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HOW THE SUPREME COURT DISTORTED TEXT, IGNORED HISTORY, AND GASLIGHTED THE BOLD PROMISE OF THE CIVIL RIGHTS ACT OF 1866
A *Comcast* Case Study

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PROLOGUE

But for Blacks, No Civil War: Abraham Lincoln (1862)

On August 14, 1862, President Lincoln hosted a delegation of five local Black ministers he had invited to the first-ever meeting of any president with Black leaders. As the small group met with Lincoln at the White House, the President was still awaiting a significant Union military victory, which he considered a prerequisite for announcing his plan to issue the Emancipation Proclamation on January 1, 1863.[1] Though the legal status of slaves who escaped to Union lines remained murky during this early Civil War period—these former slaves often were labeled and kept as "contraband"[2]—Lincoln continued to push his belief in foreign colonization as the most promising option for freed slaves.

Asserting that the races should be "separated," Lincoln convened this August meeting to seek help from Black leaders with his plan to relocate Black Americans to Central

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1 An incomplete victory at the terrible Battle of Antietam afforded that opportunity; Lincoln disclosed his plan to his Cabinet on September 22 and made his intention public on September 23, 1862. Doris Kearns Goodwin, Team of Rivals 481–83 (2005).

2 Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 Yale L.J. 1916, 1930, 1934–35, 1940 (1986).

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America, where they could thrive in a "similarity of climate with your native land."[3] David Blight, in his Pulitzer Prize–winning biography of Frederick Douglass, summarized "this infamous meeting" as "Lincoln's worst racial moment . . . [when] a nearly desperate president gave a one-way lecture looking for self-sacrificing black men to volunteer to leave their country to assuage the fears of white people who now had to imagine the end of slavery."[4]

As he pushed for his colonization plan, Lincoln declared to the ministers: "*But for your race among us* there could not be war, although many men engaged on either side do not care for you one way or another."[5] Lincoln acknowledged that Black people, slave or free, had suffered "the greatest wrong inflicted on any people"; he nevertheless went on to assert that "[o]n this broad continent, not a single man of your race is made the equal of a single man of ours."[6] In front of invited members of the press, Lincoln told the Black delegation that if they did not take on leadership for voluntary repatriation, they would thereby demonstrate "an extremely selfish view of the case."[7]

Across the country, "Blacks generally exploded with ire at Lincoln's colonization address."[8] Frederick Douglass sardonically noted that Lincoln's "but for" rhetorical claim was akin to a "horse thief pleading that the existence of the horse is the apology for his theft or the highway man contending that the money in a traveler's pocket is the sole cause of his robbery."[9] And Horace Greeley, the influential editor of the *New York Tribune*, skewered Lincoln for being "unduly influenced by the counsels . . . of certain fossil politicians hailing from the Border States."[10]

Lincoln sought to regain ground by publishing a public letter eight days after his unfortunate colonization meeting. Though his response remained deeply problematic, it also illustrated the core problem in Lincoln's earlier "but for" claim about Black people and the Civil War. In what was to become a famous letter, Lincoln wrote: "My paramount object in this struggle *is* to save the Union, and is *not* whether to save or destroy slavery."[11] He continued, "If I could save the Union without freeing *any* slave I would do it, and if I could save it by freeing *all* the slaves I would do it; and if I could save it by freeing some and leaving others alone I would also do that."[12]

3 David W. Blight, Frederick Douglass 372 (2018).

4 *Id.* at 371 (emphasis added).

5 *Id.* (quoting *Address on Colonization to a Deputation of Negroes*, 5 The Collected Works of Abraham Lincoln 370–75 (Roy P. Basler ed., 1953) (emphasis added)).

6 *Id.*

7 *Id.* at 371 (quoting *Address on Colonization to a Deputation of Negroes*, *supra* note 5, at 372).

8 *Id.* at 372.

9 *Id.* at 373. Blight added, "The president's intentions with colonization have long been the subject of rigorous debate in Lincoln scholarship." *Id.* at 374–77. Douglass later came to know Lincoln personally and to think of him much more favorably.

10 Goodwin, *supra* note 1, at 471.

11 *Id.*

12 *Id.*

By November 1863, Lincoln's Gettysburg Address proclaimed that the untold amount of blood and suffering during the Civil War promised "a new birth of freedom."[13] With Black Americans finally allowed to enlist, their storied courage and gruesome losses had much to do with turning the tide of the war as well as of public opinion. As the end of the awful war approached in 1865, Lincoln lobbied with unusual enthusiasm for adoption of the Thirteenth Amendment.[14] This history offers only one of many examples during Lincoln's presidency that illustrate the complexity, if not the impossibility, of isolating specific causation in matters of race and public policy. In pursuit of some single legal cause, the difficulty becomes even more salient, particularly when it is purportedly anchored by a statute passed by a multi-membered political body more than 150 years ago.

To be fair, determining the cause or causes of the Civil War has bedeviled generations of historians and their students. Nonetheless, Lincoln's rather desperate "but for" claim within his evolving view of slavery exemplifies a common fallacy in efforts to discern, isolate, and articulate but-for causation in complex situations. Though Lincoln moved rapidly toward accepting that all Black people born in the United States ought to be citizens protected by their government, his stumble into crass "but for" reasoning in 1862 illustrates the bad habit—all too common among even smart lawyers and judges—of isolating specific ideas from their contexts. As Thomas Reed Powell famously put it, "If you think that you can think about a thing inextricably attached to something else without thinking of the thing which it is attached to, then you have a legal mind."[15] Words matter. So does context.[16]

13 *The Gettysburg Address*, Cornell, https://rmc.library.cornell.edu/gettysburg/good_cause/transcript.htm.

14 In his first public address after the Thirteenth Amendment was sent to the states, on February 1, 1865, Lincoln termed the Thirteenth Amendment "a King's cure for all the evils." 8 The Collected Works of Abraham Lincoln 254 (Roy P. Basler ed., 1953). For an excellent overview of the events that led to the ultimate passage of the Thirteenth Amendment, see Michael Vorenberg, Final Freedom: The Civil War, the Abolition of Freedom and the Thirteenth Amendment (2001). Lincoln and his political allies were not above promising jobs and more, and Lincoln made use of his personal arm-twisting skills. Goodwin, *supra* note 1, at 686–89. Some of this successful lobbying campaign was dramatized in Lincoln (DreamWorks 2012), Steven Spielberg's fine film based on Goodwin's book. Lincoln went so far as to endorse at least limited Black suffrage in Louisiana as early as a private March 13, 1864, letter to Louisiana Governor Hahn, 7 The Collected Works of Abraham Lincoln 243 (Roy P. Basler ed., 1953). For analysis of the political ramifications of this fraught issue, see LaWanda Cox & John H. Cox, Politics, Principle, and Prejudice, 1865–1866: Dilemma of Reconstruction America (1963); LaWanda Cox & John H. Cox, *Negro Suffrage and Republican Politics: The Problem of Motivation in Reconstruction Historiography*, 33 J.S. Hist. 303 (1967).

15 Fisher v. Univ. of Texas at Austin, 570 U.S. 297, 335 n.2 (2013) (Ginsburg, J., dissenting) (quoting Thurman Arnold, The Symbols of Government 101 (1935)).

16 One might think this obvious, yet it is remarkable how often Justice O'Connor's statement, "Context matters," has been quoted, far beyond the specific context of her statement, which was, in full: "Context matters when reviewing race-based governmental action under the Equal Protection Clause." Grutter v. Bollinger, 539 U.S. 308, 327 (2003). *See, e.g.*, Vitolo v. Guzman, 999 F.3d 353, 370 (6th Cir. 2021) (Donald, J., dissenting) ("Here, context matters."); Mitchell v. Washington, 818 F.3d 436, 450 (9th Cir. 2016) (Clifton, J., concurring in part and concurring in the judgment).

INTRODUCTION

> "*The only historical remains in the United States are the newspapers, but if a number be wanting, the chain of time is broken, and the present is severed from the past.*"[17]

This essay focuses on the strikingly ahistorical United States Supreme Court decision in *Comcast Corp. v. National Ass'n of African American–Owned Media*.[18] The Court's strained yet unanimous view of the country's first civil rights law has been little noticed,[19] but it is likely to have a substantial effect over time. The Court introduced a new requirement that a civil rights plaintiff must persuade a fact finder that the defendant's racial discrimination was the "but-for" cause of an alleged harm to establish a violation of the Act. Justice Gorsuch's opinion for the Court claimed that this result was compelled by "clues" accumulated "collectively . . . from the statute's text, its history, and our precedent."[20]

Despite the Court's professed devotion to textualism in numerous decisions during its 2019 Term, *Comcast* offers a troubling illustration of the Justices' willingness to manipulate categories and to use sleight of hand when they do not wish to be textually bound. The lengthy litigation and the frustrating, prolonged settlement failures involving the plaintiffs in *Comcast* may partially explain why the decision came out as it did, and unanimously at that. "African American entrepreneur Byron Allen," the operator of seven television stations, filed suit alleging racial discrimination after his Entertainment Studios Network (ESN) network unsuccessfully sought "[f]or years . . . to have Comcast, one of the nation's largest cable television conglomerates, carry its channels."[21] Yet what might initially seem a narrow decision in a messy and not terribly sympathetic case is almost certain to have profound ripple effects. Tragically, it also joins a long line of Supreme Court decisions that have helped eviscerate the "promise of freedom" that Congress specifically made within

17 Alexis de Tocqueville, Democracy in America—Part II: Instability of the Administration in the United States ch. XII (Harvey C. Mansfield & Delba Winthrop, trans., Univ. of Chi. Press, 2000) (1853).

18 Comcast Corp. v. Nat'l Ass'n of African Am.–Owned Media, 140 S. Ct. 1009 (2020).

19 The Court significantly narrowed the coverage of 42 U.S.C. § 1981, derived directly from § 1 of the Civil Rights Act of 1866, 14 Stat. 27 (1866).

20 *Comcast*, 140 S. Ct. at 1014.

21 *Id.* at 1013. Bargaining reached an impasse; ESN then filed its § 1981 discrimination suit, and many charges and countercharges, as well as "[m]uch motions practice," ensued. Other large cable companies had settled with ESN by the time the *Comcast* case reached the Supreme Court.

the text of its early Reconstruction statutes as well as the post–Civil War constitutional amendments.[22]

Part I of this essay summarizes the text and context of the pathbreaking 1866 Civil Rights Act—our nation's first civil rights statute—which boldly redefined United States citizenship and specifically listed rights inherent in it.[23] Part II analyzes the *Comcast* opinion and its conclusion that federal civil rights claims under the 1866 Civil Rights Act ought to be analyzed as tort claims. Remarkably, torts are mentioned nowhere in the statute. As part III illustrates, the current Court's much-vaunted textualist approach proved at least double-edged during the Court's 2019 Term, which included *Comcast*. In the Court's often-strained textualism during that Term, the Justices generally paid at least some

22 Best known are the Slaughter-House Cases, 14 Wall. (53 U.S.) 36 (1873), and the Civil Rights Cases, 109 U.S. 3 (1883). At least as illustrative of the Court's complicity with virulent racism was United States v. Cruikshank, 92 U.S. 542 (1876) (vacating convictions of white mob members who killed dozens of Black Americans—including those who surrendered after a pitched battle at the Colfax, Louisiana, Courthouse). *See generally* James Gray Pope, *Snubbed Landmark: Why* United States v. Cruikshank *(1876) Belongs at the Heart of the American Constitutional Canon*, 49 Harv. C.R.-C.L. L. Rev. 385–447 (2014).

Another 1876 decision, Hall v. United States, 92 U.S. 27 (1876), is virtually unknown, but it is similarly revealing and troubling: Hall, "a man of color, of Indian and African descent," was sold at a slave market in Washington, D.C., and taken to New Orleans, where he was sold in 1844 to the Bachelor's Bend plantation in Mississippi. Decades later, Hall claimed that he had been born free, that his mother was a free Indian woman, and that he was entitled to a share of the proceeds after the federal government seized and sold the plantation's cotton during the Civil War. The Court made short work of Hall's claim. In an apparent extreme extension of the ancient equitable doctrine of *nunc pro tunc,* Justice Swayne's unanimous opinion stated: "[I]t is necessary, as it were, to roll back the tide of time, and to imagine ourselves in the presence of the circumstances by which the parties were surrounded when and where the contract is said to have been made. Slavery then existed in Mississippi, and her laws upon the subject were as they had been for years. Hall was brought to the State, and there sold, bought, held, and treated as a slave." *Id.* at 30. Swayne added: "It was an inflexible rule of the law of African slavery, wherever it existed, that the slave was incapable of entering into any contract, not excepting the contract of marriage." Therefore Hall, whose color Swayne said was "presumptive proof of bondage," could have no legitimate claim to the cotton. To the very limited extent that *Hall* was cited thereafter, it was primarily to invalidate retrospectively pre–Civil War slave marriages in disputes over inheritance rights.

23 Senator Lyman Trumbull of Illinois, the primary Senate sponsor of the Civil Rights Act of 1866, declared that the statute would assure "the trumpet of freedom that we have been blowing throughout the land" and would protect "such fundamental rights as belong to every free person." Cong. Globe, 39th Cong., 1st Sess. 474. Trumbull explained further: "[T]he very object of the bill is to break down all discrimination between black men and white men. . . . [It] is simply intended to carry out a constitutional provision, and guaranty to every person of every color the same civil rights." *Id.* at 599. To James F. Wilson of Iowa, the chairman of the House Judiciary Committee, the statute's purpose was similarly clear: "to turn the artillery of slavery upon itself," and to establish a federal guarantee of "the holy cause of liberty and just government." *Id.* at 1118. *See generally* Michael Vorenberg, *Citizenship and the Thirteenth Amendment: Understanding the Deafening Silence*, *in* The Promises of Liberty: Thirteenth Amendment Abolitionism and its Contemporary Vitality 58 (Alexander Tsesis ed., 2010); Alexander Tsesis, *Introduction: The Thirteenth Amendment's Revolutionary Aims*, *in* The Promises of Liberty, *supra* note 23, at 1.

attention to the actual texts of the statutes and treaties under review. *Comcast*, however, offers a striking contrast. The decision lacked any basis whatsoever in the statutory text at issue.

Despite the lengthy and somewhat embittered litigation in *Comcast*, the underdeveloped nature of its facts may help explain why all the justices joined in the result. Yet the Court's inattention to the text and history of the Civil Rights Act of 1866 points to great future mischief. It also raises the specter of result-oriented judicial cynicism.

But-for Causation

A but-for causation test has much to do with the relative roles of judges and juries in tort cases and very little to do with the language of statutes or the discernible intent of legislators. Nearly a century ago, Leon Green—torts expert, leading legal realist, and long-tenured Dean of the Northwestern University School of Law—convincingly demonstrated the artificiality of but-for causation as a legal doorkeeper.[24] Much more recently, an article by my colleague Mari Matsuda further described how but-for restrictions in tort law impose social costs on those least able to bear them.[25] There also have been compelling arguments for the creation of constitutional torts, frequently keyed to the substantial damage done by the denial of civil rights to the important dignitary claims of plaintiffs as well as to the basic protection owed them as American citizens.[26] Nonetheless, the Court has not embraced such theories about government's obligation to protect the civil rights of

24 Leon Green, *Are There Dependable Rules of Causation?*, 77 U. PA. L. REV. 601, 605 (1929). Dean Green described the test as "vicious from two aspects: (1) it presents an inquiry impossible of determination; the case is not what might have happened but what has happened; (2) the inquiry while stated in what seems to be terms of cause is in fact whether the defendant should be held responsible."

25 Mari Matsuda, *On Causation*, 100 COLUM. L. REV. 2195 (2000). Colum McCann's remarkable novel, *Apeirogon*, offers a powerful example of how problematic it can be to isolate but-for causation. The book focuses on two fathers—one Palestinian, one Israeli—who both lost young daughters, killed in senseless violence: "But for a turn to the book store. But for an early bus. But for a random movement on Ben Yehuda. But for a trip to Ben Gurion airport to collect her grandmother. But for a late sleep-in. But for a break in the babysitting routine. But for the homework to do later that night. But for a crush of pedestrians on the corner of Hillel Street. But for a hobbling man that she had to loop around." COLUM MCCANN, APEIROGON 110–11 (2020).

26 *See*, *e.g.*, Christina B. Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225 (1986); Christina B. Whitman, *Constitutional Torts,* 79 MICH. L. REV. 5 (1980). *See generally* Rebecca J. Scott, *Discerning a Dignitary Offense: The Concept of Equal "Public Rights" During Reconstruction*, 38 L. & HIST. REV. 519 (2020). Then-Associate Justice William Rehnquist, in his early years on the Court, emphasized in several majority opinions that the post–Civil War constitutional amendments were intended to provide a civil rights sword as well as a shield. *See* Edelman v. Jordan, 451 U.S. 631, 664 (1973) ("[*Ex parte Young*] has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely as a shield, for those whom they were designed to protect."); Fitzpatrick v. Bitzer, 427 U.S. 445, 453 (1976) ("Impressed upon [the states] by [the Enforcement Clauses] are duties with respect to their treatment of private individuals."); *see also* Monroe v. Pape, 365 U.S. 167 (1961).

citizens.[27] The Court's exceptionally broad extension of "qualified immunity" for state government officials—and particularly for police officers—functions very much in the opposite direction.[28] As in *Comcast*, the Court seems to delight in establishing abstract legal barriers to avoid messy facts.[29]

Before *Comcast*, alleged racial discrimination as a factor generally was sufficient to survive summary judgment in civil rights claims. Even after the Court began to require discriminatory motive as a prerequisite for a valid Equal Protection claim in the 1970s,[30] the justices nonetheless accepted that a standard of causation far short of "but-for" remains appropriate in the discrimination context. In *Personnel Administrator of Massachusetts v. Feeney*,[31] for example, a case about alleged sex discrimination (not race discrimination), the Court rejected Helen Feeney's claim: she consistently scored high on qualifying examinations for Massachusetts civil service jobs, yet just as consistently could not land any of those jobs because competing veterans (almost all of them male) received an "absolute preference." Yet Justice Stewart's majority opinion declared that "the dispositive question" was whether Ms. Feeney "has shown that a gender-based discriminatory purpose has, **at least in some measure**, shaped the Massachusetts veterans' preference legislation" that Feeney unsuccessfully challenged.[32]

In *Comcast*, the factual allegations cried out for further proceedings in the courts below. Yet the Supreme Court, understandably frustrated by a case that had lingered for over a decade, ruled that a Rule 12(b)6 dismissal was in order because the plaintiffs (hereinafter ESN) had not alleged "but-for" causation. Never mind that ESN actually made a contract claim, alleging racial discrimination precisely within the 1866 Civil Rights Act's guarantee of an equal right "to make and enforce contracts . . . as is enjoyed by white citizens."[33] The

27 See, for example, Chief Justice Rehnquist's majority opinions in Alabama Board of Trustees v. Garrett, 531 U.S. 356 (2001) (finding that saving funds is a sufficient justification for a state to discriminate based on disability) and DeShaney v. Winnebago Cty. Soc. Servs. Dept., 489 U.S. 189 (1989) (finding no state duty to protect a four-year-old from savage beating by the child's father because the Fourteenth Amendment extends only to negative rights). *See generally* Aviam Soifer, *Of Swords, Shields, and a Gun to the Head: Coercing Individuals, but Not States*, 39 Seattle U. L. Rev. 787 (2016); Aviam Soifer, *Moral Ambition, Formalism, and the "Free World" of* DeShaney, 57 Geo. Wash. L. Rev. 1513 (1989).

28 For a searing summary and critique by Judge Carlton W. Reeves before he granted qualified immunity, see Jamison v. McClendon, 476 F. Supp. 3d 386 (S.D. Miss. 2020).

29 *See generally* Eric K. Yamamoto, *Critical Procedure: ADR and the Justices' "Second Wave" Constriction of Court Access and Claim Development*, 70 SMU L. Rev. 765 (2017); *see also* Judith Resnik, *Contracting Civil Procedure*, *in* Law and Class in America: Trends Since the Cold War (Paul Harrington & Trina Jones eds., 2018).

30 *See* Washington v. Davis, 426 U.S. 229 (1976).

31 Personnel Admin'r of Mass. v. Feeney, 442 U.S. 256 (1979).

32 *Id.* at 276 (emphasis added).

33 Comcast Corp. v. Nat'l Ass'n of African Am.–Owned Media, 140 S. Ct. 1009, 1013 (2020).

Court simply shifted legal categories. It ignored the clear, protective language of the statute by moving the entire case from contract to tort law, which seems an innovative form of legal gaslighting in a textualist era.

The Court's strikingly brief legal analysis began this way: "It is 'textbook tort law' that a plaintiff seeking redress for a defendant's legal wrong typically must prove but-for causation."[34] This assertion is hardly accurate even as a generalization about the multifaceted field of tort law, and it is entirely inaccurate about tort law in the 1860s.[35] Nonetheless, the Court managed to separate—yet also at times to combine—strands from the broad, bold coverage of the 1866 Civil Rights Act and the considerably different reach of Title VII of the Civil Rights Act of 1964 (at least as the Court has construed it).[36]

The Ninth Circuit opinion below had created a circuit court split about what must be alleged and what must be proved to establish an "actionable" claim of racial discrimination. This entire issue arose only recently, however, as lower-court judges began to reach restrictive decisions in the Title VII and Age Discrimination in Employment Act of 1967 (ADEA) contexts and then extend them to Sections 1981 and 1982. Mainly, the Title VII and ADEA decisions involved alleged retaliation in workplace conflicts.[37] But modern workplace conflicts are a far cry from the brutal realities recently freed slaves faced—in

34 *Id.* at 1014. For this claim, the Court cited its own recent decision in U. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 347 (2013), which in turn cited a textbook: W. Page Keeton et al., Prosser and Keeton on Torts 265 (5th ed. 1984)).

35 *Infra* notes 90–102.

36 *Cf.* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 415 (1968) ("Thus, although [42 U.S.C.] § 1982 contains none of the exemptions that Congress included in the Civil Rights Act of 1968 [Fair Housing Act], it would be a serious mistake to suppose that § 1982 in any way diminishes the significance of the law recently enacted by Congress.").

37 *See*, *e.g.*, Theidon v. Harvard Univ., 948 F.3d 477, 505 (1st Cir. 2020) ("With respect to causation, Theidon must show that Harvard's desire to retaliate was the but-for cause of the challenged employment action." (internal quotation marks omitted)); Natofsky v. City of New York, 921 F.3d 337, 348 (2d Cir. 2019) ("Title VII retaliation must be proved according to traditional principles of but-for causation" (internal quotation marks omitted)). *Cf.* St. Ange v. ASML, Inc., No. 3:10-CV-00079-WWE, 2015 WL 7069649, at *1 (D. Conn. Nov. 13, 2015) (Eginton, J.) ("Defendant argues that, because of the longstanding principle that Section 1981 retaliation claims are analyzed under the same legal principles as Title VII retaliation claims, *Nassar*'s but-for causation standard is equally applicable to Section 1981 retaliation claims. The Court is not persuaded. The problems that the Supreme Court highlighted in *Nassar* when analyzing Title VII do not extend to Section 1981. Indeed, the Court explicitly distinguished Section 1981 as a basis for applying a different, more demanding causation standard to Title VII retaliation claims."); Babb v. Wilkie, 140 S. Ct. 1168, 1176 (2020) ("Finally, in [*Nassar*], we interpreted Title VII's anti-retaliation provision . . . as requiring retaliation to be a but-for cause of the end result of the employment decision. . . . That reasoning has no application in the present case. The wording of § 633a(a)—which refers expressly to the "mak[ing]" of personnel actions in a way that is "free from any discrimination based on age"—is markedly different from the language of the statutes at issue in *Gross* and *Nassar*, and the traditional rule favoring but-for causation does not dictate a contrary result.").

fact and in law—in 1866. Moreover, as Justice Frankfurter stated in a different, poignant context: "But history also has its claims."[38]

I. THE TEXT AND HISTORY OF THE CIVIL RIGHTS ACT OF 1866

Remarkably, the Supreme Court in *Comcast* relied on its own sweeping assumptions about tort law rather than attending to either the original text or the current statutory language directly derived from the 1866 statute. Indeed, the Court proceeded without even a hint of awareness of the well-established history of the Civil Rights Act of 1866 and its important place in Reconstruction.[39] At its core, the Act provided that all citizens were thenceforth to enjoy "the full and equal benefits 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."[40]

38 Rosenberg v. United States, 346 U.S. 273, 310 (1953). Frankfurter explained the significance of his dissent, filed after Ethel and Julius Rosenberg had been executed, as follows: "To be writing an opinion in a case affecting two lives after the curtain has been rung down upon them has the appearance of pathetic futility. But history also has its claims. This case is an incident in the long and unending effort to develop and enforce justice according to law. The progress in that struggle surely depends on searching analysis of the past, though the past cannot be recalled, as illumination for the future."

39 The author was one of thirteen legal historians who, with the help of attorney Eugene R. Fidell, submitted an amicus curiae brief in this case. Law and History Professors' Brief as *Amici Curiae* in Support of Respondents, Comcast Corp. v. Nat'l Ass'n of African Am.–Owned Media, 140 S. Ct. 1009 (2020) (No. 18-1171), 2019 WL 4729859. Three leading tort law historians also submitted an amicus curiae brief. Brief of Torts Scholars as Amici Curiae in Support of Respondent, *Comcast*, 140 S. Ct. 1009, 2019 WL 4748379. Possibly this article may seem to be an extended form of sour grapes, yet the Court's cavalier disregard of the language and history of such an important statute ought to be a cause for broad concern—even if the Court's disregard for history is nothing new. Recently, there have been five substantial symposia about the Thirteenth Amendment and the statutes based upon it. The resulting publications may be found at The Promises of Liberty: The History and Contemporary Relevance of the Thirteenth Amendment (Alexander Tsesis ed., 2010), which is the product of a 2009 symposium jointly sponsored by the University of Chicago and Loyola University, Chicago; Symposium, *Labor Law and the Thirteenth Amendmen*t, 19 Nev. L.J. 365–534 (2018); Symposium, *The Thirteenth Amendment: Meaning, Enforcement, and Contemporary Implication*s, 112 Colum. L. Rev. 1447 (2012); Symposium, *Constitutional Redemption & Constitutional Faith*, 71 Md. L. Rev. 953 (2012); and *Thirteenth Amendment Symposium*, 38 Tol. L. Rev. 791 (2007). They have had virtually no impact in the courts. In addition, Eric Foner, deservedly considered the leading historian of Reconstruction, recently published two admirably accessible books on the subject, The Second Founding: How the Civil War and Reconstruction Remade the Constitution (2019), and The Fiery Trial: Abraham Lincoln and American Slavery (2010). His work also has not gained judicial attention, nor are judges relying on well-known additional work about Reconstruction by other stellar historians, such as James McPherson and the late Leon Litwack, John Hope Franklin, and W.E.B. DuBois, as well as by younger experts. There may be disturbing signs that the Dunning School of Reconstruction historiography is poised for a comeback, notwithstanding (and perhaps partially in response to) recent possible seeds of national racial reckoning.

40 *Supra* note 19.

The Thirty-Ninth Congress had to pass the Civil Rights Act of 1866 over President Andrew Johnson's veto, rejecting his bitter veto message, which fervently embraced a states' rights approach to Reconstruction. In fact, this was the first time that Congress overrode a presidential veto of major legislation. The statute declared that all recently liberated slaves, as well as everyone else born in the United States and its territories (with the exception of "Indians not taxed") now were United States citizens.[41] It then specified a sweeping range of rights in which all citizens would be fully and equally protected by federal law.[42] Many Congressmen enthusiastically celebrated this opportunity to use, on behalf of freedom, the kind of federal power that had been employed to return fugitive slaves to their masters. The Thirteenth Amendment's unprecedented Enforcement Clause afforded new authority, and many delighted in superseding Chief Justice Taney's *Dred Scott* decision.[43]

Congress stressed the dramatic need for federal protection of former slaves endangered by those who sought to return them to conditions as close as possible to slavery itself. In the summer and fall of 1865, the former Confederate states held conventions, and South Carolina and Mississippi soon led the way in passing stringent Black Codes.

41 Section 1 began: "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." Civil Rights Act of 1866 § 1, 14 Stat. 27.

42 The breadth of the protection of rights guaranteed by the statute is noteworthy. Following its bold citizenship provision—which precisely anticipated the first sentence of the Fourteenth Amendment that the same Thirty-Ninth Congress sent to the states for ratification less than three months later—the statute continued with "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 the full and equal benefits 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." *Id.*

43 Dred Scott v. Sandford, 60 U.S. 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. Const. amend. XIV. There is an extensive literature about this Civil Rights Act, including its direct relationship with the Fourteenth Amendment—through which many in Congress sought to "constitutionalize" that statute so that it could not be superseded by a subsequent Congress. The same Thirty-Ninth Congress proposed the Fourteenth Amendment, largely based on the statute. For more than the past half century, a remarkable revision by historians has convincingly demonstrated how inaccurate—or worse—the previous Dunning School's "Lost Cause" interpretation of Reconstruction was. Judges have lagged far behind and/or generally ignored this historical work. For a careful, clear, and convincing overview, see George Rutherglen, Civil Rights in the Shadow of Slavery: The Constitution, Common Law, and the Civil Rights Act of 1866 (2013); *see also, e.g.,* Aviam Soifer's work, including Aviam Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. Rev. 651 (1979); Soifer, *supra* note 2; Aviam Soifer, *Protecting Full and Equal Rights: The Floor and More*, *in* The Promises of Liberty: The History and Contemporary Relevance of the Thirteenth Amendment (Alexander Tsesis ed., 2010); and Aviam Soifer, *Federal Protection, Paternalism, and the Virtually Forgotten Prohibition of Voluntary Peonage*, 112 Colum. L. Rev. 1607 (2012).

These Black Codes, quickly adopted by eight states, severely restricted the rights of the freedmen and sought to compel them to continue to work under conditions akin to slavery—often in the same places where they had been slaves.[44] Overtly discriminatory laws were wrapped in the garb of "states' rights," the main thrust of President Johnson's Reconstruction policy.

Not surprisingly, the Republicans in control of the Thirty-Ninth Congress found such developments deeply disturbing.[45] Many of them—often after specific mention of the valor of Black soldiers and the huge number of casualties they had suffered during the Civil War—embraced the concept that allegiance to a government ought to be accompanied by protection by that government.[46] They insisted over and over again that the Civil Rights Act of 1866 would now guarantee freedom because it afforded all citizens full and equal legal protection. The statute went so far as to impose criminal liability on those who deprived others of their rightful equality. The *Comcast* opinion correctly pointed this out, only to use it to distinguish away the force of the statute's provisions.[47] Yet, in addition, the 1866 Civil Rights Act offered unprecedented authority to remove cases to federal court if and

44 See Eric Foner, The Story of American Freedom 104 (1998) ("During Presidential Reconstruction—the period from 1865 to 1867 when Lincoln's successor, Andrew Johnson, gave the white South a free hand in determining the contours of Reconstruction—southern state governments enforced this view of black freedom by enacting notorious Black Codes, which denied blacks equality before the law and political rights, and imposed on them mandatory year-long labor contracts, coercive apprenticeship regulations, and criminal penalties for breach of contract."). The best-known incidents of brutal early mob violence took the form of massacres in early May 1866 in Memphis and in late July 1866 in New Orleans. Considerable publicity about these incidents and additional widespread violence against Black citizens underscored how desperately newly freed slaves and their supporters needed federal protection. *See generally* U.S. Cong, House Select Comm. on the Memphis Riots, Memphis Riots and Massacres (Arno Press 1969) (1866); Ted Tunnell, Crucible of Reconstruction: War, Radicalism, and Race in Louisiana, 1862–1877, at 103–07 (1984).

45 *See* Foner, *supra* note 44, at 104 ("By 1865, virtually all northerners agreed that property rights in man must be abrogated, contractual relations substituted for the discipline of the lash, and the master's patriarchal authority over the former slaves abolished.").

46 This reciprocal concept can be traced at least back to John Locke, and it was repeated often during debates in the Thirty-Ninth Congress as well as by President Lincoln. The point was underscored when Lincoln asked his generally quite conservative Attorney General, Edward Bates, for a legal opinion about federal government duties to protect Black seamen. Bates distinguished between political and civil rights, but he declared "the duty of allegiance and the right to protection . . . correlative obligations, the one the price of the other." 10 Op. Att'y Gen. 382, 395 (1862). For a nearly contemporaneous speech that expressed quite similar views—though defining rights more broadly—see Cong. Globe, 37th Cong., 2d Sess. 1638–40 (1862) (remarks of Rep. Bingham).

47 Comcast Corp. v. Nat'l Ass'n of African Am.–Owned Media, 140 S. Ct. 1009, 1015–16 (2020). Even within its *Cruikshank* decision, United States v. Cruikshank, 92 U.S. 542, 552, 555 (1876), the Court emphasized this reciprocal relationship, though tragically the Justices went on to relegate Blacks entirely to the protection of the states in which they lived.

when states failed in their duty to enforce the Thirteenth Amendment's "grand yet simple declaration of universal freedom."[48]

As the core comparator for the civil rights that the statute listed and sought to protect, Congress clearly and specifically referred to the rights and immunities of white citizens. The Thirty-Ninth Congress understood, of course, that white citizens were not former slaves. Nor were whites being widely victimized through violence and blatant racial discrimination. The statute's use of the rights of white citizens as its metric meant that everyone was legally entitled to be treated as well as white citizens were supposed to be treated—and thereby protected broadly from race-based discrimination.[49] It guaranteed a broad range of rights that included the rights to make and enforce contracts, to own property, and to participate fully in the legal system. This pathbreaking federal law guaranteed that these rights would be protected for citizens "of every race and color," without regard to any previous condition of slavery or involuntary servitude.[50] Further, all citizens were to be "subject to like punishment, pains and penalties, and to none other."[51] This bold declaration clearly was to supersede "any law, statute, ordinance, regulation, or custom[] to the contrary."[52]

Naïve as the ambitions of the Thirty-Ninth Congress turned out to be, there was absolutely no indication in the statute that Congress meant to ignore racism where its manifestations combined with other forces. There was no indication that Congress intended to prohibit only that discriminatory conduct that could be shown to have changed the outcome of a transaction. Simply put, nowhere did Congress hint at a requirement that a plaintiff could not invoke the broad protection of the statute absent proof of but-for causation.

48 One of the most tragic ironies in American constitutional law—and that is saying something, given how many tragic ironies there are—is that in the Slaughter-House Cases, 16 Wall. (83 U.S.) 36 (1873), Justice Miller's majority opinion described the Thirteenth Amendment as "this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government—a declaration designed to establish the freedom of four millions of slaves," *id.* at 70. Further, Miller declared the "one pervading purpose" at the foundation of all three post-Civil War Amendments to be "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who formerly exercised unlimited dominion over him." *Id.* at 71. Yet this decision did a great deal to eviscerate the intended protections of section 1 of the Fourteenth Amendment; a series of additional Supreme Court decisions in the next decade—most prominently the Civil Rights Cases, 109 U.S. 3 (1883)—added considerably to the Supreme Court's complicity.

49 Of course, many took the view that the statute reached and guaranteed protection for the rights of whites as well. Senator Trumbull, for example, emphasized more than once that the Act "applies to white men as well as to black men. It declares that all persons . . . shall be entitled to the same civil rights." CONG. GLOBE, 39th Cong., 1st Sess. 599 (1866).

50 Civil Rights Act of 1866 § 1, 14 Stat. 27.

51 *Id.*

52 *Id.*

Rather, through the 1866 Civil Rights Act, "Congress transformed the common law of civil rights into the public law of equal citizenship."[53]

There can be no question that members of the Thirty-Ninth Congress had a complex mix of motives, many idealistic and surely some not. They wove a tangled web that included, for example, paternalism, the Republican Party's long-standing faith in free labor, direct political calculation, and even the desire to keep former slaves from migrating north by vigorously protecting their rights in the South.[54] Classic American optimism also played a role when the first civil rights statute "sought to fill the vacuum surrounding the legal status of the freedmen (as they were called) and to forestall the efforts of state legislatures to demote the freedmen to the status of second-class citizens (or worse)."[55] There clearly was a need to guarantee the new freedom anchored in the Thirteenth Amendment, and Congress emphatically rejected President Johnson's efforts to return as rapidly as possible to the older normalcy.[56]

And, despite the *Comcast* opinion's pronouncement to the contrary,[57] the 1866 Civil Rights Act explicitly provided for vindication of the rights it protected through civil litigation. Indeed, Section 3 established access to federal district and circuit courts for "*all* causes, *civil* and criminal, affecting persons *who are denied or cannot enforce* in [the state courts] the rights secured to them by the first section of this act."[58] It is no surprise, then, that the Supreme Court's precedents have allowed claims anchored in 42 U.S.C. §§ 1981 and 1982, the Act's modern remnants, to challenge racial discrimination successfully, even when brought by private citizens against private parties.[59]

53 Rutherglen, *supra* note 43, at 4.

54 *See generally* Eric Foner, Free Soil, Free Labor, Free Men (1970); Eric Foner, The Second Founding: How the Civil War and Reconstruction Remade the Constitution (2019).

55 Rutherglen, *supra* note 43, at 6. Indeed, "[b]efore the act, there were no civil rights in the form of entitlements to be free from discrimination, the primary sense in which we understand the term today." *Id.* at 4. Guaranteeing freedom from racial discrimination was an idealistic goal, to be sure, and one that remains elusive over a century and a half later, but the text of that statutory promise—anchored as it was in Congress's new enforcement power under the Thirteenth Amendment—never even hinted at a requirement to prove but-for causation of a particular injury before claiming a violation.

56 William R. Brock, An American Crisis: Congress and Reconstruction, 1865–1867 (1963).

57 Comcast Corp. v. Nat'l Ass'n of African Am.–Owned Media, 140 S. Ct. 1009, 1015 (2020) ("Nothing in the Act specifically authorizes private lawsuits to enforce the right to contract.").

58 Civil Rights Act of 1866 § 3, 14 Stat. 27 (emphasis added); *see also infra* Part II.

59 Congress repeatedly has disagreed with crabbed constructions by the Supreme Court of civil rights statutes; the most relevant of numerous examples pertained to the Civil Rights Act of 1991, discussed in Part II *infra*. The dialogue between courts and legislatures was celebrated in Guido Calabresi, A Common Law for the Age of Statutes (1983).

Finally, Congress took very seriously the equal rights it sought to enshrine in the Civil Rights Act.[60] Less than a year later, for example, when the lame-duck session of that Thirty-Ninth Congress confronted the harsh reality of the widespread denial of those rights and the ineffectiveness of the Freedmen's Bureau in implementing them, it sent Union troops into the recalcitrant South, which it divided into five sections under military control.[61]

II. TEXT? WHAT TEXT? THE *COMCAST* DECISION

The *Comcast* opinion began as follows:

> Few legal principles are better established than the rule requiring a plaintiff to establish causation. In the law of torts, this usually means a plaintiff must first plead and then prove that its injury would not have occurred "but for" the defendant's unlawful conduct. The plaintiffs before us suggest that 42 U.S.C. § 1981 departs from this traditional arrangement. But looking to this particular statute's text and history, we see no evidence of an exception.[62]

This remarkable paragraph is startling for a number of reasons, the first being its conclusory insistence that "this particular statute"—which nowhere looks like, sounds like, or gives any indication of being a torts provision—can be hijacked by the law of torts. The second reason is the paragraph's oversimplification of the law of torts so as to all but assure error about torts doctrine. Yet the *Comcast* opinion proceeded with these two points as its guiding principles.

Justice Gorsuch's next paragraph briefly summarized some of the facts of the case at issue, albeit with a clear undertone of impatience. His opinion implied that after negotiations failed, the plaintiffs allowed the case to drag on for years, sought an exorbitant amount, and ought to have accepted Comcast's reasons for not granting them cable access for their channels.[63] Moreover, though ESN acknowledged that Comcast had asserted legitimate

60 *See* Soifer, *supra* note 43, at 1608–20 (2012). In banning "voluntary" as well as "involuntary" peonage, the Thirty-Ninth Congress went significantly beyond the text of the Thirteenth Amendment—a clear indication that the contemporary authors of the constitutional Enforcement Clauses and the statutes Congress based upon them believed that Congress was empowered to extend federal protection of civil rights, without any prerequisite of judicial recognition of these rights. *But see* United States v. Morrison, 529 U.S. 598, 601–02 (2000).

61 *See* Eric Foner, Reconstruction: America's Unfinished Revolution, 1863–1877, at 244–45. *See generally* Brock, *supra* note 56.

62 *Comcast*, 140 S. Ct. at 1013.

63 These reasons were the "lack of demand for ESN's programming, bandwidth constraints, and its preference for news and sports programming that ESN didn't offer." *Id.* ESN countered that Comcast kept changing its requirements, granted access to non-minority applicants inconsistently with its announced programming preferences and bandwidth constraints, and retained employees who made racist remarks during the process.

business reasons, ESN insisted that these were pretextual and even suggested that Comcast had paid civil rights groups to offer public support "and to win favor before the Federal Communications Commission."[64] The Court's factual summary concluded: "As relevant here, ESN alleged that Comcast's behavior violated 42 U.S.C. § 1981(a), which guarantees, among other things, '[a]ll persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens.'"[65] This section stated the allegation accurately—there was no mention of any tort claim.

Once the opinion got into a discussion of the law, Justice Gorsuch became a skillful magician, drawing the audience's attention away from the Civil Rights Act of 1866 and keeping it away—even while flipping a few disjointed provisions into the air. As he flashed tort terminology and citations that conjured stacks of ancient treatises, the Act that Congress adopted seemed to disappear. It is hardly a surprise, therefore, that his *Comcast* opinion, considered with care, is weirdly untethered from the usual statutory construction anchors.

Unfortunately, the *Comcast* opinion also shows that Senior Federal Circuit Judge Jon O. Newman was overly optimistic when he recently stated, "[A]ll federal judges (I have been one for forty-nine years) begin the task of interpreting a federal statute by examining the text of the relevant provision."[66] Instead, the *Comcast* opinion began by entirely ignoring the text of the federal statute, replacing it with an abstract and historically inaccurate oversimplification of nineteenth-century tort law.

This goes beyond a violation of the teachings of "textualism," as even an opinion by a judge who embraces the importance of statutory history and court-made doctrine nonetheless would start with the current text of the statute in question. For instance, the Court long ago directly invoked the Act's language that addressed racial discrimination in property and contract law in applying its protections against racially restrictive covenants.[67] Then, in the series of important property and contract decisions launched by *Jones v. Alfred H. Mayer Co.*,[68] the Court directly applied the Act's language to contract and

64 *Id. Comcast* well illustrates what is so problematic about overzealous use by district court judges of summary judgment and related early dismissals, encouraged by the Supreme Court in decisions such as Ashcroft v. Iqbal, 556 U.S. 662 (2009); *see also* Yamamoto, *supra* note 29.

65 *Comcast*, 140 S. Ct. at 1013 (quoting 42 U.S.C. § 1981(a)).

66 Jon O. Newman, *The Myths of Textualism and Their Relevance to the ALI's Restatement of the Law, Copyright*, 44 COLUM. J.L. & ARTS 411, 412 (2021). In Medellin v. Texas, 552 U.S. 491, 506 (2008), Chief Justice Roberts similarly stated, "The interpretation of a treaty, like the interpretation of a statute, begins with its text."

67 *See* Buchanan v. Warley, 239 U.S. 33 (1915) (finding that statute reinforces Fourteenth Amendment invalidation of Louisville segregated housing); Hurd v. Hodge, 334 U.S. 24 (1948) (companion case to Shelley v. Kraemer, 334 U.S. 1 (1948), which invalidated restrictive covenant enforcement in District of Columbia on basis of equal property rights in § 1 of 1866 Civil Rights Act). The statutory numbering was different, but the statutory text was the same.

68 Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). More precisely, *Jones v. Alfred H. Mayer* and its progeny resuscitated 42 U.S.C. §§ 1981 and 1982, the Act's direct, explicit statutory descendants.

property matters, with no insertion of a but-for tort concept. Indeed, tort doctrine did not figure in those decisions at all.

Despite Justice Gorsuch's declaration that the Court would reach for clues in its precedents and the statutory text and history, his opinion proved entirely uninterested in any of those. He mentioned *Jones v. Alfred H. Mayer* only *en passant*,[69] thereby escaping the bounds of its language and holding. *Jones*, with 42 U.S.C. § 1982 as its basis, invalidated private racial discrimination in a housing contract. Justice Stewart's majority opinion boldly proclaimed:

> [The Thirteenth Amendment would be] a mere paper guarantee if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.[70]

This reliance on the Thirteenth Amendment and on the statutory definition of the rights for which it provided the foundation, as well as the rest of Justice Stewart's opinion, contrasts dramatically with the Court's newly imposed requirement that a plaintiff must prove not only that racial discrimination occurred but that each particular harm the plaintiff suffered would not have occurred without that discrimination. This new test is nothing short of an enormous obstacle for any plaintiff. Historians, sociologists, economists, and journalists report extensively on the myriad economic, social, class, political, and other causes—public and private—that have helped to establish and nurture inequality and mistreatment of racial minorities in the United States. A minority plaintiff—even one who has been the victim of unlawful discrimination—may not always be able to show that each harmful result of that discrimination would not have occurred otherwise. Therefore the requirement of but-for proof frequently will have the effect of allowing perpetrators of racial discrimination to escape liability, shielded by the very pervasiveness of racism.

Jones and its view of the Civil Rights Act of 1866 proved to be an important precedent pointing toward the full and equal protection of all American citizens. Within a year, for example, the Court, by then headed by Chief Justice Warren Burger, extended *Jones* to

69 *Comcast*, 140 S. Ct. at 1016–17.

70 *Jones*, 392 U.S. at 443 (internal quotation marks omitted).

reach discrimination in the transfer of membership in a recreational association in *Sullivan v. Little Hunting Park*.[71] It soon extended the prohibition on private discrimination to § 1981.[72] The Court held in *Runyon v. McCrary* in 1974 that the 1866 Act "prohibits private, commercially operated, nonsectarian schools from denying admission to prospective students because they are Negroes."[73] As in the case of many other educational institutions, the segregated private academy sued in *Runyon* had put forth numerous reasons for excluding Black children. These reasons ranged from specific and realistic business concerns to the complex racial, social, political, class, and educational attitudes of its clientele and on to the complex and varied views of the people who ran the school.[74] In other words, many factors were identified as contributing to the injury at issue. But discrimination, by its existence, was actionable. But-for causation was never even mentioned.

Justice Gorsuch claimed to find "further clues" from "[t]he larger structure and history of the Civil Rights Act of 1866."[75] But the "clues" he unearthed were either mythical or seriously misrepresented in his majority opinion.

As clues, Justice Gorsuch initially offered two remarkable assertions. First: "Nothing in the Act specifically authorizes private lawsuits to enforce the right to contract."[76] Second: "Instead," he continued, "this Court created a judicially implied private right of action, definitively doing so for the first time in 1975."[77] (One is left to wonder what criteria distinguish *definitive* Supreme Court decisions from its other precedents.) Justice Gorsuch used these revisionist assertions as a rationale that tied section 1 of the 1866 Act (the provision at issue) to the criminal provision in section 2 with its use of the phrase "by reason of his color or race," from which he then worked backward to insist on a but-for causation requirement in section 1.[78]

71 Sullivan v. Little Hunting Park, 396 U.S. 229 (1969).

72 *See* Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 410 U.S. 431, 440 (1973) ("Consequently, our discussion and rejection of Wheaton-Haven's claim that it is exempt from § 1982 disposes of the argument that Wheaton-Haven is exempt from § 1981.").

73 Runyon v. McCrary, 427 U.S. 160, 168 (1976).

74 In addition to identifying these purportedly nondiscriminatory reasons for the exclusions at issue, the defendants in *Runyon* made plausible arguments that competing constitutional rights—freedom of association, privacy, and a parent's right to direct the education of their children—protected their actions. *See id.* at 175–79.

75 *Comcast*, 140 S. Ct. at 1015.

76 *Id.*

77 *Id.*

78 *Id.* at 1015–16. Aside from the faultiness of the assertions themselves, as explained below—which makes a move from § 1 to § 2 unnecessary to begin with, this line of logic suffers from the additional problem that it would be entirely reasonable for Congress to require but-for causation for the imposition of criminal liability but not for a civil violation.

Text, history, and precedents all demonstrate how misleading Gorsuch's artful dodging turns out to be. He entirely missed § 3 of the 1866 Act, which could hardly have been more clear in establishing federal court jurisdiction for anyone deprived of the protections enumerated in § 1 (which included making and enforcing contracts). It stated:

> That the district courts of the United States within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act.[79]

Thus, the Civil Rights Act of 1866 *did* authorize private suits to enforce equal contracting rights. And, as an unsurprising corollary, the Supreme Court *did not* only in 1975 create a private right of action to do so. Indeed, the Court had been sustaining civil rights claims brought by private parties—definitively—much earlier.[80] *Comcast*'s judicial fiat thereby erased the statutory language of, and decades of precedent under, §§ 1981 and 1982. What remains is a wholly judicially manufactured barrier to civil rights enforcement.

The second "clue" claimed by Justice Gorsuch turns out to be another non-clue. Near the end of § 3, the Thirty-Ninth Congress sought to fill any gaps in the law it was promulgating that could hamper the statute's ability to vindicate the broad rights it identified. Accordingly, Congress made a single mention of "common law"—in no way in conflict

79 Civil Rights Act of 1866 § 3, 14 Stat. 27 (emphasis added). To further illustrate its broad jurisdictional ambition, § 3 went on to provide federal jurisdiction for rights denied in the context of the Freedmen's and Refugee Bureau. Section 3 also extended federal habeas corpus jurisdiction. Indeed, the Act's first full year in existence saw a decision allowing private suits to enforce it, handed down by a Supreme Court justice sitting as a circuit court judge. *See In re Turner*, 24 Fed. Cas. 337 (C.C.D. Md. 1867) (No. 14,247) (Chief Justice Salmon P. Chase).

80 *See*, *e.g.*, Hurd v. Hodge, 334 U.S. 24 (1948), discussed in note 67, *supra*. Tellingly, when the Supreme Court considered *Jones* in 1968, a private lawsuit under 42 U.S.C. § 1982 to enforce the right to purchase property, it did not even question whether that statute authorized such an action. Rather, it considered the claim without hesitation and ruled for the Plaintiff. Nor did Justice John Marshall Harlan raise the question in his strong *Jones* dissent, even though he was justifiably known for his attention to such procedural matters. He stressed the very recent passage of the Fair Housing Act of 1968, 82 Stat. 73, enacted after the oral argument in *Jones*. The *Comcast* opinion's citation for the proposition that the Supreme Court first recognized a private right of action to enforce the right to contract in 1975 was "See *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975); see also *Jett* v. *Dallas Independent School Dist.*, 491 U.S. 701, 720 (1989)." But neither of those opinions supports that proposition; indeed, in *Johnson* the Court did declare that it was breaking ground, but that was because it was inferring "a federal remedy against *discrimination in private employment* on the basis of race," 421 U.S. at 460 (emphasis added), from a provision that "on its face relates primarily to racial discrimination in the making and enforcement of contracts." *Id.* at 459.

with the statute's guarantees—directing that it be used as a gap filler, if needed.[81] Justice Gorsuch leaped from this single reference to the common law as gap filler to the idea of a broad statutory commitment to tort law and but-for causation—a breathtaking feat—allowing him to proclaim boldly that but-for causation was a "prerequisite" for a claim based on the Civil Rights Act of 1866.[82]

To read the full text of the Civil Rights Act of 1866, however, is to see clearly that Congress's central goal was to guarantee federal protection for § 1's expansive list of rights. Congress thereby intended to secure "full and equal rights" for newly freed slaves in particular and indeed for all citizens. Even § 3's reference to "common law," which emboldened Justice Gorsuch, was couched in further language that affirmed the primacy of "the Constitution and laws of the United States." Congress certainly did not intend to place the post–Civil War promise of freedom at the mercy of the substantive law of each state, many of which hardly accepted the federal government at all, much less valued federal civil rights legislation, with their recalcitrance often clearly extending to their judges.

After its "common law" digression, the *Comcast* Court never returned to the text of the 1866 Civil Rights Act. Rather, for its final "clues," the Court cherry-picked language from earlier Supreme Court opinions that ostensibly hinted at a but-for causation standard. Yet none of the referenced opinions held, or even suggested, that but-for causation is required under the Act.[83]

The Court next moved to what seems almost an intentionally distracting and ultimately confusing comparison of very different statues from very different eras. Relying entirely

81 The language was as follows: "[I]n all cases where [the] laws [of the United States] are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law . . . *so far as the same is not inconsistent with the Constitution and laws of the United States*, shall be extended to and govern said courts in the trial and disposition of such cause . . . ." § 3, 14 Stat. 27 (emphasis added). This presumably afforded federal courts a quite limited opportunity to develop federal common law under Swift v. Tyson, 41 U.S. 1 (1842).

82 Comcast Corp. v. Nat'l Ass'n of African Am.–Owned Media, 140 S. Ct. 1009, 1016 (2020).

83 The two cases Justice Gorsuch cited relating to 42 U.S.C. § 1981, Johnson v. Ry. Express Agency, Inc., 421 U.S. 454 (1975), and Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U. S. 375 (1982), had nothing to do with causation. *Johnson*, discussed *supra* note 80, concerned statutes of limitation, and *General Building Contractors* imposed a "purposeful discrimination" requirement as it rejected vicarious and respondeat superior liability, 458 U.S. 375, 391 (1982) ("We conclude, therefore, that § 1981, like the Equal Protection Clause, can be violated only by purposeful discrimination."). Of the three additional decisions Justice Gorsuch cited relating to 42 U.S.C. § 1982 (he asserted that the "Court's treatment of a neighboring provision, § 1982, supplies a final telling piece of evidence," *Comcast*, 140 S. Ct. at 1016), one involved an allegation in which the injury, by definition, was entirely due to the discrimination, so there was no reason to comment on causation. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 412 (1968) (stating that "the petitioners filed a complaint . . . alleging that the respondents had refused to sell them a home . . . for the sole reason that petitioner Joseph Lee Jones is [African American]"). The other two did not involve any issue of injury causation (much less suggest a but-for standard), nor did they base their conclusions on § 1982. *See* Buchanan v. Warley, 245 U.S. 60 (1917); Runyon v. McCrary, 427 U.S. 160, 172 (1976), discussed *supra* at note 74.

on recent decisions construing modern statutes, Justice Gorsuch proclaimed: "This ancient and simple 'but for' common law causation test, we have held, supplies the 'default' or 'background' rule against which Congress is normally presumed to have legislated when creating its own new causes of action."[84] The precedential support he offered for this proposition consisted of cases involving Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967, which he characterized as "federal antidiscrimination laws like § 1981."[85] Within three pages, however, Gorsuch provided a prime example of having it both ways. In attempting to confront the fact that Congress had repudiated earlier judicial muddying of Title VII and had clarified that "motivating factor" was the correct standard, he now asserted: "So we have two statutes with two distinct histories, and not a shred of evidence that Congress meant them to incorporate the same causation standard."[86]

In other words, the kinship between the newer civil rights statutes and § 1981 exists only when the Court wishes to apply its own newly announced default rule. The same newer statutes and § 1981 are unrelated, however, when the Court wants to ignore the more generous recent "motivating factor" test and yet insist instead that § 1981 requires the more stringent "but-for" causation requirement.

Comcast is hardly the first time that the Court has narrowly confined statutory civil rights provisions. After the Court did so repeatedly in the 1970–1980 period, in the 1991 Civil Rights Act[87] Congress explicitly rejected many of the Supreme Court's crabbed constructions (and with nary a mention of tort law). Remarkably, the *Comcast* opinion attempted to make hay of that legislative historical fact, noting that Congress explicitly stated that the burden of proof was "the motivating factor test" in Title VII cases and adding, "But nowhere in its amendments to § 1981 did Congress so much as whisper about motivating factors."[88] That observation is accurate as far as it goes, but it proves nothing; there had been no Supreme Court interpretation of § 1981 that even hinted that the statute

84 *Comcast*, 140 S. Ct. at 1014.

85 *Id.* at 1014 (citing Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013) (Title VII retaliation) and Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009) (ADEA)). Even putting aside the inconsistency described below, it is quite an extended stretch to describe these recent decisions as having established a "default" or "background" rule that should be used to interpret the Civil Rights Act of 1866. It is an additional stretch to blithely lump together the statutes at issue in these decisions (Title VII of the Civil Rights Act of 1964 and the ADEA) with the Civil Rights Act of 1866 as "federal antidiscrimination laws *like* § 1981" (emphasis added), despite the significant differences—and full century—between them. It takes real temerity (or chutzpah) to assert that Congress is "normally presumed to have legislated" with the but-for causation rule in mind when there is not a single hint—and there is plenty of reason to doubt—that the Thirty-Ninth Congress knew of, or even could have imagined, such a restrictive modern-day limitation.

86 *Id.* at 1017.

87 Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071.

88 *Comcast*, 140 S. Ct. at 1018.

might require but-for causation. There was therefore no narrow judicial interpretation for Congress—committed in 1991 to broadening civil rights protections—to reject. To infer anything from Congress's failure in 1991 to anticipate subsequent decisions that would begin to identify a but-for requirement for legal claims under the 1866 Civil Rights Act makes little, if any, sense legally, logically, or even rhetorically. Rather, Congress's clarification that discrimination in employment that was only a "motivating factor" violates the law prohibiting discrimination in employment implies that Congress still believes that racial discrimination in contracting nonetheless violates federal law.

In similar fashion, the *Comcast* Court enthusiastically blurred any distinction between the plaintiff's need to plead and prove legal harm "because of" the action of a defendant and the more stringent burden imposed by the but-for requirement. In a confusing paragraph that compares alleged harm to a Black person and alleged harm to a white person and seeks to rely on an "ordinary language" claim, Gorsuch seemed to miss the thrust of the 1866 Act entirely.[89]

Finally, in addition to erring by seeking to apply nineteenth-century tort law doctrine to a claim anchored in the Civil Rights Act of 1866, Justice Gorsuch got the torts doctrine of that period wrong. Leading historians of American tort law filed an amicus curiae brief in *Comcast* in which they bluntly differed with broad claims in the briefs of the Petitioners and the United States about the historical role and scope of but-for causation in common-law tort law. Their brief summarized: "19th century tort law featured different causation rules tailored for different kinds of cases. Courts adapted causation rules to suit the moral structure of the tort in question. In the torts most closely analogous to claims under 42 U.S.C. § 1981, . . . courts rejected a but-for requirement."[90] These scholars carefully illustrated the limited reach of but-for causation in the mid-nineteenth century. They pointed out, for example, that some intentional torts did not require even a showing of actual damage, much less proof of but-for damage causation.[91]

89 The opinion stated: "While the statute's text does not expressly discuss causation, it is suggestive. The guarantee that each person is entitled to the 'same right . . . as is enjoyed by white citizens' directs our attention to the counterfactual—what would have happened if the plaintiff had been white? This focus fits naturally with the ordinary rule that a plaintiff must prove but-for causation. If the defendant would have responded the same way to the plaintiff even if he had been white, an ordinary speaker of English would say that the plaintiff received the 'same' legally protected right as a white person. Conversely, if the defendant would have responded differently but for the plaintiff's race, it follows that the plaintiff has not received the same right as a white person." *Id.* at 1015. Justice Gorsuch seems to miss the simple human truth that if a Black person suffers an adverse action partially motivated by animus toward Black people, that person is not being treated the same as a white person would have been. That cannot, by definition, happen to a white person.

90 Brief of Torts Scholars as Amici Curiae in Support of Respondent, *Comcast*, 140 S. Ct. at 1018 (No. 18-1171), 2019 WL 4748379, at *1.

91 *See id.* at *6.

An egregious example of the improvident disregard for the torts scholars' history—and the law—jumps out from Justice Gorsuch's citation to Francis Hilliard's 1859 *The Law of Torts or Private Wrongs*. He cited to pages 78–79 of that treatise as ostensibly supporting the proposition that "the common law in 1866 often treated a showing of but-for causation as a prerequisite to a tort suit."[92] Yet several pages earlier in that very treatise, beginning on page 74, Hilliard included a section explaining the principle that "in case[s] of wrong or violation of private right, *damage will be presumed*."[93] Hilliard provided a plethora of examples, including a case in which liability was found for "refusing a vote," even "though the candidate voted for was elected."[94] In other words, when an individual alleged a violation of his basic rights, no showing of but-for causation of a concrete injury was required.[95]

The briefs of the Petitioners and the United States relied heavily on articles by turn-of-the-(last)-century Harvard Law School Professor Jeremiah Smith. As the torts scholars made clear, however, "[d]iscontent with the but-for approach led Smith to articulate a different test altogether."[96] In fact, Smith declared that when there were multiple identifiable causes, a cause "must have been a *substantial factor* in producing the damage complained of."[97] Further, the torts scholars made clear that the Petitioners' claim that "the First Restatement of Torts adopted the but-for test" was not merely misleading: it was "simply wrong."[98]

92 *Comcast*, 140 S. Ct. at 1016.

93 1 Francis Hilliard, The Law of Torts or Private Wrongs 74 (3d ed. 1866).

94 *Id.* at 75; *see also* Brief of Torts Scholars as Amici Curiae in Support of Respondent, *Comcast*, 140 S. Ct. at 1018 (No. 18-1171), 2019 WL 4748379, at *3–4.

95 The scholars pointed to a related contemporary case in which "a colored woman" was wrongfully denied seating in the "ladies car" of a train. The Illinois Supreme Court upheld the award of $200 in damages, reasoning that "[i]f the party in such case is confined to the actual pecuniary damages sustained, it would, most often, be no compensation at all, above nominal damages, and no salutary effect would be produced on the wrong doer by such a verdict." Rather, that court held, "the party may recover . . . something for the indignity, vexation and disgrace to which the party has been subjected." *Id.* at *10 (citing Chi. & Nw. Ry. Co. v. Williams, 55 Ill. 185, 190 (1870)).

96 *Id.* at *15.

97 *Id.* (citing Jeremiah Smith, *Legal Cause in Actions of Tor*t, 25 Harv. L. Rev. 303, 309 (1912) (emphasis added by Torts Scholars)).

98 *Id.* at *16. As the scholars explained more fully, "The first Restatement of Torts, promulgated by the American Law Institute in 1934, adopted Smith's and [Leon] Green's 'substantial factor' approach. Petitioner contends that the first Restatement confirmed the role of but-for causation as the *sine qua non* of liability at common law. But the statement in Petitioner's brief is simply wrong. The First Restatement adopted the substantial factor approach, not the but-for test, as its basic rule of causation." *Id.* (internal quotation marks and citations omitted).

Actually, when the first American treatise writers began to collect and describe tort law, precisely in the era of the 1866 Civil Rights Act, they simply did not mention but-for causation.[99] The limited support that the *Comcast* Court could find for its sweeping tort law oversimplification came from an 1890s treatise, by which time both the country and tort law had changed substantially from the immediate post–Civil War period. In the same paragraph, Justice Gorsuch relied on an important recent article about tort law by widely respected legal historian G. Edward White to support the Court's assertion that "the common law in 1866 often treated a showing of but-for causation as a prerequisite to a tort suit."[100] White, however, did not say that: rather, his entire article emphasized major changes in tort doctrine in the years *after 1870*.[101]

If the Supreme Court is going to insist on shoehorning the Civil Rights Act of 1866 into tort law doctrine from that period, at a minimum it should correctly state that doctrine. Even tort law from that time appears to have recognized the need to address intentional and dehumanizing action whenever it occurred. Certainly, we should—in applying a statute written for precisely that purpose—do at least that much today.

III. TEXTUALISTS AND THE 2019 SUPREME COURT TERM

Initial summaries called the October 2019 Term, during which the barely noticed *Comcast* decision was handed down in March, "the most consequential term in recent memory"[102]

99 *See* Francis Hilliard, The Law of Torts (1859, 1861, 1866); Charles G. Addison, Wrongs and Remedies: The Law of Torts (1860). These treatises demonstrated that during that period, American torts cases generally mixed actual and proximate cause. In a later (1874) version of Hilliard's treatise, he hinted at analysis akin to but-for causation, but his primary citation in that discussion was to *Tutein v. Hurley,* 98 Mass. 211 (1867), a case in which it was clear that the defendants' actions *did* pass the but-for causation test, but the Supreme Judicial Court of Massachusetts affirmed a judgment in their favor for lack of *proximate* causation. The ruling mentioned neither the words "but-for causation" nor even the concept of a single necessary prerequisite akin to the Court's but-for requirement in *Comcast*. Allan Ching, Second Year Seminar paper, Spring 2021, on file with the *American Journal of Law and Equality*.

100 Comcast Corp. v. Nat'l Ass'n of African Am.–Owned Media, 140 S. Ct. 1009, 1016 (2020) (citing G. Edward White, *The Emergence and Doctrinal Development of Tort Law, 1870–1930*, 11 U. St. Thomas L.J. 463 (2014)).

101 Even the article's title plainly indicated its inapplicability to 1866. Throughout his essay, White emphasized major doctrinal changes in tort law brought about by industrialization and a concomitant sharp rise in accidents that involved machines. Torts, he explained, changed substantially after 1870 from "an amorphous collection of civil actions not arising out of contract" to "an integrated subject, one that rapidly came to be treated as a basic common law field." G. Edward White, *The Emergence and Doctrinal Development of Tort Law, 1870–1930*, 11 U. St. Thomas L.J. 463, 463 (2014).

102 Adam Liptak, *In a Term Full of Major Cases, the Supreme Court Tacked to the Center*, N.Y. Times (Jul. 10, 2020), https://www.nytimes.com/2020/07/10/us/supreme-court-term.html.

and the one in which the Supreme Court "truly became the Roberts Court"[103] and Chief Justice Roberts became "the most powerful Chief Justice since at least 1937."[104] The relief among most leading commentators as the Court handed down a number of major decisions seemed palpable. Sadly, the Term also proved to be Justice Ginsburg's last, and her death in September 2020 changed everything, as the rapid confirmation of Justice Amy Coney Barrett suggested the end of the "Roberts Court" era.

The earlier positive commentary about the 2019 Term came about largely because the Court did not defer to President Donald Trump's sweeping claims of presidential privilege,[105] did not overrule its own recent precedent that somewhat constrained the authority of states to impose major burdens on abortions,[106] and used an administrative law arbitrary-and-capricious analysis to stop the Trump administration effort to deport immigrants previously protected by their DACA status.[107] In addition, many commentators warmly embraced several textualist decisions; they were pleasantly surprised, for example, when Justice Gorsuch's textualist interpretation of the word "sex" in Title VII meant that the Court protected LGBTQ workers, at least from overt employment discrimination.[108] On the other hand, a majority of the Justices continued to embrace and even to extend a remarkably laissez-faire attitude toward state-imposed burdens on the right to vote.[109]

To the delighted surprise of environmentalists, close attention to the text of the federal Clean Water Act helped the Court decide that Maui County in Hawai'i violated the Act by

103 The CBS Mornings Podcast, *Supreme Court Wrap Up: How It Truly Became the Roberts Court*, CBS NEWS (July 2020), https://podcasts.apple.com/us/podcast/supreme-court-wrap-up-how-it-truly-became-the-roberts-court/id1157631148?i=1000485015889. How the Court reached unanimity in *Comcast* remains a puzzle, though the apparent perception that it was a minor case might have had considerable collegial appeal. Even Justice Ginsburg's separate concurrence emphasized only that the decision discussed, but did not resolve, whether it covered the contract-formation process as well as the final decision to enter a contract.

104 Adam Liptak, *John Roberts Was Already Chief Justice. But Now It's His Court*, N.Y. TIMES (Jun. 30, 2020), https://www.nytimes.com/2020/06/30/us/john-roberts-supreme-court.html.

105 *See*, *e.g.*, Trump v. Vance, 140 S. Ct. 2412 (2020); Trump v. Mazars USA, LLP, 140 S. Ct. 2019 (2020).

106 *See* June Med. Servs. LLC v. Russo, 140 S. Ct. 2103 (2020).

107 *See* Dept. of Homeland Sec. v. Regents of Univ. of Cal., 140 S. Ct. 1891 (2020).

108 *See* Bostock v. Clayton County, 140 S. Ct. 1731 (2020). In that case, Justice Gorsuch's majority opinion held that an employee fired for being LGBTQ was fired on account of her sex—even if the employee would likely not characterize it that way in ordinary conversation. Justices Alito and Kavanaugh each dissented forcefully in opinions that, combined, ran for 135 pages (in the slip opinions), including appendices.

109 *See*, *e.g.*, the Court's startling decision overruling the district court and allowing Wisconsin to reject absentee ballots in its April 2020 primary despite serious obstacles and health risks presented by COVID-19. Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205 (2020). In Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021), Justice Alito's opinion for the Court accepted newly enacted Arizona restrictions on voting, despite § 2 of the Voting Rights Act of 1965, as amended in 1982. After coolly proclaiming that "every voting rule imposes a burden of some sort," *id*. at 2338, Justice Alito declared that Arizona's new burdens on the right to vote were not "undue burdens" and had "a long pedigree" or were "in widespread use in the United States," *id.* at 2339.

pumping partially treated pollutants into wells, from which the pollutants entered the groundwater and then emptied into the Pacific Ocean.[110] Writing for the 6–3 majority, Justice Breyer explained that the case boiled down to a key wording issue: "The linguistic question here concerns the statutory word 'from.'"[111]

Undoubtedly the most striking example of commitment to text without regard to practical results occurred on the Term's final day, in Justice Gorsuch's decision for the 5–4 majority in *McGirt v. Oklahoma*.[112] Over strong dissents pointing to the decision's broad potential to create real-world problems, the Court held that the 1866 Treaty between the federal government and the Creek Indians really did mean what it said. There had never been textual exceptions to the treaty's provisions, Gorsuch explained; therefore, most of the eastern half of Oklahoma remains Indian Territory in the context of jurisdiction over major crimes involving American Indians.[113]

These examples illustrate that the Court's textualism can prove to be double-edged, as well as unpredictable. It seems that there is textualism, and then there is textualism.[114]

110 County of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462 (2020). Justice Kavanaugh filed a separate concurrence; Justice Thomas dissented, joined by Justice Gorsuch; and Justice Alito filed a separate dissent. Maui's county council had voted to settle the case before the Supreme Court ruled, but Maui's mayor refused. *See, e.g.,* Nick Grube, *US Supreme Court Hears Maui Pollution Case as Mayor, Council Fight Continues*, Honolulu Civil Beat (Nov. 6, 2019), https://www.civilbeat.org/2019/11/us-supreme-court-hears-maui-pollution-case-as-mayor-council-fight-continues/.

111 *County of Maui*, 140 S. Ct. at 1470.

112 McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

113 Justices Ginsburg, Breyer, Sotomayor, and Kagan joined Gorsuch's majority opinion. Chief Justice Roberts dissented, joined by Justices Alito, Kavanaugh, and Thomas (except for footnote 9), and Thomas also filed a dissent. Gorsuch's opinion bristled with pithy statements that should have been relevant to his *Comcast* opinion, *e.g.:* "[J]ust as wishes are not laws, future plans aren't either," *id.* at 2464; Oklahoma should not be "substituting stories for statutes," *id.* at 2470; and "the magnitude of a legal wrong is no reason to perpetuate it," *id.* at 2480.

114 *See generally* Tara Leigh Grove, *Which Textualism?,* 134 Harv. L. Rev. 265 (2020). Perhaps the most striking example of opportunistic textualism was Justice Scalia's statement for the majority in District of Columbia v. Heller, 554 U.S. 570, 577 (2008): "The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause." This announcement—though Scalia and other textualists often deride references to "natural rights" or "natural justice"—allowed Scalia to divide and conquer. He could relegate the first clause concerning "a well-ordered militia" to the shadows, while the operative clause gave the majority a dubious textual handle for its holding, reversing long-standing precedents, that the Second Amendment embodied individual rights. The *Cruikshank* decision, United States v. Cruikshank, 92 U.S. 542, 552 (1876), for example, emphatically rejected this concept when the Court invalidated the rare federal conviction of the white leaders of a brutal mass killing of disarmed Black people in Colfax, Louisiana. Chief Justice Waite's opinion declared that, notwithstanding the Fourteenth Amendment, Barron v. Mayor & City Council of Baltimore, 7 Pet. (32 U.S.) 243 (1833), continued to bar application of the federal bill of rights to the states. *See supra* note 22. Nonetheless, McDonald v. City of Chicago, 561 U.S. 742 (2010), extended Heller, and the Court declared this individual Second Amendment right to be "fundamental" and therefore applicable to the states. *See generally* Aviam Soifer, *Text-Mess: There Is No Textual Basis for Application of the Takings Clause to the States*, 28 U. Haw. L. Rev. 373 (2006).

Babb v. Wilkie,[115] for instance, displayed a textual approach nearly opposite to that in *Comcast,* though it is the decision most closely related to *Comcast* in the 2019 Term. Ultimately, the close but strained textual analysis in *Babb* led to a finding of liability, though it also allowed the majority to deny an employee any practical remedy as the victim of discrimination. To be fair, Justice Alito's opinion did identify the intended meaning of the statute at issue, though he managed to turn this into a Pyrrhic victory at best.

Faced with a straightforward question of what it means when a law requires that federal personnel actions "shall be made free from any discrimination based on age,"[116] Alito's answer in *Babb* could be read as a parody of textualism. In delving into the meaning of "free from," Alito invoked four dictionaries. He added a discussion of the difference between adjectival and adverbial clauses and cited a 1979 version of *Black's Law Dictionary* to declare that the "imperative mood" (when a statute uses the word "shall") "denot[es] a duty."[117]

Such belabored granularity seemed unnecessary in *Babb*, but it did lead to the Court's convincing interpretation of the federal-sector provision of the ADEA holding that a plaintiff is not required to show but-for causation (i.e., that a challenged adverse personnel decision would not have occurred but for the alleged discrimination). That is, because Congress required that when federal agencies make personnel decisions they must do so free from age discrimination, Alito explained, a federal employee who alleges age discrimination need not prove that age discrimination dispositively led to the alleged discriminatory decision to prove a violation.[118]

In stark contrast to the Court's approach in *Comcast*, *Babb* began with the statute's statement that "[a]ll personnel actions . . . shall be made free from any discrimination based on age" and then moved on to a clear rule: "If age discrimination plays any part in the way a decision is made, then the decision is not made in a way that is untainted by such discrimination."[119] This clarity in textual analysis highlights the analogous failure in *Comcast*. A faithful reading of the Civil Rights Act of 1866 could hardly ignore its proclaimed commitment that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."[120] This does not mean that racial discrimination claims always win, but, as in *Babb*, alleged discrimination in the process of contracting ought to trigger careful judicial scrutiny of the factual context.

115 Babb v. Wilkie, 140 S. Ct. 1168 (2020).

116 *Id.* at 1171 (citing 29 U.S.C. § 633a(a)).

117 *Id.* at 1172, 1176.

118 *Id.* at 1174. Even as Justice Alito reached a better result on the but-for causation question than he did in *Comcast*, he cited *Comcast* as additional support for the dubious proposition that "[i]n common talk, the phrase 'based on' indicates a but for causal relationship." *Id.* at 1173 (quoting Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47 (2007)).

119 *Id.* at 1177–78.

120 42 U.S.C. § 1981.

After initially making *Comcast* look bad by comparison, however, *Babb* added two further steps that obfuscated, if they did not entirely undercut, the decision's initial belabored but accurate reading of the ADEA. First, the Court used but-for causation to distinguish between a situation in which "age [is] a but-for cause of differential treatment" and one in which "age [is] a but-for cause of the ultimate decision."[121] Indeed, Justice Alito declared that "[s]ection 633a(a) requires proof of but-for causation, but the object of that causation is 'discrimination,' *i.e.*, differential treatment, not the personnel action itself."[122]

And then, with an additional turn of the screw, Alito in effect took away everything his *Babb* opinion had just given. Without fanfare, Alito's majority opinion quickly went from *eschewing* but-for injury causation as a requirement for finding a violation of the federal-sector provision to *embracing* but-for causation as a requirement for meaningful relief. The Court declared that a well-settled "default rule" ought to apply because "recovery for wrongful conduct is generally permitted only if the injury would not have occurred but for that conduct."[123] For the victim of age discrimination to obtain actual remedial relief, the *Babb* Court invoked its own judge-made rule that victims of discrimination must meet the heavy, and often fatal, burden of proving that the harm they suffered would not have occurred "but for" the forbidden discrimination.[124]

Thus, Alito proclaimed, "§ 633a(a) plaintiffs who demonstrate only that they were subjected to unequal consideration cannot obtain reinstatement, backpay, compensatory damages, or other forms of relief related to the end result of an employment decision."[125] This is because, he explained, "[t]o obtain such remedies, these plaintiffs must show that age discrimination was a but-for cause of the employment outcome."[126]

Babb's contrast with the actual text and the entire approach of the 1866 Civil Rights Act could hardly be more pronounced. The very title of the 1866 Act was "An Act to

121 *Babb*, 140 S. Ct. at 1174.

122 *Id.* at 1176.

123 *Id.* at 1172. The citation that follows is: "See, *e.g.*, *University of Tex. Southwestern Medical Center v. Nassar*, 570 U.S. 338, 346–347 . . . (2013)." By the time *Babb* reached the Supreme Court, it, like the *Nassar* case, involved only a Title VII retaliation claim. Justice Ginsburg accepted *Nassar* as precedential in her concurrence in *Comcast*, though in *Nassar* itself she had written a powerful dissent, joined by Justices Breyer, Sotomayor, and Kagan. *See Nassar*, 570 U.S. at 363.

124 *Babb*, 140 S. Ct at 1177.

125 *Id.*

126 *Id.* at 1177–78. After invoking "traditional principles of tort and remedies law," *id.* at 1178, Justice Alito tried to explain further why "but for causation" must remain essential for practical results: "Remedies should not put a plaintiff in a more favorable position than he or she would have enjoyed absent discrimination. But this is precisely what would happen if individuals who cannot show that discrimination was a but-for cause of the end result of a personnel action could receive relief that alters or compensates for the end result." *Id.* The consolation prize for a victim of discrimination who cannot prove but-for causation might be "injunctive or other forward-looking relief." *Id.*

protect all Persons in the United States in Their Civil Rights, and Furnish the Means of their vindication." And the Thirty-Ninth Congress specifically did not separate rights and remedies. Rather, at the end of § 1's wide-ranging list of specific civil rights, Congress concluded that everyone covered by the Act "shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."[127]

Together *Comcast* and *Babb* starkly illustrate how justices can cloak themselves in the disguise of textualism, seeking to look like strict English teachers rigidly following the rules of language. Actually, they seem somewhat more like savvy communications consultants, skilled at manipulating language to serve their objectives. Writing for the Court, Justices Gorsuch and Alito joined each other's opinions in these two decisions only two weeks apart. *Comcast* imposed but-for injury causation as a condition for liability under a statute whose text did not in any way offer a basis for this conclusion. *Babb*, through its almost excruciating attention to statutory text, determined that but-for injury causation could not be a condition for liability for a discriminatory internal process—which, of course, is very difficult to prove—though but-for causation still must be proved to remedy a discriminatory result. Both decisions denied relief. Together, their results illustrate the alarming manipulability of what purports to be a judicial commitment to abide by the constraints of textualism. They also underscore how inpenetrable textualism can be to noninitiates. This, too, helps explain the appeal of textualism masquerading as transparency to satisfy members of the public who long for fixed, clear answers to complex legal questions.

CONCLUSION

Justice Gorsuch's eloquence and his commitment to an 1866 text in *McGirt v. Oklahoma* has quickly and rightfully become famous. His majority opinion began: "On the far end of the Trail of Tears was a promise. . . . Because Congress has not said otherwise, we hold the government to its word."[128]

When slavery ended, the federal government made another promise in 1866. The Civil Rights Act of 1866 committed the nation to protect former slaves, and to assure them—as very recent members of the group "citizens"—a formal, national guarantee of the protection of "full and equal benefit of all laws and proceedings for the security of persons and property."[129] The *Jones* Court accurately characterized this Act as a "sweeping" law clearly

127 Civil Rights Act of 1866 § 1, 14 Stat. 27.

128 McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020).

129 Civil Rights Act of 1866 § 1, 14 Stat. 27.

designed to "break down *all* discrimination between black men and white men" in "basic civil rights."[130]

Tragically, this early promise had an extremely short shelf life. Early commitments during Reconstruction rapidly crumbled—and the Supreme Court itself aided and abetted the multipronged, successful sabotage of the initial promise. A return to the normalcy of virulent racism quickly did more than merely relegate the five major civil rights statutes passed between 1866 to 1875 to the proverbial back burner—normal racism kicked them out of the kitchen and into the cold.

The members of the Thirty-Ninth Congress undoubtedly were naïve in their hope for acceptance and implementation of the bold statutory promise they made through the 1866 Civil Rights Act. They were overly optimistic about obedience to, and enforcement of, the constitutionalized version of the 1866 Civil Rights Act in the text of the Fourteenth Amendment, which they sent to the states in June 1866—shortly after they had overridden President Johnson's veto to make the Civil Rights Act law. The 1866 Act's words certainly have not been followed much, yet they provide a statutory text that remains on the books and deserves attention now. It merits interpretation in a manner consistent with its words, its intent, and its historical context. Congress sought to protect all Americans from a range of broad and often vicious actions used to attack the hard-earned freedom that quickly followed and built upon the Civil War victory. The Civil Rights Act of 1866 justly was celebrated as a major departure from existing law. It was explicit in saying that its provisions were to supersede "any law, statute, ordinance, regulation, or custom, to the contrary[.]"[131] To undermine it through a deeply anachronistic causation rule is to defy both history and text.

The resuscitation of the 1866 Civil Rights Act, which began in the 1960s, included broad statements declaring that the Act's guarantee of equal rights should not be undermined through obfuscation. In *Comcast*, the Court rejected a causation standard that Congress prescribed in 1991 for employment discrimination cases, a test much more easily met than the but-for causation standard the Court seemed to impose out of thin air.[132] It is a bitter irony that, in explaining this rejection in *Comcast*, Justice Gorsuch declared: "[T]o engraft a test from a modern statute onto an old one would thus require more than a little judicial adventurism, and look a good deal more like amending a law than interpreting one."[133] A shell game that cleverly hides the target dishonors both the actual statute and the appropriate judicial role.

130 Jones v. Alfred H. Mayer Co., 392 U.S. 409, 432–33 (1968), *quoted in Comcast*, 140 S. Ct. at 1020 (Ginsburg, J., concurring).

131 Civil Rights Act of 1866 § 1, 14 Stat. 27.

132 *Supra* notes 86–88 and accompanying text.

133 Comcast Corp. v. Nat'l Ass'n of African Am.–Owned Media, 140 S. Ct. 1009, 1017 (2020).

As developed above, Gorsuch's opinion engrafted an ahistorical test onto a major statute that has a proud origin story. The but-for injury causation test—overused, widely misunderstood, and subject to distortion—lacks any basis whatsoever in the Civil Rights Act of 1866. Racial discrimination in many contexts, including contract formation, was the clear target of the 1866 Act, and racial discrimination remains much too pervasive to be hidden behind a convoluted judicial barrier. *Comcast*'s intricate manipulation demeans the text it purports to interpret and reneges on its vital promise. The decision also dishonors history. In *McGirt*, the majority insisted that the Court "ought to hold the government to its word." So should the rest of us.[134]

And hope remains.[135] As Congress demonstrated—at least to a limited extent—in the Civil Rights Act of 1991, our elected representatives retain the constitutional authority to advise both the Court and the country that Congress's words did mean what they said. The nation has paid an incalculable price, across more than 150 years, as the Supreme Court has repeatedly ignored or undermined the bold promise of the Civil Rights Act of 1866—as well as the statute's direct anticipation of giving legally consequential meaning to the "protection" element of "equal protection."

The unredeemed guarantee of the "full" as well as the "equal benefits of all laws and proceedings for the security of persons and property" nonetheless survives, still to be made operative through close attention to statutory text and history. Full redemption remains impossible. Yet much still can be done to implement an extraordinary and venerable promise. It remains crucial in the never-ending pursuit of justice.

134 The prodigious lifetime of work by my colleague, Charles R. Lawrence III, has included recently, e.g., his *Forbidden Conversations: On Race, Privacy, and Community (A Continuing Conversation with John Ely on Racism and Democracy)*, 114 YALE L.J. 1353 (2005); his Georgetown Law School 2017 Commencement Address; and his *Implicit Bias in the Age of Trump,* 133 HARV. L. REV. 2304 (2019–2020). Chuck Lawrence's scholarship as well as his activism underscores how crucial racial reckoning is for everyone—as well as how difficult it will be to achieve even limited success.

135 Larry Yackle noted, "We know, as the world is beginning to understand, how fragile is our way of life and what dreadful chances we take when we trifle with its basic institutions." LARRY W. YACKLE, RECLAIMING THE FEDERAL COURTS (1994). And he believed the situation for essential constitutional rights was dire twenty-five years ago. Nonetheless, he expressed hope. For a brief discussion of the distinction between optimism and hope, see Aviam Soifer, *Optimism v. Hope: Larry Yackle, In Fairness*, 98 B.U. L. REV. 335 (2018).