Civil Rights Act of 1866 — Antidiscrimination Law — Pleading Standards — Comcast Corp. v. National Ass'n of African American–Owned Media

In 1989, in *Price Waterhouse v. Hopkins*,[1] a plurality of the Supreme Court held that in a Title VII[2] sex discrimination lawsuit, a plaintiff need show only that their gender was a "motivating factor" in an adverse employment decision, at which point the burden shifted onto the defendant to show that the same decision would have been made regardless of the plaintiff's protected characteristic.[3] Two years later, in the Civil Rights Act of 1991,[4] Congress modified the motivating factor test by providing that protected characteristics may play no role in adverse employment decisions, eliminating the use of but-for causation as a complete defense to liability under the statute.[5] In the years since, the Court has declined to extend the motivating factor test beyond Title VII discrimination claims to claims under the Age Discrimination in Employment Act[6] (ADEA)[7] or Title VII retaliation claims.[8] Recently, in *Comcast Corp. v. National Ass'n of African American–Owned Media*,[9] the Supreme Court similarly declined to extend the motivating factor test to claims brought under the Civil Rights Act of 1866,[10] instead requiring that plaintiffs show that but for their race, the defendant would have entered into a contract with them.[11] This case is emblematic of a Supreme Court trend of disregarding the purpose of antidiscrimination statutes by holding plaintiffs to a more demanding legal standard, signaling trouble for plaintiffs seeking relief under other antidiscrimination statutes, including the Americans with Disabilities Act[12] (ADA).

Entertainment Studios Network (ESN) sought to enter into a contract with Comcast Corporation (Comcast) in order for Comcast to carry ESN's channels.[13] Comcast refused, "citing lack of demand for ESN's

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[1] 490 U.S. 228 (1989).

[2] Pub. L. No. 88-352, tit. VII, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2012)).

[3] *Price Waterhouse*, 490 U.S. at 249 (plurality opinion) (quoting Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)); *see id.* at 249, 258.

[4] Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of the U.S. Code).

[5] *See id.* § 107, 105 Stat. at 1075–76 (codified at 42 U.S.C. §§ 2000e-2, 2000e-5(g)); Timothy D. Loudon, *The Civil Rights Act of 1991: What Does It Mean and What Is Its Likely Impact?*, 71 NEB. L. REV. 304, 315 (1992).

[6] Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–634 (2018)).

[7] Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 180 (2009).

[8] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 362 (2013).

[9] 140 S. Ct. 1009 (2020).

[10] Ch. 31, 14 Stat. 27.

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

[12] 42 U.S.C §§ 12101–12213 (2012).

[13] *Comcast*, 140 S. Ct. at 1013.

programming, bandwidth constraints, and its preference for . . . programming that ESN [did not] offer."[14] ESN sued under 42 U.S.C. § 1981(a), a provision that originated in the Civil Rights Act of 1866 and that "guarantees . . . '[a]ll persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens.'"[15] ESN "alleged that Comcast systematically disfavored '100% African American-owned media companies'" and that Comcast declined to enter into a contract with ESN for this reason.[16] The district court, after permitting ESN to revise its complaint twice, concluded that ESN failed to state a claim because it had not plausibly shown that "but for racial animus, Comcast would have contracted with ESN."[17] The district court therefore dismissed the complaint.[18]

The Ninth Circuit reversed on the grounds that the district court had used the wrong causation standard to assess the pleadings.[19] The Ninth Circuit held instead that ESN needed only to plead facts plausibly showing that race played "some role" in Comcast's decision not to contract with them, and that under this more generous causation standard, ESN had pleaded a valid claim.[20]

Comcast appealed to the Supreme Court, which vacated the Ninth Circuit's judgment in an opinion by Justice Gorsuch,[21] holding that in accordance with common law torts doctrine, plaintiffs seeking relief under § 1981(a) must first plead and subsequently prove that race is a but-for cause of their injury, and that this burden remains constant throughout the life of the lawsuit.[22]

The Court began its analysis with the text of the Civil Rights Act of 1866. It reasoned that though the Act does not specifically mention causation, its text, which "guarantee[s] that each person is entitled to the 'same right . . . as is enjoyed by white citizens,'" brings to mind a counterfactual — what might have occurred had the plaintiff been white?[23] Justice Gorsuch wrote that this counterfactual "fits naturally with the ordinary rule that a plaintiff must prove but-for causation."[24] He stated that this construction indicates essentially that one must ask if the defendant would have treated the plaintiff the same way if the plaintiff

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[14] *Id.*

[15] *Id.* (alteration and second, third, and fourth omissions in original) (quoting 42 U.S.C. § 1981(a)).

[16] *Id.*

[17] *Id.*; *see* Nat'l Ass'n of Afr.-Am. Owned Media v. Comcast Corp., No. CV 15-1239, 2016 WL 11652073, at *1 (C.D. Cal. Oct. 5, 2016).

[18] *Comcast*, 2016 WL 11652073, at *1; *see Comcast*, 140 S. Ct. at 1013.

[19] *Comcast*, 140 S. Ct. at 1013; *see* Nat'l Ass'n of Afr. Am.–Owned Media v. Comcast Corp., 743 F. App'x 106, 107 (9th Cir. 2018).

[20] *Comcast*, 743 F. App'x at 107.

[21] Justice Gorsuch was joined by Chief Justice Roberts and Justices Thomas, Breyer, Alito, Sotomayor, Kagan, and Kavanaugh. Justice Ginsburg joined in all but a footnote.

[22] *See Comcast*, 140 S. Ct. at 1014, 1019.

[23] *Id.* at 1015 (omission in original) (quoting 42 U.S.C. § 1981(a) (2012)).

[24] *Id.*

were white.[25] If the answer is yes, "the plaintiff received the 'same' legally protected right as a white person."[26] If the answer is no, and but for the plaintiff's race the defendant would have treated them differently, then they "ha[ve] not received the same right as a white person."[27] Therefore, the Court determined that but-for causation fit naturally with the text of the statute.

The Court then moved on to discuss the structure and history of the Civil Rights Act of 1866. The Court found it important that the Civil Rights Act itself did not create a private right of action for plaintiffs to enforce the Act but that the right of action was judicially implied and granted more than one hundred years after the passage of the Act.[28] Justice Gorsuch noted that the right of action appeared during a period in which "the Court often 'assumed it to be a proper judicial function to provide such remedies as are necessary to make effective a statute's purpose,'"[29] though "[w]ith the passage of time, of course, [the Court] ha[s] come to appreciate that" Congress, rather than the judiciary, must create private rights of action to enforce federal law.[30] Justice Gorsuch then observed that even in the era when judges implied causes of action, they usually "insisted on legal elements at least as demanding as those Congress specified for analogous causes of action" expressly provided for by statute.[31]

The Court looked at this rule in the context of § 1981 and a neighboring provision that provided criminal sanctions for violations of the Act by permitting prosecution of a person who deprived an individual of a right protected under the Act "by reason of" that individual's "color or race."[32] Justice Gorsuch noted that the Court had "often held" that "by reason of" indicated a but-for causation requirement.[33] Because Congress had specified a particular causation standard for a cause of action it had written into the statute, it would make little sense to use a more lenient causation standard in the context of a judicially implied cause of action.[34] Justice Gorsuch observed that the Civil Rights Act of 1866 explicitly incorporated the common law; he then posited that the common law in 1866 often, though not always, required but-for causation in tort suits.[35]

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[25] *See id.*
[26] *Id.* (quoting 42 U.S.C. § 1981(a)).
[27] *Id.*
[28] *See id.* at 1015 (citing Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 459 (1975)).
[29] *Id.* (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1855 (2017) (internal quotation marks omitted)).
[30] *Id.* (citing Alexander v. Sandoval, 532 U.S. 275, 286–87 (2001)).
[31] *Id.*
[32] *Id.* (quoting Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27, 27).
[33] *Id.* (citing Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176–77 (2009)).
[34] *Id.* at 1016.
[35] *Id.*

The Court then noted that its precedents accorded with the decision to require a but-for causation standard for claims brought under § 1981. Justice Gorsuch cited several examples of how the Court had previously spoken of § 1981 using the language of but-for causation, including describing § 1981 as providing a "remedy against discrimination . . . *on the basis of* race"[36] and as "designed to eradicate blatant deprivations of civil rights," such as denying African Americans "the same opportunity to enter into contracts as [is extended] to white offerees."[37] The Court also relied on its past interpretations of a related provision, 42 U.S.C. § 1982, which guarantees all citizens the same property rights as white citizens.[38] The Court had previously held that under § 1982, a plaintiff must show that they were denied the opportunity to acquire property "because of color," providing another example of language that the Court considered indicative of but-for causation.[39]

The Court then discussed why it ought not to adopt ESN's proposed causation standard — the "motivating factor" test that the Court set forth in *Price Waterhouse v. Hopkins* for discrimination claims brought under Title VII of the Civil Rights Act of 1964. The Court dismissed ESN's suggestion on the grounds that Title VII and § 1981 have "distinct histories."[40] Specifically, Title VII's motivating factor test originated with the Court's decision in *Price Waterhouse*, which introduced a burden-shifting framework that required plaintiffs to show only "that discrimination was a motivating factor in the defendant's decision" before the burden shifted to the defendant to show, as an affirmative defense, that discrimination was not the but-for cause of its decision.[41] Two years later, Congress replaced that framework with "its own version of the motivating factor test" in the Civil Rights Act of 1991.[42] In contrast, "§ 1981 dates back to 1866 and has never said a word about motivating factors."[43] Thus, the Court reasoned that the histories of § 1981 and Title VII were different and that there was no indication that Congress intended to import the motivating factor test into § 1981.[44] Further, Congress amended both § 1981 and Title VII with the Civil Rights Act of 1991, in which it formally codified its own version of the

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[36] *Id.* (omission in original) (quoting Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 460 (1975) (emphasis added)).

[37] *Id.* (quoting Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 388 (1982)).

[38] *Id.* (citing Buchanan v. Warley, 245 U.S. 60, 78–79 (1917)).

[39] *Id.* at 1016 (emphasis omitted) (quoting *Buchanan*, 245 U.S. at 79); *see id.* at 1016–17.

[40] *Id.* at 1017.

[41] *Id.* (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 246, 249–50 (1989) (plurality opinion)).

[42] *Id.* (citing Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075–76 (codified at 42 U.S.C. §§ 2000e-2, 2000e-5(g) (2012))); *see also* Loudon, *supra* note 5, at 315.

[43] *Comcast*, 140 S. Ct. at 1017.

[44] *Id.*

motivating factor test into Title VII and did not incorporate this motivating factor test into § 1981.[45] The Court dismissed ESN's proposal of incorporating the motivating factor test solely at the pleading phase as "judicial adventurism" that would "look a good deal more like amending a law than interpreting one."[46]

The Court also rejected ESN's argument that the Civil Rights Act of 1991, which included "making . . . of contracts" within § 1981's coverage,[47] made § 1981 a process-oriented right that therefore requires a motivating-factor causation standard rather than a but-for standard.[48] The Court reasoned that a process-oriented right does not necessarily require a motivating factor standard and that either a process-oriented right (which would protect the entire contract-formation process, including contract negotiation) or an outcome-oriented right (which would protect only the existence and terms of a final contract) could pair equally well with a but-for causation standard.[49] The Court therefore reserved the question whether the right granted by § 1981 is process- or outcome-oriented, holding that a but-for causation standard was appropriate in either case.[50]

Finally, the Court rejected ESN's argument that, at the motion to dismiss stage, courts ought to apply the burden-shifting framework first laid out in *McDonnell Douglas Corp. v. Green*,[51] which allows a plaintiff to show race discrimination based on indirect proof and then shifts the burden to the defendant to show that there is a race-neutral explanation for its actions.[52] The Court reasoned that *McDonnell Douglas* burden-shifting does not address causation standards but instead supplies a tool for evaluating claims when plaintiffs provide indirect proof of discrimination, "typically at summary judgment."[53] Therefore, this burden-shifting framework was inapposite and could "provide no basis for allowing a complaint to survive a motion to dismiss when it fail[ed] to allege essential elements of a plaintiff's claim."[54] The Court vacated the Ninth Circuit's judgment and remanded for further proceedings.[55]

Justice Ginsburg concurred in part and concurred in the judgment.[56] She acknowledged that precedent required the determination that a but-for causation standard applied, though she referred to her previous

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45 *Id.* at 1017–18.
46 *Id.* at 1017.
47 42 U.S.C. § 1981(b) (2012).
48 *Comcast*, 140 S. Ct. at 1018.
49 *Id.*
50 *See id.* at 1018 & n.*.
51 411 U.S. 792 (1973).
52 *Comcast*, 140 S. Ct. at 1019.
53 *Id.*
54 *Id.*
55 *Id.*
56 *Id.* at 1019 (Ginsburg, J., concurring in part and concurring in the judgment).

dissent in *University of Texas Southwestern Medical Center v. Nassar*,[57] in which she "explained that a strict but-for causation standard is ill suited to discrimination cases and inconsistent with tort principles."[58] She wrote separately to emphasize her disagreement with Comcast's view that the right granted under § 1981 is exclusively outcome-oriented and prevents discrimination only in the final contract-formation decision.[59] Justice Ginsburg opined that "if race . . . account[ed] for Comcast's conduct, Comcast should not escape liability for injuries inflicted during the contract-formation process," such as requiring ESN to perform tasks that cost the company hundreds of thousands of dollars.[60]

Comcast illustrates a trend of the Supreme Court disregarding the purpose of antidiscrimination statutes and weakening their protections with demanding legal standards — a trend that signals trouble for the application of other antidiscrimination statutes.

In the antidiscrimination law context, the Court has twice before required plaintiffs to show that their protected trait was the but-for cause of the discrimination against them in order to prevail on their claims. In 2009, in *Gross v. FBL Financial Services, Inc.*,[61] the Supreme Court held by a 5–4 majority that mixed-motives jury instructions are never proper in ADEA claims.[62] Justice Thomas wrote the opinion for the majority, in which he reasoned that the best reading of the text "because of" in the ADEA was to require that plaintiffs prove that their age was the but-for cause of the employer's discriminatory act.[63] A few years later, in *Nassar*, another 5–4 decision, the Court adopted the same strict but-for causation standard for Title VII retaliation claims, over a dissent from Justice Ginsburg.[64] Scholars had predicted this development,[65] despite arguing that the motivating factor standard applicable in other Title VII cases ought to extend to the retaliation context.[66] These cases established precedent upon which the Court could rely in later decisions heightening the causation requirements of antidiscrimination statutes.

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[57] 570 U.S. 338 (2013).

[58] *Comcast*, 140 S. Ct. at 1019 n.* (Ginsburg, J., concurring in part and concurring in the judgment) (citing *Nassar*, 570 U.S. at 383–85 (Ginsburg, J., dissenting)); *see id.* at 1019 & n.*.

[59] *See id.* at 1020.

[60] *Id.* at 1021.

[61] 557 U.S. 167 (2009).

[62] *Id.* at 170.

[63] *Id.* at 176 (quoting 29 U.S.C. § 623(a)(1) (2018)).

[64] 570 U.S. 338, 352 (2013).

[65] *See, e.g.*, James Concannon, *Reprisal Revisited:* Gross v. FBL Financial Services, Inc. *and the End of Mixed-Motive Title VII Retaliation*, 17 TEX. J. ON C.L. & C.R. 43, 90–92 (2011); Martin J. Katz, Gross *Disunity*, 114 PENN ST. L. REV. 857, 884 (2010).

[66] *See, e.g.*, Andrew Kenny, Comment, *The Meaning of "Because" in Employment Discrimination Law: Causation in Title VII Retaliation Cases after* Gross, 78 U. CHI. L. REV. 1031, 1055–61 (2011).

However, by adopting these narrow interpretations of the antidiscrimination statutes, the Court subverted the statutes' purposes and legislative histories. In the wake of both *Gross* and *Nassar*, scholars have contended that the decisions were unsound because they were inconsistent with the legislative history and purpose of each law.[67] Critically, the purpose of the ADEA was to "promote employment of older persons based on their ability rather than age[,] to prohibit arbitrary age discrimination in employment[, and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."[68] The ADEA was passed in 1967 as part of a group of statutes, including the Civil Rights Act of 1964, intended to combat discrimination.[69] The *Gross* Court disregarded that the ADEA copied language directly from Title VII, language that Congress later, in the Civil Rights Act of 1991, specified requires a motivating factor test.[70] In a similar vein, the purpose of the retaliation provisions of Title VII was to protect individuals who filed Title VII claims from adverse employment action for holding their employers accountable for discrimination in the workplace.[71] The legislative history of Title VII shows that "Congress expressed deep concerns that the Supreme Court of the United States was inappropriately cutting back on the protections that Congress intended to give to employees."[72] Though the value of legislative history as a source of meaning for statutory language has been much debated,[73] it may provide context for the purpose of the statute. In *Gross* and *Nassar*, the incontrovertible purpose of each statute was to eliminate or sharply limit discrimination on the basis of a particular characteristic and retaliation for reporting such discrimination.[74] Nevertheless, the Court

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[67] *See, e.g.*, Michael Foreman, Gross v. FBL Financial Services — *Oh So Gross!*, 40 U. MEM. L. REV. 681, 686–87 (2010); Michael C. Harper, *The Causation Standard in Federal Employment Law:* Gross v. FBL Financial Services, Inc.*, and the Unfulfilled Promise of the Civil Rights Act of 1991*, 58 BUFF. L. REV. 69, 107–08, 111 (2010).

[68] 29 U.S.C. § 621(b) (2018) (congressional statement of findings and purpose).

[69] *See* Jessica Z. Rothenberg & Daniel S. Gardner, *Protecting Older Workers: The Failure of the Age Discrimination in Employment Act of 1967*, J. SOCIO. & SOC. WELFARE, Mar. 2011, at 9, 25.

[70] *See, e.g.*, Gross v. FBL Financial Servs., Inc., 557 U.S. 167, 181–83 (2009) (Stevens, J., dissenting) ("[T]he majority's inattention to prudential Court practices is matched by its utter disregard of our precedent and Congress' intent." *Id.* at 182.); James J. Brudney, *Faithful Agency Versus Ordinary Meaning Advocacy*, 57 ST. LOUIS U. L.J. 975, 979 (2013).

[71] *See* Univ. Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 371–72 (2013) (Ginsburg, J., dissenting).

[72] *See* Catherine Donnelly, Note, *The Power to Retaliate: How* Nassar *Strips Away the Protections of Title VII*, 22 WASH. & LEE J.C.R. & SOC. JUST. 411, 443 (2016) (citing H.R. REP. NO. 102-40, pt. 2, at 2 (1991)); *see also Nassar*, 570 U.S. at 371 (Ginsburg, J., dissenting).

[73] *See, e.g.*, Stephen Breyer, Lecture, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 847 (1992); William T. Mayton, *Law Among the Pleonasms: The Futility and Aconstitutionality of Legislative History in Statutory Interpretation*, 41 EMORY L.J. 113, 114–15 (1992); Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 206–10.

[74] *See, e.g.*, sources cited *supra* notes 67–68.

incorporated common law understandings of causation that curbed plaintiffs' ability to achieve the purposes of the statutes.[75]

In *Comcast*, the Court similarly adopted a narrow causation standard in contravention of the purpose of § 1981 and without regard for the statute's legislative history. The purpose of § 1981 was to guarantee "practical freedom" for Black citizens in the wake of the dissolution of chattel slavery.[76] The legislative history of the statute suggests as much.[77] The narrow causation standard applied in *Comcast* may make accomplishing these goals more difficult by increasing the burden on plaintiffs bringing § 1981 claims.[78] In order to prove but-for causation in the antidiscrimination context, a plaintiff must prove the internal state of mind of a defendant — a difficult ask at any stage of litigation and especially at the pleadings stage.[79] Justice Ginsburg referenced in her concurrence and discussed at greater length in her dissent in *Nassar* that, while well established in the tort context, the but-for causation standard is not well suited to the context of antidiscrimination law.[80] The but-for causation requirement, combined with the heightened

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[75] *See, e.g.*, Donnelly, *supra* note 72, at 434–37 ("[A] strict approach to applying *Nassar* opens up attacks from defendants . . . [at] the motion to dismiss stage." *Id.* at 434–35.); Katz, *supra* note 65, at 884–87; Lawrence D. Rosenthal, *Timing Isn't Everything: Establishing a Title VII Retaliation Prima Facie Case After* University of Texas Southwestern Medical Center v. Nassar, 69 SMU L. REV. 143, 157–59 (2016) ("Even though *Nassar* did *not* address this specific burden (the burden at the prima facie stage), [a lower court] applied what it thought was *Nassar*'s effect on . . . [the requirements of a] prima facie case. That, of course, made it much more difficult for the plaintiff, and for future plaintiffs, to prevail." *Id.* at 159 (footnote omitted).); David Sherwyn & Michael Heise, *The* Gross *Beast of Burden of Proof: Experimental Evidence on How the Burden of Proof Influences Employment Discrimination Case Outcomes*, 42 ARIZ. ST. L.J. 901, 903–04 (2010).

[76] *Comcast*, 140 S. Ct. at 1020 (Ginsburg, J., concurring in part and concurring in the judgment) (quoting Jones v. Alfred H. Mayer Co., 392 U.S. 409, 431 (1968)); *see also* George Rutherglen, *The Improbable History of Section 1981: Clio Still Bemused and Confused*, 2003 SUP. CT. REV. 303, 351 ("Its central purpose has always been to protect the right to participate in public life, regardless of race, and to provide remedies for both public and private violations of that right.").

[77] *See Jones*, 392 U.S. at 435–36.

[78] One might argue that in light of *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), in which the Court recognized the possibility of multiple but-for causes, *see id.* at 1739–40, it is not precisely true that the Court is requiring something meaningfully more difficult to satisfy in requiring that a plaintiff show a but-for cause. However, based on *Bostock*, it is clear that the Court thinks of the motivating factor and but-for causation requirements as distinct. *See id.*

[79] *See, e.g.*, Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 385 (2013) (Ginsburg, J., dissenting) (citing Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 190 (2009) (Breyer, J., dissenting)); Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 159 (2011); A. Benjamin Spencer, *Pleading Conditions of the Mind Under Rule 9(b): Repairing the Damage Wrought by* Iqbal, 41 CARDOZO L. REV. 1015, 1042 (2020).

[80] *See Comcast*, 140 S. Ct. at 1019 n.* (Ginsburg, J., concurring in part and concurring in the judgment); *Nassar*, 570 U.S. at 384–86 (Ginsburg, J., dissenting). Scholars agree with Justice Ginsburg's assessment on this point, opining that this difficult-to-satisfy standard results in defendants who discriminate and violate federal law escaping liability for their wrongdoing. *See* Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 518–19 (2006).

requirements for pleading that the Court established in *Bell Atlantic Corp. v. Twombly*[81] and *Ashcroft v. Iqbal*,[82] may render § 1981 effective only against the most blatant examples of race discrimination.[83] Therefore, the purpose of § 1981 demands more flexibility for plaintiffs than the high barriers *Comcast* established would permit, as the high pleading standards will impede plaintiffs' ability to achieve practical freedom through the creation of nondiscriminatory contracts.

Though the Court dismissed the solutions ESN proposed as inconsistent with the text of the Act, § 1981 was passed before the intense modern focus on textualism.[84] In fact, Congress paid a great deal of attention to the legislative history it was producing as it passed the Civil Rights Act of 1991 and amended the text of § 1981 to revise the Court's interpretation of the law.[85] This behavior suggests that Congress still saw legislative history and purpose as significant for interpretation and for guiding courts' decisionmaking. The Court's decision in *Comcast* refers to legislative intent where convenient, imbuing with meaning Congress's failure to incorporate the motivating factor standard into § 1981,[86] but it pays little mind to the statute's broader, more sweeping goals of equality and nondiscrimination.[87] Though the Court in this case derided the possibility of incorporating the motivating factor test into the statute as "judicial adventurism,"[88] by ignoring the stated purposes of antidiscrimination statutes, the current Court engages in its own form of judicial lawmaking by reading statutory language in a way that defeats those purposes.

These cases constitute a trend that spells trouble for other antidiscrimination statutes, including the ADA. Scholars suggested in the wake of the *Gross* and *Nassar* decisions that the ADA was a likely next target for narrowing with a but-for causation standard, should the issue reach the Court.[89] This vulnerability remains a concern — *Gross*, *Nassar*, and

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[81] 550 U.S. 544 (2007).

[82] 556 U.S. 662 (2009).

[83] *See* Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 624 (2010) (indicating that the number of complaints dismissed on 12(b)(6) motions has increased since *Twombly* and *Iqbal* and suggesting that civil rights plaintiffs may face the most difficulty in surviving 12(b)(6) motions).

[84] *See* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 24 (2006) (arguing that modern textualism and disfavor for reliance on legislative purpose and history appeared only in 1980s and 1990s).

[85] *See* Robert Pear, *With Rights Act Comes Fight to Clarify Congress's Intent*, N.Y. TIMES (Nov. 18, 1991), https://www.nytimes.com/1991/11/18/us/with-rights-act-comes-fight-to-clarify-congresss-intent.html [https://perma.cc/R3AY-EQYL].

[86] *See* 140 S. Ct. at 1017–18.

[87] *See, e.g.*, Rutherglen, *supra* note 76, at 351.

[88] *Comcast*, 140 S. Ct. at 1017.

[89] *See* Bran Noonan, *The Impact of* Gross v. FBL Financial Services, Inc. *and the Meaning of the But-For Requirement*, 43 SUFFOLK U. L. REV. 921, 932 (2010); Lauren Smith, Comment, *Motivating Factor Versus But-For Causation in Claims Arising Under the Americans with Disabilities Act*, 48 U. TOL. L. REV. 643, 644, 660–62 (2017).

Comcast each provide new precedent in favor of narrowly interpreting the ADA. In *Comcast*, Justice Gorsuch reasoned that, because § 1981 grants Black individuals the "same right" to make contracts "as is enjoyed by white citizens," race must be a but-for cause of the failure to make a contract in order for liability to attach.[90] In the case of the ADA, there is a much simpler textual argument. The ADA prohibits discrimination "on the basis of" disability.[91] The Court's interpretation of the language of § 1981, which does not include the "because of" framing that the Court understands to indicate a requirement of but-for causation,[92] shows that the distinction between the ADA's "on the basis of" disability and the ADEA's "because of" age is a thin one and is unlikely to tip the balance in favor of a more lenient causation standard. Given that the Court used such a loose textual hook to establish a but-for causation standard in *Comcast*, it is difficult to imagine the Court interpreting "on the basis of" as having a distinct meaning from "because of." Using the same interpretive tools as in *Comcast*, *Nassar*, and *Gross*, in a future case, the Court seems likely to require that plaintiffs show but-for causation when making ADA claims. The decisions in *Gross*, *Nassar*, and now *Comcast* form a slow drumbeat foreboding the severe limitation of the private cause of action under the ADA.

The Court's recent decisions on pleading standards in antidiscrimination cases have stripped plaintiffs of their opportunity to obtain relief, in contravention of Congress's stated purpose of combating discrimination. This deprivation is important in the § 1981 context because it limits plaintiffs' avenues for relief, though Title VII retains its motivating factor test and therefore affords many potential § 1981 plaintiffs the opportunity for vindication.[93] But it is also important as part of a trend that portends similar limitations on the effectiveness of litigation under other landmark antidiscrimination statutes — especially the ADA.

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[90] *Comcast*, 140 S. Ct. at 1015 (quoting 42 U.S.C. § 1981 (2012)).

[91] 42 U.S.C. 12112(a). In defining discrimination, the statute does use the term "because of" disability. *Id.* § 12112(b)(1), (4).

[92] *See* 42 U.S.C. § 1981 (not using "because of"); Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 352 (2013) (interpreting "because of" to imply but-for causation standard); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009) (same).

[93] It is important to note, however, that Title VII does not apply to independent contractors and thus does not protect gig workers, *see* Lewis L. Maltby & David C. Yamada, *Beyond "Economic Realities": The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. REV. 239, 239–40 (1997); Danielle Tarantolo, Note, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce*, 116 YALE L.J. 170, 173 (2006), which may have reverberating effects as the gig economy expands, *see* AHU YILDIRMAZ, MITA GOLDAR & SARA KLEIN, ADP RSCH. INST., ILLUMINATING THE SHADOW WORKFORCE: INSIGHTS INTO THE GIG WORKFORCE IN BUSINESSES 3 (Feb. 2020) https://www.adp.com/-/media/adp/resourcehub/pdf/adpri/illuminating-the-shadow-workforce-by-adp-research-institute.ashx [https://perma.cc/ST6R-ZH4Y].