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Seeking Economic Justice in the Face of Enduring Racism

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SEEKING ECONOMIC JUSTICE IN THE FACE OF ENDURING RACISM

*Deseriee Kennedy**

I. INTRODUCTION

In 1967, Dr. Martin Luther King, Jr. gave a speech to Stanford University students about economic injustice titled *The Other America*. In that speech, Dr. Martin Luther King, Jr. stated that “there are literally two Americas. One America is beautiful . . . in this America millions of young people grow up in the sunlight of opportunity. But tragically and unfortunately, there is another America. This other America that has a daily ugliness that constantly transforms the buoyancy of hope into the fatigue of despair.”¹ In this speech, Dr. King strove to highlight the gap between the rich and poor, the powerful and powerless, and the racial dynamic of these disparities. His speech highlights the struggle for economic and political equality for Blacks² and the economic strata separating Whites and Blacks held in place by structural and regulatory policies.³ And the “Other America” persisted, as Dr. King stated because too many people “are concerned about

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¹ *50 Years Ago: Martin Luther King, Jr., Speaks at Stanford University*, THE MARTIN LUTHER KING, JR. RES. & EDUC. INST. (Apr. 14, 2017), <https://kinginstitute.stanford.edu/news/50-years-ago-martin-luther-king-jr-speaks-stanford-university>. [hereinafter “50 Years Ago”] Dr. King gave the talk “The Other America” at Stanford University on April 14, 1967; *see also Transcript: The Other America, Dr. Martin Luther King* <https://www.crmvet.org/docs/otheram.htm> (last visited April 15, 2021).

² Rebecca E. Zietlow, *Slavery, Liberty, and the Right to Contract*, 19 NEV. L.J. 447, 448 (2018); *id.* at 465.

³ *See* 50 Years Ago, *supra* note 1, at 465.

tranquility and the status quo than about justice and humanity.”⁴ The persistence of wealth disparities and the continued overrepresentation of Blacks among the poor has spurred significant research, commentary, and calls for action.⁵ There is an ongoing debate about what proposals are likely to affect the growing racial gap in wealth significantly.⁶ Civil Rights legislation and affirmative action are two ways lawmakers have focused on addressing the gap. Laws that prohibit discrimination in employment, housing, lending, and contracting, among other activities, should be effective arrows in the quiver to aim at racist practices and to dismantle this Other America. However, without the ability to enforce these rights through courts, the grant of substantive rights lacks effect. Dismantling barriers to Black economic development requires an intersection of acknowledging substantive rights and providing procedural access.⁷

This essay examines the extent to which the perpetuation of the wealth gap is actively assisted by the imposition of legal standards that make it difficult to seek legal redress for harms caused by the structural racial barriers in place. Race neutral pleading standards that make it difficult for plaintiffs to bring viable racial discrimination claims narrow access to the courts. This has the effect of making it difficult for individuals to right wrongs and sends a message about the extent to which society is invested in undoing structural barriers to closing the racial wealth gap. Part II of the

⁴ Martin Luther King, Jr., “The Other America” Address at Gross Pointe High School (Mar. 14, 1968), in <https://www.gphistorical.org/mlk/mlk-speech/mlk-gp-speech.pdf>.

⁵ Cedric Herring and Loren Henderson, *Wealth Inequality in Black and White: Cultural and Structural Sources of the Racial Wealth Gap*, 8 RACE SOC. PROBL. 4, 14 – 15 (2016); Federal Reserve Board Survey of Consumer Finances (last conducted in 2019); see Neil Bhutta, et. al., *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, BD. OF GOVERNORS OF THE FED. RESERVE SYS. (September 28, 2020), <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finance-20200928.htm>.

⁶ William Darity, Jr., et al., *What We Get Wrong About Closing the Racial Wealth Gap*, SAMUEL DUBOIS COOK CTR. ON SOC. EQUITY AT DUKE UNIV., INSIGHT CTR. FOR CMTY. ECON. DEV. (2018) <https://socialequity.duke.edu/portfolio-item/what-we-get-wrong-about-closing-the-racial-wealth-gap>.

⁷ See e.g., Sandra F. Sperino, *Discrimination Law: The New Franken-Tort*, 65 DEPAUL L. REV. 721, 723 (2016); Sandra F. Sperino, *Let’s Pretend Discrimination Is A Tort*, 75 OHIO ST. L.J. 1107, 1109 (2014).

essay discusses the enactment of the first Civil Rights Act and its focus on addressing the legacy of slavery and the treatment of Black people during Reconstruction. In Part III, the essay turns to a discussion of the barriers imposed on the realization of the Act's purpose by superimposing a tort-based standard onto discrimination law. Part IV argues that the Court's tort-based approach to contract discrimination claims neutralizes the Civil Rights Act's power to level the economic playing field and help reduce the racial wealth gap. It asserts that current interpretations of the first Civil Rights Act are inconsistent with contemporary understandings of how unconscious bias affects the "making and enforcement of contracts." It asserts that the Supreme Court's current approach to the Civil Rights Act of 1866 places us in a loop that returns us, in many respects, to the Reconstruction era. Finally, Part V concludes that a return to the original intent of the drafters of the 1866 Civil Rights Act would ensure that claims that allege race as a motivating factor in contracting to be sufficient.

II. THE 1866 CIVIL RIGHTS ACT

Close to 100 years before King's 1967 speech at the height of the Civil Rights Movement, Congress debated the newly freed African Americans' economic rights before passing the first Civil Rights Act. After amending the Constitution to end slavery, the right to be seen as citizens and to contract freely were the first civil rights recognized by the U.S. Congress. The Civil Rights Act of 1866, now codified in Title 42 of the United States Code section 1981, was enacted even before the Fourteenth Amendment's grant of citizenship to the newly freed slaves was ratified. Section 1 of the Act provides, "[a]ll persons within the jurisdiction of the United States shall have the same right ... to make and enforce contracts ... as is enjoyed by [W]hite citizens."⁸ The Civil Rights Act was a response by the Reconstruction Congress to Blacks' formal and informal exclusions from public life.⁹ The bill's sponsor, Senator

⁸ 42 U.S.C. § 1981(a) (2018). In *McDonald v. Santa Fe Trail Transp. Co.*, the Supreme Court held that the statute protects all races. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 96 S. Ct. 2574 (1976). Section 2 of the Civil Rights Act of 1866, later codified as 42 U.S.C. § 1982, provides that "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal.

⁹ See e.g., Zietlow, *supra* note 2, at 469 (stating "members of the Reconstruction did not view freedom of contract as an end in itself; they saw freedom of

Trumbull, stated, “[i]t is idle to say that a man is free who cannot go and come at pleasure, who cannot buy and sell, who cannot enforce his rights.”¹⁰ Senator Trumbull further noted, “[t]his measure is intended to give effect to that declaration [abolishing slavery under the Thirteenth Amendment] and secure to all persons within the United States practical freedom.”¹¹ – and Trumbull noted-- “the Act was designed to secure to all persons within the United States practical freedom.”¹²

The Act was a recognition that Whites actively barred Blacks from engaging in commercial activity with the same freedom.¹³ After the Civil War, “southern whites’ systemic refusal to sell property or extend credit to the former slaves, meant that the majority of blacks would remain economically dependent upon the group of people . . . whom they had served as slaves.”¹⁴ Legislation known as the Black Codes, which applied only to African Americans, restricted Blacks’ rights to own property, work, contract, and move freely through society.¹⁵ The Black Codes kept the freed enslaved by limiting the freedom of contract, among other things. For example, Black Codes tied Blacks to abusive sharecropping arrangements, policed the newly freed African Americans through vague vagrancy laws that made it a crime to be unemployed and prevented leaving employment without “working off” advances.¹⁶ Melissa Milewski describing the Black Codes, states:

In many southern states, the codes required that African Americans have written evidence of employment at all times and allowed any white person to arrest them if they

contract as a means towards their goal of establishing equal citizenship and fundamental rights for freed slaves and empowering all”).

¹⁰ *Jones v. Alfred H. Mayer Co.*, 88 S. Ct. 2186, 2198 (1968).

¹¹ *Id.* at 2198–99; Barry Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 YALE L.J. 541, 564 (1989).

¹² *Id.* at 2198–99.

¹³ Zietlow, *supra* note 2, at 473; Sullivan, *supra* note 11, at 552–53.

¹⁴ JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW, BACK WOMEN, WORK AND THE FAMILY FROM SLAVERY TO THE PRESENT*, 52 (1985).

¹⁵ W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* 329 (1935); MELISSA MILEWSKI, *LITIGATING ACROSS THE COLOR LINE, CIVIL CASES BETWEEN BLACK AND WHITE SOUTHERNERS FROM THE END OF SLAVERY TO CIVIL RIGHTS* 33 (2018); Jones, *supra* note 14, at 52; Zietlow, *supra* note 2, at 462 (noting the Black Codes were a form of indentured servitude).

¹⁶ Brian Sawyers, *Race, and Property After the Civil War: Creating the Right to Exclude*, 87 MISS. L.J. 703, 707, 730–31 (2018).

left before the end of their employment contracts. As punishment for not having employment, black southerners were to be hired out on chain gangs, put in stocks, and left in solitary confinement with only bread and water. . . the 1865 Mississippi legislature declared that thieves could be hanged from their thumbs and black people unable to pay fines would have their labor hired out to the highest bidder.¹⁷

The Black Codes were also “formulated to restrict their participation in occupations that could lead to independent enterprises” and restricted access to business licenses, own distilleries, sell liquor, rent or lease urban property.¹⁸ The Black Codes kept the freed Africans enslaved, in essence, by limiting their freedom of contract, among other things.

Significantly, the restrictions created by the laws lasted far beyond their formal existence. Even though the Black Codes, as legal restrictions, lasted a relatively short period, the barriers they created continued to be enforced. The Black Codes and racial violence bound the freed Blacks to Whites.¹⁹ Whites continued to impose restrictions on Blacks’ ability to engage in commerce freely through exclusion and private violence designed to maintain a system of white supremacy. Whites also imposed restrictions on Blacks through private violence intended to maintain a racial hierarchy and white supremacy. The Civil War and the 13th Amendment ended slavery in many forms but did little to address white supremacy. One of the lasting legacies of American slavery is the racial hierarchy which placed those considered a member of the “white race” at the top of the hierarchy and those considered Black at the bottom. The Black Codes, like all laws, were simply a codified expression of White desire. The eradication of these laws did not end the desire to impose a system of white supremacy. Today, the desire remains with us in the voices of the “Karens” who privately police Black bodies and their movements.²⁰

¹⁷ Milewski, *supra* note 15, at 33.

¹⁸ JULIET E. K. WALKER, *THE HISTORY OF BLACK BUSINESS IN AMERICA, CAPITALISM, RACE, ENTREPRENEURSHIP* 151-52; Zietlow, *supra* note 2, at 473, 478.

¹⁹ DuBois, *supra* note 15, at 671.

²⁰ See e.g., Karen Grisby Gates, *What’s In A Karen, Code Switch*, NPR (July, 15, 2020, 1:03 PM) <https://www.npr.org/2020/07/14/891177904/whats-in-a-karen> (stating Karens are, “women, almost always white, who are entitled, often racist and determined to get what they want. And what they want, to a

The current version of the Civil Rights Act in § 1981 requires plaintiffs to allege that defendants acted intentionally and purposefully to discriminate against them on the basis of race and that the discrimination was directed toward activities protected by the statute.²¹ The Act requires treatment of someone in the "making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."²² be the same "as is enjoyed by white citizens." Unfortunately, many in America actively seek to monopolize the enjoyment of these "benefits and privileges," leading to litigation by plaintiffs of color against large institutions or corporations.

III. REQUIRING "BUT FOR" CAUSATION IN DISCRIMINATION SUITS

In a series of decisions, the Supreme Court has imposed a tort-based causation doctrine onto discrimination claims, and in 2020, the Court imposed a "but for" causation standard onto pleading requirements in §1981 claims. In *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media* (NAAOM), Entertainment Studios Network (ESN) sued Comcast for violating §1981. The plaintiff, ESN, is a Black-owned television network operator, founded in 1993 by Byron Allen, a comic turned entrepreneur. ESN produces more than 60 syndicated T.V. shows and owns eight channels, including The Weather Channel, Local Now, and Comedy.T.V. ESN alleged that Comcast repeatedly refused to contract with them, made several different requests of ESN during the negotiations, and launched multiple White-owned networks during that time, but declined to carry ESN.²³ According to the ESN

frequent degree, is the ability to determine where Black and brown bodies may or may not be present"); Cady Lang, *How the 'Karen Meme' Confronts the Violent History of White Womanhood*, TIME (July 6, 2020, 4:11 PM) <https://time.com/5857023/karen-meme-history-meaning/> (remarking on the historical roots of "white women's victimhood" in modern times).

²¹ But see, Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 863 (1991) (arguing in favor of modernizing §1981 claims to allow disparate impact suits which do not require establishing intent to discriminate).

²² 42 U.S.C. § 1981(b) (2018).

²³ Brief for Respondents at 1, *Comcast Corp. v. Nat'l Ass'n African Am.-Owned Media and Entm't Studios, Inc.*, 140 S. Ct. 1009 (2020) (No. 18-1171), 2019 WL 3824689 at *5.

complaint, during the negotiations period, a Comcast executive stated that Comcast was not "trying to create any more Bob Johnsons," a remark that ESN took as a reference to Robert Johnson, the African American founder of Black Entertainment Network ("BET"). ESN pointed to Comcast's conduct and alleged that Comcast refused to enter into a contract with them to carry their channels because of race and that ESN was not given the same right to contract as White-owned media companies in violation of the Civil Rights law. In response, Comcast filed a motion to dismiss for failure to state a claim under 42 U.S.C. § 198, asserting that it had legitimate business reasons for refusing to contract with ESN.

Dismissal at the pleading stage turned on whether plaintiffs are obligated to allege discriminatory intent was the "but-for cause" of the refusal or a motivating factor in the refusal to contract. The district court took the position that the plaintiff's complaints did not establish discriminatory intent as the "but-for cause" of Comcast's refusal to enter into a contract with ESN. The district court dismissed the plaintiff's complaint noting that the plaintiff failed to "undercut" the defendant's "alternative explanation" for refusing to contract with the plaintiff. It opined that the complaint "did not exclude" the refusal to contract "was based on legitimate business reasons." As noted in the Supreme Court opinion, the complaint was dismissed after two amendments permitted by the court, "[b]ut each time, the court concluded, ESN's efforts fell short of plausibly showing that, but for racial animus, Comcast would have contracted with ESN."²⁴ The Ninth Circuit reversed the dismissal, reasoning that at the pleading stage of litigation, "[p]laintiffs need only to plausibly allege that discriminatory intent was a factor in Comcast's refusal to contract." The Circuit court reasoned, "a plaintiff must only plead facts plausibly showing that race played 'some role' in the defendant's decision-making process."²⁵ The appellate court noted that, based on the complaint, it could plausibly infer that ESN "experienced disparate treatment due to race and thus was denied the same right to contract as a White-owned company." The court found that plaintiffs alleged sufficient facts to suggest race played a role in the case.

In a unanimous opinion, the Supreme Court reversed the Ninth Circuit and remanded the case. The Court concluded that plaintiffs must plausibly allege that race was a "but for" cause of

²⁴ *Comcast Corp.*, 140 S. Ct. at 1013 (2020).

²⁵ *Id.* at 1013.

the alleged discrimination. The Court found that alleging race as a motivating factor is insufficient to survive a motion to dismiss. In so doing, the Court arguably raises a question of what imposing a "but for" standard will mean for plaintiffs alleging discrimination at the earliest stage of the litigation and whether the more rigorous approach will deter or bar plaintiffs from seeking relief.²⁶

The Supreme Court glosses over the fact that the statute "does not expressly discuss causation" while asserting that the statute guarantee that each person is entitled to the "same right . . . as is enjoyed by White citizens" "fits naturally with the ordinary rule that a plaintiff must prove but-for causation."²⁷ Although the Court acknowledges that section 1981 does not use causal language, it imposes a "but for" causation requirement, providing that doing so is required unless a statute indicates otherwise. The Court reasoned that a private right of action under the statute was not found until *Runyon v. McCrary* was decided in 1976, which also limited section 1981 cases to claims related to the formation of a contract.²⁸ The Court then noted that its overly restrictive reading of the Act in *Patterson v. McClean Credit Union* was overruled by the Civil Rights Act of 1991, which made clear that the statute applies to all aspects of contracting. The Court stated that the Civil Rights Act of 1991 made clear that section 1981 "includes the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."²⁹

The Court rejected the plaintiff's analogy to the Title VII "motivating factor" test, concluding that Congress in amending Title VII did not also amend § 1981 to allow for a "motivating factor test." The motivating factor test stems from the employment discrimination statute, Title VII's acknowledgment of mixed-motive

²⁶ See *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 364 (2013) (Ginsburg, J., dissenting) (noting requiring plaintiffs satisfy a "but-for" causation rather than a "mixed motive" standard for Title VII retaliation claims imposes a "stricter standard").

²⁷ *Comcast Corp.*, 140 S. Ct. at 1015 (2020).

²⁸ *Runyon v. McCrary*, 427 U.S. 160 (1976) (finding § 1981 created a private right of action against Virginia private schools for refusing to admit Black students).

²⁹ *Patterson v. McLean Credit Union*, 491 U.S. 164, 171 (1989) (holding section 1981 "does not apply to conduct which occurs after the formation of a contract"); 42 U.S.C. § 1981(b).

claims.³⁰ The Court found no basis for applying the burden-shifting mixed motives Title VII standard to §1981 claims. Instead, the Court relied on common law tort principles as an appropriate analogy for pleading requirements under 42 U.S.C. §1981, stating that "the common law in 1866 often treated a showing of but-for causation as a prerequisite to a tort suit." The opinion points to Supreme Court precedent, which referred to the statute as "afford[ing] a federal remedy against discrimination . . . on the basis of race," which the court argues is "strongly suggestive of a but-for causation standard."³¹ Without dissent, the Court found that "to prevail, a plaintiff must initially plead and ultimately prove that, but for race, it would not have suffered the loss of a legally protected right."³²

It is important to note that the road to the conclusion that discrimination in contracting claims requires pleading and proving "but for" causation was not always so clear.³³ Before the Supreme Court's *NAAOM* decision, the circuits disagreed about whether plaintiffs must prove that race was the "but for" reason for the

³⁰ Title VII prohibits discrimination in employment "on the basis of race, color, religion, sex or national origin" and is codified at 42 U.S.C. § 2000(e). The Supreme Court's decision in *Price Waterhouse v. Hopkins* 490 U.S. 228, 258 (1989), found that Title VII allows for mixed-motive claims-making an employer's conduct actionable where the plaintiff being a member of a protected class is a motivating factor in the employment decision.

³¹ *Comcast Corp.*, 140 S. Ct. at 1016 (2020) (quoting *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-460 (1975) (emphasis added in *Comcast*)). Note that the Court had previously required "but for" causation to be alleged in disability claims under the Americans with Disability Act and age discrimination under ADEA. See *Univ. of Tex. Sw. Medical Ctr. v. Nassar*, 570 U.S. 338 (2013) (finding plaintiffs must show "but for" causation to establish a Title VII retaliation claim); *Gross v. F.B.L. Financial Services, Inc.*, 557 U.S. 167 (2009) (finding plaintiffs are required to establish "but for" cause under the Age Discrimination in Employment Act).

³² *Comcast Corp.* 140 S. Ct. at 1019; Deseriee A. Kennedy, *Consumer Discrimination: The Limitations of Federal Civil Rights Protection*, 66 MO. L. REV. 275 (2001).

³³ See e.g., Brief of Amici Curiae NAACP Legal Defense & Education Fund, Inc. and Ten Civil Rights Litigating Organizations in Support of Respondents, *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, (No. 18-1171) 2019 WL 4858286 (U.S. 2019); Brief of Lawyers' Committee for Civil Rights Under Law and Twenty-One National Organizations as Amici Curiae in Support of Respondents, *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, (No. 18-1171) 2019 WL 4897098 (U.S. 2019).

decision or one motivating factor.³⁴ Additionally, depending on the lower court's interpretation of the "but for" standard, the *National Association of African American-Owned Media* case may significantly raise the bar for plaintiffs seeking to overcome the pleading stage of litigation. The Supreme Court decision does not explain whether the "but for" standard requires the plaintiff to allege and prove that race is the sole cause of differing treatment or just one key factor. Although the meaning of "but for" causation is not entirely clear,³⁵ The decision was immediately feted by legal counsel for employers and large corporations who claimed the decision as a win and were encouraged to file motions to dismiss.³⁶ The case is the most recent example of the Court's intertwining of procedural and substantive law to impose a view of what is required to prevail in a discrimination claim which is out of step with the purpose of the Civil Rights Act statute. The approach is also inconsistent with current understandings of how subtle forms of racism manifest in systems and structures that maintain the racial hierarchy that the Civil Rights Act of 1866 was designed to help dismantle.

The Comcast decision does not clearly define the "but for" standard in contracting discrimination cases. On the one hand, judges may apply a "but for" causation standard if race is one of many factors affecting a decision whether to contract and allowing plaintiffs to move past the pleading stage.³⁷ *Bostock* found that

³⁴ Brief of Lawyers' Committee for Civil Rights, *supra* note 33.

³⁵ See Nat'l Ass'n of African-Am. Owned Media v. Charter Commc'ns, Inc., No. CV 16-609-GW(FFMX), 2016 WL 9023601 (C.D. Cal. Oct. 24, 2016), *aff'd*, 908 F.3d 1190 (9th Cir. 2018), *opinion withdrawn and superseded on reh'g*, 915 F.3d 617 (9th Cir. 2019), *cert. granted, judgment vacated*, 140 S. Ct. 2561, 206 L. Ed. 2d 493 (2020), *and vacated and remanded*, 804 F. App'x 710 (9th Cir. 2020), *and aff'd*, 915 F.3d 617 (9th Cir. 2019), *and cert. granted, judgment vacated*, 140 S. Ct. 2561, 206 L. Ed. 2d 493 (2020).

³⁶ See e.g., Blake M. Edwards, "But For" vs. "Motivating" - Now Two Similar Anti-Discrimination Laws Have Different Proofs of Causation, LEWIS BRISBOIS (Mar. 25, 2020), <https://lewisbrisbois.com/newsroom/legal-alerts/but-for-vs.-motivating-now-two-similar-anti-discrimination-laws-have-differ>; U.S. Supreme Court Confirms A But-For Causation Standard For Section 1981 Discrimination Claims, LIEBERT CASSIDY WHITMORE (Apr. 30, 2020), <https://www.lcwlegal.com/news/us-supreme-court-confirms-a-but-for-causation-standard-for-section-1981-discrimination-claims-3>.

³⁷ *Comcast Corp.*, 140 S. Ct. at 1013; Nat'l Ass'n of African Am.-Owned Media, et al. v. Charter Commcn's, Inc., et al., No. 2:16-cv-00609-GW-(FFMx), Tentative Ruling on Renewed Motion to Dismiss Plaintiffs' Second Amended

Title VII's prohibition against discrimination "because of" an individual's sex includes discrimination based on sexual orientation and transgender status.³⁸ In reaching that conclusion, the court notes that "those who adopted the Civil Rights Act [of 1964] might not have anticipated their work would lead to this particularly result . . . But the limits of the drafters' imagination supply no reason to ignore the law's demands."³⁹ The *Bostock* court notes that the "because of" language in the statute "incorporates the 'simple' and 'traditional' standard of but-for causation." However, in *Bostock v. Clayton*, the Court finds that "[w]hen it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some other factor that contributed to its challenged employment decision."⁴⁰

In support of its explanation of "but for" causation, the court cites to *University of Tex. Southwestern Medical Center v. Nassar* and *Gross v. FBL Financial Services, Inc.*⁴¹ *Nassar* involved a Title VII race and religion harassment retaliation claim. Noting the 1991 amendment of Title VII, which allowed the plaintiff to obtain declaratory relief, attorney's fees and costs, and injunctive relief if race was a "motivating factor"⁴² but concludes that "a plaintiff making a retaliation claim under § 2000e-3(a) must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer."⁴³ Unlike NAAOM, four justices dissented in *Nassar*. Ginsberg, writing for the dissent reasons that, "the word 'because' does not inevitably demand but-for causation to the exclusion of all other causation formulations. When more than one factor contributes to a plaintiff's injury, but-for causation is problematic."⁴⁴ The dissent further explains that modern tort law is more generous than the standard the majority articulates in *Nassar* for Title VII retaliation claims. It notes that tort law "permits the plaintiff to prevail upon showing that either [of two] sufficient condition[s] created the harm."⁴⁵ Ginsberg goes

Complaint, August 27, 2020. Defendant Charter Communications Inc.'s Renewed Motion to Dismiss Plaintiffs' Second Amended Complaint.

³⁸ *Bostock v. Clayton Cty.*, Georgia, 140 S. Ct. 1731, 1734, (2020).

³⁹ *Id.* at 1737.

⁴⁰ *Bostock v. Clayton Cty.*, Georgia, 140 S. Ct. 1731, 1739 (2020).

⁴¹ *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350 (2013); *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 176 (2009).

⁴² *Univ. of Tex. Sw. Med. Ctr.*, 570 U.S. at 349.

⁴³ *Id.* at 362.

⁴⁴ *Id.* at 383 (Ginsberg, J., dissenting)

⁴⁵ *Id.*

on to quote the concurrence in *Price Waterhouse*, in which Justice O'Connor stated,

[I]n the area of tort liability, from whence the dissent's 'but-for' standard of causation is derived, ... the law has long recognized that in certain civil cases' leaving the burden of persuasion on the plaintiff to prove 'but-for' causation would be both unfair and destructive of the deterrent purposes embodied in the concept of duty of care. Thus, in multiple causation cases, where a breach of duty has been established, the common law of torts has long shifted the burden of proof to ... defendants to prove that their negligent actions were not the 'but-for cause of the plaintiff's injury.⁴⁶

Ginsberg, remarks that "a strict but-for test is particularly ill suited to employment discrimination cases."⁴⁷ The strong dissent in *Nassar*, increases the surprise that the Court applied the "but for" causation standard to § 1981 claims, notably since the Civil Rights statute lacks the Court's repeatedly referenced "because of" language of Title VII and instead refers to Blacks having the "same rights as" Whites to contract.

In *Gross v. FBL Financial Services, Inc.* served as support for the majority's conclusion in *NAAOM* and *Nassar* that the discrimination statutes in issue in each of those cases require plaintiffs to plead and prove "but for" causation. The Court in *FBL Financial Services, Inc.* found that Age Discrimination in Employment Act (ADEA) case that the use of the words "because of" in the statute means that "establish that age was the "but-for" cause of the employer's adverse action" and citing a torts treatise in support of its analysis.⁴⁸ In his dissent in the age discrimination case, *Gross v. F.B.L. Financial Services, Inc.*, Justice Breyer states, "the words "because of" do not inherently require a showing of "but-for" causation, and I see no reason to read them to require such a

⁴⁶ *Id.* at 384.

⁴⁷ *Id.* at 384-85.

⁴⁸ *Gross*, 557 U.S. at 177 (citing W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON LAW OF TORTS 265 (5th ed. 1984) (finding ADEA plaintiffs must prove that age was the "but for" cause of defendant's conduct and that the burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age)).

showing.”⁴⁹ His dissent succinctly notes the discordance in applying tort causation in discrimination claims stating,

It is one thing to require a typical tort plaintiff to show “but-for” causation. In that context, reasonably objective scientific or commonsense theories of physical causation make the concept of “but-for” causation comparatively easy to understand and relatively easy to apply. But it is an entirely different matter to determine a “but-for” relation when we consider, not physical forces, but the mind-related characterizations that constitute motive. Sometimes we speak of determining or discovering motives, but more often we ascribe motives, after an event, to an individual in light of the individual's thoughts and other circumstances present at the time of decision. In a case where we characterize an employer's actions as having been taken out of multiple motives. . . to apply “but-for” causation is to engage in a hypothetical inquiry about what would have happened if the employer's thoughts and other circumstances had been different. The answer to this hypothetical inquiry will often be far from obvious, and, since the employee likely knows less than does the employer about what the employer was thinking at the time, the employer will often be in a stronger position than the employee to provide the answer.⁵⁰

Interestingly, in a separate but factually similar case by NAAOM against Charter Communications, Inc., the district court rejects the view that *NAAOM* requires a “sole factor” test in refusing to dismiss NAAOM's complaint. Taking a similar approach to Breyer's dissent in *F.B.L. Financial Services*, the district court noted that a sole factor test would be “all-but-impossible for a plaintiff to be able to meet in most situations . . . pre-discovery and contradicts the ease with which plaintiffs have historically been able to plead such a claim at the outset of a case.”⁵¹ The *Charter*

⁴⁹ *Id.* at 190 (Breyer, J. dissenting).

⁵⁰ *Id.* at 190-91 (Breyer, J., dissenting) (finding mixed-motives jury instruction is never proper in an A.D.E.A. case).

⁵¹ *Comcast Corp.*, 140 S. Ct. at 1013; Nat'l Ass'n of African Am.-Owned Media v. Charter Commcn's, Inc., D.C. No. 2:16-cv-00609-GW-(FFMx). Tentative Ruling on Renewed Motion to Dismiss Plaintiffs' Second Amended Complaint, August 27, 2020. Defendant Charter Communications Inc.'s Renewed Motion to Dismiss Plaintiffs' Second Amended Complaint.

district court reasoned that the Supreme Court's definition of "but for" in a Title VII sex discrimination in an employment case that "but for" does not mean sole causation is equally applicable in section 1981.⁵² Emphasizing that a discrimination complaint that "identifies the type of discrimination that she thinks occurs . . . by whom . . . and when" is sufficient to put the defendant on notice how" in [Plaintiffs'] mind[s] at least the 'dots' are 'connected.'"

Aside from issues of clarity regarding the meaning of "but for" in contracting discrimination cases, the tort-based standard being imposed by the Court in discrimination cases has been criticized as inconsistent with common understandings of causation doctrine at the time the statute was enacted.

IV. THE CIVIL RIGHTS ACT, THE RACIAL WEALTH GAP, & IMPLICIT BIAS

The *NAAOM* "but for" interpretation cripples the civil rights statute as a tool in the struggle against racist economic behavior. The Civil Rights statutes were intended to create freed Africans' right to assert economic power to transition from being deprived of the fruits of their labor and talents to begin to build wealth.⁵³ Ongoing explicit and implicit racist acts have hampered the ability to contract freely and build wealth.⁵⁴ As a result, the imbalance of power, wealth, and resources based on racial categories continues today and the racial wealth gap is growing.⁵⁵ Wealth "is of paramount importance as a pool of resources, beyond income, that individuals or families can use as a sustained mechanism for provision of support for their offspring. Wealth represents long-term resource accumulation and provides the economic security to take risks, shield against financial loss, and cope with

⁵² *Bostock*, 140 S. Ct. at 1744.

⁵³ Sullivan, *supra* note 11, at 550.

⁵⁴ MELVIN L. OLIVER & THOMAS M. SHAPIRO, AM. BECOMING, RACIAL TRENDS AND THEIR CONSEQUENCES: VOLUME II, 224-25 (Nat'l Research Council, Nat'l Academies Press, 2001), <https://doi.org/10.17226/9719>.

⁵⁵ *Id.* at 222; Angela Hanks, et al., *Systemic Inequality, How America's Structural Racism Helped Create the Black-White Wealth Gap*, CTR. FOR AM. PROGRESS (2018), <https://www.americanprogress.org/issues/race/reports/2018/02/21/447051/systematic-inequality/>.

emergencies.”⁵⁶ Results from a Federal Reserve 2019 Survey of Consumer Finances reveal that family wealth, defined as the difference between gross assets and liabilities, is eight times higher in White families than in Black families.⁵⁷ In 2019 the median level of wealth for White families was \$188,200 and \$24,100 for Black families. The wealth gap has not improved since 1968 and exists at all income and education levels.⁵⁸ Moreover, research shows discrimination in lending, with Blacks more likely to have loan applications denied and have less access to credit and financial support than Whites.⁵⁹ Whites comprise the overwhelming majority of small business owners and chief executive officers of corporations.⁶⁰ And, Blacks own a minute percentage of the full power television stations available in the U.S.⁶¹

It is not uncommon for commentators to focus on individual failings as the cause of the gap. However, significant data refute claims that the racial wealth gap is caused primarily by cultural, moral, or behavioral weaknesses and focuses on the structural and political barriers to wealth accumulation.⁶²

⁵⁶ Alan Aja, *et al.*, *From a Tangle of Pathology to a Race-Fair America*, DISSENT (2014) <https://www.dissentmagazine.org/article/from-a-tangle-of-pathology-to-a-race-fair-america>.

⁵⁷ Bhutta, Neil, *et al.*, *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, FED. RSRV. (2020), <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.html>

⁵⁸ Moritz Kuhn, *et al.*, *Income and Wealth Inequality in America, 1949 – 2016*, Institute Working Paper 9, 43 OPPORTUNITY & INCLUSIVE GROWTH INST., FED. RSRV. BANK OF MINNEAPOLIS (2018); William Darity, Jr., *et al.*, *What We Get Wrong*, *supra* note 6, at 6; Oliver and Shapiro, *supra* note 54 at 224–25.

⁵⁹ Alan Aja, *et al.*, *From a Tangle of Pathology to a Race-Fair America, Today’s wealth and employment gaps shatter the myth of a post-racial America*, DISSENT (2014). <https://www.dissentmagazine.org/article/from-a-tangle-of-pathology-to-a-race-fair-america>; Hanks, *supra* note 55.

⁶⁰ Darity, *supra* note 6 at 33, 50.

⁶¹ Kristal Brent Zook, *Blacks own just 10 U.S. television stations. Here’s why.*, WASH. POST (August 17, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/08/17/blacks-own-just-10-u-s-television-stations-heres-why>; Black Media Owners to America: ‘Actions, More Than Words’, RBR-TVBR (June 15, 2020), <https://www.rbr.com/black-radio-owners-to-america-actions-more-than-words>.

⁶² Herring, *Wealth Inequality*, *supra* note 5, at 14; Darity, *supra* note 6, at 3; *see, e.g.*, MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH, WHITE WEALTH, A NEW PERSPECTIVE ON RACIAL INEQUALITY, 127–77

Research on discriminatory policies contributing to the wealth gap's persistence includes income inequality, occupational mobility, credit discrimination, housing discrimination, restrictive covenants, redlining, and business ownership.⁶³ Research establishes that the gap persists regardless of education or employment status.⁶⁴ In analyzing the varied explanations of the ongoing racial wealth gap, sociologists Cedric Herring and Loren Henderson note the disparities

compound and accumulate over time and from generation to generation. It offers security and protection to whites but puts African Americans at risk. Racial wealth inequality is built into the structure of American society. It operates in the normal working relationships of institutions, and its perpetuation requires only that people continue to do business as usual. Its eradication requires . . . active review of the assumptions and practices by which American institutions operate.⁶⁵

Economists like William ("Sandy") Darity have worked to "bust the myths" that purport to explain the racial wealth gap. For instance, Darity asserts oft proffered systemic solutions to closing the gap like homeownership, business development, and entrepreneurship are insufficient, largely because of the discriminatory policies and "entrenched racism."⁶⁶ According to Darity, homeownership is correlated with greater wealth, and fewer Blacks own homes, but homeownership does not explain the racial wealth gap. Darity states that even among homeowners, "White households have nearly \$140,000 more in net worth than [B]lack households." The gap persists because of housing and lending discrimination.⁶⁷

(1997), RICHARD ROTHSTEIN, *THE COLOR OF LAW, A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA*, 186 (2017).

⁶³ Herring and Henderson, *supra* note 5, at 6; Oliver and Shapiro, *supra* note 55 at 224-25.

⁶⁴ Darity, *supra* note 6, at 5-8 ("at every level of educational attainment, the median wealth among black families is substantially lower than white families . . . white households with an employed head have more than ten times higher wealth than similar black households").

⁶⁵ Darity, *supra* note 6, at 15-16.

⁶⁶ Darity, *supra* note 6, at 13; Rebecca Tippet, et al., *Beyond Broke, Why Closing the Racial Wealth Gap is a Priority for National Economic Security*, CTR. FOR GLOB. POL'Y SOL., 5, 25-26 (2014), http://globalpolicysolutions.org/wp-content/uploads/2014/04/Beyond_Broke_FINAL.pdf.

⁶⁷ Darity, *supra* note 6, at 11-12.

Darity's work further noted that building wealth through business development is hampered by "the continued exclusion of Blacks from business credit markets."⁶⁸ Similarly, entrepreneurship alone cannot fix the problem. White entrepreneurs start with more capital and have greater access to small business loans than do Blacks. Black businesses tend to be smaller, with most having no employees other than the owners and a lower rate of return than White-owned companies.⁶⁹ Discrimination in employment, housing, and lending practices fuel the racial gap.⁷⁰ In fact, Bank of America agreed to pay \$335 million to settle a housing discrimination lawsuit brought by the U.S. Department of Justice regarding higher interest rates and fees charged to Black and Hispanics than White customers.⁷¹

The "but for" causation standard for discrimination claims hinders the Civil Rights Act's ability to challenge structural barriers to economic equality and help close the racial wealth gap. Instead, a motivating factor test allows greater access to courts as a tool to help close the racial wealth gap and respond to racial exclusion from the economic center. Additionally, a motivating factor approach is more consistent with the science and reality of racism.

The *NAAOM* decision ignores the current understanding of the subtle manifestations of race discrimination and makes it more difficult to call out racist behavior. The Supreme Court's analysis imposes a pleading structure onto civil rights claims alleging discrimination that advances a view that racial hatred is at the heart of discrimination. Requiring "but for" causation allegations reveals an outmoded view of racist behavior that focuses primarily on being able to isolate overt behavior and ignores the multiple layers and complex ways in which racism operates.⁷² Although

⁶⁸ Darity, *supra* note 6, at 19.

⁶⁹ Darity, *supra* note 6, at 32-36.

⁷⁰ Oliver and Shapiro, *supra* note 54 at 239; Walker, *supra* note 18, at 371.

⁷¹ Jordan Weissmann, *Countrywide's Racist Lending Practices Were Fueled by Greed*, THE ATLANTIC (2011), <https://www.theatlantic.com/business/archive/2011/12/countrywides-racist-lending-practices-were-fueled-by-greed/250424/>; See e.g., USA V. Countrywide, CV11 10540-PSG-AJW (2011), <https://www.clearinghouse.net/chDocs/public/FH-CA-0007-0002.pdf>.

⁷² Camara Phyllis Jones, *Levels of Racism, A Theoretic Framework and a Gardener's Tale*, 90 AM. J. OF PUBLIC HEALTH 1212, 1212 (2000), 10.2105/ajph.90.8.1212; Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1100 (2008); Ayres, *supra* note 21, at 846 (1991) (noting racial animus alone could not explain gender and race discrimination in retail car negotiations).

racism includes the kind of explicit conduct the "but for" causation standard may address, it also manifests through unconscious bias based on assumptions about others' abilities, motives, and intentions based on race.⁷³ Racism reflects a system of privilege that provides differential access to society's goods, services, and opportunities by race.⁷⁴ It is structural and embedded in our institutions, customs, practices, and laws. The "but for" standard makes it difficult to challenge the ways racism creates this system of privilege that provides differential access to society's goods, services, and opportunities by race and to lay bare the subtlety of unconscious racism. A tort-based approach to anti-discrimination laws helps to render anti-discrimination laws ineffective in their ability to recognize the subtlety of unconscious racism and maintain the racial wealth gap.

First, as racism has become seen as an increasingly suspect perspective to adopt, social mores have pushed explicit racism increasingly underground or to be defined as aligned with "white supremacy." As a result, individuals have become more cautious about exposing racist beliefs.⁷⁵ Second, implicit biases can affect decision-making in ways in which the actor may not be fully conscious.⁷⁶ The science of implicit bias suggests that humans' tendency to create cognitive shortcuts to process the 11 million bits of information every second to which we are exposed includes schemas to sort people into groups or social categories.⁷⁷ The result is the creation of stereotypes and biases, often without realizing we've done so. Thus, implicit bias has been defined as the attitudes or stereotypes that affect our understanding, actions, and decisions unconsciously.⁷⁸ These biases, which include positive and negative assessments, can be involuntary and are different from consciously hiding biases based on how others might perceive you.⁷⁹ Numerous studies about implicit bias have demonstrated unconscious

⁷³ Jones, *supra* note 72, at 1212; Robinson, *supra* note 72, at 1100, 1103.

⁷⁴ Robinson, *supra* note 72, at 1107-12.

⁷⁵ Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1507 (2005).

⁷⁶ Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 961 (2006).

⁷⁷ John A. Powell, *Affirmative Action: Where Do We Go from Here?*, 48 U.S.F. L. REV. 281, 287 (2013); DANIEL KAHNEMAN, THINKING, FAST AND SLOW 38 (2013) (explaining the automatic functioning of System 1 thinking as opposed to the more deliberative, conscious reasoning of System 2 thinking); Kang, *supra* note 75, at 1498-99 (2005).

⁷⁸ Greenwald & Krieger, *supra* note 76, at 966.

⁷⁹ Kang, *supra* note 75, at 1508.

biases based on race that individuals often act upon. For example, a study published in 2004 revealed that employers treat applicants differently based on whether they believe the resume belongs to a Black or White applicant.⁸⁰ The study involved identical resumes submitted to potential employers who advertised job openings for administrative, clerical, or managerial positions in Chicago and Boston.⁸¹ "Applicants" named Emily, Greg, and Sarah received call backs fifty percent more often than "applicants" named Lakisha, Jamal, or Latoya.⁸² The researchers concluded that bias or perceptions about the applicants based on race accounted for the different response rate.⁸³ Other studies have shown similar results and have found no change in the levels of hiring discrimination against African Americans since 1989, challenging those who argue that discrimination in America has decreased.⁸⁴ Further complicating the role implicit bias can play in decision making is the human behavior to "explain away" their behavior. Studies show that there is a "the human tendency to offer compelling explanations for one's own behavior even when such explanations have little to do with the real reasons behind that behavior."⁸⁵ Moreover, implicit bias studies demonstrate that unconscious views on race can cause decision-makers to "subtly adjust criteria in real time to modify their judgments of merit" further influencing their behavior.⁸⁶

Business savvy defendants, who are aware of anti-discrimination laws, are not likely to display overt racial bias in negotiating business deals and are more likely to act subtly or even without

⁸⁰ Marianne Bertrand and Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 84 THE AM. ECON. REV. 991-1013 (2004) <http://www.jstor.org/stable/3592802> Accessed: 04/02/2009 22:19.

⁸¹ *Id.* at 994.

⁸² *Id.* at 998.

⁸³ *Id.* at 1010-11.

⁸⁴ Lincoln Quillian, *et al.*, *Meta-analysis of field experiments shows no change in racial discrimination in hiring over time*, PROCEEDINGS OF THE NAT'L ACAD. OF SCI. OF THE U.S. (2017), <https://doi.org/10.1073/pnas.1706255114>.

⁸⁵ Michael Norton et al., *Mixed Motives and Racial Bias, The Impact of Legitimate and Illegitimate Criteria on Decision Making*, 12 PSYCHOL. PUB. POL'Y & L. 36, 39 (2006).

⁸⁶ Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 U.C.L. REV. 1124, 1129 (2012).

full cognition of their behavior's rationales.⁸⁷ There can be a tendency to want to engage in business with people you feel comfortable with and share common experiences or friends with. Feelings of discomfort with close contact with people of races other than your own may arise.⁸⁸ Living in segregated America can result in limited contact with people from other races, which may cause discomfort with and stereotyping of people of races different than your own.⁸⁹

The refusal to contract with a Black media company can have complex motivations regarding an unwillingness to contract with a person of color, be associated with "Black products, or conclude that Black products and services to be inferior."⁹⁰ Similarly, differential treatment may be grounded in racism or suspicions about black clients or customers. This kind of marketplace discrimination that evidences an undervaluation of Black consumers or a fear of alienating a White customer base has been well documented.⁹¹ The refusal to contract could also be based on the inability to see "Blacks" as business executives to be taken seriously.⁹² The case is also important because of the outsized role media companies play in shaping people's perceptions of others. Making it difficult for plaintiffs to bring discrimination claims that allow a window into whether media companies are illegally excluding access to corporate power can only heighten and concentrate the

⁸⁷ See, e.g., Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decision-making, and Misremembering*, 57 DUKE L. J. 345, 353 (2007).

⁸⁸ *Id.* at 362-63, 366.

⁸⁹ See, e.g., Rachel D. Godsil & James S. Freeman, *Race, Ethnicity, and Place Identity: Implicit Bias and Competing Belief Systems*, 37 U. HAW. L. REV. 313, 324 (2015); Christopher Ingraham, *Three Quarters of Whites Don't Have Any Non-white Friends*, THE WASH. POST, (2014), <https://www.washingtonpost.com/news/wonk/wp/2014/08/25/three-quarters-of-whites-dont-have-any-non-white-friends/>.

⁹⁰ See, e.g., JOE R. FEAGIN AND MELVIN P. SIKES, LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE, 214-15, 222 (1995).

⁹¹ *Id.* at 48; Cassi Pittman, "Shopping While Black": Black Consumers' Management of Racial Stigma and Racial Profiling in Retail Settings, 20 J. CONSUMER CULTURE 3, 4-5, 16 (2020), <https://doi.org/10.1177/1469540517717777>; Kennedy, *supra* note 32, at 287.

⁹² Andrew M. Carton and Ashleigh Shelby Rosette, *Explaining Bias Against Black Leaders: Integrating Theory on Information Processing and Goal-Based Stereotyping*, 54 ACAD. MGMT. J. 1141, 1154 (2011), <http://dx.doi.org/10.5465/amj.2009.0745>.

control of images of black Americans.⁹³ In turn, closing off that access limits opportunities to build wealth and influence.⁹⁴

Judges are not immune to the force of unconscious bias. Studies show that judges have the same implicit biases as the rest of society, and these biases, can affect behavior.⁹⁵ Therefore, it is reasonable to assume that a pleading standard in discrimination cases that increases judicial discretion may make it more possible for implicit bias to creep into the decision-making and further subvert the role of pleadings in litigation. The plaintiff's initial pleading typically provides the plaintiff their first opportunity to present their story to the court and the defendants. Although the Federal Rules of Civil Procedure contain a "notice" pleading standard that requires only a short and plain statement of the claim showing they are entitled to relief, the Supreme Court's 2009 opinion in *Ashcroft v. Iqbal* imposed a plausibility standard onto the notice pleading requirement.⁹⁶ The *Iqbal* Court directs district court judges to dismiss complaints for failure to state a claim where the complaint fails to allege plausible facts. The Court reassures us that the plausibility standard does not require detailed facts or that the allegations meet a probability test.⁹⁷ It advises that lower courts judges use their "judicial experience" and "common sense" to determine whether the allegations are plausible.

Jerry Kang, in his co-authored article, *Implicit Bias in the Courts*, reasons that the plausibility standard in discrimination cases allows the judging of plaintiff's on "minimal facts," which opens the door for judges to rely on "schemas," "presumptions, or stereotypes about the parties." This is particularly concerning when judges do not have the experiences to recognize and understand the racial dynamics and slights alleged in a discrimination complaint.

⁹³ See generally, Matt Stoller, *Remote Control, A Civil Rights Lawsuit Highlights How Comcast's Monopoly Crushes Media Diversity*, THE AM. PROSPECT, (Mar. 26, 2020), <https://prospect.org/power/remote-control-comcast-monopoly-crushes-diversity/>.

⁹⁴ *Id.*

⁹⁵ Justin Levinson et al., *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63 (2017); Levinson, *Forgotten Racial Equality*, *supra* note 87, at 353; Jeffrey Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges*, 84 NOTRE DAME L. REV. 1195, 1221 (2009); Andrea Miller, *Expertise Fails to Attenuate Gendered Biases in Judicial Decision-Making*, UNIV. OF IL NEWS BUREAU (2018).

⁹⁶ *Ashcroft v. Iqbal*, 555 U.S. 662, 678 (2009).

⁹⁷ *Id.* at 678.

According to the Center for American Progress, “[B]lack judges comprise 10 percent of sitting judges and 13 percent of active judges.”⁹⁸ Black women make up only 3 percent of all sitting judges and 5 percent of active judges.⁹⁹ Whites comprise 80% of active judges at the Court of Appeals level and are 39 out of 91 Article III district judges.¹⁰⁰ As noted by the Center for American Progress,

When deciding cases that affect historically underrepresented groups, federal judges who do not belong to such groups may have difficulty recognizing and contextualizing unique concerns or hardships experienced by those whose or rights are being infringed upon; this may result in miscarriages of justice.¹⁰¹

A predominately White judiciary coupled with the more significant role for judges to import their judicial experience and common sense in ruling on motions to dismiss, as required by *Iqbal*, raises concern about the potential impact on plaintiffs seeking to bring discrimination claims.¹⁰² Additionally, researchers have posited that the decision led to an increase in motions to dismiss being filed and granted, particularly in discrimination claims.¹⁰³ Patricia Hatamayar found an increase in dismissal rates in Title VII employment discrimination cases after *Iqbal* that was not found in contract cases. Similarly, in a separate study, Victor

⁹⁸ *Examining the Demographic Compositions of U.S. Circuit and District Courts*, CTR. FOR AM. PROGRESS, (2020), <https://www.americanprogress.org/issues/courts/reports/2020/02/13/480112/examining-demographic-compositions-u-s-circuit-district-courts/>.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Phyllis Tropper Baumann, *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. REV. 211, 244–45, 247–48 (1992).

¹⁰³ *Demography of Article III Judges*, FED. JUD. CTR., 1789-2017 (last visited Apr. 15, 2021) <https://www.fjc.gov/history/exhibits/graphs-and-maps/race-and-ethnicity>. According to the Federal Judicial Center, in 2017 of the Article III judges then serving, 1,074 were white, 90 were identified as Hispanic, 2 American Indian, 27 Asian American, and 146 African American; Patricia W. Hatamayar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 597 (2010); Victor D. Quintanilla, *Beyond Common Sense: A Psychological Study of Iqbal's Effect on Claims of Race Discrimination*, 17 MICH. J. RACE & L. 1 (2011).

Quintanilla found a rise in dismissals in all federal employment discrimination cases brought under Title VII and §1981 post-*Iqbal*.¹⁰⁴ A standard that requires pleading plausible facts and allegations of "but for" causation at an early stage of the litigation provides greater opportunities for unconscious bias about the plaintiff and the defendant to creep into the process, increasing the likelihood that §1981 claims will be dismissed, and making it more difficult to assert economic rights through the courts.¹⁰⁵

The *NAAOM* opinion's imposition of a tort standard for pleading discrimination claims that imposed a causation requirement not explicitly provided for in the Civil Rights statute subverts the statute's purpose. It pushes race and racism into the background. It is problematic that the *Comcast* Court's opinion sets the pleading standard for alleging discrimination without acknowledging or mentioning racism and referencing prejudice only once in its opinion.¹⁰⁶ Judges may rely on racial stereotypes in assessing the plausibility of plaintiffs' allegations about discrimination in contracting. They may also depend on stereotypes about the rationality of business decisions of the defendants. They may assume a logic regarding the proffered explanations for the refusal to contract in contrast with the plaintiff's assertions of the defendant's discriminatory conduct or difference in treatment during contract negotiations. In fact, studies have shown that Whites tend to believe "non-racist" explanations for behavior more than Blacks.¹⁰⁷ This tendency to discredit and discount Black's experience with racism can be seen as the unwillingness to believe Blacks' interpretation of ambiguous events. In fact, the *NAAOM* district and Supreme Courts seem to pay little attention to the complaint's

¹⁰⁴ Hatamayer, *supra* note 103, at 597; Quintanilla, *supra* note 103 at 5.

¹⁰⁵ See, e.g., *Williams v. Tech Mahindra (Ams.), Inc.*, No. 3:20-cv-04684 (BRM) (LHG), 2021 WL 302929 (D.N.J. Jan. 29, 2021); *Simmons v. Triton Elevator, LLC*, No. 3:19-CV-1206-B, 2020 WL 7770245 (N.D. Tex. Dec. 30, 2020); *Lemon v. Myers Bigel, P.A.*, 985 F.3d 392 (4th Cir. 2021); *Sharifi Takieh v. Banner Health*, No. CV-19-05878-PHX-MTL, 2021 WL 268808 (D. Ariz. Jan. 27, 2021); *Swinton v. 10 Fitness Inc. Rodney Parham*, No. 4:20-cv-00177-LPR, 2020 WL 7495535 (E.D. Ark. Dec. 21, 2020).

¹⁰⁶ *Comcast Corp.*, 140 S. Ct. at 1014; see, e.g., Baumann, *supra* note 102, at 220 (noting courts' tendency to avoid acknowledging "that their procedural decisions define substantive rights").

¹⁰⁷ Evelyn R. Carter & Mary C. Murphy, *Group-based Differences in Perceptions of Racism: What Counts, to Whom, and Why?*, 9 SOC. AND PERSONALITY PSYCH. COMPASS 269, 270–71 (2015), <https://equity.ucla.edu/wp-content/uploads/2016/11/Carter-Murphy-2015.pdf>.

assertion that a Comcast executive stated that the company was not "trying to create any more Bob Johnsons." The plaintiffs thought it was clear that the executive was referring to the African American founder of BET, and the remark had racially discriminatory intent to either avoid forming business relationships with Black business owners or to avoid a mostly Black customer base.

The *NAAOM* ruling imposes an additional burden on plaintiffs to allege that the defendant would have acted differently if not for discriminatory intent, which is a more stringent and less "forgiving causation standard" than the "motivating factor" approach to pleading discrimination claims.¹⁰⁸ The "but for" causation standard imposed on §1981 claims also not only increases judicial discretion, but it also forces plaintiffs to reveal more about their case at the outset of litigation than under the *Iqbal* failure to state a claim test. The approach is more burdensome on plaintiffs and increases a power disparity in these cases that often find greater access to information and resources on the defendant's side. It may be difficult for a plaintiff to allege these facts without access to the discovery process.¹⁰⁹ The "but for" standard invites early dismissals of § 1981 claims, thereby closing access to discovery that could help to reveal facts that support allegations regarding the racist basis of that behavior which has the effect of dulling the ability of § 1981 to surface implicit bias in contracting.

Even plaintiffs who successfully defend against a motion to dismiss are disadvantaged by the process. Plaintiffs face increased litigation costs to meet the "but for" standard and respond to dismissal efforts.¹¹⁰ In addition to increased litigation costs, plaintiffs who are successful at the pleading stage would have revealed a great deal more about their case and litigation strategy under this more stringent standard. Plaintiffs must now engage in a more "defensive" pleading strategy in discrimination cases to address any nondiscriminatory explanations for defendants' conduct. This is an approach that requires substantially more of discrimination

¹⁰⁸ See, e.g., Catherine Tarantino, *Contracting Free from Racial Animus: Comcast Corporation v. National Association of African American-Owned Media and Entertainment Studios*, 15 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 77, 78 (2020).

¹⁰⁹ See, e.g., Anne-Marie G. Harris, et al., *Courting Customers: Assessing Consumer Racial Profiling and Other Marketplace Discrimination*, 24 J. PUB. POL'Y & MKTG. 163 (2005); see also Andrea Freeman, *Racism in the Credit Card Industry*, 95 N.C. L. REV. 1071, 1111 (2017).

¹¹⁰ See, e.g., Baumann, *supra* note 102, at 239 (noting the increased discovery burdens on plaintiffs in Title VII cases).

litigants than ever before and than is required of other plaintiffs bringing other types of claims.

The Court's "but for" requirement for pleadings set out in *NAAOM* raises the barrier to entry for §1981 plaintiffs while placing a protective shield around defendants. The case impacts well-financed business people and anyone seeking to enter into contracts, including consumers involved in ordinary day-to-day transactions in stores.¹¹¹ Individual plaintiffs who wish to rely on the Civil Rights Act to obtain relief for racially discriminatory experiences may find it nearly impossible to meet the "but for" pleading requirement imposed by the Court. Moreover, the *NAAOM* standard gives credence to the belief that discrimination plaintiffs are not to be believed unless there is evidence of explicit racism, a notion out of step with the reality of how racist behavior often affects its victims. A pleading standard that bars access to the courts for discrimination plaintiffs blunts the Civil Rights anti-discrimination laws' ability to make real change in the imbalance of economic power and acts as a tool to destabilize economic, racial hierarchies. Instead of playing a role in modernizing the understanding of racism in discrimination cases, the Supreme Court seems to be trying to turn back the clock on the ability of anti-discrimination principles and the courts to create change and help dismantle that "Other America."

The Court's "but for" pleading standard for §1981 claims is consistent with the view that courts use "procedure to change the substance" of statutes.¹¹² Further, the Court has once again restricted access to discrimination statutes through procedural requirements.¹¹³ As noted in an analysis of Title VII employment discrimination cases, authors Phyllis Tropper Baumann, Judith Olans Brown, Stephen N. Subrin state,

without grappling with the nature of discrimination, theories of equality, or the historical and sociological complexity of employment disparities between African-Americans and whites, the courts have rewritten the law and changed workplace behavior using the language of

¹¹¹ Kennedy, *supra* note 32, at 306.

¹¹² Baumann, *supra* note 102, at 220 (asserting that substance and procedure are "intimately intertwined").

¹¹³ See e.g., Deseriee A. Kennedy, *Processing Civil Rights Summary Judgment and Consumer Discrimination Claims*, 53 DEPAUL L. REV. 989, 996 (2004).

procedure. . . . [P]rocedure is now the master, not the handmaid, of substance.¹¹⁴

This critique is equally applicable to the NAAOM decision.

Unfortunately, the role that courts have played in holding the promise of an avenue for vindicating economic rights while at the same time often falling short of a tool for significant long-lasting racial change is not new. Historian Melissa Milewski in an analysis of civil cases between Black and White southerners from 1861 through 1950, revealed a history of African Americans appealing to civil courts for legal and economic rights, including the right to make contracts.¹¹⁵ Although her historical study of early civil cases found Blacks seeking to vindicate their economic rights through the legal system found some success in civil courts, they were less successful when acting on behalf of similarly situated Blacks in challenging racial discrimination.¹¹⁶ She concludes that although,

individual African Americans were at times able to work within the limitations of the US court system to gain decisions in their favor . . . the justice that they received remained only a limited, partial justice – forged within a system of white supremacy and often designed to benefit whites just as much as the African Americans litigating these suits.¹¹⁷

The *NAAOM* decision is an example of using procedural rules to reduce civil rights legislations' ability to achieve racial justice.

V. CONCLUSION

In describing the "Other America," Dr. King remarked that "millions of work-starved men walk the streets daily in search of jobs that do not exist . . . In this America people are poor by the millions. They find themselves perishing on a lonely island of poverty in the midst of a vast ocean of material prosperity."¹¹⁸ Dr. King situated the Other America within a historical context and, in so doing, underscored the need for the civil rights legislation aimed at

¹¹⁴ Baumann, *supra* note 102, at 220.

¹¹⁵ Milewski, *supra* note 15, at 16.

¹¹⁶ Milewski, *supra* note 15, at 192.

¹¹⁷ Milewski, *supra* note 15, at 193.

¹¹⁸ 50 Years Ago, *supra* note 1.

undoing the Other America. King cited Frederick Douglass's that emancipation absent legal protections for the formerly enslaved was just "freedom to hunger . . . freedom without roofs to cover their heads. . . It was freedom and famine at the same time."¹¹⁹ In closing his speech, Dr. King noted that Americans of different races were "caught in an inescapable network of mutuality, tied in a single garment of destiny."¹²⁰ To his mind, social justice meant a necessary sharing of power to build a new nation, not a subtle defense of hierarchies that perpetuate the divide of which he so eloquently spoke.

Dr. King preached about economic power and an "economic bill of rights" because he understood racial equality and economic equality are inextricably linked.¹²¹ He recognized that creating economic security requires a societal and not solely an individual response.¹²² The solutions to reaching that equality, ending racial discrimination in contracting, and closing the racial wealth gap are complex and varied. Still, without meaningful access to courts to challenge the discriminatory policies that create and maintain racial hierarchies in wealth, the change will be slow, if not impossible. The Supreme Court's shift to making it more difficult for those negatively affected by racially discriminatory practices to have access to justice means we are less likely to see the racial gap close. Raising the barrier to entry can have the effect of discouraging plaintiffs, dismissing meritorious claims before trial, and encouraging those who explicitly or implicitly close access to financial development to others on account of race.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*