The Customer Caste: Lawful Discrimination by Public Businesses

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It is legal to follow and watch people in retail stores based on their race, give inferior service to restaurant customers based on their race, and place patrons in certain hotel rooms based on their race. Congress enacted Title II of the Civil Rights Act of 1964 to protect Black and other people of color from discrimination and segregation in public accommodations—places where people receive goods, food, services, and lodging. Scholarship has not analyzed how well Title II and Section 1981 of the Civil Rights Act of 1866 have functioned in this arena. An examination of this caselaw shows that courts find legal numerous discriminatory and segregatory actions by places of public accommodation. An abbreviated look at Section 1982 of the Civil Rights Act of 1866 shows that courts have interpreted that law in the same manner as Section 1981. An assessment of the legislative history and text of Title II and Section 1981, in addition to a comparison to the interpretation of laws with similar purposes, demonstrates that the federal judiciary has incorrectly constrained the law by, among other actions, adopting the heavily criticized employment discrimination caselaw and requiring a common law-like contractual relationship. Jim Crow laws ceased to exist in the 1960s, but these interpretations have created "the customer caste," whereby people of color are subject to legal, daily discrimination in retail stores, restaurants, gas stations, hotels, banks, and airplanes.

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INTRODUCTION

Jim Crow laws—the state laws that enabled segregation and other inequality beginning in the 1890s—disappeared in the 1950s and 1960s due to the decision of *Brown v. Board of Education* in 1954, the enactment of the Civil Rights Act of 1964, and the adoption of the Voting Rights Act of 1965.[1] However, more than fifty years after discrimination and segregation in public schools, public accommodations, public employment, and voting were made illegal, discrimination and segregation in everyday life continue to exist for Black and other people of color. Scholars have not explored the effect of judicial decision-making on this persistence. This Article begins this inquiry by examining the federal jurisprudence on public accommodations. This caselaw has wrongfully declared that daily discriminatory actions are legal. Among other actions, courts have held stores can follow and otherwise monitor people of color, restaurants can give inferior service or seating to people of color, and hotels can give inferior service and rooms to people of color.[2] This has created a customer caste for patrons based on their race.

Present reports in media describe this discrimination in traditionally segregated places, such as restaurants and hotels. One prominent example is the notorious Starbucks incident in downtown Philadelphia in which two Black men who were waiting for a meeting were forced to leave.[3] Another example is the

1. *See* Joe R. Feagin, *The Continuing Significance of Race: Antiblack Discrimination in Public Places*, 56 AM. SOCIO. REV. 101, 101 (1991); Anne-Marie G. Harris, Geraldine R. Henderson & Jerome D. Williams, *Courting Customers: Assessing Consumer Racial Profiling and Other Marketplace Discrimination*, 24 J. PUB. POL'Y & MKTG. 163, 163 (2005). Some may find offensive the language that is employed in cases discussed in this Article. The explicit language is used for the reader to understand the alleged discrimination and then, evaluate the courts' determinations as to whether discrimination occurred.

2. While this Article focuses on discrimination against Black people, other groups also face discrimination in public accommodations. *See* Harris et al., *supra* note 1, at 163.

3. Matt Stevens, *Starbucks C.E.O. Apologizes After Arrests of Two Black Men*, N.Y. TIMES (Apr. 15, 2018), https://www.nytimes.com/2018/04/15/us/starbucks-philadelphia-black-men-arrest.html [https://perma.cc/8939-CMBY]. This type of discrimination is well documented. *See, e.g.*, Zachary W. Brewster, *Racially Discriminatory Service in Full-Service Restaurants: The Problem, Cause, and Potential Solutions*, 53 CORNELL HOSP. Q. 274, 274–76 (2012) (describing studies and polls).

removal of a Black patron who was in the lobby of his own Hilton hotel.[4] Discrimination against people of color also occurs regularly in retail stores. Stores consistently employ surveillance to watch Black customers and other people of color.[5] Other places, such as bars, have implemented dress codes that permit them to discriminate against people, including Black patrons, and have engaged in other innovative practices to discourage or block Black patrons from admittance.[6] The late race scholar Derrick Bell and Professor Joseph William Singer have each recognized the persistence of such significant race discrimination in public accommodations,[7] and social science research has similarly discussed this problem of discrimination in stores, restaurants, hotels, and other places of public accommodation.[8]

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4. Mihir Zaveri, *Doubletree in Portland Fires 2 Employees After Kicking Out Black Man Who Made Call From Lobby*, N.Y. TIMES (Dec. 28, 2018), https://www.nytimes.com/2018/12/28/us/black-man-kicked-out-hotel-portland.html [https://perma.cc/2LTC-7MDB].

5. *See* Shaun L. Gabbidon, *Racial Profiling by Store Clerks and Security Personnel in Retail Establishments: An Exploration of "Shopping While Black,"* 19 J. CONTEMP. CRIM. JUST. 345, 349 (2003); Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANN. REV. SOCIO. 181, 191 (2008); Matthew Haag, *Nordstrom Rack Apologizes to Black Teenagers Falsely Accused of Stealing*, N.Y. TIMES (May 8, 2018), https://www.nytimes.com/2018/05/08/business/nordstrom-black-men-profiling-shopping.html [https://perma.cc/Q6N7-UMMS]. Retail stores use other methods to discriminate, including locking up products commonly used by people of color. *See, e.g.*, Anne D'Innocenzio, *CVS, Walgreens, WalMart Stop Locking Up Black Beauty, Hair Care Products*, CBS BOS. (June 12, 2020), https://boston.cbslocal.com/2020/06/12/walmart-cvs-walgreens-black-hair-care-beauty-products-locked-up/ [https://perma.cc/J3WL-2QG6].

6. *See* Combs v. Cordish Cos., 862 F.3d 671, 681–82 (8th Cir. 2017) (discussing hiring people to get in fights with "undesirables," almost all of whom were Black); *cf*. Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICH. L. REV. 1835, 1843–50 (2006) (discussing the bouncer's right as the landowner's right to discriminate in admitting and excluding from property).

7. DERRICK BELL, RACE, RACISM, AND AMERICAN LAW (6th ed. 2008); Joseph William Singer, *We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, 95 B.U. L. REV. 929 (2015) [hereinafter Singer, *We Don't Serve Your Kind Here*] (discussing current Mississippi statute that permits discrimination on any basis by public businesses, including hotels and restaurants); Joseph William Singer, *The Anti-Apartheid Principle in American Property Law*, 1 ALA. C.R. & C.L L. REV. 91, 93–100 (2011) [hereinafter Singer, *The Anti-Apartheid Principle*] (discussing courts' problematic interpretation of race discrimination in public accommodations under Section 1981 and Section 1982); Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996) [hereinafter Singer, *No Right to Exclude*] (discussing history of public accommodations law); *see also* Constance Dionne Russell, Note, *Styling Civil Rights: The Effect of § 1981 and the Public Accommodations Act on Black Women's Access to White Stylists & Salons*, 24 HARV. BLACKLETTER L.J. 189, 198 (2008) (discussing discrimination against Black women by White stylists); Stephen E. Haydon, Comment, *A Measure of Our Progress: Testing for Race Discrimination in Public Accommodations*, 44 UCLA L. REV. 1207, 1213 (1997) (discussing continued prevalence of discrimination in public accommodations); Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L. J. 1271, 1289–90 (2017) (recognizing continued discrimination against people of color in public accommodations).

8. GERALDINE ROSA HENDERSON, ANNE-MARIE HAKSTIAN & JEROME D. WILLIAMS, CONSUMER EQUALITY: RACE AND THE MARKETPLACE 32 (2016) (discussing avoidance and annoyance discrimination existing in marketplace); Zachary W. Brewster, Michael Lynn & Shelytia Cocroft, *Consumer Racial Profiling in U.S. Restaurants: Exploring Subtle Forms of Service Discrimination Against Black Diners*, 29 SOCIO. F. 476, 477–78 (2014); Feagin, *supra* note 1, at 102;

Title II of the Civil Rights Act of 1964 prohibits discrimination and segregation in public accommodations. It provides that "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."[9] In *Heart of Atlanta Motel v. United States*, where the Supreme Court found Title II constitutional, the Court discussed the importance of the law to Black people. A Black traveler "continually was uncertain of finding lodging," so discrimination in public accommodations had the effect of "discouraging travel [by] a substantial portion" of the Black community.[10]

Now, despite the presence of Title II, Black and other people of color, although generally able to enter places of public accommodation, can be subject to inferior conditions. Through this treatment, a form of Jim Crow continues to exist through businesses' discrimination against people of color.[11] These circumstances may discourage people of color from shopping, eating out, and partaking in other activities because of discrimination against them by places of public accommodation.[12]

Lawsuits that challenge this type of bias have not been a recent focus of attention.[13] The most famous case occurred twenty years ago when Denny's was sued for race discrimination in a class action lawsuit.[14] Cases that involve other kinds of discrimination have been more prominent in the public eye. For example, gay and lesbian people have asserted that the law protects them against discrimination by stores and other places of public accommodation.[15] Similarly,

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Peter Siegelman, *Racial Discrimination in "Everyday" Commercial Transactions: What Do We Know, What Do We Need to Know, and How Can We Find Out?*, *in* URB. INST., A NATIONAL REPORT CARD ON DISCRIMINATION IN AMERICA: THE ROLE OF TESTING 69, 79 (Michael Fix & Margery Austin Turner eds., 1998).

9. 42 U.S.C. § 2000a.

10. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 253 (1964).

11. Caitlin Knowles Myers, Marcus Bellows, Hiba Fakhoury, Douglas Hale, Alexander Hall & Kaitlin Ofman, *Ladies First? A Field Study of Discrimination in Coffee Shops*, 42 APPLIED ECON. 1761, 1762 (2010) (citing a 2004 Gallup poll that reported that over 25 percent of Black people said they were unfairly treated in stores and restaurants); Siegelman, *supra* note 8, at 80 (citing a 1997 Gallup poll that found that over 45 percent of Black people said they experienced discrimination in the last 30 days). Fewer studies on consumer markets, as compared to employment and housing markets, exist. Pager & Shepherd, *supra* note 5, at 191.

12. Harris et al., *supra* note 1, at 169 (demonstrating that real or perceived discrimination in public accommodations exists).

13. Brian K. Landsberg, *Public Accommodations and the Civil Rights Act of 1964: A Surprising Success?*, 36 HAMLINE J. PUB. L. & POL'Y, no. 1, 2015, at 1, 1 ("Title II gets little attention . . . ."); Siegelman, *supra* note 8, at 82–85 (noting that few cases involving public accommodations are brought due to the costliness of litigation or the limited gain from bringing a suit).

14. *See* Dyson v. Flagstar Corp., C.A. No. DKC-93-1503 (D. Md. Jan. 23, 2001); *see also* Stephen Labaton, *Denny's Restaurants to Pay $54 Million in Race Bias Suits*, N.Y. TIMES, May 25, 1994, at A1 (describing suits that involved discrimination in refusal to admit, service, and payment).

15. *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1727 (2018).

people with disabilities have claimed they should be provided reasonable accommodations, such as accessible kiosks at airports for those who are blind.[16]

Most recent legal scholarship on public accommodations also has not focused on race itself.[17] It describes issues related to discrimination against LGBTQ people and people with disabilities.[18] It also addresses new technology and associated businesses such as Uber and Airbnb.[19]

There are two main, seemingly robust, laws that apply to this type of bias. As mentioned above, Title II protects against discrimination and segregation in places of public accommodation.[20] The Civil Rights Act of 1866 also prohibits discrimination in public accommodations. Section 1981 of the Act provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens."[21] Section 1982 of the Civil Rights Act

16. Dennis Schaal, *National Federation of the Blind Sues DOT on Airline Kiosk Access*, SKIFT (Jan. 22, 2014), https://skift.com/2014/01/22/national-federation-of-the-blind-sues-dot-on-airline-kiosk-access/ [https://perma.cc/SK2G-95N5].

17. Indeed, Samuel Bagenstos has stated, "There seems to be broad consensus that Title II of the Civil Rights Act of 1964, which prohibits race discrimination in 'place[s] of public accommodation,' was a remarkable success." Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1206 (2014) (alteration in original) (footnote omitted). "[C]ompliance, it is said, came quickly and easily once the Supreme Court upheld the law late in 1964." *Id.* Bagenstos recognizes that "the consensus is illusory." *Id.* at 1207. He frames the debate based on libertarian challenges such as freedom of association. *Id*. For many years, Professor Joseph William Singer has been one of the only scholars to extensively examine race discrimination in public accommodations, focusing on discrimination by retail stores. *See, e.g.*, Singer, *We Don't Serve Your Kind Here*, *supra* note 7; Singer, *The Anti-Apartheid Principle*, *supra* note 7, at 93–100; Singer, *No Right to Exclude*, *supra* note 7; *see also* JOSEPH WILLIAM SINGER, BETHANY R. BERGER, NESTOR M. DAVIDSON & EDUARDO MOISÉS PEÑALVER, PROPERTY LAW 48–50 (7th ed. 2017); TANYA KATERÍ HERNÁNDEZ, MULTIRACIALS AND CIVIL RIGHTS: MIXED-RACE STORIES OF DISCRIMINATION 67–75 (2018) (describing public accommodations cases involving mixed-race persons).

18. *See, e.g.*, Elizabeth Sepper & Deborah Dinner, *Sex in Public*, 129 YALE L.J. 78 (2019) (summarizing history of sex in public accommodations law including issues related to LGBTQ rights); Klint W. Alexander, *The* Masterpiece Cakeshop *Decision and the Clash Between Nondiscrimination and Religious Freedom*, 71 OKLA. L. REV. 1069, 1069 (2019) ("U.S. courts have increasingly become the battleground for resolving disputes over discrimination against LGBT people in employment, education, housing, and public accommodations . . . ."); Trevor Crowley, Comment, *Wheelchair Ramps in Cyberspace: Bringing the Americans with Disabilities Act into the 21st Century*, 2013 BYU L. REV. 651–52; Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 STAN. L. REV. 1241, 1261 (2014).

19. Leong & Belzer, *supra* note 7, at 1300, 1305 ("Many recent examples have not only expanded the class of people protected by public accommodation laws—for example, to include LGBTQ customers—but have also included expansion of the scope of the laws themselves."); *id.* at 1292, 1305–06 (describing studies and concluding that "discrimination prevalent in the old economy also infects the new").

20. An earlier version of a public accommodations law—the Civil Rights Act of 1875—failed as unconstitutional. *See* The Civil Rights Cases, 109 U.S. 3, 9 (1883).

21. 42 U.S.C. § 1981. There is also an argument that the common law protects against public accommodations discrimination. *See, e.g.*, Paul Vincent Courtney, Comment, *Prohibiting Sexual Orientation Discrimination in Public Accommodations: A Common Law Approach*, 163 U. PA. L. REV. 1497, 1524 (2015); A. K. Sandoval-Strausz, *Travelers, Strangers, and Jim Crow: Law, Public*

of 1866 also has relevance to discrimination in public accommodations. It states that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to . . . purchase . . . [and] hold . . . personal property."[22] The federal coverage is buttressed by state and local laws that prohibit discrimination on the basis of race in public accommodations.[23]

This Article is the first to fully analyze the federal law on race discrimination in public accommodations and show the significant, improper

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Accommodations, and Civil Rights in America, 23 LAW & HIST. REV. 53, 59–60 (2005); Singer, *We Don't Serve Your Kind Here*, *supra* note 7, at 943 n.72; Singer, *No Right to Exclude*, *supra* note 7, at 1357–67.

22. 42 U.S.C. § 1982.

23. *See, e.g.*, Lisa Gabrielle Lerman & Annette K. Sanderson, Comment, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 238–62 (1978); Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 ST. LOUIS U. L.J. 631, 635–36 (2016). State and local laws against discrimination in public accommodations existed before the 1964 Act. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 259–60 (1964) ("[T]he constitutionality of such state statutes stands unquestioned."). Some believe state and local coverage can be quite limited or a federal court will dismiss a state accommodations claim on the same basis that it would dismiss a federal claim. *See* Harris et al., *supra* note 1, at 165; Anne-Marie G. Harris, *A Survey of Federal and State Public Accommodations Statutes: Evaluating Their Effectiveness in Cases of Retail Discrimination*, 13 VA. J. SOC. POL'Y & L. 331, 338 (2006). Others believe that state and local coverage can be robust. *See, e.g.*, Sepper & Dinner, *supra* note 18. Without an empirical analysis of state and local laws as well as an examination of lawsuits alleging violations of those laws, it is difficult to conclude who is correct. At minimum, the continued, prevalent existence of discrimination in public accommodations suggests that the laws have not significantly addressed the problem. With that said, plaintiffs sometimes use state law because of poor federal protection. For example, in *Harrington v. Airbnb, Inc.*, the plaintiffs alleged that Airbnb discriminated against Black people through its mandatory photograph policy in violation of the Oregon Public Accommodations Act. 348 F. Supp. 3d 1085, 1090 (D. Or. 2018). This policy effectively allowed hosts not to rent to Black guests. *Id.* On the motion to dismiss, the court rejected the company's reason—"that it tells a host whether a prospective guest is 'reliable, authentic, and committed to the spirit of Airbnb'"—as not believable. *Id.* As an alternative to cases being brought in federal court, cases based on state and local law can be filed in state court. *See* Sarah B. Schlehr & Christa L. Riggins, *Why Employment-Discrimination Cases Usually Belong in State Court*, ADVOCATE (June 2015), https://www.advocatemagazine.com/article/2015-june/why-employment-discrimination-cases-usually-belong-in-state-court [https://perma.cc/7Y9D-P8KC]. The effectiveness of state courts for discrimination claims is unclear. *See id.*; *What is the Difference Between Filing My Lawsuit in Florida State Court Versus Federal Court for Employment Law Cases?*, SCOTT WAGNER & ASSOCS., P.A. (Dec. 20, 2016), https://www.floridalaborlawyer.com/what-is-the-difference-between-filing-my-lawsuit-in-florida-state-court-versus-federal-court-for-employment-law-cases/ [https://perma.cc/E5T4-8ZLA]. Some lawyers have expressed reluctance to bringing discrimination suits in state court. Schlehr & Riggins, *supra*. Reasons include that the cases take too long, that lawyers are more familiar with federal civil procedure than state procedure, that attorneys' fees may not be available, that state courts follow federal caselaw, and that state civil procedure has additional roadblocks. *Id.* A different option exists in some localities. For example, where a business discriminated against the person, the city itself may be able to punish the company by a fine of $100 to $1000, without the victim bringing a lawsuit in court. *See, e.g.*, City of Chicago Rules Implementing the Human Rights, Fair Housing, and Commission on Human Relations Enabling Ordinances §§ 520.100 & 235.420 (July 9, 2015); COMM'N ON HUM. RELS., CITY OF CHI., DRESS CODES, ADMITTANCE POLICIES, AND PUBLIC ACCOMMODATION DISCRIMINATION (2016), https://www.chicago.gov/content/dam/city/depts/cchr/AdjSupportingInfo/AdjFORMS/2016AdjForms/2016DressCodesHandout.pdf [https://perma.cc/9V2C-JF99].

impediments to enforcement that courts have created. It examines Title II and Section 1981 jurisprudence over the fifty years since Congress enacted Title II,[24] and also includes an abbreviated discussion of Section 1982, which has been interpreted in the same manner as Section 1981.[25] Although the federal laws against race discrimination in public accommodations have largely been considered a success, this Article concludes otherwise. Title II, Section 1981, and Section 1982 currently fail to adequately protect people of color from common methods of discrimination and segregation in places of public accommodation. Most courts have declared that as long as people of color are admitted or served, places of public accommodation can otherwise freely discriminate against them. This interpretation persists despite broad statutory language, non-limiting legislative history, and caselaw from other statutes—such as the Americans with Disabilities Act (ADA)—that interprets the same language differently to prohibit such discrimination.

In the past, the Supreme Court has recognized that "Congress depends heavily upon private citizens to enforce the fundamental rights involved" in public accommodations and other civil rights cases.[26] However, the problematic interpretation by the courts, and the already limited coverage of Title II and the restricted remedies available to plaintiffs under it,[27] result in little protection against significant race discrimination by places of public accommodation. This leaves people of color subject to daily, legal discrimination and segregation in public accommodations throughout the country.

Part I of this Article briefly describes why Congress enacted public accommodations laws. After detailing the statutory constraints of these laws, Part II then sets forth the significant jurisprudential limitations of the law, which effectively create a customer caste based on race. Finally, Part III critiques the caselaw by an examination and analysis of the statutory text, legislative history, and other relevant caselaw. It concludes that contrary to courts' current interpretation, the law requires that Black people and other people of color are able to partake in public accommodations in the same manner as others, such that following people in stores and otherwise treating people differently based on race is illegal.

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24. All cases found on Westlaw were reviewed except cases where the plaintiff proceeded pro se. For a discussion on the unique circumstances facing pro se plaintiffs, see, for example, Mitchell Levy, Comment, *Empirical Patterns of Pro Se Litigation in Federal District Courts*, 85 U. CHI. L. REV. 1819 (2018) (assessing pro se reform).

25. *See, e.g.*, Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1016–17 (2020).

26. Morse v. Republican Party of Va., 517 U.S. 186, 234 n.46 (1996).

27. *See* 42 U.S.C. § 2000a.

I.
SLAVERY, JIM CROW, AND THE DEVELOPMENT OF CIVIL RIGHTS PROTECTIONS AGAINST DISCRIMINATION IN PUBLIC ACCOMMODATIONS

After slavery was outlawed, many southern states passed "Black Codes" in 1865.[28] These laws were meant to restrict the rights of newly freed Black people.[29] They included the requirement that Black people sign yearly labor contracts or face imprisonment for vagrancy.[30] Congress responded by passing sweeping federal legislation to strengthen the guarantees of the Thirteenth Amendment, and the states also ratified the contested Fourteenth Amendment.[31]

The federal legislation included the Civil Rights Act of 1866 (1866 Act) and the Civil Rights Act of 1875 (1875 Act).[32] The 1866 Act defined citizenship as "all persons born in the United States" and declared that all citizens were protected equally by the law.[33] The law gave Black people "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens,"[34] and "the same right, . . . as is enjoyed by white citizens . . . to . . . purchase . . . [and] hold . . . personal property."[35] Due to lack of support for enforcement, this Act had a very limited impact at the time to strengthen the guarantees under the Thirteenth Amendment.[36] Similar to the 1866 Act, the 1875 Act sought to guarantee Black

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28. G. Edward White, *The Origins of Civil Rights in America*, 64 CASE W. RSRV. L. REV. 755, 773–74 (2014).

29. MICHELLE ALEXANDER, THE NEW JIM CROW 20 (2012) ("As W.E.B. Du Bois eloquently reminds us, former slaves had 'a brief moment in the sun' before they were returned to a status akin to slavery. . . . Sunshine gave way to darkness, and the Jim Crow system of segregation emerged—a system that put black people nearly back where they began, in a subordinate racial caste."); Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 935 (2019).

30. ALEXANDER, *supra* note 29, at 31; Goodwin, *supra* note 29, at 938.

31. *See* White, *supra* note 28 at 771–75; HENRY LOUIS GATES, JR., STONY THE ROAD: RECONSTRUCTION, WHITE SUPREMACY, AND THE RISE OF JIM CROW (2019). Although important to understanding the Civil Rights Acts of 1866 and 1964, this Section does not intend to provide an expansive summary of the Reconstruction Era. For a detailed history of the Reconstruction Era, see, for example, GATES, *supra*; JUMPIN' JIM CROW: SOUTHERN POLITICS FROM CIVIL WAR TO CIVIL RIGHTS (Jane Dailey, Glenda Elizabeth Gilmore & Bryant Simon eds., 2000).

32. Sandoval-Strausz, *supra* note 21, at 58–59.

33. Civil Rights Act of 1866, Pub. L. No. 39-31, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1981) ("[S]uch citizens . . . 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, 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 person and property, as is enjoyed by white citizens . . . ."); *see also* John Hope Franklin, *The Civil Rights Act of 1866 Revisited*, 41 HASTINGS L.J. 1135, 1142 (1990) ("The Civil Rights Act of 1866 undertook, moreover, to give substance and meaning to the thirteenth amendment.").

34. 42 U.S.C. § 1981.

35. *Id.* § 1982.

36. The executive branch opposed the legislation and tried to undermine it. CONG. GLOBE, 39th Cong., 1st Sess. 1679–81 (1866) (President Andrew Johnson vetoing the Civil Rights Act of 1866). After its adoption, cases alleging racial discrimination were brought under the 1866 Act, and the Supreme Court upheld the constitutionality of the Act. *See* Blyew v. United States, 80 U.S. (13 Wall.) 581, 593 (1871) (holding that the Act was intended to protect Black people from the "prejudices [that]

people equal treatment—here in public transportation and public accommodations.[37] But the 1875 Act was successfully challenged as unconstitutional.[38] In a consolidated opinion of five cases—the *Civil Rights Cases*—the Supreme Court ruled that Congress did not have the authority under the Thirteenth or Fourteenth Amendments to prohibit race discrimination by private parties.[39] Although there was a smattering of decisions over several years that protected Black people from discrimination, for example, by finding coverage under the common law,[40] the *Civil Rights Cases*, handed down in 1883, carved a path for states to enact more discriminatory laws that targeted Black people.[41]

Energized by the Supreme Court's precedent, many southern states immediately started to pass legislation that permitted the separation of people by race in railroad cars.[42] Bishop Henry McNeil Turner stated:

> The world has never witnessed such barbarous laws entailed upon a free people as have grown out of the decision of the United States Supreme Court . . . . For that decision alone authorized and now sustains all the unjust discriminations, proscriptions and robberies perpetrated by public carriers . . . . It fathers all the "*Jim-Crow cars*" into which colored people are huddled and compelled to pay as much as the whites, who are given the finest accommodations. It has made the ballot of the black man a parody, his citizenship a nullity and his freedom a burlesque.[43]

In addition to legalizing discrimination and segregation in transportation, legislation that required discrimination and segregation of people on the basis of race in other public areas also developed.[44] For instance, a Birmingham, Alabama city ordinance stated:

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existed against the colored race, which naturally affected the administration of justice in the State courts").

37. Sandoval-Strausz, *supra* note 21, at 58–59.

38. The Civil Rights Cases, 109 U.S. 3, 26 (1883).

39. *Id.* at 24 (holding that the Thirteenth Amendment relates only to slavery and involuntary servitude and that the denial of equality in public accommodations does not impose "any badge of slavery or servitude" and that protections may come from state law or through the Fourteenth Amendment).

40. *See* Singer, *No Right to Exclude*, *supra* note 7, at 1357–67.

41. Sandoval-Strausz, *supra* note 21, at 77 ("In legal terms, the ruling signaled the ascendance of individualism and property rights in American jurisprudence. In human terms, it meant the willing abandonment of black people to state and local authorities who could once again deny their claims of equality in public places; it also meant that such denials, no matter how systematic, were declared beyond the ability of the federal government to remedy.").

42. *Id.* at 79.

43. H. M. TURNER, THE BARBAROUS DECISION OF THE UNITED STATES SUPREME COURT DECLARING THE CIVIL RIGHTS ACT UNCONSTITUTIONAL AND DISROBING THE COLORED RACE OF ALL CIVIL PROTECTION (1893).

44. *See* Frances L. Edwards & Grayson Bennett Thompson, *The Legal Creation of Raced Space: The Subtle and Ongoing Discrimination Created Through Jim Crow Laws*, 12 BERKELEY J. AFR.-AM. L. & POL'Y 145, 154 (2010) ("The legal framework of segregation allowed states to draw territorial lines through properties that reinforced racial discrimination and the isolation of Black

> It shall be unlawful to conduct a restaurant or other place for the serving of food in the city, at which white and colored people are served in the same room, unless such white and colored persons are effectually separated by a solid partition extending from the floor upward to a distance of seven feet or higher, and unless a separate entrance from the street is provided for each compartment.[45]

As another example, a Virginia statute governing theaters stated:

> It shall be the duty of any person . . . operating . . . any public hall, theatre, opera house, motion picture show or any place of public entertainment or public assemblage which is attended by both white and colored persons, to separate the white race and the colored race, and to set apart and designate in each . . . certain seats therein, to be occupied by white persons, and a portion thereof, or certain seats therein, to be occupied by colored persons. [46]

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communities. Communities throughout the U.S. enacted laws that segregated the races through definition of space and property lines.").

45. BIRMINGHAM, ALA., CODE § 369 (1944); *see also Jim Crow Laws – Martin Luther King, Jr. National Historical Park, Georgia*, NAT'L PARK SERV., https://www.nps.gov/malu/learn/education/jim_crow_laws.htm [https://perma.cc/8PCX-Y3LJ] (describing Jim Crow laws). The law went on to state "[a]ny person, who being the owner, proprietor or keeper or superintendent of any tavern, inn, restaurant or other public house or public place, or the clerk, servant or employee of such owner, proprietor, keeper or superintendent, knowingly permits a negro and a white person to play together or in company with each other at any game with cards, dice, dominoes or checkers, in his house or on his premises shall, on conviction, be punished." BIRMINGHAM, ALA., CODE § 597.

46. VA. CODE § 1796a (Supp. 1926). For additional examples of statutes from this time period, see *Jim Crow Laws*, *supra* note 45. For example, a Georgia statute, with regard to barbers, stated: "No colored barber shall serve as a barber [to] white women or girls." *Id.* (alteration in original). A Louisiana statute on housing stated:

> Any person . . . who shall rent any part of any such building to a negro person or a negro family when such building is already in whole or in part in occupancy by a white person or white family, or vice versa when the building is in occupancy by a negro person or negro family, shall be guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than twenty-five ($25.00) nor more than one hundred ($100.00) dollars or be imprisoned not less than 10, or more than 60 days, or both such fine and imprisonment in the discretion of the court.

Id. (alteration in original). A Mississippi statute on hospital entrances stated: "There shall be maintained by the governing authorities of every hospital maintained by the state for treatment of white and colored patients separate entrances for white and colored patients and visitors, and such entrances shall be used by the race only for which they are prepared." *Id.* A North Carolina statute on separate militias stated:

> The white and colored militia shall be separately enrolled, and shall never be compelled to serve in the same organization. No organization of colored troops shall be permitted where white troops are available, and while white [sic] permitted to be organized, colored troops shall be under the command of white officers.

Id. An Oklahoma statute on fishing, boating, and bathing provided that: "The [Conservation] Commission shall have the right to make segregation of the white and colored races as to the exercise of rights of fishing, boating and bathing." *Id.* (alteration in original). A South Carolina statute on lunch counters stated:

> No persons, firms, or corporations, who or which furnish meals to passengers at station restaurants or station eating houses, in times limited by common carriers of said passengers, shall furnish said meals to white and colored passengers in the same room, or at the same table, or at the same counter.

Before and after the *Civil Rights Cases*, the Supreme Court explicitly supported these laws. In 1877, it ruled that states may not prohibit segregation on common modes of transportation, such as trains, streetcars, and riverboats.[47] Thereafter, in the infamous *Plessy v. Ferguson* case in 1896, the Court upheld a Louisiana state law, entitled the "Separate Car Act," that mandated the separation of people by race in railroad cars.[48] Many years later, in 1954, in *Brown v. Board of Education*, the Court overruled *Plessy v. Ferguson* and held that "[s]eparate educational facilities are inherently unequal."[49]

Change began to occur around this time.[50] It included legislation. Congress enacted Title II of the Civil Rights Act of 1964 in response to a confluence of factors including the discrimination and segregation of people of color by businesses, the Supreme Court's decision in *Brown*, widespread demonstrations against Jim Crow laws, the economic effects of protests on businesses, and the treatment of international diplomats.[51]

Id. Finally, a Virginia statute governing theaters provided that:

> Every person . . . operating . . . any public hall, theatre, opera house, motion picture show or any place of public entertainment or public assemblage which is attended by both white and colored persons, shall separate the white race and the colored race and shall set apart and designate . . . certain seats therein to be occupied by white persons and a portion thereof, or certain seats therein, to be occupied by color persons.

Id. (alteration in original).

47. Hall v. DeCuir, 95 U.S. 485, 500–01 (1877).

48. 163 U.S. 537, 550–51 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

49. 347 U.S. at 495.

50. *See* Edwards & Thompson, *supra* note 44, at 161 ("*Brown v. Board of Education* completely changed the legal and political landscape of the nation. . . . After the *Brown* decision, a new desegregated world began in theory, leading to eventual practice."); Sandoval-Strausz, *supra* note 21, at 81–82 (describing how "[t]he pace of change quickened in the mid-1950s" after *Brown* and discussing the effect of demonstrations such as the Montgomery bus boycott).

51. Michael J. Klarman, Brown *at 50*, 90 VA. L. REV. 1613, 1622–27 (2004) (explaining how, though the role of *Brown* has been contested, *Brown* played an influential role in the Civil Rights Movement in that it incited violence, which drew national attention and put these issues in the national spotlight); Michael J. Klarman, Brown*, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 44 (1994) ("When judicial desegregation orders led to school closures and race riots, or when civil rights demonstrations led to brutal suppression of peaceful protestors and mass incarcerations, southern businessmen came to appreciate that preservation of Jim Crow might be incompatible with continued economic growth . . . ."); Sandoval-Strausz, *supra* note 21, at 53 ("The Civil Rights Act of 1875 and the Supreme Court rulings in the *Civil Rights Cases* and especially in *Plessy v. Ferguson* were critical episodes in the career of Jim Crow in the nineteenth century, followed in the twentieth by the Montgomery bus boycott, the sit-ins, the Freedom Rides, and the Civil Rights Act of 1964."); Harry T. Quick, Note, *Public Accommodations: A Justification of Title II of the Civil Rights Act of 1964*, 16 W. RES. L. REV. 660, 662–63 (1965); Edwards & Thompson, *supra* note 44, at 145; *see also* GAVIN WRIGHT, SHARING THE PRIZE: THE ECONOMICS OF THE CIVIL RIGHTS REVOLUTION IN THE AMERICAN SOUTH 258 (2013) ("Exertion of economic pressure over months and years brought reluctant acquiescence by local business groups. The surprisingly positive results of these local negotiations in turn unleashed a political dynamic within the business community that produced strong federal legislation far earlier than anticipated.").

II.
STATUTORY AND JURISPRUDENTIAL LIMITATIONS OF THE RACE DISCRIMINATION PUBLIC ACCOMMODATIONS LAW

In the period before the enactment of Title II in 1964, plaintiffs and courts had not recognized Section 1981 and Section 1982 of the 1866 Act as significant laws against discrimination in public accommodations. Plaintiffs did not attempt to use them regularly, and courts generally did not enforce them. One hundred years after Congress enacted Section 1981 and Section 1982, Title II strengthened the public accommodations law and invigorated Section 1981 and Section 1982 as possibly potent statutory weapons.[52]

Enforcement of Title II began auspiciously when the Supreme Court decided that Title II was constitutionally permissible under the Commerce Clause. In one of the two consolidated cases, the Heart of Atlanta Motel, which had refused to rent to Black people and wanted to continue to bar them, sought declaratory relief.[53] The Court held that Congress's exercise of power over motels that served interstate customers was valid.[54] In the second case, Ollie's Barbecue had refused to serve Black people in their dining room.[55] The Court concluded that Title II validly applied to Ollie's because, among other reasons, the restaurant's meat had been in commerce.[56] Other decisions followed, providing relief to Black people where access to places of public accommodation was not granted.[57]

Despite this hopeful beginning, since that time, discrimination and segregation have continued—sometimes in old ways and sometimes in new ways. When plaintiffs have brought cases to challenge these practices, jurisprudential interpretations have severely limited the scope of the race discrimination public accommodations law. Although courts have held that a place of public accommodation cannot forbid admission or service because of race, it is not illegal to otherwise discriminate, including by dispensing inferior treatment. These constraints increase the burdens already placed on a plaintiff

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52. *See, e.g.*, Judith Olans Brown, Daniel J. Givelber & Stephen N. Subrin, *Treating Blacks as if They Were White: Problems of Definition and Proof in Section 1982 Cases*, 124 U. PA. L. REV. 1, 2 (1975) ("Those sections lay virtually moribund for a hundred years, until they were revived in 1968 as a judicial contribution to the mid-twentieth century civil rights movement." (footnote omitted)). Because of the *Civil Rights Cases*, for one hundred years, Section 1981 was interpreted to cover only state action. After *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), and *Runyon v. McCrary*, 427 U.S. 160 (1976), this interpretation changed. In the Civil Rights Act of 1991, Congress added explicit coverage of discrimination by non-state or private actors under Section 1981. *See* 42 U.S.C. § 1981; *infra* Part III.B.1.

53. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 242 (1964).

54. *Id.* at 261.

55. Katzenbach v. McClung, 379 U.S. 294, 296–97 (1964).

56. *Id.* at 304.

57. *See, e.g.*, Daniel v. Paul, 395 U.S. 298 (1969) (holding that a snack bar that served interstate travelers came under the purview of Title II).

through the statutory requirements and constraints, which are first briefly discussed.

A. Statutory Requirements and Constraints

1. Title II

In Title II of the Civil Rights Act of 1964, Congress set forth broad language that prohibits discrimination in public accommodations. It states: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."[58] Despite this general edict, several requirements can preclude or limit an action. First, a Title II case can be dismissed because of administrative requirements. If the alleged discrimination occurred in a state or locality that protects against discrimination, the state or locality must be notified before a lawsuit is filed.[59] If this does not occur, the case will be dismissed.[60]

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58. 42 U.S.C. § 2000a.

59. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 249 (1964); Stearnes v. Baur's Opera House, Inc., 3 F.3d 1142, 1145 (7th Cir. 1993) (remanding case for dismissal because plaintiff, a Black male, did not notify state agency prior to bringing suit); Dunn v. Albertsons, No. 2:16–cv–02194–GMN–PAL, 2017 WL 3470573, at *4 (D. Nev. Aug. 10, 2017) (holding that a plaintiff bringing suit alleging discrimination in this context must give notice to state agency). If it occurs in a state that does not protect against discrimination, the matter may be referred to the Community Relations Service for attempted voluntary compliance. *See* Guardians Ass'n v. Civ. Serv. Comm'n of the City of N.Y., 463 U.S. 582, 628 (1983) (Marshall, J., dissenting).

60. *See* Caldwell v. Klemz, No. 2:14-CV-455, 2017 WL 4620693, at *11 (N.D. Ind. Oct. 12, 2017); Chambers v. Simon Prop. Grp., No. 12-1179-EFM, 2013 WL 1947422, at *3 n.17 (D. Kan. May 10, 2013) (dismissing any potential Title II allegation as such allegation would require filing with Kansas which did not occur); Brown v. Whole Foods Mkt. Grp., 965 F. Supp. 2d 132, 138–39 (D.D.C. 2013) (finding that complaint was not properly filed within a year with D.C. Office of Human Rights), *rev'd on other grounds*, 789 F.3d 146 (D.C. Cir. 2015); Childs v. Extended Stay of Am. Hotels, No. 10-3781 (SRN/JJK), 2012 WL 2126845, at *1 (D. Minn. June 12, 2012) (dismissing Title II claim of one plaintiff because he did not file complaint with Minnesota); White v. Denny's Inc., 918 F. Supp. 1418, 1423 (D. Colo. 1996) (granting defendant's motion for summary judgment on Title II claim because administrative requirement was not met); Ghaznavi v. Days Inns of Am., Inc., No. 91 Civ. 4520 (MBM), 1993 WL 330477, at *3 (S.D.N.Y. Aug. 20, 1993) (holding that because no notice was given to a state agency, the Title II claim failed). Although courts have held that the notification requirement cannot be waived and is considered "jurisdictional," *see* Hollis v. Rosa Mexicano DC, LLC, 582 F. Supp. 2d 22, 24 (D.D.C. 2008) (dismissing claim for failure to file with District of Columbia Human Rights Office); Stephens v. Seven Seventeen HB Phila. Corp. No. 2, No. CIV.A. 99-4541, 2001 WL 33464, at *1–5 (E.D. Pa. Jan. 11, 2001) (dismissing Title II claim because plaintiffs did not give notice to appropriate state or local agency); Halton v. Great Clips, Inc., 94 F. Supp. 2d 856, 860–61 (N.D. Ohio 2000) (dismissing claims where plaintiffs did not file with the state first), a recent ruling by the Supreme Court questions these holdings, *see* Fort Bend County v. Davis, 139 S. Ct. 1843 (2019). Some courts will even apply collateral estoppel to give preclusive effect to state administrative determinations. *See, e.g.*, Macer v. Bertucci's Corp., No. 13-CV-2994 (JFB)(ARL), 2013 WL 6235607, at *1 (E.D.N.Y. Dec. 3, 2013) (precluding Section 1981 claim based on administrative judge's findings on state law claim).

Second, the places subject to Title II are limited. Although Title II lists several establishments such as restaurants and hotels,[61] it does not explicitly cover certain sites, including retail stores or grocery stores. Those places may be included, depending upon their characteristics.[62] The language of the statute incorporates certain places with specific traits and excludes others.[63] A store such as Wal-Mart cannot be a place of public accommodation unless it includes an establishment named in Title II.[64] For example, Wal-Marts will be covered when they contain Subways.[65] Similarly, grocery stores are not otherwise included but will be when they have Starbucks stores.[66] Hospitals also may not fall within the coverage, although, again, the inclusion of a covered establishment may permit its inclusion under the statute.[67] Also, a place that is not included in the statutory list, such as a barbershop, will not be a place of public accommodation unless it is located within a listed place of public accommodation—such as a hotel—and

61. 42 U.S.C. § 2000a(b).

62. *See* Singer, *No Right to Exclude*, *supra* note 7, at 1413–22 (discussing arguments regarding coverage of retail stores under Title II); Singer, *We Don't Serve Your Kind Here*, *supra* note 7, at 942 (arguing federal judges should interpret Title II to include retail stores).

63. The language of the statute provides:

> Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:
>
> (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;
>
> (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;
>
> (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and
>
> (4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

42 U.S.C. § 2000a(b).

64. *See, e.g.*, Cruz v. WalMart Super Ctr., No. 5:16-cv-03665, 2017 WL 3727003, at *3 (E.D. Pa. Aug. 29, 2017); Harris, *supra* note 23, at 338; Singer, *No Right to Exclude*, *supra* note 7, 1413–22 (discussing arguments that might not be covered but concluding they are). Changes in interstate commerce might warrant the expansion of coverage to retail stores. *Cf.* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 251 (1964); Singer, *We Don't Serve Your Kind Here*, *supra* note 7, at 936 (mentioning discriminatory surveillance and service).

65. *Cf., e.g.*, Jackson v. Walgreens Co., No. 16-0398 (JRT/FLN), 2016 WL 4212258, at *2 (D. Minn. Aug. 10, 2016).

66. *See* Dunn v. Albertsons, No. 2:16–cv–02194–GMN–PAL, 2017 WL 3470573, at *4 (D. Nev. Aug. 10, 2017); Chu v. Gordmans, Inc., No. 8:01CV182, 2002 WL 802353, at *4 (D. Neb. Apr. 12, 2002) (holding that ½ Price Store was retail store not covered under Title II).

67. *See, e.g.*, Ramirez v. Adventist Med. Ctr., No. 3:17–cv–831–SI, 2017 WL 4798996, at *5–6 (D. Or. Oct. 24. 2017); Dunk v. Brower, No. 07 Civ. 7087(RPP), 2009 WL 650352, at *6 (S.D.N.Y. Mar. 12, 2009) (holding that martial arts club was not shown to be a public accommodation under Title II).

serves the customers of that place.[68] Certain places will not be places of public accommodation under Title II at all, such as airplanes[69] and banks.[70] With respect to some places, differences of opinion exist on whether they fall within places of public accommodation. Some courts have said an airport is not a place of public accommodation.[71] Others have said it is.[72] Although places that entertain can fall within the definition of public accommodations, this is also subject to interpretation. A court held that a salon is not a public accommodation.[73] On the other hand, courts have found a women's health club[74] and a poolroom[75] are public accommodations. In addition to these restrictions, Title II explicitly excludes certain places from coverage, including private clubs and religious organizations.[76]

Finally, even if a place is subject to Title II, the relief for discrimination under the statute is extremely limited. Only attorneys' fees, declaratory relief,

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68. *See* 1 RODNEY A. SMOLLA, FEDERAL CIVIL RIGHTS ACTS § 7:8 (3d ed. 2019).

69. *See* James v. Am. Airlines, Inc., 247 F. Supp. 3d 297, 305 (E.D.N.Y. 2017) ("Airplanes and other forms of transportation are not among the public accommodations listed in Title II."); Kalantar v. Lufthansa German Airlines, 402 F. Supp. 2d 130, 138–39 (D.D.C. 2005) (holding that an airplane is not a public accommodation under Title II). Federal law prohibits airlines from discriminating on the basis of race and other characteristics. *See* 49 U.S.C. § 40127. However, there is no private right of action. The Department of Transportation can take action against the carrier including imposing a fine. *See, e.g*, Sara M. Moniuszko, *Delta Air Lines Fined $50,000 for Kicking 3 Muslim Passengers Off Flights*, USA TODAY (Jan. 27, 2020), https://www.usatoday.com/story/travel/airline-news/2020/01/27/delta-air-lines-fined-50000-discrimination-against-muslim-flyers/4587180002/ [https://perma.cc/8ZGC-9SPA].

70. *See* Akyar v. TD Bank US Holding Co., No. 18-CV-379 (VSB), 2018 WL 4356734, at *1 (S.D.N.Y. Sept. 12, 2018); Hatcher v. Servis First Bank, No. 2:16-cv-01362-RDP, 2016 WL 7336403, at *3 (N.D. Ala. Dec. 19, 2016); Lowe v. ViewPoint Bank, No. 3:12–CV–1725–G (BH), 2014 WL 4631571, at *3 (N.D. Tex. Sept. 16, 2014); Eruchalu v. U.S. Bank, Nat'l Ass'n, No. 2:12–cv–01264–MMD–VCF, 2013 WL 6667702, at *7 (D. Nev. Dec. 17, 2013).

71. *See* Benjamin v. Am. Airlines, Inc., No. CV 213-150, 2015 WL 8968297, at *1 (S.D. Ga. Dec. 15, 2015); Abdallah v. JetBlue Airways Corp., No. 14-1050 (JLL)(JAD), 2015 WL 3618326, at *6 (D.N.J. June 9, 2015).

72. *See* Tenant v. Delta Airlines, Inc., No. Civ.A. 99-594, 1999 WL 387113, at *1 (E.D. Pa. May 28, 1999).

73. *See* Denny v. Elizabeth Arden Salons, Inc., 456 F.3d 427, 431–34 (4th Cir. 2006); *see also* Halton v. Great Clips, 94 F. Supp. 2d 856, 861–62 (N.D. Ohio 2000) (holding hair salon did not fall within Title II coverage). The dissent in *Denny* protested that the salon was covered under Title II. *See* 456 F.3d at 437–41 (King, J., dissenting).

74. *See* Rousseve v. Shape Spa for Health & Beauty, Inc., 516 F.2d 64, 65–68 (5th Cir. 1975) (holding as public accommodation a spa in which "[p]leasure and relaxation [were] stressed as perquisites of membership in the studio programs: ' . . . Have fun with our fabulous personalized exercise program. Swim and Luxuriate in the Whirlpool Baths. Invigorate. Ah! Luxury! . . .'" (third and fourth alterations in original)).

75. *See* United States v. Williams, 376 F. Supp. 750, 752 (M.D. Fla. 1974).

76. 42 U.S.C. § 2000a(e); *see also* Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 440 (1973) (finding swimming club not exempt as private organization under Title II, Section 1981, or Section 1982); Wright v. Salisbury Club, Ltd., 632 F.2d 309 (4th Cir. 1980) (reversing judgment for club that excluded Black persons, finding club was not private); Olzman v. Lake Hills Swim Club, Inc., 495 F.2d 1333, 1336 (2d Cir. 1974) (finding there to be "no plan or purpose of exclusiveness" where people who bought houses that belonged to former members automatically became members); Durham v. Red Lake Fishing & Hunting Club, Inc., 666 F. Supp. 954, 958–61 (W.D. Tex. 1987) (deciding fishing and hunting club was not private club within Title II and Section 1981).

and injunctive relief can be recovered.[77] To obtain declaratory or injunctive relief, the plaintiff must respectively prove "a substantial and continuing controversy" or immediate, irreparable future injury.[78] These requirements have been difficult to show.[79]

Where plaintiffs seek injunctive relief, this remedy has been generally available only with repeated denials of admission or where admission to a place has been completely barred. For example, a judge ordered a preliminary injunction against a club that delayed and denied admission to Black people.[80] Similarly, where a hunting and fishing club had allowed no Black members and failed to offer convincing evidence for denial of membership to the plaintiff, the court enjoined the club from denying membership.[81]

However, not all cases with discriminatory admission policies will result in injunctive relief. As one example, despite evidence of a discriminatory dress policy implemented by a bowling alley against Black people and discrimination

77. *See* Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968); Capnord v. Fred's, No. 4:15–CV–168–DMB–RP, 2017 WL 4448228, at *3 (N.D. Miss. Oct. 5, 2017) (granting defendant's motion for summary judgment on the grounds that no damages are available under Title II). Injunctive relief is available only where there is a "real or immediate threat that the plaintiff will be wronged again—'a likelihood of substantial and immediate irreparable injury.'" Brooks v. Collis Foods, Inc., 365 F. Supp. 2d 1342, 1351 (N.D. Ga. 2005) (citation omitted). *See generally* Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377 (2000) (discussing limited remedies under Title III of the ADA). In addition to limited remedies, scholars have written about problems with the private attorney general model of enforcement of the civil rights laws. *See, e.g.*, Ruth Colker, *The Power of Insults*, 100 B.U. L. REV. 1, 46–51 (2020) [hereinafter Colker, *The Power of Insults*] (discussing private attorney general model using the example of the ADA).

78. McLaurin v. Waffle House, Inc., 178 F. Supp. 3d 536, 565 (S.D. Tex. 2016).

79. *See* Hammad v. Dynamo Stadium, LLC, No. H-14-1938, 2015 WL 6965215, at *13 (S.D. Tex. Nov. 10, 2015) (finding plaintiff could not show future harm or continuing present effects); Woolford v. Rest. Concepts, II, LLC, No. 407CV011, 2008 WL 217087, at *3–4 (S.D. Ga. Jan. 23, 2008) (holding that Title II injunctive relief could not be given where Black plaintiffs had been subsequently served at restaurant and other Black customers had been served at the time they were not served); LaRoche v. Denny's Inc., 62 F. Supp. 2d 1375, 1385 (S.D. Fla. 1999); Watson v. Fraternal Order of Eagles, 915 F.2d 235, 243 (6th Cir. 1990) (finding that injunctive relief may not be possible because "[t]hey have not demanded membership in Local 555 or its Ladies Auxiliary, nor have they demonstrated that it is likely that they intend to become guests of Local 555 in the future"); Callwood v. Dave & Buster's Inc., 98 F. Supp. 2d 694, 709 n.9 (D. Md. 2000) (finding that, where there was no policy of discrimination, declaratory or injunctive relief would not be ordered).

80. *See* United States v. Glass Menagerie, Inc., 702 F. Supp. 139, 139–43 (E.D. Ky. 1988). Among other evidence was testimony of employees regarding the discriminatory practices. *Id.*

81. *See Durham*, 666 F. Supp. at 961; *see also* Johnson v. Brace, 472 F. Supp. 1056, 1060 (E.D. Ark. 1979) (finding for Black plaintiffs where they were denied membership on the basis of their race). In a case that went to trial, the court found that injunctive relief was appropriate where the Black plaintiff was forbidden from returning to a restaurant. Bivins v. Wrap it Up, Inc., No. 07-80159-CIV, 2007 WL 3047122, at *9 (S.D. Fla. Oct. 18, 2007); *see also* Jackson v. Waffle House, Inc., 413 F. Supp. 2d 1338, 1365 (N.D. Ga. 2006) (finding injunctive relief possible where the Black plaintiff said he would return to Waffle House if it ended discriminatory practices); Robinson v. Power Pizza, Inc., 993 F. Supp. 1462, 1464–66 (M.D. Fla. 1998) (injunctive relief was appropriate where the company had not provided a legitimate reason for its decision not to deliver to a Black neighborhood).

against the plaintiff, the court denied injunctive relief.[82] The plaintiffs had not "set forth the likelihood of a future encounter with the defendant which [was] likely to lead to a similar violation of some protected right."[83] Courts also have given weight to the establishment's written policy against discrimination. Black plaintiffs who were treated poorly and differently from White customers by a restaurant could not show this would occur in the future, because, among other reasons, the restaurant had a non-discrimination policy.[84]

2. Section 1981 and Section 1982

The statutory constraints that apply to Title II do not apply to Section 1981 and Section 1982 of the Civil Rights Act of 1866.[85] First, Section 1981 and Section 1982 have no administrative requirements.[86] Second, those statutes do not exclude any places. If a contract can be formed with the organization or if a purchase can be made from the place, then the entity is covered.[87] As a result, discrimination by airlines can be covered under Section 1981 though it is not covered under Title II, and discrimination by retail stores can be covered under Section 1981 and Section 1982 though it may not be covered under Title II.[88] Finally, unlimited compensatory and punitive damages are available under the statutes.[89]

B. Jurisprudential Constraints

At the same time that statutory requirements in Title II curb its reach, federal courts throughout the country have created significant restrictions for

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82. *See* Henry v. Lucky Strike Ent., LLC, No. 10-CV-03682 (RRM)(MDG), 2013 WL 4710488, at *1. (E.D.N.Y. Sept. 1, 2013) (considering defendant's testimony that plaintiff's "jeans and jacket were loose-fitting" and that he "was also wearing a baseball cap").

83. *Id.* at *12 (citation omitted).

84. *Jackson*, 413 F. Supp. 2d at 1352. Where plaintiffs have shown they have frequented a place multiple times, courts may order injunctive relief. In one case where such relief was ordered, the Black plaintiffs experienced discrimination by White employees on three occasions when they visited a Waffle House. *See* Thomas v. Freeway Foods, Inc., 406 F. Supp. 2d 610, 625–26 (M.D.N.C. 2005); Sherman v. Kasotakis, 314 F. Supp. 2d 843, 885 (N.D. Iowa 2004) (granting injunctive relief after trial where four Black plaintiffs sued restaurant). In another case, a hotel had allegedly discriminated when the White staff did not give the Black plaintiff his desired room. Trotter v. Columbia Sussex Corp., No. 08-0412-WS-M, 2009 WL 3158189, at *7–8 (S.D. Ala. Sept. 28, 2009). The plaintiff showed, among other things, that he had stayed at many Marriotts. *Id.*

85. In *Runyon v. McCrary*, the Court discussed whether the "private club or other [private] establishment" exemption in the Civil Rights Act of 1964 "operates to narrow § 1 of the Civil Rights Act of 1866." 427 U.S. 160, 172 n.10 (1976) (alteration in original). If the exemption applied, which the Court did not decide, it would be relevant only if the establishment is "not in fact open to the public." *Id.* (citing 42 U.S.C. § 2000a(e)); *see also* Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 236 (1969) (finding that a community swimming pool was not a private social club where there was "no plan or purpose of exclusiveness"), *abrogated by* Ziglar v. Abbasi, 137 S. Ct. 1843 (2017).

86. 42 U.S.C. §§ 1981, 1982.

87. *Id.*

88. *See* Singer, *No Right to Exclude*, *supra* note 7, at 1425–35 (arguing for an interpretation of Section 1981 that prohibits discrimination by retail stores).

89. 42 U.S.C. §§ 1981, 1982.

Title II cases and claims under Section 1981 and Section 1982. Most of the limitations result in courts dismissing cases on a motion to dismiss or motion for summary judgment. In those instances, a judge determines that insufficient evidence of discrimination exists to proceed to discovery or to go to trial.[90] If a company does not win before trial, they can still win. A judge can order judgment as a matter of law for them after a jury decides in the plaintiff's favor. The judge decides that the jury was wrong to think sufficient evidence of discrimination existed.

Courts have dismissed numerous public accommodations cases by using these procedures in conjunction with doctrines from employment discrimination jurisprudence and common law contract principles. This dynamic is described in this Section and analyzed in Part III. As previously mentioned, because courts almost invariably have interpreted Section 1981 and Section 1982 together with the same analysis, this Article includes only an abbreviated discussion of Section 1982.

1. McDonnell Douglas Framework

a. The Law

In the early 1970s the Supreme Court created what later became known as the *McDonnell Douglas* test—a method under Title VII of the Civil Rights Act of 1964 for an employee to prove their employer discriminated against them.[91] To prove a place of public accommodation discriminated against a patron on the basis of their race in violation of Section 1981 and Title II, courts have also used this test and stated that "a Title VII-inspired evaluation is appropriate."[92]

To prove the prima facie case for Section 1981 claims under the *McDonnell Douglas* test, a plaintiff must show (1) they are "a member of a protected class," (2) they "attempted to contract for certain services," (3) they "[were] denied the right to contract for those services," and (4) "such services remained available to similarly-situated individuals who were not members of the plaintiff's protected class."[93]

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90. This is the time when all the witnesses to the circumstances surrounding the alleged discrimination would actually testify and be cross-examined.

91. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); *see* Sandra F. Sperino, *Discrimination Statutes, The Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1, 16.

92. Fall v. LA Fitness, 161 F. Supp. 3d 601, 605 (S.D. Ohio 2016); *see also* Brooks v. Collis Foods, Inc., 365 F. Supp. 2d 1342, 1353 (N.D. Ga. 2005) (applying *McDonnell Douglas* framework). "Because there is little caselaw regarding Title II, courts frequently analyze Title II claims under Title VII jurisprudence." Thymes v. AT&T Mobility Servs., LLC, No. 6:19-cv-00090, 2019 WL 1768311, at *11 (W.D. La. Mar. 19, 2019); *see also* Fahim v. Marriott Hotel Servs., 551 F.3d 344, 349 (5th Cir. 2008) (stating that because "there is but scant case law under Title II . . . [and] Title VII . . . has produced a good deal of case law," courts in Title II cases "frequently borrow Title VII authority").

93. Lindsey v. SLT L.A., LLC, 447 F.3d 1138, 1145 (9th Cir. 2006). There are other tests, but similarly situated people in a non-protected group are generally a part of the analysis. In the Seventh Circuit, a plaintiff must show that "(1) they are members of a racial minority; (2) the defendant had an intent to discriminate on the basis of race; and (3) the discrimination concerned one or more of the

Only the Sixth Circuit, the Eleventh Circuit, the Third Circuit, and a few district courts have permitted a plaintiff to substitute the showing of similarly situated people in the prima facie case.[94] In these circumstances, the Sixth Circuit has stated plaintiffs can show they "received services in a markedly hostile manner and in a manner which a reasonable person would find objectively unreasonable."[95] Although this is a broad standard, it has been further limited by the guidance that "[f]actors relevant to this determination are whether the conduct is 'so profoundly contrary to the manifest financial interests of the merchant and/or its employees; so far outside of widely-accepted business norms; and so arbitrary on its face that the conduct supports a rational inference of discrimination.'"[96]

Although the prima facie test is considered an easy test, plaintiffs often fail to meet it in public accommodations cases. If the prima facie case is shown, the defendant has the burden to provide a legitimate nondiscriminatory reason for its action, which is a low threshold to meet.[97] After the defendant offers this reason, the plaintiff must show that the defendant's justification is pretext or a cover-up for its discriminatory actions.[98]

The method of proof for Title II claims has been substantially the same as for Section 1981 claims.[99] As described above, however, Title II, unlike

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activities enumerated in the statute (i.e., making and enforcing of contract)." Morris v. Office Max, Inc., 89 F.3d 411, 413 (7th Cir. 1996). For the tests used by other circuits, see Hammond v. Kmart Corp., 733 F.3d 360, 362 (1st Cir. 2013); Lopez v. Target Corp., 676 F.3d 1230, 1233 (11th Cir. 2012); Singleton v. St Charles Parish Sheriff's Dep't, 306 F. App'x 195, 197–98 (5th Cir. 2009); Hampton v. Dillard Dep't Stores, Inc., 247 F.3d 1091, 1101–02 (10th Cir. 2001); Gregory v. Dillard's, Inc., 565 F.3d 464, 469 (8th Cir. 2009) (requiring "(1) membership in a protected class, (2) discriminatory intent on the part of the defendant, (3) engagement in a protected activity, and (4) interference with that activity by the defendant").

94. Christian v. Wal-Mart Stores, Inc., 252 F.3d 862, 872 (6th Cir. 2001); Allen v. CLP Corp., 460 F. App'x 845, 848–49 (11th Cir. 2012) (failing to find "evidence of markedly hostile conduct"); L. L. v. Evesham Twp. Bd. of Educ., 710 F. App'x. 545, 548–49 (3d Cir. 2017) (holding that in lending cases, comparator evidence is not necessary to show *McDonnell Douglas* violation); *Brooks*, 365 F. Supp. 2d at 1353–57; Callwood v. Dave & Buster's, Inc., 98 F. Supp.2d 694 (D. Md. 2000). Many other courts have declined to adopt the hostile environment test either explicitly or otherwise. *See* Odunukwe v. Bank of Am., 335 F. App'x. 58, 61–62 (1st Cir. 2009); Lizardo v. Denny's, Inc., 270 F.3d 94, 102 n.2 (2d Cir. 2001); Williams v. Staples, Inc., 372 F.3d 662, 667–68 (4th Cir. 2004); Dunaway v. Cowboys Nightlife, Inc., 436 F. App'x 386, 398–99 n.14 (5th Cir. 2011); Bratton v. Roadway Package Sys., 77 F.3d 168 (7th Cir. 1996); *Lindsey*, 447 F.3d at 1145; *cf. Gregory*, 565 F.3d at 486–89 (8th Cir. 2009) (Murphy, J., dissenting) (discussing satisfaction of hostile environment standard).

95. *Christian*, 252 F.3d at 872.

96. Scott v. Thomas & King, Inc., No. 3:09-CV-147, 2010 WL 2630166, at *8, *10 (S.D. Ohio June 28, 2010) (quoting *Christian*, 252 F.3d at 871).

97. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

98. *See id.* at 804.

99. *Allen*, 460 F. App'x at 848–49; *Dunaway*, 436 F. App'x at 398–99; Shumate v. Twin Tier Hosp., LLC, 655 F. Supp. 2d 521, 537 (M.D. Pa. 2009); Perry v. Petco Animal Supplies Stores, Inc., No. 1:07-CV-2281-ODE-CCH, 2008 WL 11417088, at *5 (N.D. Ga. Mar. 27, 2008); Feacher v. Intercontinental Hotels Grp., 563 F. Supp. 2d 389, 402 (N.D.N.Y. 2008); O'Neill v. Gourmet Sys. of Minn., Inc., 213 F. Supp. 2d 1012, 1022 (W.D. Wis. 2002); LaRoche v. Denny's Inc., 62 F. Supp. 2d

Section 1981, requires the plaintiff to show discrimination by a covered "place of public accommodation"—which can further narrow the protection available to the plaintiff under Title II.[100]

b. Public Accommodations Claims Under McDonnell Douglas

i. Failing to Show Similarly Situated People

As described above, with the exception of a few circuits and district courts, when courts use the *McDonnell Douglas* test, they require a comparison of the alleged discriminatory treatment of the plaintiff and similarly situated people who are not in the protected class. Courts will dismiss cases based on a plaintiff's inability to show that a defendant treated them differently than people who were outside their group. A few examples illustrate the state of the law.

In a Section 1981 case, the court criticized the lack of comparator evidence.[101] There, the plaintiffs, a group of Black customers, alleged that they were refused service at an Applebee's.[102] The restaurant claimed that some people in the group had been rude and had not paid in the past.[103] It did not identify the people whom it alleged had not paid and admitted that some of the people in the group may have properly paid.[104] In its dismissal of the plaintiffs' case on summary judgment, the court held they did not meet the prima facie case by showing similarly situated White customers had been treated differently.[105] The White comparators must have had the same exact characteristics as the Black customers that Applebee's claimed were in the restaurant at the time.[106] Specifically, the plaintiffs had not "identified any Caucasians who had been to Applebee's in the past, had been brought to management's attention as creating a problem in the past and had subsequently . . . been served."[107]

In another case, this time against Denny's, the court explained that the Black plaintiffs had not shown that non-Black patrons were similarly situated, yet treated differently.[108] There, after waiting over an hour and not receiving the correct order, the plaintiffs left without eating or paying for their food.[109] The manager followed them, disparaged them, and threatened to call the police.[110]

1375, 1385 (S.D. Fla. 1999); Hill v. Shell Oil Co., 78 F. Supp. 2d 764, 777–78 (N.D. Ill. 1999); Stevens v. Steak n Shake, Inc., 35 F. Supp. 2d 882, 887 (M.D. Fla. 1998).

100. *See supra* Part II.A.1; *see also* Watson v. Fraternal Order of Eagles, 915 F.2d 235, 239–42 (6th Cir. 1990) (comparing Title II and Section 1981).

101. *Scott*, 2010 WL 2630166, at *10.

102. *Id.* at *2–4.

103. *Id.* at *2.

104. *Id.* at *3.

105. *Id.* at *10.

106. *Id.*

107. *Scott*, 2010 WL 2630166, at *10.

108. Gennell v. Denny's Corp., 378 F. Supp. 2d 551, 558–59 (D. Md. 2005).

109. *Id.* at 555.

110. *Id.*

Deciding that the plaintiffs had not shown the prima facie case for this treatment, the court ordered summary judgment.[111] It explained the plaintiffs had shown neither "other similarly situated, non-African American patrons had orders that were incorrectly filled and then corrected," nor "that any other party, of any race, attempted to leave the restaurant without paying and was not followed or threatened with a call to the police."[112] The defendants, on the other hand, testified that others outside the protected group were treated similarly.[113] The circumstances had to have been the same to win on this Section 1981 and Title II case.

Even when similarly situated people may be present, courts may dispute the difference in treatment. In another Section 1981 case against Denny's, White customers received seating before the four Black plaintiffs, White customers were permitted to make racial slurs, and the plaintiffs were detained for protesting their treatment.[114] Ordering summary judgment, the court concluded that the plaintiffs could not show that the restaurant treated White customers better than the plaintiffs.[115]

A court may even disregard the different treatment of a similarly situated person who is outside of the protected class. In a Section 1981 and Title II case against Marriott, after the Black plaintiff's room key became demagnetized and he required a new key, a White employee required the plaintiff to be accompanied to his room by security and present identification to the hotel employee.[116] In the same time period, a White patron was not required to present such identification to receive a new key.[117] The court ordered summary judgment, because the hotel followed its policy and any exception for a White patron was irrelevant to whether discrimination occurred.[118]

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111. *Id.* at 559.

112. *Id.*; *see also* Hill v. U.S. Airways, Inc., No. 08-14969, 2009 WL 4250702, at *1–4 (E.D. Mich. Nov. 25, 2009) (granting summary judgment where other passenger received different treatment but was not similarly situated); Dozier v. Waffle House, Inc., No. 1:03-CV-3093-ODE, 2005 WL 8154381, at *5–6 (N.D. Ga. May 4, 2005) (finding no evidence of customary practice of greeting at times when no host is on duty, which plaintiffs claimed they were denied).

113. *Gennell*, 378 F. Supp. at 559.

114. White v. Denny's Inc., 918 F. Supp. 1418, 1421 (D. Colo. 1996).

115. *See id.* at 1425–29; *see also* Jackson v. Waffle House, Inc., 413 F. Supp. 2d 1338, 1364 (N.D. Ga. 2006) (finding that plaintiff failed to show that White patrons were not treated similarly); McCoy v. Homestead Studio Suites Hotels, 177 F. App'x 442, 445 (5th Cir. 2006) (plaintiffs did not show that non-Chinese patrons were treated differently).

116. Sherman v. Marriott Hotel Servs., 317 F. Supp. 2d 609, 612 (D. Md. 2004).

117. *Id.* at 613

118. *See id.* at 615; *see also* Wells v. Burger King Corp., 40 F. Supp. 2d 1366, 1367 (N.D. Fla. 1998) (ordering summary judgment against Burger King customers because "[a]s described by [the employees], the events . . . unfolded somewhat differently"). In another case against Marriott, after a dispute about the payment of an eighteen-dollar breakfast, a Black couple resolved that the charge would be added to their final bill. Perkins v. Marriott Int'l, Inc., 945 F. Supp. 282, 283–84 (D.D.C. 1996). Subsequently, the hotel locked the couple out of their room and searched their belongings. *Id.* at 284. In ordering summary judgment, the court decided the plaintiffs had not offered evidence that a couple not of their race would be treated differently and could not show that the actions were motivated by race. *Id.*

Although the Sixth Circuit, the Eleventh Circuit, the Third Circuit, and some district courts allow plaintiffs to show hostile discriminatory treatment instead of meeting the similarly situated person requirement,[119] courts also often find no violation under this standard. For example, in the previously mentioned case against Applebee's, the Black plaintiffs were not served after waiting over an hour and were referred to as "you people."[120] The district court held "the term 'you people' is not considered to be a racial epithet and a number of district courts have found that far more serious examples of racially-charged conduct are required to establish a prima facie case."[121] Also, the court decided that the waiter "speaking in a hostile and unprofessional manner, if true, [did] not rise to the level of being objectively discriminatory."[122] Using the multi-factor test that the Sixth Circuit had established in the past, the court concluded Applebee's had not acted against its business interests, rejected general business norms, or behaved in a patently discriminatory fashion when it refused to serve those it thought had previously not paid and been rude to servers.[123]

ii. Failing to Prove the Place of Public Accommodation's Reason for Treatment is Pretext for Discrimination

Even if the prima facie case of discrimination can be proven, courts often decide the plaintiff cannot show that the reason the defendant offered for its treatment of the plaintiff is pretext or a cover-up for discrimination. For example, in the Applebee's Section 1981 case, the defendants asserted that the Black plaintiffs were not served because, previously, they had been rude and had not paid.[124] The plaintiffs' subjective beliefs that the defendants did not serve them because of their race as well as the defendants' use of "you people" was not

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at 286–87. The court also would not consider evidence that non-White customers had complained about discriminatory treatment. *See id.*

119. *See supra* note 94.

120. Scott v. Thomas & King, Inc., No. 3:09-CV-147, 2010 WL 2630166, at *10 (S.D. Ohio June 28, 2010).

121. *Id.* Many books and articles discuss why using this type of language is race discrimination. *See, e.g.*, JANE H. HILL, THE EVERYDAY LANGUAGE OF WHITE RACISM (2008); Derald Wing Sue, Christina M. Capodilupo, Gina C. Torino, Jennifer M. Bucceri, Aisha M. B. Holder, Kevin L. Nadal & Marta Esquilin, *Racial Microaggressions in Everyday Life: Implications for Clinical Practice*, 62 AM. PSYCH. 271 (2007).

122. *Scott*, 2010 WL 2630166, at *10.

123. *Id.* In another Title II and Section 1981 case applying the alternative hostile treatment standard, the court first recognized the difficulty of the similarly situated requirement. O'Neill v. Gourmet Sys. of Minn., Inc., 213 F. Supp. 2d 1012, 1020 (W.D. Wis. 2002). There, the fifty-six-year-old plaintiff alleged that Applebee's would not serve him alcohol upon his presenting Native American tribal identification. *Id.* at 1015–16. The court stated that "[p]laintiff would be forced to uncover incidents in which white customers were served alcohol although they could not show one of the identification documents on defendants' approved list. Although it is not an impossible requirement to meet, it would be onerous." *Id.* at 1020. Applying the alternative method of proof, the court stated the store's policy requiring certain specified identification for people who appear to be thirty and younger was not "profoundly contrary to defendants' financial interests or . . . facially arbitrary." *Id.* at 1021. Thus, the prima facie case for the hostile treatment claim was not met. *Id.* at 1020–21.

124. *Scott*, 2010 WL 2630166, at *2.

enough to show the defendant's reason was a pretext or cover-up for discrimination.[125]

In another Section 1981 case, a Black passenger who had platinum medallion status with Delta Airlines waited in a priority line.[126] The airline requested he move to the back of a general line, while a White customer was moved to the front of the line.[127] The plaintiff alleged that he was denied the associated benefits of his status, which included faster service.[128] In conjunction with his claim, he alleged that the White passenger who had less favorable status was treated better than he was.[129] The court granted summary judgment for Delta Airlines.[130] According to airline policy, the passenger was required to request special services, and the time that services took was reasonable.[131] Moreover, Delta's reason to move all passengers as quickly as possible was legitimate and was not pretext for discrimination.[132]

Insufficient evidence of pretext was also a court's reason behind the dismissal of a Title II case against Waffle House.[133] There, a group of Black customers entered a Waffle House and sat down at a table.[134] This Waffle House, like others, had an open seating policy.[135] A White waitress told the customers they could not sit at the table where they had sat because the table was reserved for another group.[136] The customers refused to move, and the waitress would not serve them.[137] Another worker, who was Black, told them they did not need to move, and the person in charge at the restaurant subsequently served them.[138] Thereafter, a motorcycle group entered the restaurant and sat at a table near the Black customers, and the waitress served them.[139] Although the court found that the plaintiff had shown a prima facie case of discrimination, it ordered summary judgment for the restaurant.[140] The plaintiffs had not proven the defendant's reason for its decision—reserving the table for another group—was pretext for discrimination.[141] This is despite evidence that the waitress referred to the plaintiffs as "you people" multiple times,[142] that the motorcycle group was an

125. *Id.* at *10.
126. Lee v. Delta Air Lines, Inc., 38 F. Supp. 3d 671, 672–73 (W.D. Penn. 2014).
127. *Id.* at 673.
128. *Id.* at 674.
129. *Id.* at 676.
130. *See id.* at 678.
131. *Id.* at 676–77.
132. *Id*. at 677–78.
133. *See* McLaurin v. Waffle House, Inc., 178 F. Supp. 3d 536, 565 (S.D. Tex. 2016).
134. *Id.* at 541.
135. *Id.* at 549.
136. *Id.* at 541–42.
137. *Id.* at 542.
138. *Id.*
139. *Id.*
140. *See id.* at 545–52.
141. *See id.* at 552.
142. *Id.* at 549–50.

all-White group,[143] and that the motorcycle group, which included the waitress' father, intimidated the plaintiffs by following them outside and showing them a knife.[144]

As a final example of cases dismissed because a court decided pretext was not shown, a White mall security person ordered a group of Black men not to walk "seven deep."[145] After the group split up into smaller groups, they were evicted from the mall.[146] Subsequently, White testers engaged in the same actions but were not told to disperse.[147] Also, there was no specific policy against the walking action that the group of Black men had taken.[148] Despite this evidence, the court ordered summary judgment on the plaintiffs' Section 1981 claim, ruling that the defendant's reason for its treatment of the Black men—that the large group was in the way of others—was not pretext for discrimination against them.[149]

2. No Contractual Issue

Especially because of the remedies limitations in Title II that were described above,[150] Section 1981, which provides for damages, is a more attractive option for many plaintiffs. In 1989, the Supreme Court narrowly interpreted Section 1981's "make and enforce contracts" language to preclude cases alleging harassment in employment and certain discriminatory promotions.[151] Congress responded by amending Section 1981 to define "make and enforce contracts" to mean "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[152]

Courts have held that the refusal to admit or serve—in other words, not to contract at all—violates Section 1981. However, nowadays, most companies do not act in this obviously discriminatory manner to deny admission or service. They may engage in other actions to inhibit contracts. As courts have recognized, "in light of the clear illegality of outright refusal to serve, a restaurant which wishes to discourage minority customers must resort to more subtle efforts to dissuade."[153]

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143. *See id.* at 547.

144. *See id.* at 542–33.

145. *See* Vaughn v. N.S.B.F. Mgmt., Inc., No. 95-CV-70282-DT, 1996 WL 426445, at *1 (E.D. Mich. Apr. 1, 1996), *aff'd*, 114 F.3d 1190 (6th Cir. 1997).

146. *See id.*

147. *See id.* at *7.

148. *See id.* at *3.

149. *See id.* at *7.

150. *See supra* Part II.A.1.

151. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 189 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* CBOCS West, Inc. v. Humphries, 553 U.S. 442 (2008).

152. Civil Rights Act of 1991 § 101, 105 Stat. at 1072.

153. Brooks v. Collis Foods, Inc., 365 F. Supp. 2d 1342, 1358 (N.D. Ga. 2005) (quoting Charity v. Denny's Inc., No. CIV A 98-0554, 1999 WL 544687, at *5 (E.D. La. July 26, 1999)).

In addition to the use of *McDonnell Douglas* to dismiss claims,[154] courts frequently dismiss plaintiffs' claims on the basis that the plaintiff has no contractual claim: there was no contract at all, a contract was completed, or a contract could have been completed. For example, courts have severely limited claims against stores by holding that retail contractual relationships do not exist until a decision to purchase was made and do not continue after the discrete act of purchase.[155] In other contexts, such as a restaurant or bar, while some courts have decided the contractual relationship between the parties is not confined to admission or service, thus allowing claims for poor service to be actionable,[156] many courts do limit a plaintiff to claims of failure to admit or serve. As long as the place admitted, served, or could have served the plaintiff, no violation will exist where the place otherwise treated the plaintiff differently because of their race.[157]

a. Following and False Shoplifting Accusations

Discriminatory surveillance practices have been documented in sociology literature.[158] Most courts have decided that if stores engage in this behavior of following and/or falsely accusing Black shoppers of shoplifting, no Section 1981 claim for the Black shopper exists. Title II usually will not apply in these contexts, because the store is not a place of public accommodation as defined in the statute. If it does apply, the Title II claim will generally fail for the same reasons as under Section 1981.

In one example of these claims under Section 1981, a clerk called the police after two Black men, Morris and Nailor, entered an Office Max store.[159] Once the police arrived, the men were required to provide identification.[160] The Seventh Circuit dismissed the plaintiffs' lawsuit on summary judgment.[161] Their ability to buy was not impaired, so they were not denied the right to make and enforce a contract.[162] The court explained, "While the incident that Morris and

154. Many of the claims in the *McDonnell Douglas* section above concern these more subtle claims outside of refusal to admit or serve.

155. *See, e.g.*, Arguello v. Conoco, Inc., 330 F.3d 355, 359–60 (5th Cir. 2003).

156. *See id.* at 360–61; Eddy v. Waffle House, Inc., 482 F.3d 674, 678 (4th Cir. 2007), *vacated*, 554 U.S. 911 (2008) (mem.).

157. *See* Morris v. Office Max, Inc., 89 F.3d 411, 413 (7th Cir. 1996) (concluding that Black plaintiffs had no valid claim where "[t]hey were denied neither admittance nor service, nor were they asked to leave the store"); Watson v. Fraternal Order of Eagles, 915 F.2d 235, 243 (6th Cir. 1990) (finding actionable Section 1981 claim where Black plaintiffs were asked to leave to prevent club from selling soft drink to a Black patron, for refusal to serve could be accomplished by asking plaintiffs to leave).

158. *See* Brewster et al., *supra* note 8, at 479.

159. *Morris*, 89 F.3d at 411–12.

160. *Id.* In the Fifth Circuit, in a similar case against Coach, a Black plaintiff alleged that she was asked to provide identification to use her credit card while White shoppers were not. Scott v. Coach, Inc., No. 08-0443-CV-W-HFS, 2009 WL 3517670, at *1 (W.D. Miss. Oct. 26, 2009). The court dismissed the case on summary judgment. *Id.*

161. *Morris*, 89 F.3d at 415.

162. *Id.* at 414.

Nailor experienced was unfortunate and undoubtedly disconcerting and humiliating, it does not constitute a violation . . . ."[163] The court also discussed the Section 1982 claim. It stated that "[b]ecause of their common origin and purpose, Section 1981 and Section 1982 are generally construed in tandem."[164] After rejecting the Section 1981 claim, the court also dismissed the Section 1982 claim on the same basis—that they could have made their purchases.[165]

In another case, this time in Kansas, a White security guard at a mall told a Black woman who was shopping to pull up her pants.[166] She replied that she was dressed appropriately.[167] The guard proceeded to follow her, ridicule her, and then block her from using the elevator.[168] After she turned away, the guard continued to move behind her, again making comments along the way.[169] Thereafter, he handcuffed her, and when she objected, two or three other White guards tackled her.[170] The guards then searched her belongings and prohibited her from using her phone.[171] After her mother came to pick her up, the guards uncuffed her and told her she was prohibited from shopping at the mall for a year.[172] On a motion to dismiss, the court decided that the plaintiff had no Section 1981 claim, because she had not alleged that "she was prevented from making any specific purchases."[173] In the past, the Tenth Circuit, which the district court was obligated to follow, had stated, "[f]reedom from racially discriminatory security practices [was not] a benefit or privilege of a merchant's implied contractual offer to let [a person] shop in its store."[174]

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163. *Id.* at 415.

164. *Id*. at 413; *see also* Harris et al., *supra* note 1, at 164 ("Given that most courts interpret it similarly, [Section 1982] does not provide more effective relief than Section 1981."); Runyon v. McCrary, 427 U.S. 160, 190 (1976) (Stevens, J., concurring) ("[I]t would be most incongruous to give those two sections a fundamentally different construction.").

165. *Morris*, 89 F.3d at 415.

166. Chambers v. Simon Prop. Grp., No. 12-1179-EFM, 2013 WL 1947422, at *1 (D. Kan. May 10, 2013).

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at *3.

174. Hampton v. Dillard Dep't Stores, Inc., 985 F. Supp. 1055, 1059–60 (D. Kan. 1997), *aff'd*, 247 F.3d 1091, 1118 (10th Cir. 2001) (agreeing with the district court about the scope of the statute's protections). Similarly, in another case against Dillard's, a group of Black plaintiffs alleged that the store engaged in discriminatory surveillance in violation of Section 1981. Gregory v. Dillard's, Inc., 565 F.3d 464, 466–67 (8th Cir. 2009). The Eighth Circuit en banc affirmed the dismissal at the motion to dismiss stage. *Id.* Where such discriminatory action did not "block" making a purchase, it was not illegal under the statute. *Id.* 472–76. The court stated that "[r]acially biased watchfulness, however reprehensible, does not 'block' a shopper's attempt to contract" and cited several cases supporting the concept that there is no claim unless an item is picked for purchase. *Id.* at 470, 472. Examples of illegal behavior, the court noted, include asking a customer to leave the store or refusing service. *Id.* at 481.

Most recently, the Eighth Circuit made the limited reach of the law clear by saying "[m]erely entering a retail establishment is not a protected activity under § 1981 as the mere expectation of being treated without discrimination while shopping is not enough." Withers v. Dick's Sporting Goods, Inc.,

People falsely accused of shoplifting generally fare no better. For example, a Black plaintiff was followed around a store by a White Radio Shack employee, purchased an answering machine, and was later falsely accused of shoplifting by the police, whom the store had contacted about the plaintiff.[175] The First Circuit affirmed dismissal of all of the plaintiff's federal and state accommodations claims on a motion to dismiss and a motion for summary judgment.[176]

First, in a decision dismissing the Section 1981 and Section 1982 public accommodations claims that was later affirmed by the First Circuit, the district court declared the plaintiff "consummated his contractual relationship with Radio Shack: he purchased his supplies and went home, without any interference based upon his race."[177] The district court concluded that following a person and falsely accusing them of shoplifting were not actionable: the statutes did not cover "[g]eneral mistreatment related to race."[178]

In its affirmance of dismissal, the First Circuit also discussed the plaintiff's Section 1982 claim. It said, "Due to the statutes' similar wording and common lineage, sections 1981 and 1982 are traditionally construed *in pari materia*."[179] As a result, it stated, "we are confident that our reasoning vis-à-vis section 1981

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636 F.3d 958, 963 (8th Cir. 2011). In this case against Dick's Sporting Goods, the Black patrons were under the constant surveillance of the White store employees on the two occasions they went to the store. *Id.* at 961–62. However, the court found no discrimination because the store did not prevent them from purchasing any items. *See id.* at 965–66. As the court stated, "we have clearly established that discriminatory surveillance by a retailer, or mere offending conduct, does not demonstrate interference with a protected activity and any allegations of such activity are insufficient to state a claim . . . ." *Id*. at 965. A contractual relationship was not thwarted as required under the law. *See id*.

175. Garrett v. Tandy Corp., No. Civ. 00-384-P-H, 2003 WL 21250679, at *3–5 (D. Me. May 30, 2003) (magistrate report and recommendation).

176. *See* Garrett v. Tandy Corp., 86 F. App'x 440 (1st Cir. 2004).

177. Garrett v. Tandy Corp., 142 F. Supp. 2d 117, 119 (D. Me. 2001), *aff'd*, 295 F.3d 94, 101 (1st Cir. 2002).

178. *Id.* at 119. In another case, the Fifth Circuit affirmed summary judgment for Dillard's, where plaintiff was falsely accused of shoplifting, detained, falsely arrested, and banned from the store. Morris v. Dillard Dep't Stores, Inc., 277 F.3d 743, 746–47, 751–53 (5th Cir. 2001). These actions did not block a contract under Section 1981: "[T]he ban alone [was] too speculative to establish loss of any actual contractual interest owed to [plaintiff] by Dillard's." *Id*. at 753. To have a claim, she was required to have attempted to contract with the store during the ban. *See id*.; *see also* Hunter v. Buckle, Inc., 488 F. Supp. 2d 1157, 1172–73 (D. Kan. 2007) (finding no evidence that plaintiff decided to purchase jeans that she had tried on); Jeffrey v. Home Depot U.S.A., Inc., 90 F. Supp. 2d 1066, 1069–70 (S.D. Cal. 2000) (finding that, although delayed, Black plaintiff was not denied the ability to make his purchase when the store asked for permission to search his bag, which he did not give). At the time of the case, most of the courts of appeals had concluded that "discriminatory surveillance and watchfulness does not qualify the embarrassed victim for making a claim"; as long as a purchase was not prevented, no Section 1981 claim existed. *See* Scott v. Coach, Inc., No. 08-0443-CV-W-HFS, 2009 WL 3517670, at *1 (W.D. Miss. Oct. 26, 2009). Cases in other circuits have been dismissed on similar grounds. *See, e.g.*, Perry v. Petco Animal Supplies Stores, Inc., No. 1:07-CV-2281-ODE-CCH, 2008 WL 11417088, at *5 (N.D. Ga. Mar. 27, 2008) (granting motion to dismiss where boys who were Black took a purchased dog cage to a car and the police detained them, searched the backpack, and found nothing, noting that "[e]ven . . . overt racism" is not covered as long as "no contractual interest was harmed"); HENDERSON ET AL., *supra* note 8, at 39–40, 105–20.

179. *Garrett*, 295 F.3d at 103.

(and, thus, our holding) applies with equal force to any claim that the appellant might have under section 1982."[180]

In the subsequent decision granting summary judgment on the state public accommodations claim, which the First Circuit affirmed, the district court followed the First Circuit's prior holding that "the challenged surveillance must have some negative effect on the shopper's ability to contract with the store in order to engage the gears of section 1981."[181] The court granted summary judgment because the patron had not been prevented from making a purchase.[182]

b. Slow, Delayed Service

Similar to discriminatory surveillance, social science literature has recognized discriminatory service because of race.[183] And for the same reason that discriminatory surveillance claims are not successful, courts generally dismiss these discriminatory service claims under Title II and Section 1981, because the contract—the service—can be completed.

For example, a court granted a motion to dismiss discrimination claims by Black patrons of a Pizza Hut in North Carolina.[184] The plaintiffs alleged that they received slower service than White customers and that the White manager touched their pizza.[185] When the plaintiffs arrived, they were not seated by staff.[186] Later, after a table was put together for them, they were not shown to the table so they sat down at the table on their own.[187] After they continued not to

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180. *Id.*

181. *Id.* at 101. In *Ortiz-Rosario v. Toys "R" Us P.R.*, Inc., the court found no Section 1981 claim where two hours and twenty minutes passed between the time a Black Puerto Rican plaintiff was accused of shoplifting and when the store and police, who had been called, exonerated her. 585 F. Supp. 2d 216, 218–19 (D.P.R. 2007). The plaintiff was subsequently left inside the store and could have made a purchase at the store if she wished. *Id.* at 221–22. The Section 1982 claim was dismissed on the same basis. *Id.*; *see also* Kinnon v. Arcoub, Gopman & Assocs., Inc., 490 F.3d 886, 891–94 (11th Cir. 2007) (affirming summary judgment where Black plaintiff could not show pretext for restaurant's reasons for additional charge and slow service, despite racist "n word" language later used by the employee who assisted her).

182. Garrett v. Tandy Corp., No. Civ. 03-384-P-H, 2003 WL 21703637, at *1 (D. Me. July 22, 2003), *aff'd*, 86 F. App'x 440 (1st Cir. 2004); *see also* Chu v. Gordmans, Inc., No. 8:01CV182, 2002 WL 802353, at *6 (D. Neb. Apr. 12, 2002) (holding that no cause of action existed where plaintiff was questioned and her purchases inspected after she made purchases); Lewis v. J.C. Penney Co., 948 F. Supp. 367, 372 (D. Del. 1996) (granting summary judgment to defendants, where Black plaintiff was accused of shoplifting after making purchases, because "not a single case was cited in which a customer, falsely accused of shoplifting, was permitted to proceed").

183. *See* Brewster et al., *supra* note 8, at 479; Zachary W. Brewster & Sarah N. Rusche, *The Effects of Racialized Workplace Discourse on Race-Based Service in Full-Service Restaurants*, 41 J. HOSP. & TOURISM RSCH. 398, 406–09 (2017) [hereinafter Brewster & Rusche, *The Effects of Racialized Workplace Discourse*] ("[R]ace-based service is systemic in the full-service restaurant industry."); Zachary W. Brewster & Sarah Nell Rusche, *Quantitative Evidence of the Continuing Significance of Race: Tableside Racism in Full-Service Restaurants*, 43 J. BLACK STUD. 359, 362, 375–79 (2012).

184. Bobbitt v. Rage Inc., 19 F. Supp. 2d 512, 514–15, 518 (W.D.N.C. 1998).

185. *Id.* at 514–15.

186. *Id.* at 514.

187. *Id.*

receive service, they retrieved their own menus.[188] White customers were seated, waited on, and even served food before the plaintiffs received any service.[189] An employee with a traditionally Muslim name—Muhammad Ali—apologized to them and said, "it was '[the other employees'] belief to act this way.'"[190] He took their order and, after they received their pizza, the plaintiffs said there was insufficient sauce on it.[191] The White manager responded by touching their pizza—pulling back the cheese to try to prove this was not so.[192] The court decided that this conduct was not a Section 1981 or a Title II violation, because the plaintiffs had not been denied service.[193] Slow service was not actionable.[194] The Black "[p]laintiffs were denied neither admittance to the restaurant nor service."[195] "While inconvenient, frustrating and all too common, the mere fact of slow service in a fast-food restaurant does not . . . rise to the level of violating one's civil rights."[196] The court further stated that the discriminatory "poor service" was not actionable.[197]

Similarly, courts have held that Section 1981 does not cover discriminatory service by a bank. In one case in Arizona, a Black customer tried to make credit card payments and withdraw money from the drive-thru of her bank JPMorgan Chase.[198] After a twenty-minute delay, the acting bank manager insisted she come inside to verify her identity.[199] She complied, and made credit card payments with the manager's help.[200] When she next attempted to make her withdrawal, the teller refused to help her and said she had never seen the plaintiff in the bank.[201] Despite the manager attempting to assist the plaintiff by verifying her signature, the teller continued to say she was uncomfortable giving the plaintiff money, could refuse her service, and told the manager that the customer could go to another branch.[202] The manager said he could not override the teller's decision and explained that there had been fraud at the bank.[203] At some point, the manager told the customer to return to the teller who completed the

188. *Id.*
189. *Id.* at 514–15.
190. *Id.* at 515.
191. *Id.*
192. *Id.*
193. *See id.* at 517–18, 521–22.
194. *Id.* at 518.
195. *Id.*
196. *Id.* (quoting Robertson v. Burger King, Inc., 848 F. Supp. 78, 81 (E.D. La. 1994)); *see also* Jackson v. Waffle House, Inc., 413 F. Supp. 2d 1338, 1363 (N.D. Ga. 2006) (finding that a wait time of thirty to forty-five minutes, standing alone, is not actionable under Title II).
197. *See Bobbitt*, 19 F. Supp. 2d at 519.
198. *See* York v. JPMorgan Chase Bank, Nat'l Ass'n, No. CV-18-04039-PHX-SPL, 2019 WL 3802535, at *1 (D. Ariz. Aug. 13, 2019).
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*

transaction.[204] In all, this took more than an hour.[205] On a motion to dismiss, the court rejected the plaintiff's Section 1981 claim.[206] There had been no denial of service.[207] Even if the delay was caused by racial discrimination, there was no loss of a contract.[208]

Discriminatory service can occur in any place of public accommodation including stores and gas stations. In a case against Target, a Hispanic plaintiff alleged a White cashier refused to check him out and served White customers before and after him.[209] Thereafter, a supervisor told the customer that the same White cashier was open, but the cashier continued to refuse to serve him.[210] Another cashier then checked out the customer.[211] Because the plaintiff had been allowed to buy his items, he had no Section 1981 claim.[212] Affirming dismissal on a motion to dismiss, the Eleventh Circuit declared that "[s]ection 1981 does not provide a general cause of action for all racial harassment that occurs during the contracting process."[213]

c. Service Infused with Racist Remarks

The use of explicit racist and coded racist comments has been documented in the service industry.[214] Where racist language is employed, as long as a court

204. *Id.*
205. *Id.*
206. *Id.* at *1, *4.
207. *Id.* at *3.
208. *Id*. As another example in a bank, a court granted a motion to dismiss a Section 1981 claim of a Black Bancorp customer who was told to stand in the individual customer line, even though he had a business account, and who was told to remove his sunglasses. Allen v. U.S. Bancorp., 264 F. Supp. 2d 945, 947–51 (D. Or. 2003). Even though the customer had evidence that White people were not treated similarly, the court decided his contractual interest was satisfied. *Id.* at 951–53. Any delay was not protected. *Id.*
209. Lopez v. Target Corp., 676 F.3d 1230, 1231 (11th Cir. 2012).
210. *Id.* at 1231–32.
211. *Id.* at 1232.
212. *Id.* at 1234–35.
213. *Id.* at 1234 (alteration in original) (citation omitted). Similarly, in a case where a Black plaintiff was delayed from entering a Wal-Mart store, racial epithets were used against him, and he was barred from returning to the store, the Fifth Circuit decided that no claim under Section 1981 existed because he had not been denied the ability to make a purchase. Singleton v. St. Charles Parish Sheriff's Dep't, 306 F. App'x 195, 198 (5th Cir. 2009); *see also* Kirt v. Fashion Bug, Inc. #3253, 495 F. Supp. 2d 957, 959–60, 972–75 (N.D. Iowa 2007) (affirming grant of summary judgment where Black plaintiff was called "you people," screamed at, and told that if she did not leave the store police would be called, because plaintiff had not picked an item at that time and was not ultimately prevented from making a purchase, as another employee said she could continue shopping). In another case, a jury found for the Black plaintiff who alleged a gas station clerk discriminated against him by requiring him to wait for service. Bentley v. United Refin. Co. of Pa., 206 F. Supp. 2d 402, 403 (W.D.N.Y. 2002). The trial court threw out the jury's verdict and ordered judgment as a matter of law for the gas station on the Section 1981 claim. *Id.* at 406. At the time, the plaintiff was the only Black customer at the store. *Id.* at 404. There was also direct evidence that the clerk could have possessed discriminatory motives: five years earlier, the clerk had said she "hate[d] n[—]s." *Id.* Despite the delay in service, the court stated the plaintiff had no claim, because he was able to complete his transaction. *Id*. at 406.
214. *See* Brewster & Rusche, *The Effects*, *supra* note 183, at 398–99; *cf.* SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW (2017)

deems a purchase was or could be made, courts generally have found the plaintiff has no viable claim.

For example, in a case involving the purchase of gasoline and attempted purchase of beer, Hispanic plaintiffs alleged that a White Conoco store clerk treated them differently.[215] The employee required identification in connection with the use of a credit card, used obscenities against them, used inappropriate gestures, made racially derogatory comments, and later locked them out of the store.[216] After a jury found that the store discriminated against the plaintiffs, the trial judge overturned the jury's decision, rendering judgment as a matter of law, which the Fifth Circuit affirmed.[217] Section 1981 was not violated, because the store did not prevent the plaintiffs from making a purchase.[218] Rejecting that a relationship continues in a retail context similar to an employment relationship such that racial harassment can be covered under Section 1981, the court decided the clerk's conduct was not illegal.[219]

In another similar case, a White Kmart store clerk made many racist comments while the Black plaintiff placed an item on layaway. [220] The First Circuit affirmed the dismissal of the Section 1981 claim on a motion to dismiss, because the plaintiff was not "actually denied" the ability to make a contract.[221]

Similarly, in the same manner as the First and Fifth Circuits, the Seventh Circuit decided a case with explicit racist remarks. It affirmed summary judgment on Section 1981 and Section 1982 claims for an Ameritech store where the Black plaintiff was given the finger and refused service by an assistant sales manager who had previously made racist remarks in the plaintiff's presence.[222] The plaintiff could have been served by another employee as evidenced both by the manager handing the phone brochure to another employee and that employee asking if he could help the plaintiff when the plaintiff returned to obtain the employee's name as a witness.[223]

(discussing explicit discrimination in employment discrimination cases dismissed by judges); Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505 (2018) (discussing explicit bias in cases).

215. *See* Arguello v. Conoco, 330 F.3d 355, 356–57 (5th Cir. 2003).

216. *Id.*

217. *Id.* at 356.

218. *Id.* at 359.

219. *Id.* at 360.

220. Hammond v. Kmart Corp., 733 F.3d 360, 361 (1st Cir. 2013).

221. *Id.* at 362–66 (quoting Garrett v. Tandy Corp., 295 F.3d 94, 100–01 (1st Cir. 2002)).

222. Bagley v. Ameritech Corp., 220 F.3d 518, 522 (7th Cir. 2000).

223. *Id.* at 521–22; *see also* Flowers v. TJX Cos., No. 91-CV-1339, 1994 WL 382515, at *1, *6 (N.D.N.Y. July 15, 1994) (granting summary judgment for defendant on Section 1981 claim where, although officer called by T.J. Maxx harassed Black plaintiffs and intended to ask them to leave, plaintiffs were not prevented from making purchases); Roberts v. Walmart Stores, Inc., 769 F. Supp. 1086, 1090 (E.D. Mo. 1991) (finding that recording of race of check writer is not a discriminatory practice actionable under Section 1981 and Section 1982—and thus Black plaintiffs had no claim—because purchase was not prevented, and race of all check writers was recorded); Harrison v. Denny's Rest., Inc., No. C-96-0343 (PJH), 1997 WL 227963, at *4–5 (N.D. Cal. Apr. 24, 1997) (granting summary judgment despite allegations of denial of service by one waiter and slow service because restaurant did not deny service to Black plaintiff); White v. Denny's Inc., 918 F. Supp. 1418, 1429 (D.

d. Other Behavior

More subtle forms of discrimination in public accommodations have been documented.[224] Courts often also dismiss these claims before trial. For example, a Black plaintiff was making copies in a Kinko's store when a White employee said Black people do not look right on pink paper.[225] The White employee and other people in the area, all of whom were White, laughed.[226] Thereafter, the plaintiff finished her copies and paid.[227] The court granted the motion to dismiss; the plaintiff's Section 1981 contractual right was not violated because she was able to obtain her copies.[228] When Section 1981 was amended, "Congress did not intend to convert Section 1981 into a general prohibition against race discrimination."[229]

3. Presumption Against a Finding of Discrimination

In addition to the employment of the *McDonnell Douglas* framework and contractual requirements, courts use a variety of methods to evaluate the evidence of race discrimination in public accommodations cases and ultimately dismiss the cases. The courts effectively create a presumption against a finding of discrimination.

a. Crediting the Place of Public Accommodation's Evidence

At times, courts will credit the defendant's evidence as dispositive in public accommodations cases. For example, in a case against Marriott, the plaintiff who was Egyptian American and Muslim alleged that the hotel discriminated against her on the basis of her race and religion by refusing to give her a room. [230] On summary judgment, the Fifth Circuit affirmed the trial court's dismissal of her Title II claim.[231] Plaintiff had not presented evidence that the hotel had used racial slurs and could not show that Marriott's reason—that it didn't have a

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Colo. 1996) (granting summary judgment because seating White customers before Black customers is not an actionable Section 1981 claim). Even where cases are not dismissed on summary judgment, a court may highlight the possibility that there is no valid Section 1981 claim. *See* Davis v. Megabus Ne. LLC, 301 F. Supp. 3d 105, 111 (D.D.C. 2018). In a case brought by a Black plaintiff against Megabus for discrimination against passengers on the basis of race, the court denied summary judgment, deciding that the company could be liable for the actions of the baggage handler who engaged in the allegedly discriminatory conduct. *Id.* at 110–13. However, the court mentioned that the company had not moved to dismiss on the broader ground of scope of Section 1981 coverage. *Id.* at 111.

224. *See* Brewster et al., *supra* note 8, at 480–81.

225. Baltimore-Clark v. Kinko's Inc., 270 F. Supp. 2d 695, 697–98 (D. Md. 2003).

226. *Id.* at 698.

227. *Id.* at 700.

228. *Id.*

229. *Id.* In another case, where an Asian American plaintiff had alleged discriminatory treatment by the personnel in a lobby, the court decided that no Section 1981 violation existed because he was not prevented from accessing the building. Benzinger v. NYSARC, Inc. N.Y.C. Chapter, 385 F. Supp. 3d 224, 234 (S.D.N.Y. 2019).

230. Fahim v. Marriott Hotel Servs., 551 F.3d 344, 346–47 (5th Cir. 2008).

231. *Id.* at 352.

room—was pretext for discrimination.[232] Although the plaintiff alleged that Air France had reserved a room for her and that people obtained rooms after she was told there were no rooms, the court found determinative the hotel's evidence that rooms were not available.[233]

In another case, this one involving a restaurant, a court decided similarly to the Fifth Circuit. There, Black plaintiffs alleged that they were denied seating in the main dining room of Sam and Harry's restaurant because of their race.[234] After they left, in a subsequent call to the restaurant, they were informed reservations were available, and the restaurant was not crowded.[235] The plaintiffs returned and, following a discussion about the previous denial of seating, the restaurant told them to leave.[236] Where the restaurant claimed that there were no spots available during the first visit and plaintiffs presented no evidence that White patrons without reservations were seated, the court said there was "no evidence" of discrimination.[237] The court stated, "We are left with two bald assertions [by plaintiffs], that tables were empty during both visits and that plaintiffs saw no black customers or staff. Defendants dispute that during the first visit these tables were actually available and not already reserved."[238] Thus, crediting the restaurant's evidence, the court granted its motion for summary judgment on the Section 1981 and Title II discrimination claims.[239]

In a final example, a plaintiff who looked to be of Middle Eastern descent was taken off an American Airlines plane, and the airline decided not to rebook him on a flight.[240] After a jury found American discriminated against the plaintiff in violation of Section 1981, the First Circuit ordered judgment as a matter of law because it gave weight to the decision-makers' assertion that they did not know the plaintiff's supposed race.[241]

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232. *Id.* at 351.

233. *Id.* at 351–52 (5th Cir. 2008). In a case decided on similar grounds, the Black plaintiff alleged a Section 1981 violation occurred when he was asked to leave a restaurant in downtown Indianapolis but White patrons were not treated in the same manner. *See* Jones v. Indy 104, LLC, No. 1:08–cv–01128–SEB–TAB, 2010 WL 2270931, at *1–4 (S.D. Ind. June 2, 2010). The court granted summary judgment for the restaurant. *Id.* at *15. The plaintiff's testimony was not sufficient to show discrimination while the defendant's testimony that it treated White patrons similarly to the plaintiff was sufficient to show it did not discriminate. *See id.* at *4–7.

234. Jackson v. Tyler's Dad's Place, Inc., 850 F. Supp. 53, 55 (D.D.C. 1994).

235. *Id.* at 54.

236. *Id.*

237. *Id.* at 56.

238. *Id.*

239. *Id*. at 57. In another case, the Black plaintiff alleged that Wal-Mart took White customers' checks without addresses, including that of her husband, who was White, but at times would not take some Black customers' checks without addresses. Stucky v. Wal-Mart Stores, Inc., No. 02-CV-6613 CJS(P), 2005 WL 2008493, at *7–10 (W.D.N.Y. Aug. 22, 2005). The court granted summary judgment on the Section 1981 claim where, among other things, her check without an address had been taken in the past and Wal-Mart showed it told employees not to take them. *Id.*

240. Cerqueria v. Am. Airlines, Inc., 520 F.3d 1, 4–10 (1st Cir. 2008).

241. *Id.* at 17–18. In another case, a Black plaintiff was shopping at Macy's and purchased several items using an American Express card. Scott v. Macy's E., Inc., No. Civ.A.01–10323–NG, 2002 WL 31439745, at *2 (D. Mass. Oct. 31, 2002). Thereafter, Macy's personnel called American Express, and

b. Suspicious Behavior

In some cases, courts grant summary judgment finding a plaintiff's behavior suspicious even though that same behavior by a White person may not be considered suspicious. In a case against American Airlines, six plaintiffs of Iraqi descent presented evidence that customers questioned their presence prior to boarding.[242] Subsequent behavior, such as using the bathroom pre-flight, covering oneself up with a blanket, as well as supposed staring, led the pilot to return the plane to the gate.[243] The police then questioned the six plaintiffs for over two hours.[244] Because of the flight situation that day, everyone on the flight had to wait for another flight the next day.[245] The court ordered summary judgment on the Section 1981 claim.[246] There was no evidence that the airline discriminated; instead, the plaintiffs had engaged in "unusual and threatening behavior."[247]

c. Lack of Direct Evidence of Discrimination

Courts may dismiss cases on motions to dismiss or summary judgment where there is evidence of racist remarks. Not surprisingly, then, when defendants do not mention race, courts can be reticent to permit claims to go forward. In a case against Southwest Airlines, the plaintiff—a Black man—and his fiancée each boarded a plane with the appropriate carry-on bags.[248] While on board, the plaintiff began to carry one of his fiancée's bags.[249] The White flight attendant said he had too many bags, and he explained that one of the bags was his fiancée's.[250] Another White employee then insisted he must leave the plane, and he and his fiancée were rebooked on a later flight.[251] Subsequently, the plaintiff sued, and his Section 1981 claim was dismissed. [252] The plaintiff could not show that similarly situated White people were not treated the same or that the airline had mentioned his race.[253]

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the plaintiff's card was frozen. *Id.* He tried to use the card subsequently but could not. *Id.* at *3. Despite evidence that Macy's had told American Express that two Black men were using a card fraudulently, the court dismissed the Section 1981 case on summary judgment because that evidence could not be used and, thus, no evidence of race discrimination existed in the case as presented. *See id.* at *4–7.

242. Al-Watan v. Am. Airlines, Inc., 658 F. Supp. 2d 816, 818–19 (E.D. Mich. 2009).

243. *Id.* at 820.

244. *Id.*

245. *Id.*

246. *Id.* at 829.

247. *Id.* at 827; *see also* HENDERSON ET AL., *supra* note 8, at 39–40, 105–20; Marcus L. Stephenson & Howard L. Hughes, *Racialised Boundaries in Tourism and Travel: A Case Study of the UK Black Caribbean Community*, 24 LEISURE STUD. 137, 152 (2005).

248. Mercer v. Sw. Airlines, No. 13–cv–05057–MEJ, 2014 WL 4681788, at *1 (N.D. Cal. Sept. 19, 2014).

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* at *2, *7–8.

253. *Id.* at *7. Similarly, in a case against United Airlines, the plaintiffs of Indian descent alleged that the airline discriminated against them on the basis of their race. Tejwani v. United Airlines, Inc.,

In a case against Bob Evans, the court again required racist comments. A Black plaintiff and his daughter asked for a table in the front of the restaurant but were given a back table.[254] Their server also referred to the plaintiff as "[y]ou damned idiot."[255] The plaintiff sued, alleging this treatment was prohibited discrimination on the basis of race under Title II and Section 1981.[256] When the court dismissed the case, it declared, "Such facts are far from blatant remarks indicating a racial motivation."[257]

d. Insufficient Evidence of Discrimination

Courts also often dismiss Title II and Section 1981 claims on the basis that insufficient evidence of discrimination exists. In one Title II and Section 1981 case brought against McDonald's, a Black customer bought a cup of coffee and

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No. 08 Civ. 2966(SCR), 2009 WL 860064, at *1 (S.D.N.Y. Mar. 31, 2009). They alleged that some passengers in line with them made racist comments toward them. *Id.* They further asserted that a United manager required them to step out of the line and wait for other passengers even though several passengers told the manager that plaintiffs were properly in line. *Id.* at *2. The court ordered summary judgment on their Section 1981 claim because the plaintiffs had not claimed "that any United employee uttered any derogatory remarks or comments or that any United employee encouraged such behavior on the part of some of the passengers waiting on line." *Id.* at *3. Further, they could not show that White people were not treated similarly. *Id.* at *4. The court declared that "race-neutral factors" were "possible." *Id.*

254. Acey v. Bob Evans Farms, Inc., No. 2:13–cv–04916, 2014 WL 989201, at *1 (S.D. W. Va. Mar. 13, 2014).

255. *Id.*; *see also* KangJae Jerry Lee & David Scott, *Racial Discrimination and African Americans' Travel Behavior: The Utility of Habitus and Vignette Technique*, 56 J. TRAVEL RSCH. 381, 385 (2017) (describing discriminatory seating in restaurants). Cracker Barrel settled a suit with the NAACP for $8.7 million for seating Black customers in the back of their restaurant in the smoking section and refusing to serve them. *Cracker Barrel Settles Racial Discrimination Lawsuits for $8.7M*, FOX NEWS (Sept. 9, 2004), https://www.foxnews.com/story/cracker-barrel-settles-racial-discrimination-lawsuits-for-8-7m [https://perma.cc/L4XQ-X65X].

256. *Acey*, 2014 WL 989201, at *1.

257. *Id.* at *4; *see also* Daniels v. Dillard's, Inc., 373 F.3d 885, 887–88 (8th Cir. 2004) (affirming summary judgment on several Black plaintiffs' claims that a White employee did not permit them to use checks and did not give them discounts while White customers were treated differently); Lizardo v. Denny's, Inc., 270 F.3d 94, 106 (2d Cir. 2001) (affirming dismissal of Section 1981 claim on summary judgment because Asian American and Black plaintiffs who were kicked out of restaurant did not sufficiently show similarly situated people not in the group were treated differently, and could not use evidence of hostile treatment to show discrimination). In another case, this time against Extended Stay, the Black plaintiffs were told a hotel room was available. Childs v. Extended Stay of Am. Hotels, No. 10–3781 (SRN/JJK), 2012 WL 2126845, at *1 (D. Minn. June 12, 2012). After they asked about the amenities available at the hotel, they were informed it had no pool and continental breakfast but the Holiday Inn had these. *Id.* They left to check the Holiday Inn but returned to the Extended Stay. *Id.* They were then notified that no room was available for them at the Extended Stay. *Id.* They subsequently called a few times and, after disguising their voice as White, were told a room was available. *Id.* at *2. Later, upon a complaint to the general manager, they were told they had been incorrectly informed. *Id.* A room was available. *Id.* The couple brought suit under Title II and Section 1981. *Id.* at *3. The court granted summary judgment because there was insufficient evidence of discrimination. *Id.* at *6. No hotel agent made "racial insults or remarks" when they requested a room. *Id.* Additionally, there was no discriminatory policies or evidence that similarly situated White customers were treated differently. *Id.* at *5–6.

sat at a large table.[258] He was a regular customer, frequenting this McDonald's many days a week for three years.[259] A White male later sat at the table.[260] He proceeded to tell the plaintiff that he would need to leave the table when the man's friends arrived.[261] When one of the friends, another White male, subsequently arrived and also told the plaintiff he had to move, the plaintiff refused.[262] The White men raised their voices, and the plaintiff followed in also doing so.[263] One of the White men said, "[t]hat's what's wrong with you people."[264] The manager (whose race is not mentioned by the court) went to the table, and without reason, told the plaintiff to leave the restaurant.[265] The Black customer then swore at the manager, left, and was subsequently barred from the restaurant before being permitted in again after three days.[266] The Eleventh Circuit affirmed summary judgment on the claims.[267] In doing so, it made a judgment about the evidence:

> [A] manager's decision to show some preference for a *group* of diners who have yet to order over a *single* diner who already has been served and has had ample time to finish his coffee, does not evidence discrimination, *absent some more telling conduct, such as abusive language or outright hostility.*[268]

In another Title II and Section 1981 case, this time against a hotel, a court ordered summary judgment for the hotel after the Black plaintiffs were evicted, arrested, and imprisoned.[269] Among other things, the court stated that "[e]ven though [the motel employee] may have used a racial slur during this incident, this alone is insufficient to show race was the *reason* [the employee] asked [the patron] to leave the premises."[270]

In a final example that again involved McDonald's, the evidence included: a McDonald's manager treating the Black plaintiff with contempt, the plaintiff being prevented from eating inside the McDonald's, the plaintiff then being falsely arrested, and six witnesses supporting her description of her treatment.[271] The First Circuit affirmed summary judgment and stated there was insufficient

258. Allen v. CLP Corp., 460 F. App'x 845, 846 (11th Cir. 2012).
259. *Id.*
260. *Id.* at 846–47.
261. *Id.* at 847.
262. *Id.*
263. *Id.*
264. *Id.* (alteration in original).
265. *Id.*
266. *See id.*
267. *Id.* at 848–49.
268. *Id.* at 848 (citation omitted).
269. Barton v. Thompson, No. CIV.A. HAR-95-2154, 1996 WL 827416, at *1–2 (D. Md. May 18, 1996).
270. *Id.* at *4.
271. Alexis v. McDonald's Rests. of Mass., Inc., 67 F.3d 341, 345–48 (1st Cir. 1995).

evidence of discrimination for the Section 1981 claim to go to a jury.[272] Specifically, the court stated:

> Although these observations may be entirely compatible with a race-based animus, there simply is no foundation for an inference that [the manager] harbored a racial animus toward [the plaintiff] or anyone else, absent some probative evidence that [the manager's] petulance stemmed from something other than a race-neutral reaction to the stressful encounter plainly evidenced in the summary judgment record . . . .[273]

4. Claims That Survive

Some Title II and Section 1981 claims survive dismissal by courts on motions for summary judgment or motions to dismiss. Many of these cases fall into two categories: forced removal from a place and denial of service. Beyond these categories, a small minority of courts have occasionally permitted some additional claims to go forward. These other categories will be discussed in the next Section.

a. Forced Removal

When plaintiffs are removed from a place of public accommodation, courts sometimes permit their cases to move forward. In a Title II and Section 1981 case against Dave & Buster's, Black patrons were ejected from the restaurant after they complained of discriminatory treatment.[274] The court denied summary judgment, where "[s]ignificantly" the testimony of White patrons corroborated the plaintiffs' allegations.[275] In contrast, in the same case, the court granted summary judgment on the Title II and Section 1981 claims of another group of Black customers.[276] They alleged, among other claims, that the restaurant seated them in the back near the kitchen instead of at a better table where it seated White customers, that they were referred to as "you people," and that they were constructively evicted by their treatment.[277]

In another case, this time against a store, plaintiffs of Arabic/Middle Eastern descent used a firearm range and then intended to shop at the

272. *Id.* at 347–48.

273. *Id.* at 347.

274. Callwood v. Dave & Buster's Inc., 98 F. Supp. 2d 694, 700 (D. Md. 2000).

275. *Id.* at 699, 717–18.

276. *Id.* at 718.

277. *Id.* at 701–702, 718–21. In another case against a restaurant, two Black patrons at a restaurant's bar were ejected after they refused to get up for two White women in response to an informal policy at the bar that men give up their seats for women. Carroll v. Tavern Corp., Nos. 1:08–CV–2514–TWT–JFK, 1:08–CV–2554–TWT–JFK, 2011 WL 1102698, at *2–5 (N.D. Ga. Feb. 9, 2011) (magistrate report and recommendation), *adopted*, 2011 WL 1044609 (N.D. Ga. Mar. 23, 2011). The court denied summary judgment on the Title II and Section 1981 claims. *Id.* at *31. Among other evidence was evidence of a policy favoring White customers and the presence, at the time, of a White man and Indian man who were not asked to move when the Black patrons refused. *Id.* at *24–25. In addition, there was evidence that when the others were asked, they moved for the women, but the restaurant still removed the Black patrons. *Id.*

accompanying store.[278] After they spoke in a non-English language in the restroom, the owner screamed at them, swore at them, and kicked them out of the store.[279] The court denied the motion to dismiss the Section 1981 claim, because the plaintiffs had alleged denial of access to the store.[280]

As a final example, when a Black plaintiff alleged she was kicked off a Greyhound bus by a White bus driver because of her race, the court denied summary judgment on her Section 1981 claim: "Her travel contract was terminated by Greyhound when she was not permitted to reboard the bus."[281]

b. Denial of Service

In some cases where the company denies service, courts permit the lawsuits to move forward. In a case against Northwest Airlines, Muslim men of Middle Eastern descent were not permitted to board a flight allegedly because of their race.[282] The court denied the motion to dismiss the Section 1981 claim, because the men had contracted to be on the flight on which they had been denied admittance.[283]

In a case against the grocery store Jewel, a Black plaintiff filed a Section 1981 claim after he was not allowed to make purchases and was subsequently arrested for alleged theft; those charges were dismissed.[284] The store clerk who was responsible for the plaintiff's treatment had stated, "I know

278. Sayed-Aly v. Tommy Gun, Inc., 170 F. Supp. 3d 771, 773 (E.D. Pa. 2016).

279. *Id.*

280. *Id.*; *see also* Whitehurst v. 230 Fifth, Inc., No. 11 Civ. 0767(CM), 2011 WL 3163495, at *4 (S.D.N.Y. July 26, 2011) (denying motion to dismiss Section 1981 claim, where a group of Black patrons who had a reservation at a restaurant were kicked out of the restaurant by White employees); Shebley v. United Cont'l Holdings, Inc., 357 F. Supp. 3d 684, 691–92 (N.D. Ill. 2019) (denying United Airline's motion to dismiss where Lebanese American family alleged discrimination based on their national origin, religion, and race after they were asked to leave a United flight on the assertions that they did not follow instructions); Bonner v. S-Fer Int'l, Inc., 207 F. Supp. 3d 19, 26 (D.D.C. 2016) (denying motion to dismiss by Salvatore Ferragamo where a White boutique employee kicked out Black plaintiff when she asked to see a pair of shoes); Adams v. U.S. Airways Grp., Inc., 978 F. Supp. 2d 485, 488–89 (E.D. Pa. 2013) (denying airline's motion to dismiss where eleven Black passengers were removed from a plane during which time employees referred to one of them as a "black b---h" and as "you people," and were warned to "keep their mouths shut"); Dunaway v. Cowboys Nightlife, Inc., 436 F. App'x 386, 391–92 (5th Cir. 2011) (reversing summary judgment where Black patrons were removed from club); Banks v. Bank of Am., N.A., 505 F. Supp. 2d 159, 166–68 (D.D.C. 2007) (denying summary judgment for bank when Black plaintiff customer of bank was denied services, removed from bank, and arrested); Ezell v. Edwards Theatres, Inc., No. 104-CV-6533-SMS, 2006 WL 3782698, at *10–18 (E.D. Cal. Dec. 21, 2006) (denying summary judgment where theatre removed two Black patrons after White woman who called them "you people" and the n word complained about them); Solomon v. Waffle House, Inc, 365 F. Supp. 2d 1312, 1324–28 (N.D. Ga. 2004) (denying summary judgment on Black couple's Section 1981 claim where they did not receive their food from White employees).

281. Howell v. Greyhound Lines, Inc., No. 1:07-cv-1113-TCB, 2009 WL 10666051, at *1–2, *7 (N.D. Ga. Apr. 3, 2009).

282. Alasady v. Nw. Airlines Corp., No. Civ.02–3669 (RHK/AJB), 2003 WL 1565944, at *1–2, *10–11 (D. Minn. Mar. 3, 2003).

283. *Id.* at *10–11 (D. Minn. Mar. 3, 2003).

284. Henderson v. Jewel Food Stores, Inc., No. 96 C 3666, 1996 WL 617165, at *1 (N.D. Ill. Oct. 23, 1996).

you people because I've been doing this job for four years and I know you were going to steal this cologne."[285] On another day, the clerk threatened to hurt the plaintiff.[286] The court denied Jewel's motion to dismiss the claim, because the store had prevented the plaintiff from using the accommodation by not allowing him to enter into a contract or purchase.[287]

In another case that involved the denial of service, the Sixth Circuit reversed the district court's grant of summary judgment on a Section 1981 claim.[288] There, the plaintiffs, a Black couple, unsuccessfully tried to book a hotel for their wedding reception numerous times over three months.[289] White testers subsequently attempted to book the hotel for a wedding reception and received more favorable treatment than the Black testers.[290] In this Circuit that accepts hostile treatment claims, the plaintiffs demonstrated hostile treatment through their unsuccessful attempts to talk to the hotel about the wedding booking; they also showed that other non-Black people were not treated similarly.[291]

III.
HAS THE LAW BEEN INTERPRETED CORRECTLY?

Courts have interpreted Title II, Section 1981, and Section 1982 to cover only a narrow set of discriminatory behavior in public accommodations cases. In one decision where surveillance based on race was permitted, the Eighth Circuit noted that it was simply engaging in statutory interpretation, not making policy.

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285. *Id.* at *1.

286. *Id.* at *2.

287. *Id.* at *4; *see also* Washington v. Duty Free Shoppers, Ltd., 710 F. Supp. 1288, 1289 (N.D. Cal. 1988) (denying motion for summary judgment where seventeen Black plaintiffs who were asked for plane tickets or passports refused service while others from public were not asked and were served); Shen v. A & P Food Stores, No. 93 CV 1184 (FB), 1995 WL 728416, at *1 (E.D.N.Y. Nov. 21, 1995) (denying motion to dismiss where plaintiffs of Chinese descent were denied ability to purchase juice by store).

288. Keck v. Graham Hotel Sys., Inc., 566 F.3d 634, 636 (6th Cir. 2009).

289. *Id.* at 637–38.

290. *Id.* at 638–39.

291. *Id.* at 640–42. In a case that involved the selective denial of service, a restaurant would not serve customers from two to five a.m. in the dining room. Robinson v. Paragon Foods, Inc., No. CIVA1:04CV2940JEC, 2006 WL 2661110, at *1 (N.D. Ga. Sept. 15, 2006). Only to-go orders were permitted and a 25-cent to-go fee was assessed in addition to a 10 percent tip. *Id.* At that time, almost all of the customers were Black and coming from a Black nightclub. *Id.* at *2. Since evidence existed that White people were allowed to dine in at the same time that Black people were not, the court denied summary judgment on Title II and Section 1981 claims. *Id.* at *7–8; *see also* Halton v. Great Clips, 94 F. Supp. 2d 856, 866–70 (N.D. Ohio 2000) (denying motion for summary judgment on some claims on proof that White customers were treated more favorably than Black customers of salon). A court also denied Borders bookstore's motion to dismiss a Section 1981 case brought by a Black plaintiff who had picked a book to purchase. Newman v. Borders, Inc., 530 F. Supp. 2d 346, 351 (D.D.C. 2008). After the plaintiff had picked the book, a security guard blocked his way to the check out, insisted he had stolen from the store, said she had been watching him since he entered, and told him to empty his shopping bag from another store. *Id.* at 347–48. The court found that the plaintiff had been "thwarted" in his attempt to purchase. *Id.* at 349.

"[W]e do not express the view (as suggested by plaintiffs' counsel at oral argument) that a certain level of race discrimination in retail establishments is 'acceptable.'"[292] It declared that Congress and the President establish the law, not the courts.[293] The question is whether courts like this one are indeed just following the statutory law or whether they have interpreted the law incorrectly. Legislative history, statutory text, contract law, and previous interpretations of the language in other statutes show courts have not interpreted the statutes in the right manner. In doing so, the courts have effectively created a customer caste.

A. Title II

1. Legislative History

Title II's legislative history shows Congress intended the Act to ensure people of color would receive access to places of public accommodation. In 1963, in his submission to Congress about public accommodations, President John F. Kennedy stated that "no action is more contrary to the spirit of our democracy and Constitution—or more rightfully resented by a Negro citizen who seeks only equal treatment—than the barring of that citizen from restaurants, hotels, theatres, *recreational areas* and other public accommodations and facilities."[294]

The first version of H.R. 7152, which was an early draft of the Civil Rights Act of 1964, described the inability of racial minorities "to obtain adequate lodging accommodations" and stated that "they may be compelled to stay at hotels or motels of poor and inferior quality."[295] It stressed their inability to obtain food while traveling and their exclusion from entertainment and recreational facilities.[296] It stated that, in some circumstances, "[d]iscriminatory practices" by retail stores have prevented minorities from "patronage."[297] The House was also concerned about exclusion and segregation of minorities in "public facilities" where conventions could be held.[298]

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292. Gregory v. Dillard's, Inc., 565 F.3d 464, 476 (8th Cir. 2009) (en banc).

293. *Id.* There was a strong dissent in the case. *See id.* at 478 (Murphy, J., dissenting, with Bye, Melloy, Smith, JJ., joining) ("I respectfully dissent from the majority's failure to give effect to the legislation enacted by Congress to give African Americans equal rights to contract and to purchase goods as possessed by whites.").

294. Daniel v. Paul, 395 U.S. 298, 306–07 (1969) (quoting Special Message to the Congress on Civil Rights and Job Opportunities, 1 PUB. PAPERS 483, 485 (June 19, 1963)).

295. H.R. 7152, 88th Cong. § 201(b) (1963).

296. *Id.* §§ 201(c), (d).

297. *Id*. § 201(e).

298. *Id.* § 201(f). The Bill provided in part that "[a]ll persons shall be entitled, without discrimination or segregation on account of race, color, religion, or national origin, to the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of the following public establishments." *Id.* § 202(a). Included were hotels, entertainment places, gasoline stations, and retail stores. *Id.* Only injunctive relief was possible when a person was "about to engage in" a prohibited practice. *Id.* § 204(a). The prevailing party could receive attorneys' fees. *Id.* § 204(b). Previous versions in the House, such as H.R. 1985, had some similar language. *Miscellaneous Proposals Regarding the*

A subcommittee of the House Judiciary Committee held hearings thereafter. Committee Chairman Emanuel Cellar introduced the hearings by referring to the problem of denial of "access."[299]

The next version of H.R. 7152 eliminated the findings, excluded retail stores, and included the following broad language: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."[300] The House Report that described the Bill stated, "It would make it possible to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public."[301] Further, it described the Bill as "a constitutional and desirable means of dealing with the injustices and humiliations of racial and other discrimination."[302] The report asserted that the law "declares the basic right to equal access to places of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin."[303] Representative William McCulloch and several others described "the opportunity for every individual, regardless of the color of his skin, to have access to places of public accommodations."[304] They stated, "Daily we permit citizens of our Nation to be humiliated and subjected to hardship and abuse solely because of their color."[305] They further recognized that people of color "are . . . denied access to restaurants, hotels, gasoline stations, theaters, and similar establishments," while "[t]heir money is gladly taken at the supermarket, variety shop, or department store."[306] They concluded that places of public accommodation "may not deny service,"[307] so the Bill prohibited denial of "access to places."[308]

Following the January 1964 House Rules Committee hearings, H.R. 7152 was adopted by the House. It featured major amendments, but the main language remained unchanged.[309] In June 1964, the Senate made further changes to H.R. 7152, but the main provision of the public accommodations section stayed the

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Civil Rights of Persons Within the Jurisdiction of the United States: Hearings Before the Subcomm. No. 5 of the H. Comm. on the Judiciary, 88th Cong. 1033–1035 (1963) [hereinafter *Hearings*] (statement of Abe McGregor Goff, Vice Chairman, Interstate Com. Comm'n).

299. *Hearings*, *supra* note 298, at 907–08 (statement of Emanuel Celler, Chairman, Subcomm. No. 5 of the H. Comm. on the Judiciary).

300. H.R. 7152, 88th Cong. § 201(a) (1964).

301. H.R. REP. NO. 88-914, pt.1, at 18 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 2391, 2393.

302. *Id.*

303. *Id.* at 20.

304. *Id.*, pt. 2, at 7.

305. *Id.* at 8.

306. *Id.*

307. *Id.*

308. *Id.*, pt.1, at 20.

309. H.R. 7152, 88th Cong. (1964). A "Community Relations Service" was established to help resolve discrimination issues. *Hearings*, *supra* note 298, at 30–31.

same.[310] The House adopted the amendments on July 2, 1964, and the President signed the bill on the same day.[311]

Although its legislative history emphasizes the denial of access,[312] evidence exists that Congress intended the statute to have an expansive reach. Congress focused on the denial of access and not bad service because businesses generally did not admit or serve Black people. This attention to access does not show that Congress intended to cover only admittance or service. For example, in addition to a discussion of the "exclusion from public accommodations of every description," a Senate Report explained the need to address the unacceptable "differential treatment in" public accommodations.[313] Moreover, as discussed above, Congress intended to eliminate the humiliation faced by Black people who were discriminated against by places of public accommodation—humiliation that can obviously occur when inferior service is received.[314]

2. The Language of Title II

The most significant evidence of the intended scope of Title II is the language of the statute that Congress enacted.[315] It provides that "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."[316] The statute could have stated that people were entitled to admittance or service or used similar limiting language. Instead, it used extremely broad language such as "full and equal enjoyment" and listed a range of benefits that are protected from discrimination: "goods, services, facilities, privileges, advantages, and accommodations."[317] Congress also could have excluded "full and equal

310. PAUL M. DOWNING, CONG. RSCH. SERV., GGR 100-2, THE CIVIL RIGHTS ACT OF 1964: LEGISLATIVE HISTORY; PRO AND CON ARGUMENTS; TEXT LRS-26-32 (1965). The Senate proposed that a plaintiff must inform states and localities with relevant laws at least thirty days before bringing an action. *Id.* at LRS-27.

311. H.R. 7152, 88th Cong. (1964); PAUL M. DOWNING, CONG. RSCH. SERV., GGR 100-2, THE CIVIL RIGHTS ACT OF 1964: LEGISLATIVE HISTORY; PRO AND CON ARGUMENTS; TEXT 32 (1965).

312. As previously noted, a House Report mentioned "the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public." H.R. REP. NO. 88-914, pt.1, at 18; *see also* Rousseve v. Shape Spa for Health & Beauty, Inc., 516 F.2d 64, 70 (5th Cir. 1975) (discussing same congressional purpose).

313. S. REP. NO. 88–872, at 15 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 2355, 2369; *see also* H.R. REP. NO. 88-914, at 19–20 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 2391, 2395.

314. *See supra* text accompanying note 310. *See generally* Elizabeth Sepper, *A Missing Piece of the Puzzle of the Dignitary Torts*, 104 CORNELL L. REV. ONLINE 70 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3433406 [https://perma.cc/D57F-TPCN] (describing public accommodations statutes as laws that protect against dignitary torts that cause humiliation among other harms).

315. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (discussing importance of the text of statutes).

316. 42 U.S.C. § 2000a.

317. *Id.*

enjoyment" and stated that all persons were entitled only to the goods, services, etc. of places of public accommodation without discrimination or segregation. If courts do not give meaning to "full and equal enjoyment" and "goods, services, facilities, privileges, advantages, and accommodations," the words will be superfluous, contrary to statutory construction principles.[318]

Among other sources, the Supreme Court has used the Webster's and the Oxford English dictionaries (hereinafter "Webster's" and "Oxford") to understand the meaning of words set forth in statutes.[319] In its decisions, the Court has "inconsisten[tly]" used dictionaries from different time periods including those that are current and those that date to when statutes were enacted.[320] As a result, definitions from both time periods are described here.

The current Webster's states that "full" means "complete especially in detail, number, or duration," using "full share" as an example.[321] The current Oxford's English dictionary defines "full" as "abundant, amply sufficient, copious; satisfying all requirements."[322] The 1964 Webster's also has a consistent definition of "completely; to the greatest degree."[323] The 1933 Oxford dictionary, in effect in 1964,[324] provides the same definition.[325]

Further, the current Webster**'**s states that "equal" means "like in quality, nature, or status."[326] It also states that "equal" means "like for each member of a group, class, or society" and uses "provide equal employment opportunities" as an example.[327] The current Oxford similarly defines "equal" as "possessing a like degree of a (specified or implied) quality or attribute."[328] The 1964 Webster's also has a consistent definition: "of the same quantity, size, number,

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318. *See, e.g.*, Nielsen v. Preap, 139 S. Ct. 954, 969 (2019) ("[E]very word and every provision is to be given effect [and that n]one should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." (second alternation in original) (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012))).

319. *See* James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 489 (2013); Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era*: *An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 239–40, 240 n.85 (2010).

320. Brudney & Baum, *supra* note 319, at 491.

321. *Full*, WEBSTER'S DICTIONARY, https://www.merriam-webster.com/dictionary/full [https://perma.cc/F87A-EYD2].

322. *Full*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/viewdictionaryentry/Entry/75327 [https://perma.cc/R9V3-NV8S].

323. *Full*, WEBSTER'S NEW WORLD DICTIONARY OF THE ENGLISH LANGUAGE, COLLEGE EDITION 585 (1964) [hereinafter 1964 WEBSTER'S].

324. E-mail from University of Illinois College of Law Library to Suja Thomas (Sept. 22, 2020) (on file with author) [hereinafter Law Library E-mail].

325. *Full*, OXFORD ENGLISH DICTIONARY (1933), https://archive.org/details/in.ernet.dli.2015.271841/page/n591/mode/2up.

326. *Equal*, WEBSTER'S DICTIONARY, https://www.merriam-webster.com/dictionary/equal [https://perma.cc/R84Y-M4T4].

327. *Id.*

328. *Equal*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/viewdictionaryentry/Entry/63695 [https://perma.cc/KG78-M9TJ].

value, degree, intensity, etc."[329] The Oxford dictionary in effect in 1964 provides the same definition.[330]

Finally, the current Webster's states that "enjoyment" means "possession and use" and uses "the enjoyment of civic rights" as an example.[331] The current Oxford definition is broader. It states, "the possession and use of something which affords pleasure or advantage."[332] The 1964 Webster's also has a consistent definition of "having the use or benefit of something; having as one's lot or advantage."[333] The Oxford dictionary in effect in 1964 provides the same definition.[334]

These definitions of "full," "equal," and "enjoyment" give a consistent picture of what the text of the statute means. At minimum, places of public accommodation should give complete and like use and possession of the goods, services, etc. without discrimination and segregation.

Congress also included an expansive list of what a customer must receive without discrimination and segregation from a place of public accommodation. The patron should receive full and equal enjoyment of each of "the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation."[335]

The current Webster's states that "goods" are things that are "manufactured or produced for sale."[336] The current Oxford's English dictionary similarly defines goods as "[t]hings that are produced for sale; commodities and manufactured items to be bought and sold; merchandise, wares; crops; produce."[337] The 1964 Webster's definition of "merchandise; wares" is also consistent.[338] The Oxford dictionary in effect in 1964 has a very similar definition.[339]

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329. *Equal*, 1964 WEBSTER'S, *supra* note 323, at 490.

330. *Equal*, OXFORD ENGLISH DICTIONARY (1933), https://archive.org/details/in.ernet.dli.2015.271840/page/n995/mode/2up.

331. *Enjoyment*, WEBSTER'S DICTIONARY, https://www.merriam-webster.com/dictionary/enjoyment [https://perma.cc/R26J-TR6J].

332. *Enjoyment*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/view/Entry/62415 [https://perma.cc/E49M-T9UX].

333. *Enjoyment*, 1964 WEBSTER'S, *supra* note 323, at 482.

334. *Enjoyment*, OXFORD ENGLISH DICTIONARY (1933), https://archive.org/details/in.ernet.dli.2015.271840/page/n931/mode/2up.

335. 42 U.S.C. § 2000a(a).

336. *Good*, WEBSTER'S DICTIONARY, https://www.merriam-webster.com/dictionary/goods [https://perma.cc/33Y8-BMPW].

337. *Good*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/view/Entry/79925 [https://perma.cc/4BS7-PRJ3].

338. *Good*, 1964 WEBSTER'S, *supra* note 323, at 624.

339. *Good*, OXFORD ENGLISH DICTIONARY (1933), https://archive.org/details/in.ernet.dli.2015.271841/page/n921/mode/2up?q=good.

The current Webster's defines "service" as "the work performed by one that serves."[340] Further, "serve" means "to wait on customers."[341] The current Oxford dictionary similarly defines "service" as the "provision (of labor, material appliances, etc.) for the carrying out of some work for which there is a constant public demand."[342] The 1964 Webster's also has a consistent definition: "work done or duty performed for another or others."[343] The Oxford dictionary in effect in 1964 has a very similar definition.[344]

The current Webster's defines "facilities" as things "that [make] an action, operation, or course of conduct easier."[345] The current Oxford similarly defines them as "the physical means or equipment required for doing something, or the service provided by this."[346] The 1964 Webster's also has a consistent definition: "the means by which something can be more easily done."[347] The Oxford dictionary in effect in 1964 appears to lack a definition.[348]

The current Webster's defines "privilege" as "a right or immunity granted as a peculiar benefit, advantage, or favor."[349] The current Oxford similarly defines "privilege" as "a right, advantage, or immunity granted to or enjoyed by an individual, corporation of individuals, etc., beyond the usual rights or advantages of others."[350] The 1964 Webster's also has a consistent definition: "a right, advantage, favor, or immunity granted to some person, group of persons, or class, not enjoyed by others and sometimes detrimental to them."[351] The Oxford dictionary in effect in 1964 has the same definition.[352]

The current Webster's defines "advantage" as "a factor or circumstance of benefit to its possessor."[353] The current Oxford's similarly states, "benefit;

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340. *Service*, WEBSTER'S DICTIONARY, https://www.merriam-webster.com/dictionary/service [https://perma.cc/YKE7-3GK9].

341. *Serve*, WEBSTER'S DICTIONARY, https://www.merriam-webster.com/dictionary/serve [https://perma.cc/49V8-MWU7].

342. *Service*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/view/Entry/176678 [https://perma.cc/7RYG-Z4J7].

343. *Service*, 1964 WEBSTER'S, *supra* note 323, at 1331.

344. *Service*, OXFORD ENGLISH DICTIONARY (1933), https://archive.org/details/in.ernet.dli.2015.271834/page/n521/mode/2up.

345. *Facility*, WEBSTER'S DICTIONARY, https://www.merriam-webster.com/dictionary/facility [https://perma.cc/59LU-JREL].

346. *Facility*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/view/Entry/67465 [https://perma.cc/Y827-L7DZ].

347. *Facility*, 1964 WEBSTER'S, *supra* note 323, at 520.

348. *Facility*, OXFORD ENGLISH DICTIONARY (1933), https://archive.org/details/in.ernet.dli.2015.271841/page/n13/mode/2up.

349. *Privilege*, WEBSTER'S DICTIONARY, https://www.merriam-webster.com/dictionary/privilege [https://perma.cc/TC9L-ACZG].

350. *Privilege*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/view/Entry/151624 [https://perma.cc/53MG-ALHD].

351. *Privilege*, 1964 WEBSTER'S, *supra* note 323, at 1160.

352. *Privilege*, OXFORD ENGLISH DICTIONARY (1933), https://archive.org/details/in.ernet.dli.2015.120831/page/n179/mode/2up.

353. *Advantage*, WEBSTER'S DICTIONARY, https://www.merriam-webster.com/dictionary/advantage [https://perma.cc/WT63-HJ6X].

increased well-being or convenience."[354] The 1964 Webster's definition is also consistent: "a favorable or beneficial circumstance, event, etc."[355] The Oxford dictionary in effect in 1964 has a similar definition.[356]

Finally, the current Webster's defines "accommodation" as "lodging, food, and services or traveling space and related services."[357] The current Oxford dictionary similarly states, "room and provision for the reception of people, esp. with regard to sleeping, seating, or entertainment; living premises, lodgings."[358] The 1964 Webster's also has a consistent definition: "lodgings; room and board, . . . traveling space, as in a railroad train or airplane; seat, berth, etc."[359] The Oxford dictionary in effect in 1964 has a very similar definition.[360]

These definitions of "goods," "services," "facilities," "privileges," "advantages," and "accommodations" describe all of the benefits of the place of public accommodation. As a result of these words in the statute, a customer is entitled not just to "the goods and services." They are entitled to all parts of the experience of the public accommodation and entitled to the "full and equal enjoyment" of them. Again, without giving meaning to all of these words, they would be superfluous.[361]

a. Application to Public Accommodations Cases

Courts have largely interpreted Title II to require the contractual relationship set forth in Section 1981.[362] But several facts do not support this interpretation. First, Title II's legislative history does not refer to Section 1981. Additionally, the text of Title II does not use language from Section 1981 or refer to contracts.[363] Finally, courts have taken the position of the like interpretation

354. *Advantage*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/view/Entry/2895 [https://perma.cc/NEJ7-X74Y].

355. *Advantage*, 1964 WEBSTER'S, *supra* note 323, at 21.

356. *Advantage*, OXFORD ENGLISH DICTIONARY (1933), https://archive.org/details/in.ernet.dli.2015.99992/page/n171/mode/2up.

357. *Accommodation*, WEBSTER'S DICTIONARY, https://www.merriam-webster.com/dictionary/accommodation [https://perma.cc/8BLE-HQAR].

358. *Accommodation*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/view/Entry/1134 [https://perma.cc/6CUG-P53M].

359. *Accommodation*, 1964 WEBSTER'S, *supra* note 323, at 9.

360. *Accommodation*, OXFORD ENGLISH DICTIONARY (1933), https://archive.org/details/in.ernet.dli.2015.99992/page/n97/mode/2up.

361. *See supra* note 318.

362. Moreover, while the subtitle of Title II is "equal access," courts have long ago rejected the importance of such subtitles. *See* Brotherhood of R.R. Trainmen v. Balt. & Ohio R.R., 331 U.S. 519, 528–29 (1947) ("[H]eadings and titles are not meant to take the place of the detailed provisions of the text."); 2A NORMAN J. SINGER & SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47:14 (7th ed. 2019).

363. *Cf.* N.Y. Gaslight Club, Inc. v. Carey, 447 U.S. 54, 61 (1980) (comparing words in Title II and Title VII and deciding differences are meaningful and cannot be "mere surplusage"); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 283 (1978) (distinguishing language in Title II and Title VI).

of the statutes despite the Supreme Court's recognition of the independence of Title II and Section 1981.[364]

Courts have occasionally permitted cases to go forward by citing the "full and equal enjoyment" language in Title II. For example, a court relied on this language in a case where employees of a grocery store watched and followed plaintiff, made discriminatory accusations, forcibly restrained him, and searched his body.[365] The court denied the motion to dismiss because "full and equal enjoyment" in Title II included freedom from these discriminatory actions.[366] Similarly, when Black customers sued a North Carolina Pizza Hut after they were required to pre-pay for food, a court employed the full and equal enjoyment language.[367] The court denied Pizza Hut's motion to dismiss because the terms and conditions of the Black patrons' contract were different from White patrons' terms and conditions.[368]

A few examples illustrate the overly narrow reading that almost all courts have given to the "full and equal enjoyment" language. In the same case against Pizza Hut, other Black plaintiffs were given poor service, which included slow service and the White manager touching their pizza.[369] The court dismissed these claims, finding the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations" language irrelevant.[370] Further, when courts consider claims for discriminatory surveillance, they often dismiss them. They fail to examine this expansive full and equal enjoyment language and instead rely on the idea that no contractual relationship exists between the store and the patron.

Indeed, a customer cannot fully and equally enjoy the "goods" of a store or the experience of shopping, which is necessary to procure "goods," when employees follow them because of their race. Further, they cannot fully and

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364. *See* Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237–38 (1969) (holding that the public accommodations provision in Title II did not supersede the Civil Rights Act of 1866 and "[t]here is moreover, a saving clause in the 1964 Act as respects 'any right based on any other Federal . . . law not inconsistent' with that Act" (footnote omitted)).

365. *See* Thomas v. Tops Friendly Mkts., Inc., No. CIVA96CV1579(RSP/GJD, 1997 WL 627553, at *1, *4–5 (N.D.N.Y Oct. 8, 1997). In this case, the court deemed the grocery store a place of public accommodation because there was a lunch counter. *See id.* at *4.

366. *Id.* at *4–5.

367. Bobbitt v. Rage Inc., 19 F. Supp. 2d 512, 519–22 (W.D.N.C. 1998).

368. *Id.* The Section 1981 claim also survived. *Id.* Several courts have found that requiring Black plaintiffs to pre-pay violates Title II and Section 1981. *See, e.g.*, Jackson v. Waffle House, Inc., 413 F. Supp. 2d 1338, 1358–59 (N.D. Ga. 2006) (denying Waffle House's motion for summary judgment because the Black plaintiff was denied "full enjoyment" when he was required to pre-pay for take-out order while White patrons were not); Dozier v. Waffle House, Inc., No. 1:03-CV-3093-ODE, 2005 WL 8154381, at *7–11 (N.D. Ga. May 4, 2005) (denial of summary judgment when plaintiffs were requested to pre-pay for food order); Hill v. Shell Oil Co., 78 F. Supp. 2d 764, 777–78 (N.D. Ill. 1999) (finding claims actionable under Title II and Section 1981, where Black customers were required to pre-pay for gasoline at a Shell gas station, "subject[ing] [them] to different terms of purchase" and "abridg[ing] their rights to the 'full and equal enjoyment of the goods'" (quoting 42 U.S.C. § 2000a(a))).

369. *Bobbitt*, 19 F. Supp. 2d at 515.

370. *Id.* at 521.

equally enjoy the "services" of a store, which include the assistance of the employees, when employees follow or detain them because of their race.

Other language in the statute also supports this reading. Customers cannot have the full and equal enjoyment of use of the actual "facilities" of the store without discrimination when employees follow them. Moreover, they do not have the full and equal enjoyment of the "privileges" and "advantages" of the store—including being afforded space from the employees in their shopping—when they are followed and watched based on their race.

In addition to finding discriminatory surveillance legal, courts generally hold that a restaurant customer has no claim for discriminatory treatment if the customer can be served. Again, this is based on the idea that the restaurant has no contractual obligation beyond service and, again, courts do not examine the broad language of the statute. However, the text grants full and equal enjoyment of the "services, privileges, and advantages," which would include equally fast service and good seating at a restaurant without discrimination.[371] It also prohibits segregation.[372] Courts contravene the purpose of the Civil Rights Act of 1964 when they permit businesses to engage in back-of-the-bus-type seating in restaurants without liability.

As another example of the overly narrow reading courts give to "full and equal enjoyment," courts generally state that service infused with discriminatory remarks is legal, again on the basis that the customer is entitled only to service, not good service. Here, the courts again disregard the broad language of Title II. The text grants the full and equal enjoyment of "services" without discrimination,[373] which would logically include the quality of the service. It is difficult to imagine a patron fully and equally enjoying a restaurant or store when their service is infused with racism.

Other courts permit places of public accommodation to discriminate against or segregate Black and other people of color by holding as legal the following business actions: requirements to give identification, searches, cuffing, accusations of shoplifting, and general harassment and questioning. Again, the language of the statute provides for full and equal enjoyment of the place of public accommodation—which would not be satisfied when places of public accommodation discriminate against patrons by acting in this manner because of race.

b. The ADA's Full and Equal Enjoyment Language

In interpreting statutes, courts have recognized the relevance of other legislative acts that use the same language.[374] Title II has the same "full and equal enjoyment" language as some statutes. Most prominently, Title II shares

371. *See* 42 U.S.C. § 2000a(a).
372. *Id.*
373. *See id.*
374. 2B SINGER & SINGER, *supra* note 362, § 51:1.

language with Title III—the public accommodations title of the Americans with Disabilities Act.[375] Title III states: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."[376]

Scholars have argued that courts have interpreted Title III of the ADA improperly to narrow coverage under the statute.[377] However, courts have interpreted Title III more broadly than Title II—though not necessarily as broadly as they should. Title III requires more than simply providing admittance or service. People with disabilities are to receive some treatment similar to that afforded people without disabilities. For example, the Ninth Circuit has stated, "The ADA guarantees the disabled more than mere access to public facilities; it guarantees them 'full and equal enjoyment.'"[378] In order to guarantee full and equal enjoyment, "[p]ublic accommodations must start by considering how their facilities are used by non-disabled guests and then take reasonable steps to provide disabled guests with a like experience."[379] A number of other circuits have agreed with this standard.[380]

As an example of what it is meant by "full and equal enjoyment," the Ninth Circuit required a theater to provide both wheelchair seating for the individual and an adjoining seat for his spouse.[381] The Ninth Circuit later referenced that case, stating, "The attendant seat was obviously not necessary for [the plaintiff] to see the movie, but moviegoers expect to sit with their friends and family

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375. *See* 42 U.S.C. § 12182(a). Other statutes also use the term "full enjoyment," such as the Fair Housing Act, 42 U.S.C. § 3614(a), as well as state public accommodations statutes, *see, e.g.*, MICH. COMP. LAWS § 37.2605(2)(e) (2020); 775 ILL. COMP. STAT. 5/5-102 (2018); MINN. STAT. § 363.03(3) (2019).

376. § 12182(a).

377. *See, e.g.*, Colker, *The Power of Insults*, *supra* note 77, at 53–66 (mentioning several ADA cases where plaintiffs lose when courts narrowly interpret statute); Samuel R. Bagenstos, *Taking Choice Seriously in* Olmstead *Jurisprudence*, 40 J. LEGAL MED. 5 (2020) (discussing integration and choice for people with disabilities after the Supreme Court's decision in *Olmstead*).

378. Baughman v. Walt Disney World Co., 685 F.3d 1131, 1135 (9th Cir. 2012) (quoting § 12182(a)).

379. *Id.*

380. *See, e.g.*, A.L. v. Walt Disney Parks & Resorts US, Inc., 900 F.3d 1270, 1294 (11th Cir. 2018); J.D. v. Colonial Williamsburg Found., 925 F.3d 663, 672 (4th Cir. 2019); Argenyi v. Creighton Univ., 703 F.3d 441, 449 (8th Cir. 2013). In its interpretation of the "full and equal enjoyment" language in the ADA, the Seventh Circuit similarly has stated, "The core meaning . . . is that the owner or operator of a store, hotel, restaurant, . . . or other facility . . . that is open to the public cannot exclude disabled persons from entering the facility and, *once in, from using the facility in the same way that the nondisabled do.*" *See* Doe v. Mut. of Omaha Ins., 179 F.3d 557, 559 (7th Cir. 1999) (emphasis added) (dismissing case on other grounds). Additionally, the Fifth Circuit has interpreted the "full and equal enjoyment" language in a like manner to mean "to prohibit an owner, etc., of a place of public accommodation from denying the disabled access to the good or service and from interfering with the disableds' full and equal enjoyment of the goods and services offered." *See* McNeil v. Time Ins., 205 F.3d 179, 186–88 (5th Cir. 2000).

381. *See* Fortyune v. Am. Multi-Cinema, Inc., 364 F.3d 1075, 1085 (9th Cir. 2004).

during the show; their enjoyment is diminished if they are forced to sit apart."[382] So, enjoyment of the movie-going experience was covered under the statute. Similarly, a theater must seat people with disabilities in places other than the front row. The Ninth Circuit remarked that it was "simply inconceivable that this arrangement could constitute 'full and equal enjoyment' of movie theater services by disabled patrons" because it required the individuals "to crane their necks and twist their bodies in order to see the screen, while non-disabled patrons [had] a wide range of comfortable viewing locations from which to choose."[383] The court rejected the notion that theaters satisfied the ADA by simply seating those with disabilities.[384]

In a restaurant, the seating arrangements for patrons who have disabilities also have to be similar to those for customers without disabilities. In one case, Starbucks' seating arrangement required a plaintiff who was in a wheelchair to sit facing the wall.[385] The court held that the ADA requires "an experience comparable to that afforded to non-disabled patrons."[386] Through its seating, "Starbucks Company deprived its wheelchair-bound customers of the opportunity to participate, to the same extent as non-disabled patrons, in the social aspects of the 'full and rewarding coffeehouse experience' Starbucks Company consciously affords its able-bodied patrons."[387]

If the courts employed the same interpretation for "full and equal enjoyment" under Title II as described under the above Title III law, several types of claims of discrimination would be illegal, including discriminatory surveillance, discriminatory slow service, and other discriminatory terms and conditions. If a person is subject to being followed and watched because they are Black, they cannot enjoy the public accommodation in the same manner as others who are White. Similarly, if a person is subject to slower service than another based on their race, they cannot enjoy the public accommodation to the same extent as the person of a different race who receives better service. If a person is subject to racist remarks or other discriminatory treatment, again they cannot enjoy a place of accommodation in the same way as those who are not of the same race.

c. Another Interpretation of Full and Equal Enjoyment

The interpretation of similar language in state statutes may have some probative value especially where the statutes were enacted for like purposes.[388]

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382. Baughman, 685 F.3d at 1135.

383. Or. Paralyzed Veterans of Am. v. Regal Cinemas, Inc., 339 F.3d 1126, 1133 (9th Cir. 2003).

384. *See id.* (rejecting that theatres comply "[n]o matter where in the theater the seats are, and no matter how sharp the viewing angle, so long as there is no physical object standing between the disabled patron and the screen").

385. Kalani v. Starbucks Coffee Co., 698 F. App'x 883, 885 (9th Cir. 2017)

386. *Id.* at 887.

387. *Id.* (citation omitted).

388. 2B SINGER & SINGER, *supra* note 362, § 52:1.

The Michigan Civil Rights Act also uses the "full and equal enjoyment" language in its public accommodations statute.[389] The Michigan Supreme Court originally narrowly interpreted this language to protect "primarily . . . *denial of access* to a place of public accommodations or public services."[390] In that case, *Kassab v. Michigan Basic Property Insurance Association*, the plaintiff claimed the insurer denied his fire claim based on his national origin.[391] He relied on the broad statutory language that protected "an individual['s] . . . full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of . . . national origin."[392] The court decided the plaintiff had no discrimination claim against the insurance company for denial of his claim.[393] The Michigan Civil Rights Act protected only access to a policy of insurance for fire loss; it did not cover discrimination in the handling and adjustment of claims under a policy.[394]

Several years later, the Michigan Supreme Court changed its interpretation of the statute, overruling *Kassab*. In that case, a Black physician was subjected to charges of unprofessional behavior and administrative hearings designed to discourage him from using the hospital facilities.[395] The plaintiff alleged that this discriminatory treatment deprived him of the ability to fully and equally utilize the facilities.[396] The court found the plaintiff adequately pleaded a claim, because "the full and equal enjoyment of staff privileges [was] protected."[397] The court discussed *Kassab*, which had held that, "as long as the company provided access to services, the CRA did not prevent it from discriminating in providing full and equal enjoyment of those services."[398] In so holding, the court had previously "read[] nonexistent limitations into the statute."[399] Similar to the Michigan

389. MICH. COMP. LAWS § 37.2605(2)(e) (2020).

390. Kassab v. Mich. Basic Prop. Ins. Ass'n, 491 N.W.2d 545, 546 (Mich. 1992), *overruled*, Haynes v. Neshewat, 729 N.W.2d 488 (Mich. 2007).

391. *Id.* at 546.

392. *Id.* (citation omitted).

393. *See id.*

394. *Id.*

395. Haynes v. Neshewat, 729 N.W.2d 488, 488 (Mich. 2007).

396. *Id.* at 491.

397. *Id.* at 493.

398. *Id.*

399. *Id.* Cases under other law with this "full and equal enjoyment" language have similarly given effect to this language. *See* Windsor Clothing Store v. Castro, 41 N.E.3d 983, 992 (Ill. App. Ct. 2015) (recognizing discriminatory surveillance under Illinois public accommodations statute, 775 ILL. COMP. STAT. 5/5-102, and permitting $25,000 of damages for emotional distress awarded by the Illinois Human Rights Commission to stand); Bray v. Starbucks Corp., No. A17-0823, 2017 WL 6567695, at *7 (Minn. Ct. App. Dec. 26, 2017) (finding that, where transgender individual received hostile treatment from Starbucks employees while being served, "[n]either the MHRA nor caselaw expressly limits public-accommodation discrimination claims to those in which a person is denied access to or refused service by a place of public accommodation" and that "a person within a protected group could be humiliated enough to the point that they are constructively denied full use and enjoyment of services and/or goods").

Supreme Court's former interpretation, courts have unnecessarily curbed the interpretation of the expansive "full and equal enjoyment" language in Title II.

3. The Role of McDonnell Douglas

As described previously, courts adopted the *McDonnell Douglas* framework as a method to analyze discrimination claims under Title VII and later used this analysis for public accommodations claims under Title II (and Section 1981).[400] This comports with the "whole statute" or "whole act" rule of statutory construction wherein the interpretation of one part of a statute is relevant for the interpretation of another part within the same statute.[401]

With that said, courts have already criticized *McDonnell Douglas* in the context of employment discrimination cases. They have said that this method has unnecessarily complicated the issue of whether discrimination occurred under the general language of Title VII.[402] Similarly, the statutory language in Title II (and Section 1981) does not limit to the *McDonnell Douglas* analysis the manner in which a plaintiff can show that they experienced public accommodations discrimination. As such, courts wrongly require a higher *McDonnell Douglas* analysis, including that plaintiffs show that others who were similarly situated were treated differently and that they demonstrate pretext.

There are several reasons not to require these similarly situated and pretext showings from *McDonnell Douglas* to govern public accommodations claims. First, assuming the general *McDonnell Douglas* test makes sense in any setting, it was created in the context of employment, which is very different from public accommodations cases where comparators likely will not be available as often.[403] Second, in the employment setting, courts often do not require—and the Supreme Court itself has not required—a showing of similarly situated people.[404]

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400. *See supra* Part II.B.1.

401. 2A SINGER & SINGER, *supra* note 362, § 46:5 (stating that each part or section of a statute should be construed in connection with every other part or section to produce a harmonious whole); 2B SINGER & SINGER, *supra* note 362, § 51:1 (describing using statutes of the same subject to aid interpretation of one another).

402. *See* Walton v. Powell, 821 F.3d 1204, 1210 (10th Cir. 2016) ("[T]he test has proven of limited value . . . ."); Coleman v. Donahoe, 667 F.3d 835, 863 (7th Cir. 2012) (Wood, J., concurring, with Tinder and Hamilton, JJ., joining) (criticizing *McDonnell Douglas* test).

403. *See* Khedr v. IHOP Rests., LLC., 197 F. Supp. 3d 384, 387–88 (D. Conn. 2016) (describing how others may not be available for comparison); Brooks v. Collis Foods, Inc., 365 F. Supp. 2d 1342, 1355 (N.D. Ga. 2005); Christian v. Wal-Mart Stores, Inc., 252 F.3d 862, 870–71 (6th Cir. 2001) (recognizing difference in employment setting where comparators may be available more readily); Callwood v. Dave & Buster's Inc., 98 F. Supp. 2d 694, 706 (D. Md. 2000) (same).

404. SANDRA F. SPERINO, MCDONNELL DOUGLAS: THE MOST IMPORTANT CASE IN EMPLOYMENT DISCRIMINATION LAW 126–46 (2018); *see also* Ernest F. Lidge III, *The Courts' Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 MO. L. REV. 831 (2002); Tricia M. Beckles, Comment, *Class of One: Are Employment Discrimination Plaintiffs at an Insurmountable Disadvantage if They Have No "Similarly Situated" Comparators*, 10 U. PA. J. BUS. & EMP. L. 459, 478 (2008) (describing courts' incorrect use of similarly situated requirement). For example, employees can always allege hostile environment claims and need not show others outside the

Third, employment claims have been interpreted more broadly than public accommodations claims. For example, courts always permit a harassment claim in the employment context but only a few courts have permitted harassment claims in the public accommodations context.[405] Additionally, those that have adopted the hostile discriminatory treatment standard in public accommodations cases have also unnecessarily narrowed that analysis.[406] Fourth, discrimination can be shown in many ways.[407] Often, others are not similarly situated, and thus a comparison is not possible.[408] This does not mean discrimination did not occur.[409] Fifth, courts narrowly interpret the pretext requirement in the *McDonnell Douglas* test in favor of the defendant.[410] However, it is quite possible the factfinder could find pretext.[411]

Often in conjunction with *McDonnell Douglas*, courts also dismiss cases by crediting the employer's evidence, labelling the plaintiff's behavior as suspicious, and stating direct evidence of discrimination does not exist.[412] Again, nothing in the statutory language mandates these court-imposed requirements. Importantly, in all of these circumstances, the argument here is simply that there is a factual question to be resolved. The factfinder should consider the live evidence in court and decide whether discrimination occurred.

With that said, because many businesses may not be places of public accommodation under Title II—such as a retail store like Dillard's—the more expansive coverage discussed in this Section has limited use. More importantly, the limited remedies under Title II also severely restrict the usefulness of a reasonable, more expansive reading of the statute. Plaintiffs cannot recover for any psychological injuries that they may suffer and may not receive punitive damages.[413] They may receive only injunctive and declaratory relief. Outside of class actions, individuals are unlikely to bring cases where they can receive only declaratory or injunctive relief. Additionally, as the courts have shown, it is

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protected class, who were similarly situated, were not treated in the same manner. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (describing sexual harassment cause of action under Title VII).

405. *See supra* Part II.B.1.b.ii.

406. *See supra* Part II.B.1.b.ii.

407. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, n.13 (1973).

408. *See* Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728 (2011); Brown et al., *supra* note 52, at 6–7 (discussing the difficulty of showing similarly situated White persons).

409. Goldberg, *supra* note 408, at 735; Brown et al., *supra* note 52, at 6–7.

410. *See supra* Part II.B.1.b.ii.

411. *See* Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 96 (2011).

412. *See supra* Part II.B.3.

413. JOE R. FEAGIN & MELVIN P. SIKES, LIVING WITH RACISM 38–56 (1994) (describing examples of discrimination in public accommodations and the psychological toll on Black people). For background demonstrating that discrimination causes psychological injuries, see generally Ronald C. Kessler, Kristin D. Mickelson & David R. Williams, *The Prevalence, Distribution, and Mental Health Correlates of Perceived Discrimination in the United States*, 40 J. HEALTH & SOC. BEHAV. 208 (1999). There is very little mention of the Title II prohibition of segregation by public accommodations in the caselaw. However, claims of discriminatory seating in restaurants and discriminatory assignment of rooms in hotels, among other claims, could fall under this statutory prohibition.

extremely difficult to obtain declaratory or injunctive relief in these cases. While these holdings may be questionable,[414] this question—mainly regarding injunctive relief—relates to the larger issue of when injunctions generally should be granted and thus, is beyond the scope of this Article.

B. Section 1981

Because of the expansive scope of damages under Section 1981 and Section 1982, these statutes are currently more significant to plaintiffs than Title II in public accommodations cases.

1. Legislative History

The Civil Rights Act of 1866 was enacted "primarily" to counter the Black Codes that southern states had passed to keep Black people in the status of slaves after the passage of the Thirteenth Amendment.[415] It sought to ensure equal citizenship to former slaves.[416] Among other protections, Section 1981 provided Black people "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens," and Section 1982 stated that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to . . . purchase . . . [and] hold . . . personal property."[417] The Senator who introduced the 1866 Act said the Bill would "break down *all* discrimination between black men and white men" and ensure "practical freedom" for Black people.[418] Because of contentions about the constitutionality of the 1866 Act,[419] after the adoption of the Fourteenth Amendment, Congress reenacted the Act in the Enforcement Act of 1870.[420] There was "nearly a century of virtually complete neglect" until the 1960s, when the Supreme Court decided there was a private cause of action under Section 1982,[421] and thus also under Section 1981.[422] The Court recognized that although the 1866 Act sought to eliminate the Black Codes, the language of the statute was much broader and clearly intended to address private action.[423] Thereafter, litigants began to more

414. *See supra* Part I.A.1.

415. George Rutherglen, *The Improbable History of Section 1981: Clio Still Bemused and Confused*, 2003 SUP. CT. REV. 303, 309 (2003). The Thirteenth Amendment was aimed at both private and public behavior to eliminate the vestiges of slavery. *See id.* at 315.

416. *Id.* at 308–09.

417. 42 U.S.C. §§ 1981, 1982.

418. CONG. GLOBE, 39th Cong., 1st Sess. 599 (1866) (emphasis added).

419. *Id.* at 312.

420. *See, e.g.*, Xi Wang, *The Making of Federal Enforcement Laws, 1870-72*, 70 CHI.-KENT L. REV. 1013, 1023 n.37 (1995) (detailing the background of the Enforcement Act.).

421. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437–39 (1968).

422. Rutherglen, *supra* note 415, at 332; *see, e.g.*, Runyon v. McCrary, 427 U.S. 160, 168–69 (1976); Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 459–60 (1975); Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 439–40 (1973).

423. *Jones*, 392 U.S. at 427. The Court also pointed out the limitations of the statute and thus the importance of the Fair Housing Act. *Id.* at 413–14. For example, the Court stated that discrimination in

frequently use Section 1981 for employment discrimination claims, and Section 1981 as well as Section 1982 in public accommodations cases.[424]

Some years later, in 1989, in *Patterson v. McLean Credit Union*,[425] the Supreme Court considered the meaning of the "make and enforce" language in Section 1981. The Court recognized that Congress wanted Black people to be able to contract and not to contract on different terms than White people.[426] So, Section 1981 prohibited, "when based on race, the refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms."[427] However, the Court held that Section 1981 did not cover the continuing employment relationship.[428] Consequently, it did not prohibit racial harassment in the terms and conditions of the plaintiff's employment and certain discrimination in promotions.[429]

After the Supreme Court's decision in *Patterson*, Congress reacted by broadening the scope of Section 1981 in the Civil Rights Act of 1991 (1991 Act). The legislative history of the 1991 Act provided that Section 1981 was "a critically important tool used to strike down racially discriminatory practices in a broad variety of contexts."[430] At minimum, the amendment made Section 1981 as broad or broader than the original Section 1981. The House Judiciary Committee intended to "restor[e] the broad scope of Section 1981"[431] and "bar *all* racial discrimination in contracts."[432] The House Education and Labor Committee declared Congress's goal to "overrule . . . *Patterson* [and] . . . prohibit[] all race discrimination in *all* phases of the contractual relationship."[433] Congress defined "make and enforce contracts" to mean "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[434] It "ensure[d] that federal law prohibit[ed] all race discrimination in all phases of the contractual relationship."[435] The legislative history went on to say "[t]he

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the provision of services or facilities is protected under the Fair Housing Act but not under the 1866 Act. *Id.* at 413.

424. Rutherglen, *supra* note 415, at 335–37.

425. 491 U.S. 164 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* CBOCS West, Inc. v. Humphries, 553 U.S. 442 (2008).

426. *Id.* at 177.

427. *Id.*

428. *Id.* at 176–77.

429. *Id.* at 179–180. Such discrimination and harassment were covered under Title VII, which included the broader language of "compensation, terms, conditions or privileges of employment." *Id.* at 180 (quoting 42 U.S.C. § 2000e–2(a)(1)). This broad language is very similar to that in Title II, lending further support the broader reading of Title II discussed in the previous Section.

430. H.R. REP. NO. 102–40, pt. 2, at 35 (1991).

431. *See id.* at 2.

432. *Id.* at 2, 37 (emphasis added).

433. *Id.*, pt. 1, at 92 (emphasis added).

434. 42 U.S.C. § 1981.

435. H.R. REP. NO. 102–40, pt. 1, at 92. Section 1981 was "to bar all race discrimination in contractual relations." *Id.* at 92; *see also* Callwood v. Dave & Buster's, Inc., 98 F. Supp. 2d 694, 703

[statutory] list [of the meaning of 'make and enforce contracts'] . . . is intended to be illustrative rather than exhaustive."[436] Also, while *Patterson* specifically concerned employment, Congress noted that contracts in other areas had been affected by *Patterson* and thus discussed its intention to eliminate the effect of the case on any contract.[437]

2. The Meaning of "Make and Enforce Contracts" in Section 1981

Years after the enactment of the 1991 amendment to Section 1981, the Supreme Court discussed who was covered under Section 1981. It stated the statute "offers relief when racial discrimination blocks the creation of a contractual relationship, as well as when racial discrimination impairs an existing contractual relationship, so long as the plaintiff has or would have rights under the existing or proposed contractual relationship."[438] It made clear that "would-be contractor[s]" were covered along with those who had already contracted.[439] Although the Court adopted a somewhat generous interpretation of the statute—"to block[]" or "impair[]" a contractual relationship[440]—both before and after this decision, lower courts have dismissed many claims in circumstances where a business indeed blocked or impaired a contract.[441] Also similar to their interpretation of Title II, courts have stated the Section 1981 language covers only discrimination in admittance or service. Again, this is despite no explicit limiting language in the statute.[442]

Before and after the amendment to Section 1981, courts have narrowly interpreted the "make and enforce contracts" language. This is because of their circumscribed beliefs about the meaning of the language. The courts have concluded that "make and enforce contracts" is coterminous with the limitations

(D. Md. 2000) (interpreting Section 1981's legislative intent to be broad and its language to cover during and after contract formation).

436. H.R. REP. NO. 102–40, pt. 1, at 92; *see also* H.R. REP. NO. 102–40, pt. 2, at 37 ("This list is intended to be illustrative and not exhaustive.").

437. H.R. REP. NO. 102–40, pt. 2, at 36 ("The damage caused by Patterson has not been limited to the employment context. Complaints that alleged intentional racial discrimination in insurance, auto repair, and advertising contracts, have been dismissed because of Patterson."). In sum, the legislative history's reference to all contracts, the importance of the elimination of harassment in contracting relationships, and no explicit coverage for only employment cases highly suggest that harassment in all contractual relationships was covered. *See* H.R. REP. NO. 102–40, pt. 1, at 92–93.

438. Domino's Pizza v. McDonald, 546 U.S. 470, 476 (2006). "[I]f Domino's refused to deal with the salesman for a pepperoni manufacturer because the salesman was black," it would not violate "the right of the salesman to make a contract on behalf of his principal" because the salesman "has no beneficial interest in a contract." *Id.* at 475.

439. *See id.* at 476.

440. *See id.*

441. *See supra* Part II.B.2.

442. In *Comcast Corp. v. National Ass'n of African American-Owned Media*, the Supreme Court explicitly declined to decide a question not posed in the petition for certiorari—that is, whether "making" in Section 1981(b) refers to the contractual "process" or just "outcomes," the latter of which would have limited the scope of the statute. *See* 140 S. Ct. 1009, 1018 (2020).

of common law contract law.[443] In doing so, they have stated that public accommodations can engage in many discriminatory practices without legal liability. As described above, this includes discriminatory surveillance and detention by stores.[444] Although a person must be able to complete a purchase, this requirement in turn has been interpreted very narrowly. Courts have decided that a contractual relationship does not form until an item for purchase is picked, and even then, a court must decide the shopper's purchase was blocked to be actionable.[445] If someone was detained but allowed to shop after the detention or had not picked out an item for purchase, courts declare the purchase or contract was not blocked.[446] As another example, courts require only that stores and restaurants serve customers. They declare that customers can contract under Section 1981 even when they receive discriminatory slow or worse service or service infused with racist remarks.[447]

But the legislative history and the language before and after the 1991 amendments show this contract-restricted interpretation is not supported. There is no reference to the common law of contract in Section 1981 or in the legislative history. While the common law can be used to interpret federal statutes,[448] it is merely a default, gap-filling guide to the statute's meaning. Common law understandings do not trump clear text or other clear indications of legislative intent.[449] Here, Congress set forth broad language that is not coterminous with the common law of contract.[450] The language requires that a Black person possess the same right to make contracts as a White person.

The Supreme Court's interpretation of Section 1981 before the 1991 amendment requires nondiscriminatory terms in offers to contract. Simply employing this jurisprudence, stores would be liable for discriminatory surveillance and detention and restaurants would be liable for discriminatory service; they offer to contract on only discriminatory terms. By watching a Black patron as they shop, the merchant offers "to make" a contract with that person

443. *See, e.g.*, Demery v. City of Youngstown, 933 F.2d 1008 (6th Cir. 1991) (unpublished table decision) (stating that Section 1981 "represents a federal statutory confirmation and reinforcement of the fourteenth amendment and the common law right to contract").

444. *See supra* Part II.B.2.a (discussing following and false shoplifting accusations).

445. *See supra* Part II.B.2.a.

446. *See supra* Part II.B.2.a.

447. *See supra* Part II.B.2.a–d.

448. *See* SINGER & SINGER, *supra* note 362, § 50:4.

449. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 17–19 (AM. L. INST. 1981). As an aside, the common law on public accommodations may actually favor coverage of this type of discrimination. *See* Singer, *No Right to Exclude*, *supra* note 7, at 1357–73. A recent Supreme Court case refers to the words "common law" in Section 1981. *See* Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1016 (2020). In that case, the Court seemed to suggest that Section 1981 requires a common law analysis for a variety of matters. *See id.* However, a careful examination of the statute shows that the common law as modified by each state's statutes and constitutions applies only to the "trial and disposition"; the statute appears to reference a procedural issue, not a substantive law issue. *See* Civil Rights Act of 1866, Pub. L. No. 39-31, § 3, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1981).

450. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 17–19.

on only discriminatory terms—that is, they cannot buy an item without being watched based on their race. Similarly, by giving a Black patron slower or worse service, a restaurant, bank, or store offers to make a contract on only discriminatory terms. For example, when a person goes to Smith and Wollensky, they go there for a variety of reasons. This can include the food, the atmosphere, and the service, and they pay for those benefits through a hefty price. If Black customers are seated in the back or given slow or other bad service, they have been offered a contract on different terms than White customers.

Further, "to make a contract" naturally is a phrase that includes the process of contracting, similar, for example, to the phrase "to make a cake," which includes the process of making the cake. Just like a cake cannot be made without putting together the ingredients and baking the cake, the contract to buy cannot be made without the process of, for example, looking for and choosing an item or going to a restaurant and being seated.

The amended language defining "make and enforce contracts" to mean "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship" gives additional reason for courts to find that discriminatory actions by merchants against customers are illegal. While courts have interpreted this language broadly in the employment context, as described above, they have continued to limit the language to encompass only the traditional common law contractual relationship in the settings of public accommodations. For example, they have asserted that Section 1981 is irrelevant until the buyer picks an item to purchase or offers to contract. If Congress had intended this limitation, it could have made this clear by reference to the common law of contract or, for example, by use of offer and acceptance. The current interpretation ignores the "making" language in the statute. The current Webster's states that "making" means "the act or process of forming, causing, doing, or coming into being."[451] The current version of the Oxford English Dictionary defines "making" as "production, creation, construction, preparation."[452] The 1988 Webster's dictionary[453] has the same definition as the current version.[454] The 1989 Oxford dictionary has the

451. *Making*, WEBSTER'S DICTIONARY, https://www.merriam-webster.com/dictionary/making [https://perma.cc/M5FH-7A26].

452. *Making*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/view/Entry/112669 [https://perma.cc/FXS9-XY2R].

453. This version is the currently available version that is closest in time to the passage of the 1991 amendment. Law Library E-mail, *supra* note 324.

454. *Making*, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 719 (1988). Concurring in an opinion, Justice Ginsburg stated that "the word 'making' is most sensibly read to capture the entire *process* by which the contract is formed." *Comcast*, 140 S. Ct. at 1020 (Ginsburg, J., concurring). She further stated: "Postformation racial harassment violates § 1981, the amendment clarifies, because the right to 'make and enforce' a contract includes the manner in which the contract is carried out. So too the manner in which the contract is made." *Id.* at 1021.

same definition as the current version.[455] In summary, under Section 1981, there shall be no discrimination in the production, creation, construction, or preparation of contracts. The production or creation of the contract in a store would be shopping to find an item at a store. Thus, discriminatory surveillance of people while shopping would be illegal. Similarly, the production or creation of a contract in a restaurant would include the request for a table and being seated.

There is another way to think about this. "Making" refers to the time period before and the time when the contract is made. "Performance" and "modification" refer to the time period after the contract is made. Thus, any discriminatory behavior in the pre-formation of the contract is covered, as well as in the contractual relationship itself. However, courts have asserted that liability does not occur unless a contract is blocked by discriminatory surveillance or other discriminatory treatment and have otherwise narrowly interpreted what it means to "block." But the language of Section 1981 does not require that the contract is blocked. It covers discriminatory terms and conditions in the offer to contract,[456] which would include surveillance and bad service. Additionally, even if only the blocking of contracts was covered, this would be met when a person is followed around a store or given discriminatory service at a store or restaurant. This can cause people to leave prematurely. Moreover, it can cause people to buy less. It can also cause people not to go to the store at all. Such actions can block contracts and also creates offers to contract on discriminatory terms and conditions.

With that said, the Supreme Court has held that Section 1981 protects against the discriminatory impairment of contracts as well. All of the actions on the basis of race that have been held legal—such as surveillance, slow service, racist remarks, worse seating or rooms, requiring identification, searching, cuffing, accusations of shoplifting, general harassment, and questioning—would block or impair contracts.

Let us address if Section 1981 were to properly encompass only the common law of contracts. If common law contract law limits Section 1981, the scope of coverage for discrimination by stores is different than discrimination by restaurants. If discrimination by stores were limited in this manner, there would be no significant arguments for coverage before the product is chosen in a store

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455. *Making*, OXFORD ENGLISH DICTIONARY (1989), https://www.oed.com/oed2/00138805 [https://perma.cc/6RF3-EKFB]. This version is the currently available version that is closest in time to 1991.

456. *See* 42 U.S.C. § 1981. For additional background on how race discrimination in public accommodations affects people of color, see Lee & Scott, *supra* note 254, at 388 (finding that minorities make choices in their travel based on racism they have experienced); Stephanie Wallace et al., *Cumulative Effect of Racial Discrimination on the Mental Health of Ethnic Minorities in the United Kingdom*, 106 AM. J. PUB. HEALTH 1294 (2016); Tiffany Yip, Gilbert C. Gee & David T. Takeuchi, *Racial Discrimination and Psychological Distress: The Impact of Ethnic Identity and Age Among Immigrant and United States-Born Asian Adults*, 44 DEV. PSYCH. 787 (2008).

or after the customer pays for the product in the store.[457] However, a common law restriction would still make many discriminatory actions by restaurants illegal. Once an order in a restaurant is made, there is an implied covenant of good faith and fair dealing. A breach occurs "where a party acts in bad faith, but it may also be found where the defendant acts in a commercially unreasonable manner while exercising some discretionary power under the contract."[458] In conjunction with Section 1981, this requires non-discriminatory service. Similarly, there is an implied promise to perform within a reasonable time.[459] For example, if a steak is ordered, there is an implied covenant to receive that steak within a reasonable time period.

3. The Meaning of the "Enjoyment of All Benefits, Privileges, Terms, and Conditions of the Contractual Relationship" Under Section 1981

In addition to the expansive "making, performance, modification, and termination of contracts" language in the amended Section 1981, there is the promise of "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[460] The phrase "enjoyment . . . of the contractual relationship" appears to refer to the previous "making, performance, . . . of contracts" phrase. Accordingly, the contractual relationship should refer to the entire relationship from the time in the door—e.g., looking for goods at a store or requesting a table at a restaurant or a room at a hotel—to the time out the door.

The 1991 amendment to Section 1981 arguably made Section 1981 equivalent in scope to Title II, which gives further reason for a broad reading of Section 1981. In *Patterson*, the Supreme Court contrasted the expansive coverage of the Civil Rights Act of 1964 with the more limited language in Section 1981.[461] Subsequently, Congress added essentially the same language that is in Title VII to Section 1981. Thus, Congress appeared to intend to make Section 1981 as broad as Title VII.[462] At the same time, when Congress enacted the 1964 Act, it likely intended the same broad coverage for Title VII and Title II given their similar expansive language. As a result, Section 1981 arguably is equally as broad in coverage for public accommodations claims as Title II, but without Title II's limitations on the entities that are subject to it and the remedies available under it.

While courts should cite the broad enjoyment language in Section 1981(b) in support of discrimination claims, most do not. The following cases are

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457. *See* SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 6:1 (4th ed. 2007) (discussing the contractual requirements of offer and acceptance).

458. *Id.* § 63:22.

459. *Id.* § 63:24.

460. 42 U.S.C. § 1981.

461. *See* 491 U.S. 164, 180 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* CBOCS West, Inc. v. Humphries, 553 U.S. 442 (2008).

462. *See* Rutherglen, *supra* note 415, at 346 (stating that the 1991 Act "effectively ma[de] the coverage of section 1981 in employment cases as broad as Title VII").

exceptions. In one case, White employees of a restaurant served Black plaintiffs a fly-infested meal.[463] The defendant asserted that because the plaintiffs had been served, they had no claim.[464] Denying the motion to dismiss, the court held that the plaintiffs were entitled to edible food.[465] It cited Section 1981(b) and stated that "restaurant contracts are for more than food, they are for a dining experience commensurate with the quality of the establishment attended."[466]

Similarly, in another case, a court generally cited the Section 1981(b) language in denying the defendant's dismissal motion.[467] The Black plaintiff reserved a suite at a Marriott but upon his arrival was refused a suite.[468] Among other evidence, an employee testified to the hotel's explicit discrimination against the patron.[469] The court said there was no authority under Section 1981 for the hotel's proposition that as long as the plaintiff was given some room, the hotel could refuse his requests and give him an inferior room.[470] The plaintiff had been refused the contract that he sought.[471]

And, in a case involving American Airlines, after the Black plaintiff was upgraded to first class, a White flight attendant discriminated against him.[472] This included the failure to offer coat service as well as the failure to offer beverage service, both of which were offered to White passengers.[473] Additionally, the flight attendant had spit into his drink.[474] On summary judgment, citing the Section 1981(b) language, the court held that the plaintiff had sufficient evidence of a Section 1981 claim.[475]

Similarly, Delta Airlines searched the bags of an Iranian American and prohibited him from bringing his appropriately sized carry-on bags with him.[476] Citing Section 1981(b), the court denied summary judgment on the plaintiff's Section 1981 claim because Delta could not show why it permitted others to carry on baggage while the plaintiff could not.[477]

The broad statutory language can also support hostile treatment claims. One scholar, Professor Singer, has persuasively argued that the amendment to

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463. Gilyard v. Northlake Foods, Inc., 367 F. Supp. 2d 1008, 1014–15 (E.D. Va. 2005).
464. *Id.* at 1014.
465. *Id.* at 1014–15.
466. *Id.* at 1014.
467. Trotter v. Columbia Sussex Corp., No. 08-0412-WS-M, 2009 WL 3158189, at *4–7 (S.D. Ala. Sept. 28, 2009).
468. *Id.* at *1–2.
469. *Id.* at *2.
470. *Id.* at *4.
471. *Id.* at *4–7. Quoting a song by the Rolling Stones, the hotel had argued that "you can't always get what you want." *Id*. at *5.
472. Madison v. Courtney, 365 F. Supp. 3d 768, 772–73 (N.D. Tex. 2019).
473. *Id.* at 771–72.
474. *Id.* at 770.
475. *See id.* at 773–76.
476. Bary v. Delta Airlines, Inc., No. CV–02–5202(DGT), 2009 WL 3260499, at *4–5 (E.D.N.Y. Oct. 9, 2009), *aff'd*, 553 F. App'x. 51 (2d Cir. 2014).
477. *Id.* at *26–28.

Section 1981 in the 1991 Act must affirmatively protect against racial harassment by retail stores. He stated, "It defies reason to believe that Congress intended to prohibit racially discriminatory harassment on the job but found harassment of customers in retail stores to be perfectly fine."[478]

As mentioned previously, only a few courts have recognized claims for hostile treatment.[479] In one case, the court denied summary judgment on the Section 1981 claim where Black plaintiffs received worse treatment than White customers at a Waffle House.[480] The Black customers alleged they were not greeted, they were placed at a counter when they requested a booth, the waitress spilled orange juice on them, she threw straws at them, and they received their food after an hour.[481] The court cited Section 1981(b) and decided "receiv[ing] services in a markedly hostile manner and in a manner that a reasonable person would find objectively unreasonable" would be actionable.[482]

Again, as illustrated here, the broad language in Section 1981 should cover a variety of actions on the basis of race that courts have held legal—such as surveillance, slow service, racist remarks, worse seating or rooms, requiring identification, searching, cuffing, accusations of shoplifting, general harassment, and questioning.

4. The Meaning of the "Full and Equal Benefit of All Laws and Proceedings for the Security of Persons and Property" Under Section 1981

Finally, Section 1981(a) includes the right "to the full and equal benefit of all laws and proceedings for the security of persons and property."[483] Almost all courts have decided this part of Section 1981(a) does not apply to private parties. For example, the Eighth Circuit considered whether a plaintiff could have a claim for discriminatory surveillance under this clause.[484] There, when the Black plaintiff was leaving a store, the manager told the plaintiff he was being watched, claimed the plaintiff shoplifted earlier in the day, and threatened the plaintiff that

478. *See* Singer, *The Anti-Apartheid Principle*, *supra* note 7, at 100.

479. *See supra* Part II.B.1.a (discussing the *McDonnell Douglas* framework).

480. Brooks v. Collis Foods, Inc., 365 F. Supp. 2d 1342, 1346–48, 1358 (N.D. Ga. 2005).

481. *Id.*

482. *Id.* at 1358; *see also* Sawyer v. Sw. Airlines Co., 243 F. Supp. 2d 1257, 1271–73 (D. Kan. 2003) (denying summary judgment where Black plaintiffs were subjected to a racially infused comment over the intercom by a White Southwest Airlines flight attendant), *aff'd*, 145 F. App'x. 238 (10th Cir. 2005); Dobson v. Cent. Carolina Bank & Tr. Co., 240 F. Supp. 2d 516, 520–23 (M.D.N.C. 2003) (denying judgment on the pleadings to bank that harassed Black customer).

483. The full language is:

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

42 U.S.C. § 1981(a).

484. *See* Elmore v. Harbor Freight Tools USA, Inc., 844 F.3d 764, 766–67 (8th Cir. 2016).

he would call the police.[485] The court rejected that the plaintiff could have a claim for denial of "full and equal benefit" under Section 1981.[486] Because only state actors were subject to that clause, the plaintiff's Section 1981 claim was dismissed on a motion to dismiss.[487]

At the same time, select courts have permitted such claims. The Sixth and Second Circuits, along with a few trial courts, have recognized a claim against private actors under this clause.[488] For example, using this provision, the en banc Sixth Circuit reversed a district court summary judgment decision that had been affirmed by a panel of the Court of the Appeals.[489] There, a Black shopper tried on clothes at Dillard's, was accused of shoplifting, and was required to show a female worker that she had not put on the store's clothes under her clothes.[490] After she was cleared of shoplifting, she left the store without purchasing anything and sued under Section 1981.[491] The en banc court stated the plain language of Section 1981 required equal benefits for Black patrons of the store.[492]

In a case within the Second Circuit, the importance of this additional protected activity is also shown. There, upon exiting the store, Black customers had to show their receipts, and White customers did not.[493] A court first granted summary judgment for Toys 'R' Us on a Section 1981 contractual claim, because the contractual relationship had previously ended.[494] However, the court denied summary judgment on the same facts for a Section 1981 "equal benefit" claim, because the plaintiffs might have been able to show White people were treated differently.[495]

In a final example, a federal district court in Kansas granted summary judgment on the Section 1981 contractual claim against the Buckle because the plaintiffs, both Black, had not shown an intent to make a specific purchase before they were detained, and thus they were not prevented from making a purchase.[496] However, due to the store's actions of detaining and cuffing, the court denied

485. *Id.* at 765.
486. *Id.* at 766–67.
487. *Id.*
488. *See, e.g.*, Chapman v. Higbee Co., 319 F.3d 825, 829–33 (6th Cir. 2003) (en banc); Phillip v. Univ. of Rochester, 316 F.3d 291, 295–96 (2d Cir. 2003).
489. *See Chapman*, 319 F.3d at 829–32.
490. *Id.* at 828.
491. *Id.* at 828–29.
492. *See id.*
493. Drayton v. Toys 'R' Us Inc., 645 F. Supp. 2d 149, 153–54, 155–57 (S.D.N.Y. 2009).
494. *Id.*at 157–58; *see also* Otis v. Wetter, 111 F. App'x 433, 434 (7th Cir. 2004) (discussing possible Section 1981 and Section 1982 claims but rejecting as "far too inconsequential" the store's discriminatory request to see her credit card (after she swiped) and also deciding the Black plaintiff did not have a claim for security guards' discriminatory review of the receipts of other Black customers).
495. *See Drayton*, 645 F. Supp. 2d at 158–59.
496. *See* Hunter v. Buckle, Inc., 488 F. Supp. 2d 1157, 1173 (D. Kan. 2007).

summary judgment on their Section 1981 claim of denial of "full and equal benefit."[497]

With this stated, the best reading of the statute supports the reading that there is no additional claim against private parties under this provision. Although Section 1981(c) states that the rights apply to both governmental and non-governmental entities, the text of the right to the "full and equal benefit of all laws and proceedings for the security of persons and property" appears to apply only to governmental entities that make laws and have proceedings. This understanding is consistent with the words that precede the full and equal benefit language. These words refer to the process of enforcement of laws—"to sue, be parties, give evidence"—which the state enforces.[498] This meaning is also consistent with the words that follow the "full and equal benefit" language. These words refer to state action of "like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."[499] Additionally, the language of "full and equal benefit of all laws and proceedings for the security of persons and property" does not appear to give any additional substantive protection under Section 1981. Instead, it grants people the same benefits under any other law or proceeding that exists or is enacted for the security of people or property. The current Webster's states that "security" refers to "freedom from danger" or "safety."[500] The 1865 version of Webster's similarly defines security as "freedom from apprehension, anxiety, or care; confidence of safety."[501] As a result, people are given the right to the same benefits regarding laws and proceedings regarding safety. Again, this appears to refer to state laws that would function in this manner.

5. Section 1982

Section 1982 has relevance in public accommodations cases against retail stores. As previously discussed, courts have interpreted it in the same restrictive manner as Section 1981. The language of Section 1982 provides: "All citizens of the United States shall have the same right . . . as is enjoyed by white citizens . . . to . . . purchase . . . [and] hold . . . personal property." Unlike Section 1981, Congress did not amend Section 1982 in the 1991 Act. Regardless of this fact, when retail stores engage in discrimination on the basis of race by watching, following, stopping, or detaining Black and other people of color, they interfere with those individuals' equal rights to purchase and hold personal property that Section 1982 protects. Because of these actions by retail establishments, people of color may not shop at the stores, they may leave before

497. *Id.*
498. *See* 42 U.S.C. § 1981(a).
499. *See id.*
500. *Security*, WEBSTER'S DICTIONARY, https://www.merriam-webster.com/dictionary/security [https://perma.cc/FCS7-RW66].
501. *Security*, WEBSTER'S DICTIONARY (1865), https://archive.org/details/americandictiona00websuoft/page/1192/mode/2up.

making purchases, and they may be placed in significant stress when in the store. Courts should recognize that Section 1982, like Section 1981, provides a vibrant statutory basis to counter such race discrimination by retail stores.[502]

C. Rethinking the Meaning of Equality Under the Statutes

To date, in the vast majority of circumstances, the courts have effectively decided that the law entitles people only to access—admittance or service—in places of public accommodation because the rest of the discrimination is not bad enough. This form of Jim Crow where people of color can be subject to surveillance in retail stores and inferior service in places such as restaurants, hotels, banks, and airplanes discriminates against and segregates people of color. People of color can be followed around stores.[503] People of color can be served last.[504] People of color can be placed in suboptimal areas of restaurants and hotels.[505] People are placed in what is effectively a customer caste.

When Congress enacted the Civil Rights Act of 1866 and the Civil Rights Act of 1964, it sought to guarantee equal treatment for Black and other people of color who had faced slavery and widespread discriminatory treatment. Now, by courts' interpretation of these statutes, these groups have continued to be subjugated to inferior conditions in everyday life. The law guarantees equal treatment in broad language. There is no such equality when you can be admitted or served but otherwise treated differently. By allowing this discriminatory behavior to continue unchecked, courts permit people of color to be treated in a manner analogous to the circumstances under Jim Crow.

In *Katzenbach v. McClung*, Ollie's Barbecue did not serve Black people in the dining room.[506] Now, permitting restaurants to seat people of color in inferior areas and to give them slower service is equivalent to this illegal treatment from over fifty years ago. Similar to how people would be dissuaded from traveling then, people of color now can be dissuaded from going to such places because of inferior treatment. Thus, permitting this treatment can effectively bar admission or service. This is because those consumers may not want to engage with those places in such circumstances.[507] The true equality in the words of the statutes does not impose an arbitrary limitation of protection of admission or

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502. *See* Zuyus v. Hilton Riverside, 439 F. Supp. 2d 631, 636 (E.D. La. 2006) ("[P]ursuant to § 1982, . . . a department store detective may not stop and question black customers but not white customers." (citing Evans v. Tubbe, 657 F.2d 661, 663 n.2 (5th Cir. 1981))).

503. *See supra* Part II.B.2.a.

504. *See supra* Part II.B.2.b.

505. *See supra* Part II.B.2.c–d.

506. 379 U.S. 294, 297 (1964).

507. *See* HENDERSON ET AL., *supra* note 8, at xvii–xxv (providing examples of such effects); *cf. The Green Book*, N.Y. PUB. LIBR. DIGITAL COLLECTIONS, https://digitalcollections.nypl.org/collections/the-green-book?&keywords=&sort=sortString+asc#/?tab=about [https://perma.cc/2UX4-TBXS] (listings of places Black people could visit without fear).

service. Instead it requires that people of color be able to partake of the place of public accommodation in the same manner as others.

CONCLUSION

The courts' interpretations of Title II, Section 1981, and Section 1982 have helped to create a customer caste whereby people of color are subject to legal, inferior, discriminatory treatment on a daily basis. In this post-Jim Crow world, this legal treatment looks alarmingly similar to some of the conditions in the 1960s before Title II was enacted.

This jurisprudence has been unnecessarily narrow.[508] The statutes include broad language that covers claims of discriminatory treatment such as surveillance, slow service, different terms and conditions, and other discriminatory conditions.[509] To the extent the text is not clear, the legislative history of each suggests the importance of the words that Congress used and does not limit the interpretation of the broad statutory language.

Courts' current interpretation of Title II and the limited remedy of injunctive relief makes Title II ineffective. Lawyers know that these claims are difficult to win and the pay-off for clients is low. Early in the life of the analogous statute of Title VII, the Supreme Court recognized that injunctive relief would not motivate an employer. "If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality."[510] To make Title II more effective, Congress should take a few actions. It should mandate that the language of Title II be interpreted broadly, should expand the remedies to include compensatory and punitive damages, and should permit juries to decide these factually intensive cases. Congress should also add places, such as retail stores, to the definition of places of public accommodation under the statute.

Section 1981 has both broad language—not limited by the common law of contract—and expansive remedies. Section 1982 also has broad language and expansive remedies. Courts need to recognize this and permit these claims to go to juries. Congress can help by passing an amendment to clarify the broad coverage of the statutes.

Change in the courts and by Congress is necessary to help eliminate discrimination by businesses that have created a customer caste and has relegated Black and other people of color to positions of legal inferiority.[511]

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508. SINGER & SINGER, *supra* note 362, § 60:1 (stating that remedies are to be construed in a liberal manner).

509. *See, e.g.*, 42 U.S.C. § 2000a-2; *see also* 110 CONG. REC. 9767 (1964) (statement of Sen. Humphrey) ("This plainly means that a defendant in a criminal trespass, breach of the peace, or other similar case can assert the rights created by 201 and 202 and that State Courts must entertain defenses grounded upon these provisions.").

510. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975).

511. In the meantime, although state laws are not discussed in this Article, they may provide respite or even significant alternative coverage in some circumstances, including against discrimination

by retail stores. *See State Public Accommodation Laws*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 8, 2019), https://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx [https://perma.cc/L36G-EKV5]; Singer, *No Right to Exclude*, *supra* note 7, at 1289 n.13, app. I–III. Outside of this possibility of state protection, the common law on public accommodations may safeguard patrons against discrimination. *See id.* at 1289 n. 13, 1303–1412.