] Without the aforementioned "smoking gun", Section 1981 matters will simply not survive long enough to conduct discovery. This could present an opportunity to Section 1981 defendants to move for sanctions against the plaintiff, for which the attorney would be jointly and severally liable.[146] This scenario allows for an argument that counsel in essence misled the court into a waste of its time and resources, frivolously haled the defendant into court, and could be the basis for formal discipline. In State courts, using Pennsylvania as an example, counsel could face an ancillary suit under the Dragonetti Act[147] for initiating spurious litigation without cause. The prospect of formal discipline will likewise dissuade prospective attorneys from even considering these cases without absolute proof.

VI. Conclusion

Attorneys should note that due to a recent settlement in this case, there will not be a decision on remand regarding the Court's reservation of whether Comcast should face liability for injuries sustained during the contract-formation process.[148] While the Court's opinion to require but-for causation at the pleading stage, for the moment, will undoubtedly have a prophylactic effect on the viability of Section 1981 litigation where no smoking gun exists,

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[145] Fed. R. Civ. P. 5(b)(3).
[146] Fed. R. Civ. P. 5(c).
[147] 42 Pa. C.S. § 8351.
[148] FORTUNE.COM, *Comcast and Media Mogul Byron Allen Settle Racial Discrimination Dispute*, https://fortune.com/2020/06/11/comcast-byron-allen-settle-racial-discrimination-suit/ (last visited 20 August 2020) (announcing a settlement of the lawsuit via carriage agreement).

attorneys should utilize the arguments above as a blueprint to attack dismissals on appeal, and prepare defenses against sanctions litigation that is a likely consequence of this problematic holding and reasoning. Additionally, attorneys should look for opportunities to have the judiciary readdress this decision.

However, the most error-proof way to redress this holding is a Congressional amendment to explicitly define the pleading standard as a motivating factor/burden-shifting approach in Section 1981 cases. Given the current political climate, whether this approach is taken remains to be seen.