

Fall 2018

42 U.S.C. § 1981's Equal Benefit Clause: Debating the Application to Private Actor Discrimination

Lauren Pope

Recommended Citation

Lauren Pope, *42 U.S.C. § 1981's Equal Benefit Clause: Debating the Application to Private Actor Discrimination*, 14 *Nw. J. L. & Soc. Pol'y.* 125 (2018).
<https://scholarlycommons.law.northwestern.edu/njlsj/vol14/iss1/4>

This Note or Comment is brought to you for free and open access by Northwestern Pritzker School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of Law & Social Policy by an authorized editor of Northwestern Pritzker School of Law Scholarly Commons.

42 U.S.C. § 1981's Equal Benefit Clause: Debating the Application to Private Actor Discrimination

Lauren Pope*

INTRODUCTION

In May 2015, Floyd Elmore, a black man, walked into his local hardware store. After browsing, Mr. Elmore decided not to buy anything and walked towards the exit. On his way out, the manager approached him and said: "I'm watching you. I caught you stealing here earlier today and told you not to come back any more." Mr. Elmore responded that he had not visited the store earlier that day. The manager called the police and the manager's boyfriend yelled at Mr. Elmore while making an obscene gesture in his direction. When the police arrived, they questioned Mr. Elmore and ultimately told him to leave.¹

Mr. Elmore sued the hardware store under the Equal Benefit Clause of 42 U.S.C. § 1981(a), claiming that the hardware store denied him the "full and equal benefit of the law" as enjoyed by white citizens.² The district court granted the hardware store's motion to dismiss and the Eighth Circuit affirmed, finding that Mr. Elmore failed to allege state action.³ Subsection (c) of § 1981, however, states that the rights protected by § 1981 are protected from state *and* nongovernmental discrimination.⁴

Originally passed as § 1 of the 1866 Civil Rights Act, 42 U.S.C. § 1981(a) reads:

(a) 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

* J.D. Candidate, Northwestern Pritzker School of Law, 2019; B.A., Brown University, 2014. Thank you to Professor Victoria Nourse for her guidance and expertise in the world of statutory interpretation. I am also very grateful to Erika Dirk for her helpful suggestions and encouragement as my Note Editor. Last but not least, thank you to the editorial team at the *Northwestern Journal of Law & Social Policy* for their valuable contributions.

¹ *Elmore v. Harbor Freight Tools USA, Inc.*, 844 F.3d 764, 765–66 (8th Cir. 2016), *cert. denied*, 138 S. Ct. 316 (2017).

² *Elmore*, 844 F.3d at 765–66.

³ *Id.* When a court requires a plaintiff to allege "state action," the plaintiff must direct his or her claim at the actions of some government body or official. See "State Action," Black's Law Dictionary (10th ed. 2014).

⁴ 42 U.S.C. § 1981(c) (2012).

subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.⁵

Two of the provisions in subsection (a) are commonly referred to as the Contract Clause—“All persons . . . shall have the same right . . . to make and enforce contracts” and the Equal Benefit Clause—“All persons . . . shall have the same right . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.”

In the 1970s and 1980s, the Supreme Court decided several cases first expanding and then narrowing the scope of § 1981’s Contract Clause. To clarify the Contract Clause’s application, Congress added subsection (b) to § 1981 in 1991:

(b) For purposes of this section, the term “make and enforce contracts” includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.⁶

Congress also added subsection (c) in the same amendment:

(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.⁷

Despite the clear language of subsection (c), which prohibits the impairment of “the rights” protected by “this section” from discrimination by state law *and* nongovernmental discrimination, the circuit courts disagree as to whether subsection (c) applies to *all* the rights protected in subsection (a)—including the Equal Benefit Clause—or whether subsection (c) applies *only* to the Contract Clause of subsection (a). As a result, some circuits require plaintiffs filing a claim under § 1981’s Equal Benefit Clause to allege state action,⁸ while others do not.⁹ The Supreme Court has twice denied certiorari on the issue of whether § 1981’s Equal Benefit Clause prohibits private discrimination, first in 2003 after the Sixth Circuit’s decision in *Chapman v. Higbee Co.*¹⁰ and most recently in October 2017 after the Eighth Circuit affirmed the dismissal of Mr. Elmore’s case.¹¹

⁵ § 1981(a) (emphasis added).

⁶ § 1981(b).

⁷ § 1981(c).

⁸ See *Elmore*, 844 F.3d 764; *Bilello v. Kum & Go, LLC*, 374 F.3d 656 (8th Cir. 2004); *Adams ex rel. Harris v. Boy Scouts of Am.—Chickasaw Council*, 271 F.3d 769 (8th Cir. 2001); *Brown v. Philip Morris Inc.*, 250 F.3d 789 (3d Cir. 2001); *Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F.3d 851 (8th Cir. 2001).

⁹ See *Chapman v. Higbee Co.*, 319 F.3d 825 (6th Cir. 2003) (en banc); *Phillip v. Univ. of Rochester*, 316 F.3d 291 (2d Cir. 2003).

¹⁰ *Higbee Co. v. Chapman*, 542 U.S. 945 (2004) (denying certiorari).

¹¹ *Elmore v. Harbor Freights Tools USA, Inc.*, 138 S. Ct. 316 (2017) (denying certiorari).

Even if the Supreme Court were to hold that § 1981's Equal Benefit Clause indeed does prohibit private discrimination, the debate over the Equal Benefit Clause does not end there. The courts must then decide what *types* of private discrimination the Equal Benefit Clause prohibits. Upon first read, one might assume that the Equal Benefit Clause serves as a blanket prohibition against all types of private discrimination. But upon further inspection, it becomes clear that this is not the case. Both the text and legislative history of the Equal Benefit Clause show that the Clause reaches only private discrimination involving the impairment of a law or proceeding for the "security of persons and property."

Thus, when a retail store's employee blatantly harasses a shopper based on that shopper's race but does not threaten the security of that shopper's person or property, the shopper does not have a cause of action under the Equal Benefit Clause. Plaintiffs subjected to the harassment Mr. Elmore faced *should* be able to bring a claim when a business employee harasses them because of their race. In order to deter businesses from harassing customers and to compensate plaintiffs who experience racial harassment, Congress should amend the language of § 1981's Equal Benefit Clause to remove the words "for the security of persons of property" or should pass a new law prohibiting this form of private discrimination.

This Comment will proceed in two parts. First, Part I argues that the Equal Benefit Clause prohibits private discrimination. In order to show this, Parts I-A through I-B will discuss the history of the Equal Benefit Clause, tracing the statute through its passage, re-codification, and 1991 amendment. Part I-C will then address the conflicting positions advanced by the circuit courts as to whether a plaintiff must allege state action to support a claim under the Equal Benefit Clause. Part I-D will explain why those circuits interpreting the Equal Benefit Clause as requiring state action are mistaken, given the Clause's plain language and legislative history.

In Part II, the Comment argues that even if the Supreme Court were to hold that the Equal Benefit Clause prohibits private discrimination, the Clause does not prohibit *all* types of private discrimination, as some commentators have suggested. Rather, the plain language and legislative history of the Equal Benefit Clause show that the Clause only prohibits private discrimination involving the impairment of a law or proceeding for the security of one's persons or property. Part II-A will explain why the Clause is limited to this type of private discrimination and will refute arguments to the contrary. Part II-B will argue that because the Equal Benefit Clause has such a limited scope, victims of racial harassment do not have a cause of action when the harassment threatens neither their person nor property. The Comment concludes by arguing that Congress should fill this gap in modern civil rights protection.¹²

¹² For the purposes of this Comment, discussion of § 1981's protections will be limited to race. However, the Supreme Court has recognized that § 1981 protects minorities who face discrimination based on ancestry and ethnicity as well as race. *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987) ("Based on the history of § 1981, we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are

I. DOES § 1981'S EQUAL BENEFIT CLAUSE APPLY TO PRIVATE DISCRIMINATION?

To answer the question of whether § 1981's Equal Benefit Clause applies to private discrimination, the following section traces the changes Congress made to the language of § 1981 throughout history and provides context for the 1991 amendment. After providing this necessary background, the section then outlines the current circuit split as to whether the Equal Benefit Clause prohibits private discrimination. This section concludes by arguing that the Equal Benefit Clause *does* prohibit private discrimination and refutes arguments to the contrary.

A. *Origination and Development of the 1866 Civil Rights Act*

Congress originally passed the language of modern-day § 1981(a) as § 1 of the 1866 Civil Rights Act.¹³ Having passed the Thirteenth Amendment just one year earlier in 1865, Congress enacted the 1866 Civil Rights Act with the hopes of “giv[ing] effect” to the Thirteenth Amendment and “secur[ing] to all persons within the United States practical freedoms.”¹⁴ When presenting the bill to the floor, Senator Trumbull, the bill's author,¹⁵ stated that the Thirteenth Amendment would have no effect if former slaves did not have the same civil rights as white citizens.¹⁶ Thus, Senator Trumbull explained, the purpose of the 1866 Act was to extend civil rights to black citizens.¹⁷

Congress passed the 1866 Act pursuant to its authority under § 2 of the Thirteenth Amendment,¹⁸ which states that Congress shall have the power to enforce § 1 of the Amendment with appropriate legislation.¹⁹ Two years after Congress passed the 1866 Civil Rights Act, Congress enacted the Fourteenth Amendment.²⁰ To ensure that the 1866 Act had a legitimate footing in the Constitution, Congress used § 5 of the newly enacted Fourteenth Amendment to re-codify § 1 of the 1866 Civil Rights Act as §§ 16 and 18 of the 1870 Enforcement Act.²¹ This re-codification of § 1 of the 1866 Act pursuant to the Fourteenth Amendment, however, did not strip the 1866 Act of its roots in the

subjected to intentional discrimination solely because of their ancestry or ethnic characteristics.”); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617–18 (1987) (same).

¹³ Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1981 (2012)).

¹⁴ CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

¹⁵ George Rutherglen, *The Improbable History of Section 1981: Clio Still Bemused and Confused*, 55 SUP. CT. REV. 303, 310 (2003).

¹⁶ CONG. GLOBE, 39th Cong., 1st Sess. 474.

¹⁷ *Id.*

¹⁸ *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 431 (1968).

¹⁹ U.S. CONST. amend. XIII § 2.

²⁰ *Jones*, 392 U.S. at 436 (“In light of the concerns that led Congress to adopt it and the contents of the debates that preceded [sic] its passage, it is clear that the Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein . . . Nor was the scope of the 1866 Act altered when it was re-enacted in 1870, some two years after the ratification of the Fourteenth Amendment.”).

²¹ Enforcement Act of 1870, ch. 114, § 16, 16 Stat. 144. Congress passed the Enforcement Act of 1870 to give the President the power to carry out the Fifteenth Amendment and to combat efforts to prevent blacks from voting. Rutherglen, *supra* note 15, at 317–18.

Thirteenth Amendment, which reaches private action.²² Rather, as the Court explained in its landmark decision in *Jones v. Alfred H. Mayer Co.*, even after its re-codification under the Fourteenth Amendment, the 1866 Act remained a valid exercise of Congress’s power to pass laws to enforce the Thirteenth Amendment.²³

By the time the Court decided *Jones*, the language from § 1 of the 1866 Act had been split into two statutes and codified as 42 U.S.C. §§ 1981 and 1982.²⁴ In *Jones*, the petitioners filed a claim under § 1982, which prohibits both private and public racial discrimination in the sale or rental of property.²⁵ In response to the suit, the respondents argued that § 1982 was unconstitutional.²⁶ The Court, however, upheld § 1982 as a valid exercise of Congress’s power to enforce the Thirteenth Amendment.²⁷ Because both §§ 1981 and 1982 originated from § 1 of the Civil Rights Act of 1866, the *Jones* Court’s interpretation of § 1982 applied to § 1981 as well.²⁸

B. *The 1991 Amendment to § 1981*

Following the Court’s decision in *Jones*, the Supreme Court decided several opinions addressing § 1981’s Contract Clause. The following two cases interpreting the Contract Clause provide the necessary context for understanding Congress’s decision to amend § 1981 in 1991. First, in *Runyon v. McCrary*, the Supreme Court held that because § 1981 can reach “purely private acts of . . . discrimination,”²⁹ the law “prohibits racial discrimination in the making and enforcement of private contracts.”³⁰ A little over a decade later, in *Patterson v. McLean Credit Union*, the Court reaffirmed its holding that § 1981’s Contract Clause applies to private contracts,³¹ but held that the Clause does not protect

²² *Jones*, 392 U.S. at 436.

²³ *Id.*

²⁴ The modern-day language in §§ 1981 and 1982 came from the same paragraph in § 1 of the Civil Rights Act of 1866. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (“[C]itizens . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.”) (codified as amended at 42 U.S.C. § 1981 (2012)).

²⁵ *Jones*, 392 U.S. at 412.

²⁶ *Id.*

²⁷ *Id.* at 413.

²⁸ *Id.* at 436.

²⁹ *Runyon v. McCrary*, 427 U.S. 160, 170 (1976) (citing *Jones*, 392 U.S. at 436).

³⁰ *Runyon*, 427 U.S. at 168. In *Runyon*, a private school refused to allow black students to enroll because of the school’s policy of denying admission to black students. *Id.* at 164. The parents of the black students sued the school, alleging that the school violated § 1981’s protection against discrimination in the making and enforcing of contracts. *Id.* at 163–64.

³¹ *Patterson v. McLean Credit Union*, 491 U.S. 164, 179 (1989). In *Patterson*, the plaintiff, an African-American woman, filed a claim against her former employer alleging that the employer harassed her throughout her tenure with the company. *Id.* at 169.

employees from racial harassment by their employer.³² The Court reasoned that the plain language of § 1981 only protects contracting parties at the stages of formation and enforcement of a contract but does not provide protection for the stages in between.³³

The Court's decision in *Patterson* prompted Congress to act. In 1990, just one year after *Patterson*, both houses of Congress passed the Civil Rights Act of 1990.³⁴ The drafters of the 1990 Act sought to overturn *Patterson* and several other Supreme Court cases decided in the summer of 1989 that drastically cut back on civil rights protections.³⁵ The primary opposition to overriding *Patterson* via federal law came from business lobbyists who argued that overturning *Patterson* would encourage businesses to implement hiring quotas—i.e. numerical requirements for how many minority employees the company must employ—based on race.³⁶ But even the Bush Administration, the loudest voice cautioning against quotas, announced its support for eliminating *Patterson*,³⁷ thus revealing a general consensus on *Patterson*'s undesirability.

However, in October 1990, President Bush vetoed the 1990 Civil Rights Act out of concern that the Act would incentivize employers to implement hiring quotas.³⁸ While the text of the 1990 Act did not mandate quotas, it allowed for the presumption of discrimination when an employer's workforce had a significant discrepancy between the number of minority and non-minority employees.³⁹ Thus, as the Administration feared, the Act would encourage employers to implement racial quotas to protect themselves from liability.⁴⁰

In the beginning of the 1991 term, Congress began its second attempt to pass a Civil Rights Act. In the House Judiciary Committee's Report on the 1991 Act, the Committee explained the need for action: "The impact of *Patterson* has

³² *Id.* at 190 (citing *Runyon*, 427 U.S. at 168).

³³ *Patterson*, 491 U.S. at 176.

³⁴ Ronald D. Rotunda, *The Civil Rights Act of 1991: A Brief Introductory Analysis of the Congressional Response to Judicial Interpretation*, 68 NOTRE DAME L. REV. 923, 924 (1993).

³⁵ Reginald C. Govan, *Honorable Compromises and the Moral High Ground: The Conflict Between the Rhetoric and the Content of the Civil Rights Act of 1991*, 46 RUTGERS L. REV. 1, 20–23 (1993). In addition to overturning *Patterson*, which limited the protection of the contractual provision of § 1981 to the formation and enforcement of contracts, the drafters sought to reverse: (1) *Lorance v. AT&T Technologies*, 490 U.S. 900, 911 (1989), where the Court interpreted Title VII's statute of limitations narrowly so as to shorten plaintiffs' time to file, (2) *Martin v. Wilks*, 490 U.S. 755, 759 (1989), where the Court threatened the effectiveness of consent decrees to resolve Title VII cases, and (3) *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 665–66 (1989), where the Court redefined the "business necessity" test used in disparate-impact cases. Rotunda, *supra* note 34, at 924. Before *Wards Cove*, employers could use the "business necessity" defense in disparate-impact claims by proving that the employment practice that caused the disparate impact was of necessity to the business. However, the Court in *Wards Cove* removed the burden from the employer of proving "business necessity" and instead placed the burden on the plaintiff to disprove it. *Id.* at 22–23.

³⁶ *Id.* at 157.

³⁷ *Id.* at 50–51.

³⁸ *Id.* at 151.

³⁹ Rotunda, *supra* note 34, at 925.

⁴⁰ *Id.*

been disastrous. Last year . . . more than 200 Section 1981 race discrimination claims had been dismissed because of *Patterson*.⁴¹ In other words, because the *Patterson* Court read § 1981 as protecting only the formation and enforcement of contracts, plaintiffs who filed claims under § 1981 for racial harassment on the job were dismissed. On November 21, 1991, President Bush signed the Civil Rights Act into law.⁴²

The 1991 Civil Rights Act turned the existing language of § 1981 into subsection (a) and added subsections (b) and (c) to § 1981:

(b) For purposes of this section, the term “make and enforce contracts” includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.⁴³

(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.⁴⁴

The House Judiciary Committee stated in its report that the overall purpose of the 1991 Civil Rights Act was to “respond to recent Supreme Court decisions by restoring the civil rights protections that were dramatically limited by those decisions” and to “strengthen existing protections and remedies available under federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination.”⁴⁵

As for the two new subsections added to § 1981, the Committee stated that the purpose of subsection (b) was to overrule *Patterson* and make it clear that the “right to make and enforce contracts free from race discrimination includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.”⁴⁶ The Committee also explained that the purpose of subsection (c) was to “codify *Runyon*” where “the Court held that Section 1981 prohibited intentional race discrimination in private, as well as public, contracting.”⁴⁷ The Report concluded with the statement: “The Committee intends to prohibit racial discrimination in all contracts, both public and private.”⁴⁸

By overturning *Patterson*, the 1991 amendment clarified the scope of § 1981’s Contract Clause. But because Congress focused exclusively on the Contract Clause, the drafters did not make any mention during debates or in reports of the amendment’s impact on § 1981’s Equal Benefit Clause. As a result,

⁴¹ H.R. REP. NO. 102-40, pt. 2, at 36 (1991).

⁴² Govan, *supra* note 35, at 238.

⁴³ 42 U.S.C. § 1981(b) (2012).

⁴⁴ § 1981(c).

⁴⁵ H.R. REP. NO. 102-40, pt. 2, at 1.

⁴⁶ *Id.* at 37 (internal quotations omitted).

⁴⁷ *Id.*

⁴⁸ *Id.*

after 1991, a circuit split developed over the amendment's impact on the Equal Benefit Clause.

C. The Circuit Split Over the Interpretation of § 1981's Equal Benefit Clause

Subsection (c) of § 1981 states: “The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.”⁴⁹ Despite this unambiguous language, several circuit courts disagree as to whether subsection (c) applies to *all* the rights protected in subsection (a)—including both the Contract Clause and the Equal Benefit Clause—or whether subsection (c) *only* applies to the Contract Clause. In other words, the circuits disagree about whether the language “the rights protected by this section” in subsection (c) refers to *all* the rights protected in subsection (a), or just the right to make and enforce contracts.

On one side of the split, the Fourth and Eighth Circuits have held that a plaintiff must allege state action to state a claim under the Equal Benefit Clause and the Third Circuit has made similar statements in dicta.⁵⁰ Conversely, the Second and Sixth Circuits have held that a plaintiff need not allege state action to support a claim under the Equal Benefit Clause.⁵¹

1. Circuits that Impose a State Action Requirement on § 1981's Equal Benefit Clause

The Third Circuit was the first to articulate the rule that a plaintiff must allege government action to state a claim under § 1981's Equal Benefit Clause. In *Mahone v. Waddle*, a case decided before Congress added subsection (c) to § 1981, two black citizens brought a claim under § 1981's Equal Benefit Clause alleging that police officers stopped the plaintiffs for a traffic violation without probable cause because of their race.⁵² Although the Third Circuit found that the plaintiffs adequately stated a claim against the police officers under the Equal Benefit Clause,⁵³ the court added in dicta that the Equal Benefit Clause only prohibits discrimination by state actors.⁵⁴ The court explained that while the Contract Clause concerns the relations between private individuals, the guarantee of the “full and equal benefit of all laws and proceedings for the security of

⁴⁹ § 1981(c).

⁵⁰ *Elmore v. Harbor Freight Tools USA, Inc.*, 844 F.3d 764, 765 (8th Cir. 2016), *cert. denied*, 138 S. Ct. 316 (2017); *Bilello v. Kum & Go, LLC*, 374 F.3d 656, 661 (8th Cir. 2004); *Adams ex rel. Harris v. Boy Scouts of Am.—Chickasaw Council*, 271 F.3d 769, 777 (8th Cir. 2001); *Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F.3d 851, 855 (8th Cir. 2001); *Jones v. Poindexter*, 903 F.2d 1006, 1010 (4th Cir. 1990); *Shaare Tefila Congregation v. Cobb*, 785 F.2d 523, 525–26 (4th Cir. 1986), *rev'd on other grounds*, 481 U.S. 615 (1987); *Mahone v. Waddle*, 564 F.2d 1018, 1029–30 (3d Cir. 1977).

⁵¹ *Chapman v. Higbee Co.*, 319 F.3d 825, 833 (6th Cir. 2003) (en banc); *Phillip v. Univ. of Rochester*, 316 F.3d 291, 294 (2d Cir. 2003).

⁵² *Mahone*, 564 F.2d at 1020.

⁵³ *Id.* at 1024.

⁵⁴ *Id.* at 1029–30.

persons and property” suggests a concern with relations between individuals and the state, not with relations between two private individuals.⁵⁵

The Fourth Circuit adopted the *Mahone* court’s interpretation of the Equal Benefit Clause as prohibiting discrimination by state actors only. In *Shaare Tefila Congregation v. Cobb*, member families of a Jewish community filed a class claim under § 1981’s Equal Benefit Clause against a group of defendants who vandalized the walls of the community’s synagogue with anti-Semitic slogans.⁵⁶ The Fourth Circuit affirmed the dismissal of the plaintiffs’ Equal Benefit Clause claim, reasoning that the plaintiffs failed to allege state action.⁵⁷ The court quoted *Mahone*’s rationale that the language of the Equal Benefit Clause “suggests a concern with relations between the individual and the state.”⁵⁸

The Eighth Circuit also requires plaintiffs filing a claim under the Equal Benefit Clause of § 1981 to allege state action. In *Youngblood v. Hy-Vee Food Stores*, the Eighth Circuit dismissed a plaintiff’s Equal Benefit Clause claim because the plaintiff failed to allege state action.⁵⁹ In *Youngblood*, a grocery store clerk stopped the plaintiff, a black man, from leaving the store until the plaintiff showed his receipt.⁶⁰ The store clerk accused Mr. Youngblood of stealing, called the police, and told him to wait for the police to arrive.⁶¹ Upon arrival, the police did not find any suspicious activity and told Mr. Youngblood to leave.⁶² Mr. Youngblood filed a claim against the grocery store under the Equal Benefit Clause of § 1981.⁶³ Citing to *Mahone*, the Eighth Circuit affirmed the district court’s dismissal of the claim, reasoning that “because the state is the sole source of the law, it is only the state that can deny the full and equal benefit of the law.”⁶⁴

Most recently, in December 2016, the Eighth Circuit again held that plaintiffs must allege state action in an Equal Benefit Clause claim. In *Elmore v. Harbor Freight Tools USA, Inc.*, as discussed earlier, Mr. Elmore brought a claim under § 1981’s Equal Benefit Clause against a hardware store because the manager of the store accused Mr. Elmore of stealing, told him to leave, and called

⁵⁵ *Id.* at 1029. This statement was dicta because *Mahone* involved a claim against police officers and did not involve any claim of private discrimination. *Id.* at 1020.

⁵⁶ *Shaare Tefila Congregation v. Cobb*, 785 F.2d 523, 524–25 (4th Cir. 1986), *rev’d on other grounds*, 481 U.S. 615 (1987).

⁵⁷ *Shaare Tefila Congregation*, 785 F.2d at 525–26.

⁵⁸ *Id.* at 526 (citing *Mahone*, 564 F.2d at 1029).

⁵⁹ *Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F.3d 851, 855 (8th Cir. 2001).

⁶⁰ *Id.* at 853.

⁶¹ *Id.* at 853–54.

⁶² *Id.* at 854.

⁶³ *Id.* at 853.

⁶⁴ *Id.* at 855. The Eighth Circuit reaffirmed its holding in *Youngblood* in two subsequent cases, each time relying on the same reasoning that, since the state is the sole source of the law, only the state can deny an individual the full and equal benefit of the law. *See Bilello v. Kum & Go, LLC*, 374 F.3d 656, 661 (8th Cir. 2004); *Adams ex rel. Harris v. Boy Scouts of Am.–Chickasaw Council*, 271 F.3d 769, 777 (8th Cir. 2001). In a third case, the Eighth Circuit again stated that § 1981’s Equal Benefit Clause required state action. *Bediako v. Stein Mart, Inc.*, 354 F.3d 835, 838 n.3 (8th Cir. 2004). The court did not provide a rationale and cited to *Youngblood*. *Id.*

the police.⁶⁵ The Eighth Circuit dismissed Mr. Elmore's claim, relying on the same rationale as *Mahone*—because the state is the source of the law, only the state can deny an individual the full and equal benefit of the law.⁶⁶ Although the Third, Fourth, and Eighth Circuits all interpret the Equal Benefit Clause as prohibiting only state actor discrimination, the Eighth Circuit's opinions are more vulnerable to attack, as the Eighth Circuit decided *Youngblood* and *Elmore* after Congress added subsection (c), which explicitly says that § 1981 prohibits nongovernmental discrimination.

2. Circuits that Interpret § 1981's Equal Benefit Clause as Prohibiting Private Actor Discrimination

Conversely, both the Second and Sixth Circuits do not require plaintiffs to allege state action to support a claim under the Equal Benefit Clause.⁶⁷ In *Phillip v. University of Rochester*, the Second Circuit held that a group of black students adequately stated an Equal Benefit Clause claim when they alleged that a university security guard asked to see their student IDs and told them to leave their university's library.⁶⁸ The Second Circuit declined to follow the *Mahone* court's interpretation of the Equal Benefit Clause for several reasons. First, the Second Circuit rejected *Mahone*'s logic that only a state can deprive an individual of the full and equal benefit of the law.⁶⁹ The court explained that while the language of the Equal Benefit Clause suggests there must be a "nexus" between a claim and the state, "the state is not the only actor that can deprive an individual of the benefit of laws or proceedings for the security of persons or property."⁷⁰ Second, the Second Circuit found that although the House Judiciary Committee Report on the 1991 amendment stated that the purpose of subsection (c) was to codify the U.S. Supreme Court's decision in *Runyon*, this did not limit subsection (c)'s application to the Contract Clause.⁷¹ The court explained that although *Runyon* did involve a claim under the Contract Clause, *Runyon* held that § 1981 "reaches purely private acts of racial discrimination" and thus is not limited to the Contract Clause.⁷² Third, the Second Circuit criticized *Mahone* for failing to consider the legislative history of the Civil Rights Act of 1866. The court explained that Senator Trumbull's intention that the 1866 Act would "break down all discrimination between black men and white men," coupled with the repeated references in the floor debate of physical assaults by whites against recently freed slaves meant that the 1866 Act intended to prohibit private acts of discrimination.⁷³ Lastly, the Second Circuit stated that even if *Mahone* was

⁶⁵ *Elmore v. Harbor Freight Tools USA, Inc.*, 844 F.3d 764, 765 (8th Cir. 2016), *cert. denied*, 138 S. Ct. 316 (2017).

⁶⁶ *Elmore*, 844 F.3d at 766.

⁶⁷ *Chapman*, 319 F.3d at 833; *Phillip v. Univ. of Rochester*, 316 F.3d 291, 294 (2d Cir. 2003).

⁶⁸ *Phillip*, 316 F.3d at 292–93.

⁶⁹ *Id.* at 295.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* (quoting *Runyon v. McCrary*, 427 U.S. 160, 170 (1976)).

⁷³ *Phillip*, 316 F.3d at 296 (quoting *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 432 (1968)).

correctly decided in 1977, the 1991 amendment to § 1981 resolved any doubt as to whether the Equal Benefit Clause applies to private actor discrimination.⁷⁴

Like the Second Circuit, the Sixth Circuit has interpreted § 1981's Equal Benefit Clause as prohibiting private discrimination. In *Chapman v. Higbee Co.*, the Sixth Circuit sitting en banc⁷⁵ held that the plaintiff, a black woman, adequately stated an Equal Benefit Clause claim against a department store for searching her person after a store clerk suspected her of shoplifting.⁷⁶ The court provided several reasons why § 1981's Equal Benefit Clause prohibits private actor discrimination. First, the court explained that the text of subsection (c) unambiguously applies to "the rights" protected in § 1981(a), which includes the Equal Benefit Clause.⁷⁷ The court then cited the Supreme Court's decision in *Griffin v. Breckenridge* as precluding the argument that the application of subsection (c) to the Equal Benefit Clause creates an internal inconsistency in § 1981.⁷⁸ In *Griffin*, the Supreme Court found that 42 U.S.C. § 1985(3)'s Equal Protection Clause applies to both private and state action, reasoning that the concept of state action is not implicit in an equal protection provision.⁷⁹

The Sixth Circuit also rejected the defendant's argument that applying the Equal Benefit Clause to nongovernmental action would lead to the absurd result of federalizing tort law. Specifically, the defendant argued that if the Equal Benefit Clause applied to private discrimination, this would allow plaintiffs to bring tort claims in federal court under § 1981. The court noted that interpreting the Equal Benefit Clause as reaching private activity would not open a floodgate of cases because the language of the Clause limits the type of tort claims that could be brought under it. The court explained that the words "for the security of persons and property" require that plaintiffs show both a "denial of the benefit of a law or proceeding protecting his or her personal security or a cognizable property right" and intentional discrimination, which requires a "high threshold of proof."⁸⁰ Lastly, the Sixth Circuit explained that nothing in the legislative history of the 1991 amendment precludes a reading of the statute that applies subsection (c) to the Equal Benefit Clause.⁸¹ It stated that while the House Judiciary Committee Report on the 1991 amendment indicated that subsection (c) intends to prohibit both public and private discrimination in contracts, this intention does not limit subsection (c)'s application to the Contract Clause of subsection (a).⁸²

⁷⁴ *Phillip*, 316 F.3d at 296.

⁷⁵ The en banc panel reversed the original panel's decision that the Equal Benefit Clause only prohibits discrimination by state actors. See *Chapman v. Higbee Co.*, 256 F.3d 416, 421 (6th Cir. 2003), *rev'd en banc*, 319 F.3d 825 (6th Cir. 2003).

⁷⁶ *Chapman*, 319 F.3d at 828.

⁷⁷ *Id.* at 829.

⁷⁸ *Id.* at 831 (citing *Griffin v. Breckenridge*, 403 U.S. 88, 91 (1971)).

⁷⁹ *Chapman*, 319 F.3d at 831 (citing *Griffin*, 403 U.S. at 96). In *Griffin*, black citizens of Mississippi filed suit under 42 U.S.C. § 1985(3), the Ku Klux Klan Act, to recover damages from an allegedly racially motivated assault committed on a public highway. *Griffin*, 403 U.S. at 90.

⁸⁰ *Chapman*, 319 F.3d at 831–33.

⁸¹ *Id.* at 831–32.

⁸² *Id.*

One judge, who was joined by two other members of the en banc panel, wrote a lengthy dissent to the *Chapman* majority. Citing the familiar rhetoric of *Mahone*, the dissent opined that the Equal Benefit Clause “implicitly incorporates the concept of state action” because only the state can prescribe laws and therefore “only the state can deprive an individual of the benefit of those laws.”⁸³ The opinion further explained that “an individual is only deprived of the full and equal benefit of all laws and proceedings if he or she is impaired or prevented from enforcing through legal process his or her established rights.”⁸⁴ The dissent also denounced the majority’s reliance on *Griffin v. Breckenridge*, arguing that an interpretation of § 1985(3)’s Equal Protection Clause cannot be imputed to § 1981’s Equal Benefit Clause given the difference in language between the two clauses.⁸⁵ Finally, the dissent argued that applying subsection (c)’s protection against nongovernmental action to the Equal Benefit Clause leads to the absurd result of federalizing tort law, reasoning that the language “for the security of persons and property” encompasses any “garden-variety state tort law claim.”⁸⁶

In sum, the circuit courts disagree on whether § 1981’s Equal Benefit Clause prohibits private discrimination. The Third, Fourth, and Eighth Circuits interpret the Equal Benefit Clause as prohibiting state actor discrimination only, reasoning that because the state creates the law, only the state can deprive an actor of the equal benefit of the law. Conversely, the Second and Sixth Circuits interpret the Equal Benefit Clause as prohibiting both private *and* state actor discrimination given the legislative history of the 1866 Civil Rights Act, the language of the 1991 amendment, and the Supreme Court’s interpretation of the Equal Protection Clause of § 1985(3) in *Griffin v. Breckenridge*.

D. *Resolving the Circuit Split: § 1981’s Equal Benefit Clause Prohibits Private Discrimination*

Read properly, the language in Section § 1981(c)—“the rights protected by this section” —refers to *all* the rights protected in § 1981(a), including both the Contract Clause and Equal Benefit Clause.⁸⁷ This is true for several reasons. First, the plain language of § 1981’s text supports this reading. Second, the legislative history of § 1981 shows that Congress intended for the Equal Benefit Clause to

⁸³ *Id.* at 838 (Suhreinrich, J., dissenting).

⁸⁴ *Id.*

⁸⁵ *Id.* at 840–41. Section 1981’s Equal Benefit Clause guarantees the equal “benefit” of the laws, whereas § 1985(3) guarantees the equal “protection” of the laws. 42 U.S.C. § 1981 (2012); 42 U.S.C. § 1985(3) (2012). The Equal Protection Clause of § 1985(3) in its entirety reads,

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Id.

⁸⁶ *Chapman*, 319 F.3d at 842.

⁸⁷ § 1981(c) (2012).

cover private actors. Third, applying subsection (c) to the Equal Benefit Clause does not create an internal inconsistency in § 1981 because, as the Supreme Court noted in *Griffin v. Breckenridge*, the state is not the only actor who can deprive an individual of the full and equal benefit of the law.⁸⁸ Finally, the *Chapman* dissent's concern that interpreting the Equal Benefit Clause to reach private discrimination will federalize tort law is misplaced.

1. The Plain Language of § 1981

To begin, the text of subsection (c) makes it clear that the Equal Benefit Clause prohibits private discrimination. One cannot selectively apply subsection (c) to the Contract Clause of subsection (a) without adding meaning to the text of subsection (c) so that it reads: “the *contractual* rights protected in subsection (a) are protected against impairment by nongovernmental discrimination.” The text of § 2 of the Civil Rights Act of 1866 also shows that Congress intended for the Equal Benefit Clause to prohibit discrimination by private actors. Section 1 of the 1866 Civil Rights Act included the list of rights now codified as § 1981(a).⁸⁹ In § 2, Congress imposed criminal sanctions of a fine or jail time on “any person who, *under color of any law, statute, ordinance, regulation, or custom*, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act”⁹⁰ The fact that Congress included a reference to “under color of any law” in § 2 but did not include such a reference in § 1 shows that Congress could have included this language in § 1 if it wanted § 1 to apply only to state action. By limiting criminal sanctions to individuals who violated § 1 “under any color of law,” Congress distinguished between violations of § 1 by private individuals and violations of

⁸⁸ *Griffin v. Breckenridge*, 403 U.S. 88, 97 (1971).

⁸⁹ Section 1 of the Civil Rights Act of 1866 reads,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1981(a) (2012)).

⁹⁰ Civil Rights Act of 1866, ch. 21, § 2, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1981(a) (2012) (emphasis added)).

§ 1 by the state.⁹¹ The Supreme Court noted this in *Jones v. Alfred H. Mayer Co.* when it stated:

[T]he structure of the 1866 Act, as well as its language, points to the conclusion . . . that § 1 was meant to prohibit *all* racially motivated deprivations of the rights enumerated in the statute, although only those deprivations perpetrated “under color of law” were to be criminally punishable under § 2.⁹²

Moreover, as the Supreme Court articulated in *Griffin v. Breckenridge*, when Congress intends to limit the application of a civil rights statute to state actors, it does so explicitly.⁹³ For example, in drafting both the Fourteenth Amendment and 42 U.S.C. § 1983, Congress unambiguously limited the coverage to state actors.⁹⁴ Section 1981, however, contains no such limit.

In passing the 1991 Civil Rights Act, which added subsections (b) and (c) to § 1981, Congress did not change course from its original plan to ban both state and private discrimination. In 1991, Congress added subsection (c) to § 1981, which reads, “[t]he rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.”⁹⁵ Nothing in the language of subsection (c) limits the rights already provided in subsection (a).

2. Legislative History of the 1866 Civil Rights Act

Looking beyond the text of the Act, the legislative history of the 1866 Civil Rights Act further demonstrates that the Equal Benefit Clause prohibits private discrimination. In passing the Civil Rights Act of 1866, Congress understood that the Act would ban discrimination by private actors. This is demonstrated through statements made by Senator Trumbull, the author of the bill, and other members of Congress. Senator Trumbull explained that he intended for the 1866 Act to “give effect to the [Thirteenth Amendment] and secure to all persons within the

⁹¹ See *Hawk v. Perillo*, 642 F. Supp. 380, 391 (N.D. Ill. 1985) (interpreting § 1981’s Equal Benefit Clause as applying to private action by comparing §§ 1 and 2 of the Civil Rights Act of 1866 to show that § 1 protected against private- *and* state-actor discrimination).

⁹² *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 426 (1968).

⁹³ See *Griffin*, 403 U.S. at 97 (noting that Congress’s “failure to mention any state action requirement can be viewed as an important indication of congressional intent” to prohibit both private and state actor deprivations of the rights protected in § 1983(3)); *Hawk*, 642 F. Supp. at 390 (“Indeed, when Congress has intended to limit the reach of a civil rights statute to official misconduct, it has done so expressly.”) (citing § 2 and § 1983).

⁹⁴ See U.S. CONST. amend. XIV, § 2 (“ . . . nor shall any State deprive any person of life, liberty, or property, without due process of law”); § 1983 (“Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, equity, or other proceeding for redress”).

⁹⁵ § 1981(c).

United States practical freedom.”⁹⁶ To effectively carry out the Thirteenth Amendment’s ban on slavery and ensure “practical” freedom, the 1866 Act banned private acts of discrimination, given that slavery was not a state-run institution.⁹⁷ Senator Trumbull also explained that the “very object of the bill [was] to break down *all* discrimination between black men and white men”⁹⁸ If the Act did not protect recently freed slaves from private actors, it could hardly serve to break down all discrimination.⁹⁹ To make his point clear to the other members of Congress, Senator Trumbull explained that the Act would punish “[n]ot State officers especially, but everybody who violates the law.”¹⁰⁰

Other statements made during the legislative debates over the 1866 Act also show that Congress recognized that the Act would combat private discrimination.¹⁰¹ The debates contain numerous references to both specific state laws discriminating against black people *and* to acts of violence towards black people by private citizens.¹⁰² For example, Senator Creswell of Maryland stated that he received letters about violence towards and murders of recently freed slaves. Because of this, Senator Creswell wanted the Bill to extend over

⁹⁶ CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866). The Supreme Court in *Jones v. Alfred H. Mayer Co.* explicitly relied on Senator Trumbull’s statements when discussing the legislative history of the Civil Rights Act of 1866. After quoting Senator Trumbull’s statement that the Thirteenth Amendment gave Congress the power to end all civil rights discriminations against black citizens, the Supreme Court stated, “Surely Senator Trumbull was right. Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation.” *Jones*, 392 U.S. at 440.

⁹⁷ See *Jones*, 392 U.S. at 438 (“As its text reveals, the Thirteenth Amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.”) (citing *The Civil Rights Cases*, 109 U.S. 3, 20 (1883)) (internal quotations omitted).

⁹⁸ CONG. GLOBE, 39th Cong., 1st Sess. 599 (emphasis added); see also *Jones*, 392 U.S. at 433 (stating that the Civil Rights Act of 1866 would have a “sweeping” effect of abolishing both the Black Codes and private-actor discrimination) (citing remarks by various Senators during the congressional debate over enactment of the Civil Rights Act of 1866, as contained in CONG. GLOBE, 39th Cong., 1st Sess.).

⁹⁹ CONG. GLOBE, 39th Cong., 1st Sess. 599.

¹⁰⁰ *Id.* at 500; see also Rutherglen, *supra* note 15, at 310 (“When the [1866 Act] was under consideration, however, its opponents did not speak in terms that sharply distinguished between coverage of private individuals and coverage of state officers, but blurred the two together. In their view, the act was objectionable both because it applied directly to private conduct and because it imposed liability on state officers.”).

¹⁰¹ See Barry L. Refsin, Comment, *The Lost Clauses of Section 1981: A Source of Greater Protection After Patterson v. McLean Credit Union*, 138 U. PA. L. REV. 1209, 1214–15 (1990) (arguing that the 1866 Civil Rights Act aimed to protect recently freed slaves from the Black Codes and from violent attacks by whites).

¹⁰² See *Jones*, 392 U.S. at 427 (“The congressional debates are replete with references to private injustices against Negroes—references to white employers who refused to pay their Negro workers, white planters who agreed among themselves not to hire freed slaves without the permission of their former masters, white citizens who assaulted Negroes or who combined to drive them out of their communities.”) (citing various passages from CONG. GLOBE, 39th Cong., 1st Sess.).

Maryland.¹⁰³ As one commentator explained:

Conventional wisdom once held that the principal objective of the Civil Rights Act of 1866 was to nullify the infamous Black Codes that were enacted in several Southern states during 1865 and early 1866. The currency of that view has been debased, however, by historical research, which has shown that the Black Codes were quickly suppressed by the Freedmen's Bureau and the Union Army

. . . To be sure, the Black Codes exacerbated problems faced by the Freedmen. Equally, if not more troublesome, however, was the presence of pervasive and entrenched private discrimination.¹⁰⁴

The Supreme Court in *Jones v. Alfred H. Mayer Co.* adopted this reading of the legislative history of the 1866 Civil Rights Act when it stated that the purpose of the Civil Rights Act of 1866 was to eradicate both private and state discrimination. Discussing the Congressional intent behind the Civil Rights Act of 1866, the *Jones* Court stated:

In light of the concerns that led Congress to adopt it and the contents of the debates that preceded [sic] its passage, it is clear that the Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein¹⁰⁵

Furthermore, there is no evidence suggesting that Congress intended for the 1991 amendment to eliminate the 1866 Act's ban on private discrimination. The only available insight into Congress's intent in passing subsections (b) and (c) can be found in the House Judiciary Committee Report. With respect to subsection (b), the Committee stated that the purpose of the subsection was to overrule *Patterson*, which limited § 1981's Contract Clause to the "formation" and "enforcement" of contracts, and clarify that the "right to make and enforce contracts free from race discrimination includes the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship."¹⁰⁶ With respect to subsection (c), the Committee stated the purpose as to "codify *Runyon*" where "the Court held that Section 1981 prohibited intentional race discrimination in private, as well as public, contracting."¹⁰⁷ The Report continued: "The Committee intends to prohibit racial discrimination in all contracts, both public and

¹⁰³ CONG. GLOBE, 39th Cong., 1st Sess. 439.

¹⁰⁴ Barry Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 YALE L.J. 541, 551–52 (1989).

¹⁰⁵ *Jones*, 392 U.S. at 436.

¹⁰⁶ H.R. REP. NO. 102-40, pt. 2, at 37 (1991) (internal quotations omitted).

¹⁰⁷ *Id.*

private.”¹⁰⁸ Thus, Congress’s stated purpose for the two subsections added in 1991 focuses exclusively on the Contract Clause but makes no mention of subsection (c)’s impact on the Equal Benefit Clause.

Those who argue that Congress intended for subsection (c) to apply only to the Contract Clause of subsection (a) point to the House Judiciary Committee’s statement that the purpose of subsection (c) is “to prohibit racial discrimination in all contracts, both public and private.”¹⁰⁹ So, the argument goes, this statement demonstrates that Congress only intended to apply subsection (c) to the Contract Clause but not to the Equal Benefit Clause. This reading of the House Judiciary Committee Report is unpersuasive for several reasons. The fact that the House Judiciary Committee did not explicitly mention the Equal Benefit Clause in its Report does not mean Congress intended to limit subsection (c)’s application to the Contract Clause. If Congress intended to limit subsection (c) to the Contract Clause, it could have made this clear in the language of subsection (c). Rather, it used the broad language of “*the rights* protected by this section”¹¹⁰ A statement made in a Committee report cannot supersede unambiguous statutory language.¹¹¹

The Committee also stated in its Report that subsection (c) intended to codify *Runyon*, which shows that Congress understood subsection (c) as applying to all the rights in subsection (a). In *Runyon*, the Supreme Court held that “§ 1981 . . . reaches purely private acts of racial discrimination.”¹¹² To arrive at this conclusion, the *Runyon* Court cited its holding in *Jones v. Alfred H. Mayer Co.* that the 1866 Act “was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law”¹¹³ The *Runyon* Court’s holding that § 1981 “reaches purely private acts of racial discrimination” is thus not limited to § 1981’s Contract Clause, since the Court in *Runyon* used broad language referring to § 1981 generally and relied on *Jones*, which applies to § 1981 in its entirety. Thus, by stating that subsection (c) intended to codify *Runyon*, the House Judiciary Committee adopted the rule from *Runyon* that *all* of § 1981 “reaches purely private acts of racial discrimination.” Finally, the House Judiciary Committee stated the overall purpose of the Civil Rights Act of 1991 was, in part, to “strengthen existing protections and remedies available under federal civil rights laws”¹¹⁴ Because the 1866 Civil Rights Act prohibited private actor discrimination and because Congress wanted to *expand* the existing

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ 42 U.S.C. § 1981(c) (1991).

¹¹¹ *See, e.g.,* *Magwood v. Patterson*, 561 U.S. 320, 334 (2010) (“We cannot replace the actual text with speculation as to Congress’ intent.”); *Dodd v. United States*, 545 U.S. 353, 357 (2005) (“We must presume that [the] legislature says in a statute what it means and means in a statute what it says there.”) (quoting *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)) (internal quotations omitted).

¹¹² *Runyon v. McCrary*, 427 U.S. 160, 170 (1976).

¹¹³ *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 436 (1968).

¹¹⁴ H.R. REP. NO. 102-40, pt. 2, at 1 (1991).

civil rights protection within the 1991 Act, the 1991 Act cannot be read as shrinking the Equal Benefit Clause to apply to state actors only.

3. Lack of Internal Inconsistency

Interpreting the Equal Benefit Clause as prohibiting private discrimination does not create an internal inconsistency in § 1981. Contrary to the Eighth Circuit's position, the state is not the only actor who can deny an individual of the full and equal benefit of the law. For example, a privately hired security guard could violate the Equal Benefit Clause if he were to detain an individual based on his or her race. In this situation, the security guard, a privately-hired individual, violated that person's right to be free from false imprisonment, which is a state tort law that guarantees personal security. Another example would be if a black student at a private university complained of sexual harassment and the university did not investigate the accusation because of the reporting student's race. In this instance, the private university denied that student the "full and equal benefit" of a "proceeding"—an investigation into the allegations—"for the security of persons and property." A similar situation may also arise if a private employer refused to pursue an employee's claim of sexual harassment because of that employee's race. These hypothesized situations show that private institutions are capable of depriving an individual of the full and equal benefit of a "proceeding for the security of persons and property."

The *Chapman* dissent articulated the position that only the state can deprive an individual of the full and equal benefit of the law most persuasively when it said: "an individual is only deprived of the full and equal benefit of all laws and proceedings if he or she is impaired or prevented from enforcing through the legal process his or her established rights."¹¹⁵ The problem with this reasoning, however, is that it assumes that an individual's rights can be impaired only if that individual does not have an avenue for redress in court. This is not so. A private party does not deprive another person of the "benefit" of a law—for example the right to be free from false arrest—only at the moment when that person is prevented from bringing his or her claim in court. Rather, a private party violates the law prohibiting false arrest the moment he or she unlawfully detains another person. Laws provide two benefits: they prohibit specified conduct and provide remedies for violations to deter the prohibited conduct. The argument that a person is not deprived of the benefit of a law until that person is prevented from collecting a remedy assumes that the only benefit of a law is to remedy a violation. But when *A* falsely imprisons *B*, *A* deprives *B* of the right to be free from false imprisonment the moment *B* is detained.

Indeed, the Supreme Court has accepted the position that a private actor can deprive another person of the equal protection of the law. In *Griffin v. Breckenridge*, where black citizens from Mississippi filed suit under § 1985(3) to recover damages from an allegedly racially motivated assault committed on a public highway,¹¹⁶ the Supreme Court held that § 1985(3), the Ku Klux Klan Act,

¹¹⁵ *Chapman v. Higbee Co.*, 319 F.3d 825, 838 (6th Cir. 2003) (en banc).

¹¹⁶ *Griffin v. Breckenridge*, 403 U.S. 88, 90 (1971).

applied to private conspiracies.¹¹⁷ Section 1985(3) provides a cause of action for a plaintiff when “two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons the equal protection of the laws”¹¹⁸ In holding that § 1985(3)’s Equal Protection Clause prohibits private discrimination, the *Griffin* Court stated:

A century of Fourteenth Amendment adjudication has . . . made it understandably difficult to conceive of what might constitute a deprivation of the equal protection of laws by private persons. Yet there is nothing inherent in the phrase that requires the action working the deprivation to come from the State.¹¹⁹

The Court then highlighted Congress’s failure to mention a state action requirement in § 1985(3) as an important indication that Congress intended for the Act to reach private actors.¹²⁰

The *Chapman* dissent argued that the Supreme Court’s interpretation of § 1985(3) in *Griffin* cannot be extended to § 1981’s Equal Benefit Clause because the equal “protection” of the law is not the same as equal “benefit” of the law.¹²¹ This argument relies on a shallow reading of the text that favors form over substance. While the words “benefit” and “protection” are not the same, both words serve the same function within each statute. Section 1985(3) prohibits any person from “depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws”¹²² Similarly, § 1981(a) guarantees that all persons within the United States “shall have the same right . . . [to] the equal benefit of all laws”¹²³ Both provisions ensure that individuals are not deprived of their affirmatively granted rights. Section 1981 does so with language *granting* each person the full benefit of the law; § 1985(3) does so by *prohibiting* others from denying someone the equal protection of the law.

4. Concern Over Federalizing Tort Law

The *Chapman* dissent opined that interpreting the Equal Benefit Clause as prohibiting private discrimination will “federalize tort law.” In other words, if the Equal Benefit Clause prohibited private discrimination, federal courts would be faced with a flood of tort claims brought under § 1981. This concern lacks merit for several reasons. First, § 1981 prohibits instances of racial discrimination, not every day torts. To state a claim under the Equal Benefit Clause, the plaintiff must

¹¹⁷ *Id.* at 101–02.

¹¹⁸ 42 U.S.C. § 1985(3) (2012).

¹¹⁹ *Griffin*, 403 U.S. at 97 (citing *United States v. Harris*, 106 U.S. 629, 643 (1883)).

¹²⁰ *Griffin*, 403 U.S. at 97.

¹²¹ *Chapman v. Higbee Co.*, 319 F.3d 825, 838 (6th Cir. 2003) (en banc) (Suhrheinrich, J., dissenting).

¹²² § 1985(3).

¹²³ 42 U.S.C. § 1981(a) (1991).

allege racial animus, which requires a heightened burden of proof.¹²⁴ The plaintiff must also identify a “law or proceeding for the security of persons and property” that is “enjoyed by white citizens” that the defendant impaired. As discussed in greater detail below, the language of “for the security of persons and property” restricts the types of claims that can be brought under § 1981 to torts involving the security of one’s person or property.¹²⁵

Additionally, even if interpreting the Equal Benefit Clause as prohibiting private discrimination results in federal courts hearing more tort claims, this is not an irrational result. Congress clearly contemplated allowing contract claims into federal court given § 1981’s Contract Clause. It is doubtful that Congress would allow an increase in contract claims in federal court with § 1981 but did not want to increase the number of tort claims in federal court under the same statute.¹²⁶ Indeed, both contract and tort claims regularly appear in federal court under diversity jurisdiction. Most importantly, the interest of controlling federal courts’ dockets cannot justify a refusal to protect the rights guaranteed by § 1981.

In sum, the Eighth Circuit hides behind the flawed rhetoric of “only the state creates the law so only the state can deprive an individual of the equal benefit of the law.” Yet, as illustrated above, the text and legislative history of the Civil Rights Act of 1866 indicate that the Equal Benefit Clause prohibits private discrimination and the 1991 amendment does not alter this application. Further, as the Supreme Court noted in *Griffin*, applying subsection (c)’s protection against nongovernmental discrimination to the Equal Benefit Clause does not create an internal inconsistency in the statute. Finally, the concern that the Equal Benefit Clause will “federalize tort law” if interpreted to prohibit private discrimination lacks merit.

II. TYPES OF PRIVATE DISCRIMINATION COVERED BY § 1981’S EQUAL BENEFIT CLAUSE

Even if the Supreme Court were to resolve the circuit split and hold that the Equal Benefit Clause prohibits private discrimination, the debate over the Equal Benefit Clause does not end there. Courts will also have to determine what *types* of private discrimination the Equal Benefit Clause prohibits. In other words, courts must decide what laws and proceedings the Equal Benefit Clause

¹²⁴ *Chapman*, 319 F.3d at 832–33; *Phillip v. Univ. of Rochester*, 316 F.3d 291, 298 (2d Cir. 2003).

¹²⁵ *See Chapman*, 319 F.3d at 832 (stating that the “security of persons and property” language limits the potential class of cases that may be brought” under the Equal Benefit Clause because a litigant “must demonstrate the denial of the benefit of a law or proceeding protecting his or her personal security or a cognizable property right”); *Phillip*, 316 F.3d at 298 (responding to the concern that applying the Equal Benefit Clause to private action will federalize tort law by explaining that the language of the Equal Benefit Clause limits the number of claims, given that plaintiffs must allege racial animus and must point to a “law or proceeding for the security of persons and property” impaired by the defendant).

¹²⁶ *See Phillip*, 316 F.3d at 297–98 (“Because both contracts and torts are areas of particular state concern, there is no persuasive reason why racially motivated torts that deprive a plaintiff of the equal benefit of laws or proceedings for the security of persons and property should be outside the ambit of federal authority while racially motivated breaches of contract are not.”).

guarantees. A close reading of the text and an understanding of the provision's legislative history show that the Equal Benefit Clause cannot be interpreted as a blanket prohibition of all types of private actor discrimination.

A. *Identifying the Scope of the Equal Benefit Clause*

The Equal Benefit Clause reads: “All persons . . . have the same right . . . to the full and equal benefit of all laws and proceedings *for the security of persons and property* as is enjoyed by white citizens”¹²⁷ Some commentators have interpreted the Clause as prohibiting harassment that does not involve the security of the plaintiff's person or property. For example, one commentator argues that the Clause provides a cause of action for minorities subjected to racial harassment in retail stores, such as when a store employee tells a customer to leave, makes a derogatory comment to a customer, or accuses the customer of stealing based on assumptions made about the customer's race.¹²⁸ Another argues that the Equal Benefit Clause provides a cause of action for black patrons subjected to discrimination by white stylists in hair salons, such as when a salon refuses service.¹²⁹

The text of the Equal Benefit Clause, however, does not support these kinds of applications. The words “for the security of persons and property” limit the scope of the Equal Benefit Clause so that only two kinds of discrimination are actionable: (1) discrimination that prevents a person from enjoying the full benefit of laws that secure one's person or property, and (2) discrimination that impairs a person's access to the proceedings set in place to secure one's person or property.¹³⁰ Thus, physical assault, detention, the taking of private property, and a private institution's refusal to institute a proceeding to protect one's person or property—when motivated by race—are all actionable under the Equal Benefit Clause.

Commentators who interpret the Equal Benefit Clause as providing a cause of action for instances of racial harassment that do not implicate physical safety or the security of one's property ignore the words “for the security of persons and property.” For example, when a black person is discriminated against by white stylists at a salon, the stylists' actions do not violate a law that guarantees the security of that patron's person or property. Likewise, when a store employee asks

¹²⁷ § 1981(a) (emphasis added).

¹²⁸ Simone P. Wilson, *Retailing Racial Profiling: A Case for the Use of the Full and Equal Benefit Clause of Section 1981 in Consumer Racism Claims*, 6 RUTGERS RACE & L. REV. 123, 131 (2004).

¹²⁹ Constance Dionne Russell, *Styling Civil Rights: The Effect of Section 1981 and the Public Accommodations Act on Black Women's Access to White Stylists and Salons*, 24 HARV. BLACK LETTER L.J. 189, 222–23 (2008).

¹³⁰ The Second and Sixth Circuits have both recognized this. *See Chapman*, 319 F.3d at 832 (stating that the “security of persons and property” language limits the potential class of cases that may be brought” under the Equal Benefit Clause because a litigant “must demonstrate the denial of the benefit of a law or proceeding protecting his or her personal security or a cognizable property right”); *Phillip*, 316 F.3d at 298 (stating that prospective Equal Benefit Clause plaintiffs must: (1) show racial animus; (2) identify a relevant law or proceeding for the “security of persons or property”; and (3) persuade the fact-finder that the defendants have deprived them of the “full and equal benefit” of this law or proceeding).

a black shopper to leave the store or accuses the shopper of stealing, yet does not physically threaten the shopper's safety, the store has not violated a law for the security of the shopper's person or property. This was precisely the situation in Mr. Elmore's case.¹³¹ The hardware store manager's actions towards Mr. Elmore are inexcusable. But because the hardware store did not act in a way that denied Mr. Elmore the equal benefit of a law or deny him a proceeding that would protect his person or property, Mr. Elmore could not state a claim against the hardware store under the Equal Benefit Clause. Thus, the Eighth Circuit correctly dismissed Mr. Elmore's case, albeit for the wrong reason.

By contextualizing the language of the Equal Benefit Clause in 1866, the year it was written, it becomes clear why Congress limited the Clause to guarantee the equal benefit of laws involving the security of persons and property. No matter how altruistic Senator Trumbull's goal of ending "all discrimination" may appear, Senator Trumbull stated on several occasions that the 1866 Act intended to protect only civil rights, not social or political rights. Senator Trumbull explained:

The bill is applicable exclusively to civil rights. It does not propose to regulate the political rights of the individuals: it has nothing to do with the right of suffrage, or any other political right; but is simply intended to carry out a constitutional provision, and guaranty [sic] to every person of every color the same civil rights.¹³²

The members of Congress who drafted and passed the 1866 Civil Rights Act did not intend for the Equal Benefit Clause to serve as a universal prohibition of all forms of racial discrimination by private actors. And, in the 1991 amendment to § 1981, Congress left the words "for the security of persons and property" untouched. As a result, this passage continues to constrain the Equal Benefit Clause's application today.

B. Proposed Solution: Congress Should Act

An interpretation of the Equal Benefit Clause that adheres to the text and legislative history of the Act leads to an incredibly frustrating result. Plaintiffs like Mr. Elmore should be able to bring a claim against businesses that blatantly discriminate against them based on their race.¹³³ As a product of 1866, § 1981 does not meet the standards of equality society should demand in 2018. Relying

¹³¹ See *supra* Part I-C.

¹³² CONG. GLOBE, 39th Cong., 1st Sess. 599 (1866).

¹³³ Although Title II of the Civil Rights Act of 1964 prohibits private discrimination in places of "public accommodation," 42 U.S.C. § 2000a (2012), two limits make Title II an insufficient vehicle to remedy the kind of racial harassment Mr. Elmore experienced. First, the racial harassment would have to occur in a place of "public accommodation," which includes inns, motels, restaurants, and places of entertainment. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 247 (1964). Second, Title II only allows for injunctive relief, § 2000a-3, which will not compensate plaintiffs who experience a single instance of harassment by a store.

on the courts to interpret the Equal Benefit Clause as prohibiting racial discrimination in situations beyond those implicating the security of one's person or property is an insufficient solution, as the courts would have to ignore § 1981's text and legislative history to do so. Rather, Congress should remove the "for the security of persons or property" provision from the Equal Benefit Clause. Congress could also pass a new law providing a cause of action for shoppers who, like Mr. Elmore, face blatant racial harassment in retail stores. As the Supreme Court acknowledged in *Jones v. Alfred H. Mayer Co.*, Congress can legislate to prohibit private discrimination under the authority granted to it in § 2 of the Thirteenth Amendment. Congress could also pass this kind of law as necessary and proper under the Commerce Clause.¹³⁴

In 2006, the Supreme Court issued a decision that essentially read the Equal Benefit Clause out of § 1981, thus further showing the need for Congress to legislate. In *Domino's Pizza, Inc. v. McDonald*, the Supreme Court heard a claim brought under § 1981's Contract Clause and had to decide whether the Contract Clause's protection extends to the agents of a contracting party.¹³⁵ In a unanimous decision, the Supreme Court held that the Contract Clause's protection does not extend to agents of a contracting party.¹³⁶ Although the holding involved an interpretation of the Contract Clause, the Court's rationale implicated the Equal Benefit Clause. The Court stated:

[N]othing in the text of § 1981 suggests that it was meant to provide an omnibus remedy for *all* racial injustice. If so, it would not have been limited to situations involving contracts. Trying to make it a cure-all not only goes beyond any expression of congressional intent but would produce satellite § 1981 litigation of immense scope.¹³⁷

The Court's interpretation of § 1981 shows that if the Supreme Court were to finally grant certiorari on this issue, it is possible that the Court could completely gut the Equal Benefit Clause. While the facts of *McDonald* address only § 1981's Contract Clause, the Court did not qualify its statement that § 1981 is "limited to situations involving contracts."¹³⁸ The Court's acknowledgement that Congress did not intend for the Equal Benefit Clause to provide an "omnibus

¹³⁴ See *Heart of Atlanta Motel*, 379 U.S. at 261 (holding that Title II of the Civil Rights Act of 1964, which prohibits private discrimination in places of public accommodation, is valid exercise of Congress's commerce power).

¹³⁵ *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 473 (2006). McDonald, a black man and president of JWM Investments, sued Domino's Pizza after contractual relationships between JWM Investments and Domino's soured. *Id.* As the relationship deteriorated, a Domino's agent said to McDonald, "I don't like dealing with you people anyway," and later refused to explain what he meant by "you people." *Id.* McDonald filed a claim under § 1981's Contract Clause against Domino's Pizza alleging that Domino's breached its contract with JWM Investments out of racial animus towards McDonald. *Id.*

¹³⁶ *Id.* at 475.

¹³⁷ *Id.* at 479.

¹³⁸ *Id.*

remedy for all racial injustice” also suggests that the Court will not read the Equal Benefit Clause as prohibiting a wide range of private discrimination. Thus, in addition to the frustrating reality that § 1981’s Equal Benefit Clause is limited by the language “for the security of persons and property,” the Supreme Court’s statements in *Domino’s* give an additional reason for why Congress should create legislation to provide plaintiffs like Mr. Elmore with a cause of action.

CONCLUSION

Interpreting § 1981’s Equal Benefit Clause requires the courts to ask two questions: first, does the Equal Benefit Clause prohibit private discrimination and, if so, what types of private discrimination does the Clause prohibit? The circuits disagree with regard to the first question. The Third, Fourth, and Eighth Circuits interpret the Equal Benefit Clause as prohibiting state actor discrimination only, but the Second and Sixth Circuits interpret the Clause as prohibiting both private and state actor discrimination. The Second and Sixth Circuits are correct, given the text of § 1981 and the legislative history of the 1866 Civil Rights Act.

Even if the Supreme Court were to resolve the circuit split and hold that the Equal Benefit Clause prohibits private discrimination, the Equal Benefit Clause, as currently written, does not go far enough in prohibiting private discrimination. The language “for the security of persons and property” limits the Equal Benefit Clause to prohibiting only discrimination that implicates the security of one’s person and property. As a result, plaintiffs like Mr. Elmore who are told to leave stores, called names, and accused of shoplifting on account of their race, do not have a cause of action under § 1981’s Equal Benefit Clause. Federal civil rights legislation should provide a cause of action for individuals such as retail shoppers or salon patrons who face private racial harassment. Until Congress amends the language of § 1981 to remove the words “for the security of persons and property” or passes a new statute, patrons who face racial harassment by business employees will not have an avenue for redress in court.