CASTING A SHORT NET: THE SUPREME COURT'S DAMAGING INTERPRETATION OF § 1981 IN PATTERSON V. MCLEAN CREDIT UNION AND COMCAST CORP., V. NATIONAL ASSOCIATION OF AFRICAN AMERICAN OWNED MEDIA AND ENTERTAINMENT STUDIOS NETWORK, INC.

Tessa Martin[1]

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[1] Juris Doctorate Candidate, Atlanta's John Marshall Law School, May 2021.

INTRODUCTION

The Supreme Court in its most recent term decided the case of *Comcast Corp., v. Nat'l Ass'n of African Am-Owned Media and Entertainment Studios Network, Inc.*, and handed a decidedly damaging blow to the civil rights community and minorities asserting racial discrimination claims pursuant to 42 U.S.C. § 1981.[2] The majority opinion, written by Justice Gorsuch, determined that a plaintiff bringing a § 1981 action must plead and prove her case of racial discrimination by establishing that the defendant caused her injury under the stringent *but-for* legal standard of causation.[3] The Court declined to address Comcast's narrow interpretation of the scope of § 1981's coverage, which was to include protection only against racial discrimination at the final stages of the contract process and not the entire formation process.[4] While the Court reserved this question for consideration on remand, the majority's reservation to resolve this mistaken interpretation, as Justice Ginsburg noted in her concurrence, invites the Court to repeat the same error of reading the statute far too narrowly that it made in 1989 in the case of *Patterson v. McLean Credit Union*, another decision that dealt a savage blow to the advancement of racial equality in contracting.[5] The *Comcast* decision emphasizes a departure from earlier Supreme Court precedent, in which § 1981 was construed in a more liberal manner, not only to protect the act of entering into a contract, but the effects of that act as well.[6] The majority in *Comcast* seems to side step this precedent and instead relies on "textbook" tort law which[7], as one commentator observed, is a historical error that could have been remedied with a more careful reading of the cited text which the majority relied in *Comcast*.[8]

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[2] Comcast Corp. v. Nat'l Ass'n of African American-Owned Media, 140 S. Ct. 1009, 206 L. Ed.2d 356 (2020).

[3] *Comcast*, 140 S. Ct. at 1019.

[4] *Id.* at 1018.

[5] *See id.* at 1020 (Ginsburg, J., concurring in part) (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989)). (Ginsburg argues that Comcast's narrow view of § 1981 cannot be squared with the statute's language, "an equal right…to make…contracts.").

[6] *See generally* Jones v. Alfred H. Mayer Co*.,* 392 U.S. 409 (1968); Johnson v. Railway Express Agency Inc. 421 U.S. 454, 95 S. Ct. 1716, 44 L.Ed.2d 295 (1975); and Runyon v. McCrary, 427 U.S. 160 (1976).

[7] *Comcast,* 140 S. Ct. at 1014.

[8] *See* Alexandra D. Lahav, *Why Justice Gorsuch Was Wrong about Causation in Comcast*, 23 GREEN BAG 2d 205, 207 (2020) (arguing that the case Justice Gorsuch relied on, (for the proposition that the *but-for* causation standard was the default common- law rule), in Hayes v. Michigan Cent. R. Co., 111 U.S. 228, 229 (1884) was a misreading of the case, as the proper test for determining causation under *Hayes* was the requirement that the plaintiff show

Comcast's requirement, that the plaintiff must prove that the defendant would have acted differently *but-for* plaintiff's race, places a severe stumbling block in the face of the protection afforded by § 1981 for minorities in contracting.[9] Proving *but-for* causation at the pleading stage, instead of requiring the plaintiff to plausibly allege that race was a motivating factor or that there was a reasonable probability that race was the factor that led to the discriminatory action, will lead to thousands of otherwise meritorious claims thrown out on a motion for summary judgment or a motion to dismiss. The *Comcast* decision ultimately represents a repeated failure by the Supreme Court to advance racial equality in contracting.[10]

Part I of this Comment will briefly discuss the history of § 1981 from the crucial language of its inception to early Judicial interpretation prior to *Patterson,*[11] to the statute's amendment in 1991 alongside Title VII. This Part provides context for the central argument of this Comment, which is that the Supreme Court has damaged the advancement of racial equality in contract law with its decisions in *Patterson* and *Comcast*.

Part II will discuss the decision in *Patterson* and argues that the Court's narrow interpretation of § 1981 set the stage for harmful interpretations of the statute and drastically set back the advancement minorities had gained in the Courts.[12] Part III will discuss the *Comcast* decision and argues that the *Comcast* case is an extension of the same failed interpretation of § 1981 that Patterson put forth. This Part asserts that the decision of Justice Gorsuch on the causation standard for a § 1981 claim is

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there was a "reasonable probability" that the injury resulted from the defendant's breach of duty).

[9] I use "minority" interchangeably with African American throughout this Comment. While § 1981 protects discriminatory actions against any race, the focus of this Comment is on the discriminatory actions against African Americans in particular.

[10] *See generally* Joan Biskupic, *How an Era Ended in Civil Rights Law*, THE WASHINGTON POST (May 24, 1993), https://www.washingtonpost.com/archive/politics/1993/05/24/how-an-era-ended-in-civil-rights-law/4135a21d-8f8a-40d6-b5f4-2a3a1db97e0f/ (asserting that not only did *Patterson v. McLean Credit Union* issue a decisive break with a "string of liberal civil rights decisions" but also revealed conflicting visions of how the Civil Rights laws should be interpreted among the Justices).

[11] Specifically, the case of Runyon v. McCrary, 427 U.S. 160 (1976). (Note that the importance of *Runyon* would be misstated without mention to the trifecta of cases that led to the solidification of the right to action against private acts of discrimination in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), Tilman v. Wheaton-Haven Recreation Ass'n, Inc., 410 U.S. 431 (1973), and Johnson v. Ry. Exp. Agency, Inc., 421 U.S. 454 (1975)).

[12] *See generally* William P. Wassweiler, *Civil Rights Law—An Application of the Dynamic Approach to Statutory Interpretation—Patterson v. McLean Credit Union, 491 U.S. 164 (1989)*, https://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=2346&context=wmlr (discussing three specific forms of statutory interpretation to § 1981: the "intentionalist"; the "textualist"; and the "dynamic"; ultimately concluding that a dynamic approach to *Patterson* renders the most rational result).

unfavorable to the equality of African Americans in contract law, specifically with respect to employment contracts, independent contractors, and franchise agreements. Moreover, the decision fails to account for the national policy considerations that weigh in favor of the availability of § 1981 to claimants with meritorious claims of racial discrimination and ignores years of Congressional policies to remove substantive and procedural stumbling blocks from African American's in entering into contracts.[13]

Part IV concludes this Comment by arguing that the majority in *Comcast* should have been persuaded by one assertion put forth by Congressional members of the Black Caucus as amici curiae in their brief for the Respondent, that a plain textual reading of § 1981 reveals no language indicating a but-for causation requirement, but rather the "plain language of § 1981 encompasses every racially motivated refusal to contract, regardless of whether other motives prompt that refusal as well."[14] The contention here is essentially that § 1981, as opposed to other federal employment discrimination statutes, has implicit to its original language the motivating factor standard of causation. This Part reaffirms this argument but goes a step further and stresses that a deference to the societal and legal implications in society currently, must necessarily be considered with respect to judicial interpretations of § 1981, as such interpretations are most consistent with the efforts of Congress to eliminate racial segregation in this Country.[15]

I. THE CIVIL RIGHTS ACT OF 1866

> To be a citizen of the United States carries with it some rights; and what are they? They are those inherent, fundamental rights which belong to free citizens or free men in all

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[13] This argument is loosely derived from Justice Marshall's concurrence in part in *Johnson*, where Marshall approved of the majority's adherence to the protection of § 1981 against private rights of discrimination, but disagreed with the majority's decision not to apply the tolling principle to the statute of limitations to a § 1981 claim while a Title VII charge was pending, as it undermined the foundation of Title VII and frustrated the congressional policy of providing alternative remedies and failed to consider whether national policy considerations favored the continued availability of the § 1981 cause of action. *Johnson,* 421 U.S. at 470.

[14] Brief of Members of Congress as Amici Curiae Supporting Respondents at 3, Nat'l Ass'n of Afr. Am.-Owned Media and Ent. Studios Networks, Inc., 589 U.S. (2020) (No. 18-1171) [hereinafter *Brief of Members of Congress*].

[15] *Runyon*, 427 U.S. 160 at 191 (Stevens, J., concurring) (although Justice Stevens disagreed with the interpretation that § 1981 was written with the intention to apply to private acts of discrimination as such an interpretation "did not reflect the sentiments of the Reconstruction Congress"; he believed that such an interpretation was best suited towards the sense of justice today and stated that in interpreting § 1981 the Court should defer to the "policy of the Nation as formulated by Congress in recent years.").

> countries, such as the rights enumerated in this bill, and they belong to them in all the States of the Union.[16]

Against the backdrop of early Reconstruction, the Civil Rights Act of 1866 ("the Act"), was passed. The Act specifically granted all individuals within the jurisdiction of the United States the same legal and absolute rights:

> [A]nd such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, 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 persons and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.[17]

While the Act's introduction received a majority support in the United States Senate with a vote of 33-12 and a majority of the House of Representatives approved the legislation by a vote of 111-38, its passage into law was not without struggle. Not only did President Johnson veto the bill, arguing it was a violation of federalism, he also argued that Congress did not have the constitutional delegation of authority by which to secure civil rights for the newly freed slaves.[18] Jackson undoubtedly forgot his history, as the newly ratified Thirteenth Amendment was the constitutional vehicle by which the bill was eventually enforced. Senator Lyman Trumbull, the bill's author, reacted to this resistance by stating, "surely we have the authority to

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[16] CONG. Globe, 39th Cong., 1st Sess. 500 (1866) (Sen. Trumbull).

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

[18] CONG. Globe, 39th Cong., 1st Sess. 1679, 1680 (1866) (President Johnson's veto of the Act ignorantly challenged the fact that the Act would confer rights of citizenship on African Americans when they had not "proven themselves of good moral character"; Jackson stated: "it is now proposed by a single legislative enactment to confer the rights of citizens upon all persons of African descent, born within the extended limits of the United States, while persons of foreign birth, who make our land their home, must undergo a probation of five years, and can only then become citizens upon proof that they are 'of good more character, attached to the principles of the Constitution…and well-disposed to the good order and happiness of the same.'").

enact a law as efficient in the interest of freedom, now that freedom prevails throughout the country, as we had in the interest of slavery when it prevailed in a portion of the country."[19] Trumbull was referencing the Fugitive Slave Acts of 1793 and 1850 which, as scholar Robert Kaczorowski put it, "suggests one of the bitter ironies of the statute's history, for [the Slave Acts] served as legislative models of congressional enforcement of a constitutional provision securing a fundamental right of United States citizenship, the property right of slaveholders in their slaves."[20] Despite the awfulness of the Act's beginning, its purpose was broad and intentional: to vindicate the rights of former slaves, reinforce the Thirteenth Amendment and to do away with the Black Codes, those invidious laws Southern states had enacted to keep the freed slaves in harsh and coercive employment agreements, SO that the Southern economy would not collapse.[21]

Newly freed African Americans faced insurmountable struggles and hardship post Emancipation. Much of the South was so entrenched with a hatred and fear of the freed slaves that freedom for Blacks did not exist, even after the passage of the Thirteenth Amendment. Blacks faced severe private discrimination in areas they depended upon for their very survival: food, housing, and employment.[22] The *Schurz Report,*[23] perhaps the earliest account we have that describes this discriminatory treatment and one that was

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[19] CONG. Globe, *supra* note 16, at 475.

[20] Robert J. Kaczorowski, *Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of Runyon v. McCrary, The Review Essay and Comments: Reconstructing Reconstruction*, 98 YALE J. L. 565, 567 (1988-1989).

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

[22] Linda A. Lacewell & Paul A. Shelowitz, *Beyond A Black and White Reading of Sections 1981 and 1982: Shifting the Focus from Racial Status to Racist Acts*, 41 U. MIAMI L. REV. 823, 827 n.25 (1987) "The law had created two worlds, so separate that communication between them was almost impossible. Separation bred suspicion and hatred, fostered rumors and misunderstanding, and created conditions that made extremely difficult any steps toward its reduction. Legal segregation was so complete that a southern white minister was moved to remark that it 'made of our eating and drinking, our buying and selling, our labor and housing, our rents, our railroads, our orphanages and prisons, our recreations, our very institutions of religion, a problem of race as well as a problem of maintenance.'" *Id.* at 14 n.25 (quoting John Hope Franklin, *History of Racial Segregation in the United States*, in 3[0]4 ANNALS 1, 8 (1956)).

[23] CARL SCHURZ, REPORT ON THE CONDITION OF THE SOUTH, 39th Congress, S. EXEC. DOC. No. 2 (1st Sess. 1865) https://wwnorton.com/college/history/america9/brief/docs/Schurz_Carl_Report_on_the_Condition_of_the_South_11865.pdf [hereinafter *The Schurz Report*]; *see also* Barry Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 YALE L.J. 541, 550 n.78 (1989).

used as Senator Trumbull's primary resource in drafting the Act,[24] delivers the impressions of Southern white employers when faced with the opportunity to "hire" recently freed Blacks.[25] Essentially, the belief that "[y]ou cannot make the negro work, without physical compulsion" was the implacable opinion prevailing throughout much of the South.[26] The obvious effect of this was that the discriminatory treatment of Blacks became a condition that festered, polluting the laws of the southern states and creating a circular effect for Blacks.[27] The reconstructionist policies under President Johnson's administration furthered this effect for Blacks and "allowed Southerners to legislate their transition from slavery to freedom,"[28] essentially controlling the newly freed slaves once more. As one author suggests:

> [t]hese behavioral expressions of private prejudice were underpinned by law, from common law powers over property to legislative charters for streetcar companies…The restrictions generally were 'understood rather than stated' but they were powerful customs with deep roots in slavery.[29]

The reality was that Blacks were kept on plantations, forced to work for little to no compensation, beaten, starved, and otherwise kept in the same condition as before, save for the titular assurance that they were freemen.[30] It was because of this severe discriminatory treatment and the lingering hope indulged by white Southerners that slavery might yet be preserved that the Act was proposed.[31]

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[24] *The Schurz Report, supra* note 23.
[25] *Id.*
[26] *The Schurz Report*, *supra* note 23, at 18. (Schurz further reported that Southern whites were of the sound opinion that "If negroes walked away from the plantations, it was conclusive proof of the incorrigible instability of the negro, and the impracticability of free negro labor. If some individual negroes violated the terms of their contract, it proved unanswerably that no negro had, or ever would have, a just conception of the binding force of a contract, and that this system of free negro labor was bound to be a failure.").
[27] *Id.* at 19. (Schurz observed that "a belief, conviction, or prejudice … so widely spread and apparently so deeply rooted as this, that the negro will not work without physical compulsion, is certainly calculated to have a very serious influence upon the conduct of the people entertaining it.").
[28] Wassweiler, *supra* note 12, at 665.
[29] Kenneth L. Karst, *Private Discrimination and Public Responsibility: Patterson in Context*, Sup. Ct. Rev 1, 8 (1989).
[30] *See supra* notes 18-27 and accompanying text.
[31] See source cited *supra* note 17.

From its very inception, the Act arguable always intended to reach private acts of discrimination.[32] History shows that the framers of the Act did not intend, nor could have intended, "to legislate within a concept of state action."[33] The absolute rights which the Act protects, those quoted by Senator Trumbull in the beginning of Part I, were absolute rights, independent of State law and quintessential, fundamental rights of citizenship.[34] Trumbull, in arguing the bill on the Senate floor, insisted that "the federal government has authority to make every inhabitant of Pennsylvania a citizen, and clothe him with the authority to inherit and buy real estate, and the State of Pennsylvania cannot help it."[35] The rights enumerated and protected by the Act were not only a direct response to the deplorable conditions against Blacks in the South, but "an expression of the framers' understanding of the rights essential to political and economic freedom and individual autonomy"[36] that is fundamental to equality of citizenship.[37] The same rights "as [are] enjoyed by white citizens," was the promise by Congress to provide all citizens with the same enumerated rights yet allowed the states to retain their authority to regulate the exercise of those rights.[38] As an editorial for the New York Evening Post noted:

> Congress does not say in this bill by what rules evidence shall be given in courts, by what tenure property shall be held, or how a citizen shall be protected in is occupation. It only says to the states, whatever laws you pass in regard to these matters, make them general; make them for the benefit of one race as well as another.[39]

One of the Supreme Court's first encounters with interpreting § 1981was *Hodges v. United States*.[40] In *Hodges*, African-Americans were terrorized by a group of white citizens who refused to allow them to work in

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[32] Kaczorowski, *supra* note 20, at 566.
[33] *Id.* (Kaczorowski argues that this conclusion follows from the constitutional and legal doctrines within which the framers legislated in 1866 to enforce civil rights, from the nature of the civil rights violations which confronted them, and from the remedies they provided in the Civil Rights Act of 1866 to enforce civil rights directly in the federal courts).
[34] *Id.* at 570.
[35] CONG. Globe, *supra* note 16, at 500 (Sen. Trumbull).
[36] Kaczorowski, *supra* note 20, at 570.
[37] *Id.*
[38] *Id.* at 573.
[39] *See generally* Kaczorowski, *supra* note 20 (citing to N.Y. Evening Post (n.d.) (collected in Scrapbook on the Civil Rights 32 (E. McPherson ed., n.d.) in Edward McPherson Papers (collection available in Library of Congress)).
[40] 203 U.S. 1 (1906).

a local sawmill.[41] A lawsuit was brought for conspiracy to prevent African-Americans from entering into contracts for employment.[42] The Court noted that "one of the disabilities of slavery, one of the indicia of its existence, was a lack of power to make or perform contracts."[43] The Court, however, honed in on the word "slavery" and interpreted it to mean that an African American must actually be enslaved before the Thirteenth Amendment would apply.[44] The Court further stated that "no mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery."[45] The *Hodges* decision, arguably the apex of judicial restraint in interpreting the Act, became the prevailing law regarding the application of § 1981. Fortunately, sixty-two years later, the Supreme Court overruled *Hodges* in *Jones v. Alfred H. Mayer Co*.,[46] and began its short journey "to interpret § 1981 more broadly" and more consistently within the framers intent "to eradicate racial animus" and promote equality of contract amongst all races.[47] In overruling *Hodges*, the *Jones* Court stated that "[t]he conclusion of the majority in *Hodges* rested upon a concept of congressional power under the Thirteenth Amendment irreconcilable with the position taken by every member of this Court in the *Civil Rights Cases* and incompatible with the history and purpose of the Amendment itself."[48] *Jones* is doubly important, because in *Runyon v. McCrary* decided a few years later, the Court adhered to the legislative history of the Act adopted by *Jones* noting that "[i]t is clear that the Act was designed to do just what its terms suggest: to 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."[49]

Runyon v. McCrary was a powerful decision that solidified § 1981 as a valuable remedy against private acts of discrimination and confirmed the interpretation of the statute that the *Jones* Court had labored through.[50] *Runyon* was a consolidation of several cases brought by parents whose black children were allegedly denied admission to private schools based on race, and the sole issue presented to the Court was whether § 1981 prohibited "private schools from excluding qualified children solely" based on their

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[41] *Id.* at 3.
[42] *Id.*
[43] *Id.* at 17.
[44] *Id.*
[45] *Id.*
[46] 392. U.S. 409 (1968).
[47] Wassweiler, *supra* note 12, at 682, 684 n.196.
[48] *Jones*, 392 U.S. at 44-43.
[49] Runyon v. McCrary, 427 U.S. 160, 170 (1976) (quoting Jones, 392 U.S. at 436).
[50] *Id.*

race.[51] The Court found that the precedent of *Jones*, *Tillman*, and *Johnson* had already revealed the answer to the issue presented in *Runyon* that § 1981, like its companion statute § 1982, reached private conduct.[52] The Court was unwavering and declared:

> [t]he prohibition of racial discrimination that interferes with the making and enforcement of contracts for private educational services furthers goals closely analogous to those served by § 1981's elimination of racial discrimination in the making of private employment contracts and . . . . by § 1982's guarantee that 'a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man.'[53]

Sections 1981 and 1982 were often construed together by the Courts, although § 1982 carries with it expansive language in the "same right", but both statutes were read broadly.[54]

Not only was *Runyon* an important decision for the advancement of racial equality in contracting generally, but it was especially important as it emphasized that the impact of § 1981 claims can extend beyond employment contracts and into the realm of "independent contracting and private school segregation."[55] Indeed, after *Runyon*, segregated activities within a private school or private establishment for the first time were deemed unlawful, further beating back the specter of whites only that still haunted the Country at that time.[56]

Section 1981 was of course amended in 1991, two years after the decision in *Patterson v. McClean Credit Union*.[57] This Congressional

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[51] *Id.* at 163-64.
[52] *Id.* at 170-72 (first citing Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); then citing Tilman v. Wheaton-Haven Recreation Ass'n, Inc., 410 U.S. 431 (1973); and then citing Johnson v. Railway Express Agency Inc., 421 U.S. 454 (1975)).
[53] *Id.* at 179 (quoting *Jones*, 392 U.S. at 443).
[54] Linda A. Lacewell & Paul A. Shelowitz, *Beyond a Black and White Reading of Sections 1981 and 1982: Shifting the Focus from Racial Status to Racist Acts*, 41 U. MIAMI L. REV. 823, 823 n.3, 824 (1987).
[55] Theodore Eisenberg & Stewart Schwab, *The Importance of Section 1981*, 73 CORNELL L. REV. 596, 603-604 (1988) (expounding upon the impact of § 1981 and cases like *Runyon* and arguing that a "statute's impact cannot be measured solely by the cases filed under it; its influence on primary behavior and it symbolic value also count.").
[56] *Id.* at 604.
[57] Civil Rights Act of 1991, Pub. L. No. 102–166, § 101, 105 Stat. 1071 (amending Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, the Age Discrimination in Employment Act of 1967, the Civil Rights Act of 1866, and the Civil Rights Attorney's Awards Act of 1976).

amendment overruled portions of *Patterson*[58] and added sections (b) and (c) to the statute.[59] Section (b) defined "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 contractual relationship."[60] As Part III of this Comment will discuss, the term "making" plays an important role in the Court's analysis in *Comcast* in deciding the causation standard for claims arising under section 1981.[61] Section (b) was a direct response to the Court's decision in *Patterson* to make clear that Congress intended the Statute, as a whole, to prohibit discrimination during contract formation *and* during the course of employment.[62] Section (c) of the Statute was added to protect the Act from further failed interpretation from the Supreme Court and to codify the portion of *Patterson* that reaffirmed *Runyon*, that the right to make and enforce contracts is "protected against impairment by nongovernmental discrimination and impairment under color of State law."[63]

While it was certainly an encouraging step forward for Congress to protect the rights afforded in § 1981 by further defining its language in statute—the causation standard for these claims remained unresolved. Alongside the amendment to § 1981, Congress amended Title VII to include a motivating factor test, but did not make such an amendment to § 1981. [64] This omission has led the Supreme Court to find consistently that other employment discrimination statutes, like Title VII retaliation claims, the Age Discrimination in Employment Act ("ADEA") cases, and more recently § 1981 cases to all follow the but-for standard of causation.[65] The failure to codify a motivating factor test to § 1981 ultimately seems arbitrary

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[58] *Id.*

[59] *Id.* § 101(2), 105 Stat. at 1071-72.

[60] 42 U.S.C.A. § 1981(b)(Westlaw through Pub. L. No. 117-7 (excluding Pub. L. No. 116-283)).

[61] *See* discussion *infra* Part III.

[62] 42 U.S.C.A. § 1981(b)(Westlaw through Pub. L. No. 117-7 (excluding Pub. L. No. 116-283)).

[63] *Id.* § 1981(c); *see also* § 1981 note (Municipalities, persons liable--Generally).

[64] *Id.* Civil Rights Act § 107(a), 105 Stat. at 1075 ("Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."). (Notably the motivating factor test is specific to Title VII and does not apply to other federal statutes).

[65] *See* Gross v. FBL Fin. Servs., 557 U.S. 167 (2009) (holding the ADEA made it unlawful to discriminate against an individual "because of such individual's age" and that such language indicated that age must be proven to be the but-for cause of the employer's adverse decision); see also Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013) (holding that retaliation claims, unlike status-based discrimination claims under Section 2000e-2(a), must be proved according to traditional principles of but-for causation, and not the lessened causation test stated in the statute).

considering Congress applied that standard to Title VII, whose elaborate administrative procedures makes for more hoop jumping for victims of discrimination than a § 1981 claim.[66] Moreover, the failure to codify a motivating standard to the statute is inconsistent with the intent of the language of the statute itself. The language of § 1981 bestows absolute rights upon citizens, regardless of their skin color, "to make and enforce contracts"; these are rights which are *fundamental to citizenship*, meant to vindicate the rights of former slaves and to impress upon all races the same rights "as [are] enjoyed by white citizens."[67] If the language ensures equality in all aspects of the contract process, meaning the right is to be the same across all races, a causation standard that "forbid[s] all racial discrimination affecting the[se] basic civil rights enumerated,"[68] and which "encompass[es] every racially motivated refusal" to act is a standard that is consistent with those enumerated rights.[69] This statement hinges on the assertion that a motivating factor standard is already implicit to the language and purpose of the statute itself. It would seem that if Congress intended to remediate the Supreme Court's blunder in so limiting the reach of § 1981 with *Patterson*, it would seek to ensure that no confusion remained as to the coverage, application, and reach of § 1981 by codifying a causation standard that fit alongside its text.

Ultimately, the Civil Rights Act of 1991 was a recognizable response to the shortcomings of the Supreme Court in failing to interpret the statute as affording broad coverage rather than limiting coverage, yet the Congressional unwillingness to codify a motivating factor test, which is arguably embedded in the very fabric of the statute's language, is an omission that has had lasting consequences.[70]

II. FALLING BEHIND: THE *PATTERSON* DECISION

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[66] *See generally* Donald R. Livingston, *The Civil Rights Act of 1991 and EEOC Enforcement*, 23 STETSON L. REV. 53, 57 (1993) (Livingston ultimately argues that the Civil Rights Act of 1991 "injected a large dose of uncertainty into federal employment discrimination law" even though the Congressional intent was to provide appropriate remedies for harassment and to clarify authority and guidelines for disparate impact suits. *Id.* at 100.).

[67] *See* 42 U.S.C.A. § 1981(a) (Westlaw) (emphasis added).

[68] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 435 (1968).

[69] *Id.* at 421 (while *Jones* discusses the implications of § 1982 of the Act, the language of § 1982 is similar to § 1981 because they were enacted together).

[70] The Civil Rights Act of 1991 not only implicated *Patterson* but addressed a string of Supreme Court decisions decided close in time and which all undermined Civil Rights legislation; *see* Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Martin v. Wilks, 490 U.S. 755 (1989); EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991); Lorance v. AT&T Techs., Inc., 490 U.S. 900 (1989); Library of Cong. v. Shaw, 478 U.S. 310 (1986); and W. Virginia Univ. Hosps., Inc. v. Casey, 499 U.S. 83 (1991).

"What the Court declines to snatch away with one hand, it takes with the other."[71]

Brenda Patterson had been working for the McLean Credit Union ten years as a teller and file coordinator when she was laid off in July of 1982.[72] In her complaint, she alleged several instances of discriminatory treatment based on her African American race that violated § 1981; specifically harassment by her employer, failure to promote, and discharge.[73] In her allegations of racial harassment, Patterson described occurrences where the President of the Credit Union told her that the other women would probably not like working with her because she was black, he would periodically stare at her for minutes at a time, giving her demeaning tasks like sweeping and dusting, which were not given to the white employees.[74] The President would criticize her publicly in staff meetings, though he would not do the same to the white employees.[75] He even told her on one occasion that Blacks were "known to work slower than Whites."[76] Throughout her tenure, Patterson was never promoted though she witnessed a white junior colleague get promoted.[77] Patterson was late to file her claim and so could not bring a Title VII claim, thus she brought it under § 1981.[78]

The jury found for the Credit Union on the § 1981 claims of discrimination in her discharge and failure to promote, but the Court determined a claim for harassment is not actionable under § 1981 and did not submit that claim to the jury.[79] On appeal, Patterson submitted a two-fold challenge to the district court's order.[80] First, Patterson claimed the court erred in refusing to submit the racial harassment claim to the jury; and two, the court "erred in instructing the jury that in order to prevail on her § 1981 claim of discriminatory failure to promote, she must show that she was better qualified than the white employee" who was promoted instead.[81] The court of appeals affirmed and on the racial harassment issue, the court held that

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[71] Patterson v. McLean Credit Union, 491 U.S. 164, 189 (1989) (Brennan. J., concurring).
[72] Brief for Petitioner at 9, Patterson v. McClean Credit Union, 491 U.S. 164 (1987) (No. 87-107) 1987 WL 955275 [hereinafter Brief for Petitioner].
[73] *Id.* at 7-9.
[74] *Id.* at 7-8.
[75] *Id.* at 8.
[76] *Id.* at 9.
[77] *Id.*
[78] Patterson v. McLean Credit Union, 805 F.2d 1143, 1148 (4th Cir. 1986), *aff'd in part, vacated in part*, 491 U.S. 164 (1989) ("Presumably for statute of limitations reasons, Patterson did not assert a claim under Title VII of the Civil Rights Act of 1964.").
[79] Patterson v. McLean Credit Union*,* 491 U.S. 164, 169-170 (1989).
[80] *Id.* at 170.
[81] *Id.*

"while instances of racial harassment may implicate the terms and conditions of employment under Title VII, and of course may be probative of the discriminatory intent required to be shown in a § 1981 action…racial harassment does not abridge the right to 'make' and 'enforce' contracts."[82] On the jury instructions, the court held that "once respondent had advanced superior qualification as a legitimate nondiscriminatory reason for its promotion decision, petitioner had the burden of persuasion to show that" justification was pretextual.[83]

When the *Patterson* case was brought to the Supreme Court on a petition for a writ of certiorari, the questions brought by the parties were straightforward: first, whether the claim of racial harassment asserted by Brenda Patterson was actionable under § 1981 as the alleged harassment encompassed post contractual discrimination; and second, whether the jury instructions given by the District Court on petitioner's claim was error.[84] It was not until oral arguments, where the Court made the controversial request that the parties brief and argue an additional question: whether the interpretation of § 1981 as adopted by the Court in *Runyon* should be reconsidered.[85] This last question sent "shock waves" through the civil rights community, as *Runyon* had solidified the private cause of action to enforce the right to contract as well as adhered to the legislative history of § 1981 adopted by the *Jones* Court.[86] As one author put it, "the bitterness of four dissenting Justices was matched by the majority's righteous dudgeon."[87]

In ordering reconsideration of *Runyon*, the Court was essentially questioning the original intent of the legislators and debating whether the Civil Rights Act of 1866 should be restricted in scope to apply only to discriminatory state action. To reconsider this central piece of Court precedent that had legitimated the ability of African Americans to sue for acts of private racial discrimination placed in doubt years of Congressional policies to eradicate segregation.[88]

The Court ultimately upheld *Runyon*, choosing to abide by the doctrine of stare decisis and keep the peace.[89] There is irony in that decision

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[82] *Id.*
[83] *Id.*
[84] *See Brief for Petitioner*, *supra* note 72.
[85] Patterson v. McLean Credit Union, 485 U.S. 617 (1988).
[86] *See* discussion *supra* Part I.
[87] Karst, *supra* note 29.
[88] *See generally* Karst, *supra* note 29, citing e.g., Civil Rights Act of 1964, 78 Stat. 241 as added and as amended, 28 U.S.C. § 1447 (d), 42 U.S.C. §§ 1971, 1975a-1975d, 2000a, 2000h-6 (1970 ed. and Supp. IV); Voting Rights Act of 1965, 79 Stat. 437 as added and as amended, 42 U.S.C. §§ 1973-1973bb-4; Civil Rights Act of 1968, Titles VIII, IX, 82 Stat. 81, 89, as amended, 42 U.S.C. §§ 3601-3631 (1970 ed. and Supp. IV).
[89] Patterson v. McClean Credit Union, 491 U.S. 164, 171-74 (1989).

however, as *Patterson* did not preserve the same statutory interpretation of § 1981 that *Runyon* protected, but rather derided it and the prior decisions on this issue that the *Runyon* Court confirmed. One author observed that the reaffirmation of *Runyon* had little to do with adhering to stare decisis and everything to do with conciliating a broad political consensus.[90] In the same breath that the Court upheld the *Runyon* decision that § 1981 provided an avenue for private discrimination, it showed little interest in seeking any remedy for that discrimination, which is what prompted Justice Brennan to remark: "What the Court declines to snatch away with one hand, it takes with the other."[91]

While *Runyon* preserved the statutory foundation of § 1981 that the "same right … to make and enforce contracts" that "is enjoyed by white citizens" should also be enjoyed by African Americans, the true meaning of which "encompasses an employee's right to protection from racial harassment by her employer,"[92] the Majority diverged from this accepted precedent with *Patterson*. While the Court acknowledged that the literal reading of § 1981 offered protection against racial harassment at the formation and enforcement stage of the contract, it determined that the statute could not be extended to provide protection for racial harassment *during* a contract's performance.[93] This restricted reading cannot be reconciled with contract law, as Justice White pronounced in his part concurrence by stating definitively that a "contract is not just a piece of paper…[it is] evidence of a vital, ongoing relationship between human beings."[94] A contract, but more specifically an employment contract, signifies the "totality of interrelations between the contracting parties throughout the term of the contract's performance and enforcement."[95] Disregarding this view of contracts, the Majority instead found that even if there are racially discriminatory actions in employment events such as vacation pay, disability benefits, transfers, assignments, evaluations, demotions, and basic working conditions, these actions are not actionable under § 1981, despite the fact that they are inherent activities inextricable from the contract itself. [96]

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[90] Karst, *supra* note 29 (arguing that the majority of Justices could not ignore the sixty-six United States Senators and 118 Representatives that filed a brief urging the Court to reaffirm *Runyon*, as did the attorney generals of forty-seven states).
[91] *See generally id.*; *see also Patterson*, 491 U.S. at 189 (1989) (Brennan, J., concurring in part, dissenting in part).
[92] *Patterson,* 491 U.S. at 189-90, 220.
[93] *Id.* at 176-77 (majority opinion).
[94] *Id.* at 221 (White, J., concurring); *See also* Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691, 710-12 (1974) (writing: "one of the primal roots" of contract law is the "social matrix" of an agreement).
[95] Karst, *supra* note 29, at 28.
[96] *Patterson,* 491 U.S. at 171 (majority opinion).

The Court defended its "needlessly cramped interpretation" of the statute by pointing to the availability of Title VII to claimants as well as state contract law.[97] The Court stated that "[i]nterpreting § 1981 to cover postformation conduct unrelated to an employee's right to enforce his or her contract…would also undermine the detailed and well-crafted procedures for conciliation and resolution of Title VII claims."[98] While it is fairly standard that a plaintiff asserting claims of racial discrimination often brings the claims under both Title VII and § 1981, as the statutes often intersect, there are significant differences between them which makes their mutual availability to plaintiffs all the more necessary.

Unlike Title VII, § 1981 has a longer statute of limitations, does not require employees to file a charge of discrimination with the Equal Opportunity Commission or administrative agencies before instituting the action, has no requirement for a minimum number of employees, and has unlimited compensatory and punitive damages.[99] And while employment race discrimination claims are generally brought under Title VII, since this is Congress's specially designed statute for workplace discrimination lawsuits, the importance of the availability of § 1981 to employees is still substantial.[100] Certainly the Court has affirmed this reality before in *Johnson v. Railway Express Agency, Inc.*, when it held that the remedies under these two statutes are "separate, distinct, and independent."[101] Moreover, the effects of the limitation on the scope of coverage under Title VII to employers with only 15 or more employees, leads to a sobering reality, as the Equal Employment Opportunity Commission estimates that this excludes roughly 10.7 million workers, which is roughly fourteen percent of the work force, and eighty-six percent of all establishments from Title VII's coverage.[102] This kind of data reinforces the importance of offering two pathways to employees with claims of racial discrimination. Indeed, Justice Brennan did not mince words when he labeled the Majority's reconsideration of *Runyon* "disturbing," because it went so far afield of what the Court had done in the

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[97] *Id.* at 189 (Brennan, J., concurring in part, dissenting in part).
[98] *Id.* at 180 (majority opinion).
[99] *Compare* 42 U.S.C. § 2000e (West) *with* 42 U.S.C. § 1981 (West).
[100] *Id. See also* Patterson v. McLean Credit Union, 485 U.S. 617, 621 (1988) (certain Justices in *Patterson*, like Justice Blackmun, who dissented from the Court's order to reargue *Runyon*, conceded that Title VII might be the more appropriate avenue for these kinds of claims when he stated: "it is probably true that most racial discrimination in the employment context will continue to be redressable under other statutes….").
[101] Johnson v. Ry. Exp. Agency, Inc., 421 U.S. 454, 461 (1975).
[102] Theodore Eisenburg, *The Importance of Section 1981*, 13 CORNELL L. REV. 596, 602 (1988).

past to cases that were antagonistic to the Nation's commitment to racial equality.[103]

The Court's response to Brenda Patterson's claim of racial discrimination during the course of her employment with McClain Credit Union undoubtedly damaged working relations between African American's and their white employers.[104] The Court missed an opportunity to clearly define the coverage of § 1981 and continue the traction that African American's were slowly gaining in the Courts and instead, as Karst suggests the "majority's textual commitment to the 'eradication of racial discrimination' relayed mixed messages."[105] Arguably, it is the workplace which provides the opportunity to bridge racial divides, establish a more unified society, and also to define a person's status in that society.[106] This is why racial harassment in the workplace completely undermines the integration and unification of the races and is contrary to the spirit of integration of the American society.[107] It is because of this that the story of Brenda Patterson is all the more devastating a loss.[108]

The effects of *Patterson* were felt for months and years after the decision was rendered. It took only a few weeks after *Patterson* was decided for thirteen racial harassment cases in federal district courts to be dismissed.[109] And one particular federal judge enthusiastically embraced the decision for all it could possibly be worth, holding that § 1981 has nothing to say about racially discriminatory employee evaluations, compensation, or discharges, and that a racially discriminatory refusal to promote would be forbidden, if at all, only when the promotion in question amounted to an entirely new employer/employee relation.[110] Additionally, from the decision of *Patterson*, to the amendment of the statute in 1991, no § 1981 retaliation claims were allowed to proceed in any federal appeals courts.[111] The NAACP Legal Defense and Educational Fund reviewed court actions between the date

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[103] *Patterson*, 491 U.S. at 191 (Brennan, J., concurring in part, dissenting in part).
[104] *See generally* Karst, *supra* note 29.
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] Arthur S. Hayes, *Job-Bias Litigation Wilts Under High Court Ruling*, WALL ST. J., Aug. 22, 1989, at B1.
[110] Greggs v. Hillman Distrib. Co., 719 F.Supp 552 (S.D. Texas 1989).
[111] *See, e.g.*, Walker v. South Central Bell Tel. Co., 904 F.2d 275, 276 (5th Cir. 1990), *superseded by statute*, 553 U.S. 442 (2008); Overby v. Chevron USA, Inc., 884 F2d 470, 473 (9th Cir. 1989) *superseded by statute*, 553 U.S. 442 (2008); Sherman v. Burke Contracting, Inc., 891 F.2d 1527, 1534—1535 (111th Cir. 1990) *superseded by statute*, 553 U.S. 442 (2008); Taggart v. Jefferson Cty. Child Support Enf't Unit, 935 F.2d 947 (8th Cir.1991) *superseded by statute*, 553 U.S. 442 (2008) (which held that racially discriminatory discharge claims under § 1981 are barred.).

of the *Patterson* decision and November first of that same year, and found that Judges had dismissed ninety-six discrimination claims in fifty cases.[112] One such case involved an "industrial nurse whose supervisor had repeatedly made explicit racial and sexual remarks to her, and on two occasions showed her pictures of interracial sexual acts and told her she had been hired to perform them."[113] The woman's claim, made under § 1981, was dismissed by the Seventh Circuit concluding that "her claim did not relate to 'conduct which impairs the right to enforce contract obligations.'"[114] And to add further insult to injury, a 'significant number' of the dismissed cases "could not be brought under Title VII because they did not involve job discrimination."[115]

III. THE *COMCAST* DECISION AND A RETURN TO THE PAST

Like a specter from the past the *Comcast* decision appeared, delivering a harsh causation standard for plaintiffs with claims of racial discrimination and producing bewilderment as to the real coverage of § 1981. Like *Patterson*, this case diminishes the equality of contracting for African Americans.

Comcast deals with the quintessential failure to deal between two media conglomerates. African American media entrepreneur and businessman, Byron Allen, owner of Entertainment Studios Network ("ESN"), which is the operator of seven television networks. Since 2018, ESN had sought to get Comcast Corporation ("Comcast") to include its channels, as Comcast is one of the nation's largest cable television networks.[116] The first time ESN began the conversation, Comcast refused to carry the channels, insisting that ESN would need "support from Comcast's regional offices."[117] Upon obtaining the support from the regional offices, ESN attempted again to gain Comcast's business, but was rejected with Comcast now informing ESN to gain support from Comcast's division offices.[118] After gaining the support of the division offices, ESN was told that their support was insignificant, because "they

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[112] Ruth Marcus, *NAACP: Key Rights Ruling Hurts Bias Claims,* DAILY PRESS (Nov. 20, 1989), at A1, available at https://www.dailypress.com/news/dp-xpm-19891120-1989-11-20-8911200089-story.html.
[113] *Id.* at A4.
[114] *Id.*
[115] *Id.*
[116] Comcast Corp. v. Nat'l Ass'n of African American -Owned Media, 140 S. Ct. 1009, 1013 (2020).
[117] Brief for Respondents at 3, Comcast Corp. v. Nat'l Ass'n of African American -Owned Media, 140 S. Ct. 1009 (2020) (No. 18-1171) [hereinafter Brief for Respondents].
[118] *Id.* at 3-4.

deferred to the decision of the corporate office."[119] The third offer of ESN to accept its channels was rejected by Comcast, citing "lack of demand for ESN's programming, bandwidth constraints, and its preference for news and sports programming that ESN didn't offer."[120] Throughout the time that ESN was made to jump through these administrative hoops, Comcast launched more than eighty white-owned networks, many of them lesser known and less successful channels than those owned by ESN.[121] In its suit against Comcast, ESN alleged racial animus and the failure to be given the same right to contract as white-owned media companies in violation of § 1981.[122] Furthermore, in its complaint, ESN alleged that a Comcast executive had said that "[Comcast] was not trying to create any more Bob Johnsons."[123] In the suit, ESN did not dispute that "Comcast had offered legitimate business reasons for refusing to carry its channels" during negotiations, however ESN argued these reasons were pretextual.[124]

After lengthy motions practice, the District court, after twice allowing ESN a chance to remedy its complaint by identifying additional facts to support its case, ultimately dismissed the complaint holding that "ESN's efforts fell short of plausibly showing that, but for racial animus, Comcast would have contracted with ESN."[125] The Ninth Circuit reversed, holding that the lower court had "used the wrong causation standard when assessing ESN's pleadings."[126] According to the Ninth Circuit, a plaintiff did not have to show that racial animus was a but for cause of the defendant's conduct, only that a plaintiff must "plead facts plausibly showing that race played 'some role' in the defendant's decision making process."[127] Because other circuits had a different understanding of the causation standard under § 1981, the Supreme Court agreed to hear the case.[128]

Justice Gorsuch in writing the opinion, delved right away into the default rules of tort law to find that § 1981 followed a default rule of but-for causation.[129] Gorsuch stated: "[T]he guarantee that each person is entitled to the 'same right…as is enjoyed by white citizens' directs our attention to the

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[119] *Id.* at 4.
[120] *Comcast*, 140 S. Ct. at 1013.
[121] Brief for Respondents, *supra* note 117, at 4.
[122] Complaint at 15, 28, Comcast Corp. v. Nat'l Ass'n of African American-Owned Media, 140 S. Ct. 1009 (2020) (No. 2:15-cv-10239).
[123] *Id.* at 15.
[124] *Comcast*, 140 S. Ct. at 1013.
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.* ("[T]he Seventh Circuit held that 'to be actionable, racial prejudice must be a but-for cause…of the refusal to transact.'" (quoting Bachman v. St. Monica's Congregation, 902 F.2d 1259, 1262–1263 (1990))).
[129] *Id.* at 1014.

counterfactual—what would have happened if the plaintiff had been white?"[130] Gorsuch answered his own question by efficiently concluding that the focus of the analysis fits naturally with the ordinary rule that a plaintiff must prove but-for causation.[131] Notably, Gorsuch admitted that the text of the statute did not explicitly address causation nor did it contain any language indicating but-for causation—but he insisted it was suggestive by the language.

Gorsuch pointed to § 2 of the Civil Rights Act of 1866, the criminal sanctions section that "permitted the prosecution of anyone who 'depriv[es]' a person of 'any right' protected by the substantive provisions of the Civil Rights Act of 1866 'on account of' that person's prior 'condition of slavery' or 'by reason of' that person's 'color or race'".[132] Essentially, the use of "because of" or "on account of" were indicative of but-for causation standards, based on Gorsuch's understanding of tort law and the Court's precedent. And for further justification on the similarity in language, Gorsuch pointed to § 1982, the sister statute to § 1981, that recognized claims arising under § 1982 where a citizen is not allowed "to acquire property…*because of* color".[133] Notwithstanding the similarity in the language of the two statutes, the Court has, as Justice Gorsuch pointed out, often treated §§ 1982 and 1981 very similarly. Yet, in the precedent cited by Gorsuch in *Comcast*, to prove that § 1981 ought to have the same causation standard, the Court is not looking at any "because of" language but is focused instead on the scope and breadth of both statutes.[134]

Just as harmful to minorities as the causation standard the *Comcast* Court determined appropriate for § 1981 claims, was the question grappled with by the parties in briefs, but left unanswered by the Court.[135] ESN suggested that a motivating factor test fit more comfortably with the statutory language because of the word "making".[136] This word, ESN suggested, was Congresses way of clarifying that "§ 1981(a) guarantees not only the right to equivalent contractual outcomes (a contract with the same final terms), but also the right to an equivalent contracting process (no extra hurdles on the road to securing the contract)."[137] In Comcast's opinion, the statute

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[130] *Id.* at 1015.
[131] *Id.*
[132] *Id.*
[133] *Id.* at 1016.
[134] *See, e.g.*, CBOCS West, Inc. v. Humphries, 553 U.S. 442, 452 (2008) (the Court held that § 1981 was similar to § 1982 in that it should cover retaliation claims).
[135] *Id.* at 1018 (the Court determined that it did not need to take any position on whether § 1981 as amended protects only outcomes or protects processes too, a question not passed on below or raised in the petition for certiorari).
[136] *Id.*
[137] *Id.*

"unambiguously protected only outcomes—the right to contract, sue, be a party, and give evidence."[138] Comcast argued that no reasonable reader could assume that because Congress changed the word from 'make' to 'making' in 1991 that the statute carries such a "radically different meaning and so extends § 1981 liability."[139] Under its theory, Comcast urged that the but-for causation standard made more sense, because the statute only focused on the actual outcomes of the contract.[140]

Though Comcast's argument teetered on the *Patterson* line of interpretation, the Court did nothing to reign it in. Glibly sidestepping the precarious explanation beneath this argument, the Court said only that the parties debate missed the point and subsequently failed to take a side.[141] Because the Court decided it did not need to weigh in on whether § 1981 applies to contractual outcomes *and* the right to an equivalent contracting process, the Court introduces the concept that a party could discriminate early on in the contracting formation process, as long as the final outcome of the contract held no trace of racial discrimination.[142] This is where the *Comcast* decision echo's analogously to *Patterson*, and dismisses what Justice Brennan noted as "Congress' vision of a society in which contractual opportunities are equal."[143]

Ultimately those that will pay the most for the Court's decision are minorities in employment contracts, low wage independent contractors, and franchisee's.[144] § 1981 has proven to be a safe harbor for African American low-wage independent contractors since Title VII coverage for "employees" notably does not include independent contractors.[145] According to the 2018 study from the Market Place Edison Research, one in five workers are independent or contract workers.[146] It has been estimated that within a decade, contractors and freelancers could make up half the American

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[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] Elie Mystal, *The Supreme Court Just Made it Easier to Get Away With Discrimination*, THE NATION (Mar. 26, 2020) https://www.thenation.com/article/society/scotus-comcast-discrimination/.
[143] Patterson v. McLean Credit Union*,* 491 U.S. 164, 189 (1989) (Brennan, J., concurring in part).
[144] *See* Carla Wong McMillan, Kelly J. Baker, *Discrimination Claims and Diversity Initiatives: What's A Franchisor to Do?,* 28 FRANCHISE L. J. 71 (2008).
[145] Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e et seq. (1964).
[146] Yuki Noguchi, *Freelanced: The Rise of the Contract Workforce*, NPR (Jan. 22, 2018), https://www.npr.org/2018/01/22/578825135/rise-of-the-contract-workers-work-is-different-now (arguing that employers needing "specialized expertise on demand, just not for the long term"—the job market has many more options for short term work then it did before).

workforce.[147] As society advances in technology and the traditional workplace no longer looks the same, the legal parameters in place needs to adapt to the changing times. The work force world that was the reality in *Patterson* is different now, it has morphed into a "gig economy."[148] The term "gig" used to be associated with traveling musicians or artists who worked for the short term, without any consistency or stability in life. Instead, "gig economy" refers to a growing segment of the labor market where employment is outside a traditional full-time or part-time model, usually in a freelance society.[149] Roughly 24% percent of Americans, eighteen years or older, are earning income by working in the gig economy, and of that percentage, 58% are concentrated among Hispanics and African Americans.[150] These are gigs with big companies, like Uber, Lyft, Ebay, Mary Kay, TaskRabbit, Airbnb, and others.[151] Workers in this sector will have little to no recourse under federal law for any racial discrimination that may arise during the course of their working relationship.

Franchise agreements are generally characterized as long-term "relational contracts", essentially because they require mutual performance over an extended period of time.[152] As franchise agreements tend to be incomplete in defining a parties' duties, discretion as to performance over the duration of the agreement tends to lie with the owner of the franchise.[153] Because of the overall control the owner of the franchise may have to dictate the terms of an agreement, it would be difficult for an employee of a franchise to show that racial animus was the sole cause for the owner's refusal to contract initially or in the terms and conditions of the contractual relationship. However, most discrimination claims in the franchise context involve termination or a non-renewal of the franchise contract, rejection of an applicant for a franchise, and disproval of a relocation request.[154] Similarly, to an independent contractor relationship, the franchisor-franchisee relationship is not governed by Title VII. Instead, this employment

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[147] *Id.*
[148] Marketplace – Edison Research Poll, *The Gig Economy*, EDISON RESEARCH (2018), https://www.edisonresearch.com/wp-content/uploads/2019/01/Gig-Economy-2018-Marketplace-Edison-Research-Poll-FINAL.pdf.
[149] *Id.*
[150] *Id.*
[151] George Howard, *Gigs Are No Longer Just for Musicians: How the Gig Economy is Creating a Society of Starving Artists,* FORBES (Mar. 26, 2019), https://www.forbes.com/sites/georgehoward/2018/03/26/gigs-are-no-longer-just-for-musicians-how-the-gig-economy-is-creating-a-society-of-starving-artists/?sh=10ed477d4ad0#25e199cf4ad0.
[152] Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 STAN L. REV. 927 (1990).
[153] McMillan, *supra* note 144.
[154] *Id.*

relationship depends upon § 1981, or other similar state statutes, for coverage.[155] Before the decision in *Comcast*, a court deciding a franchisee's claim of discrimination would use the burden-shifting framework from *McDonnell Douglass Corp v. Green*.[156] Now that the causation standard requires a but-for analysis, the franchisee must establish a direct causal link to the defendant's discriminatory treatment and can no longer rely on facts that their race may have been a determining factor in the refusal to contract.[157]

IV. A PROPOSAL FOR A DYNAMIC STATUTORY INTERPRETATION TO § 1981

Now that the *Comcast* decision has been rendered, the prophetic words of Justice Blackmun, expressed against the Court in *Wards Cove*, ring true once more: "[o]ne wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against non-whites—is a problem in our society, or even remembers that it ever was."[158] *Wards Cove* of course, was the beginning of the string of Supreme Court cases to undermine civil rights legislation, the last case *Patterson v. McClean Credit Union*, central to this Comment's argument, completed that dismantling.[159] And with this latest decision in *Comcast*, it would seem that the Supreme Court has come full circle in destabilizing central civil rights legislation, specifically § 1981.

Patterson read the statute far too narrowly, essentially destroying its application altogether.[160] Since the statute was amended in 1991, Congress afforded the Court a fresh opportunity to interpret the reach of this statute in a way that would be consistent with the framer's intent, essentially: a statute that would afford all person's an equal opportunity to contract during every stage of the contract's life span. Congressional review in 1991 remained short-cited however, as it did not codify the "motivating factor test" of causation that was applied to Title VII which may have saved the day for

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[155] *Id.*

[156] 411 U.S. 792, 802 (1973) (where a plaintiff must carry the initial burden of the presenting the prima facie case of discrimination by showing she was subject to less favorable treatment based on her race, that she met the requirements for an available contract, the application was ultimately rejected, and that the contract was inevitably awarded to an individual who was of a different race than the plaintiff. Once the plaintiff established the prima facie case, the burden shifted to the defendant to point to legitimate nondiscriminatory reasons for the plaintiff's rejection, and if the defendant does so, the plaintiff must show that race was a determinative factor in the decision or that the defendant's explanation was merely pre-textual.).

[157] McMillan, *supra* note 144.

[158] Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 662 (1989) (Blackmun, J., dissenting).

[159] *See* Wassweiler, *supra* note 12.

[160] *See* discussion *supra* Part II.

countless petitioners, like ESN.[161] Unfortunately, it was too little too late and now the *Comcast* Court has limited the statutes application once more.[162]

The Congressional members of the Black Caucus, as amici curiae in their brief for ESN, appealed to Justice Gorsuch's known textualist proclivities in arguing that a textual reading of § 1981 reveals no language indicating a but-for causation requirement, but rather the "plain language of § 1981 encompasses every racially motivated refusal to contract, regardless of whether other motives prompt that refusal as well."[163] This argument is right on the money and if taken a step further to consider that the contract provision in the statute fits within an entire list of other rights enumerated within the Act, a but-for causation standard hardly makes sense alongside the broad range of equality that the statute's language implicitly suggests.[164]

Gorsuch was not persuaded as he felt the statute "follows the usual rules" of textbook but-for causation based upon what an ordinary English speaker would *not* say, when stating that a plaintiff did not enjoy the "same right" to make contracts "as is enjoyed by white citizens," if race was not a but-for cause affecting the plaintiff's ability to contract.[165] Yet, the members of the Black Caucus as amici were not wrong. A plain textual reading of the statute does not reveal any language indicating a but-for causation standard, but this assertion begs for more. Gorsuch's approach to § 1981 simply limits the reach of the statute. Incorporating a dynamic approach to the statute, offers a superior interpretation and one that ultimately brings it closer to its intended purpose, namely an equal opportunity for all races to enter into, participate, and conclude a contract without discrimination. The dynamic approach to statutory interpretation also takes into consideration societal changes and in this context addresses the implicit motivation test to § 1981's language.[166] However, a dynamic interpretation of a statute, specifically § 1981, does not circumvent the original text of the legislature, it is not an interpretation that requires the Judiciary to become rogue law-makers, but rather the "textual perspective [becomes] critical in many cases."[167] The goal should be to combine the text of § 1981 with a dynamic reading which would necessarily place the reader at the door of a motivating factor test of causation

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[161] *Id.*
[162] *See* discussion *supra* Part III.
[163] Brief of Members of Congress at 14, Comcast Corp. v. Nat'l Ass'n of African American-Owned Media, 140 S. Ct. 1009, 1016 (2020) (No. 18-1171), 2019 WL 4858285, at 14.
[164] *See* discussion *supra* Part I.
[165] Comcast Corp. v. Nat'l Ass'n of African American-Owned Media, 140 S. Ct. 1009, 1016 (2020) (emphasis added).
[166] *See supra* text accompanying notes 64-70.
[167] William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1483 (1987) (arguing ultimately that a dynamic approach views both textual perspectives and evolutive perspectives as most important in interpreting statutes).

rather than the but-for standard. Because the *Comcast* decision left open the question as to whether § 1981 really covers contract outcomes as well as contract processes'—a case addressing this very issue will inevitably come to the door of the Supreme Court, and when it does—hopefully the Court is persuaded to answer this question in the affirmative, implementing the dynamic approach to statutory interpretation.

The dynamic approach certainly has its place in the Court's history. Justice Stevens, in his concurrence in *Johnson v. Transportation Agency*, applied a dynamic approach to Title VII and urged the majority that the Court should not be constrained any longer by legislative history in interpreting Title VII.[168] Stevens stated that "[t]he logic of antidiscrimination legislation requires that judicial constructions of Title VII leave 'breathing room 'for employer initiatives to benefit members of minority groups."[169] *Johnson* dealt with an affirmative action plan for the county transportation agency whose purpose was to increase employment in jobs where women were significantly under represented.[170] The plan allowed the agency to consider gender in reviewing application's qualifications for promotion.[171] Justice Brennan, writing for the majority, relied on the interpretation given to Title VII in *United Steelworks of America v. Weber*, and upheld the plan. *Weber* had only analyzed the legislative history of Title VII as it related to African Americans—yet, like Steven's approach in *Johnson*, it is suggestive of a dynamic approach to interpreting Title VII. The dynamic approach is best used when "societal conditions change in ways not anticipated by Congress and, especially, when the legal and constitutional context of the statute decisively shifts as well, this current perspective should, and will, affect the statute's interpretation, notwithstanding contrary inferences from the historical evidence."[172] In this way, societal conditions and perspectives should be considerations when studying § 1981's reach.[173]

The literal reading given to § 1981 in *Comcast*, and the deference to rules of tort law over national policy considerations in combatting racial inequality in this Country, are at odds not only with other expansive interpretations given to other civil rights legislation, like Title VII, but the purpose and origin of the statute. As Wassweiler puts it, "[d]eference to current societal, political and legal views regarding § 1981 becomes more

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[168] Johnson v. Transportation Agency, 480 U.S. 616, 645-46 (1987) (Stevens, J., concurring).
[169] *Id.* at 645.
[170] *Id.* at 630-31 (majority opinion).
[171] *Id.* at 624-25.
[172] Eskridge, *supra* note 167, at 1494.
[173] *See* Runyon v. McCrary, 427 U.S. 160, 191 (1976) (Stevens, J., concurring) ("The policy of the Nation as formulated by the Congress in recent years has moved constantly in the direction of eliminating segregation in all sectors of society.").

convincing after considering the alternatives."[174] Certainly, the concerns of Senator Trumbull in protecting newly freed slaves from continuing in harsh and coercive employment agreements, were articulated in the legislative history surrounding the Civil Rights Act of 1866, namely that the Act was meant to protect African Americans from the "tyrannical acts, the tyrannical restrictions, and the tyrannical laws which belong to the condition of slavery."[175] Trumbull's concerns were not short cited at all, his concerns were deeply rooted in the reality that these conditions were "nothing more than nineteenth-century racial harassment."[176]

V. CONCLUSION

The purpose of this Comment was to offer an understanding for the importance of a § 1981 pathway to petitioners with valid claims of racial discrimination juxtaposed alongside the history of the statute and its intended purpose. The Supreme Court has ultimately failed to adequately protect these petitioners, specifically minorities, with their claims of discrimination through the decisions of *Patterson* v. *McClean Credit Union* and *Comcast* Corp*., v. National association of African American Owned Media and Entertainment Studios Network, Inc*. Understanding the Court's failure is important, as it is only through a recognition of such failure that we can hope to inspire change. My proposal for a dynamic approach to interpretations of § 1981 is not a new idea,[177] but it is offered here in light of Justice Ginsburg's warning to the Majority in *Comcast* that the Court's failure to address the full scope of coverage afforded under § 1981 invites the Court to repeat the darker side of history and send the statute back to the narrow interpretation prescribed by the Court in *Patterson*.[178] Because the issue of § 1981's coverage is still not solidified as of *Comcast's* rendering, this Comment proposes that plaintiffs with meritorious claims of racial discrimination will not be satisfied unless § 1981 is interpreted dynamically—that is, alongside the framers intent for the statute, the fundamental rights enumerated through its text, and society's goal for the eradication of racism in all areas where a contract is signed.

Tessa Martin

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[174] Wassweiler, *supra* note 12, at 691.
[175] CONG. Globe, 39th Cong., 1st Sess. 1118, 1152 (1866).
[176] *See The Supreme Court, 1988 Term—Leading Cases*, 103 HARV. L. REV. 330, 338 (1989).
[177] *See generally* Eskridge, *supra* note 167.
[178] *See* discussion *supra* Part II.