No. 18-1171

IN THE
Supreme Court of the United States

COMCAST CORPORATION,
Petitioner,
v.
NATIONAL ASSOCIATION OF AFRICAN AMERICAN-OWNED MEDIA AND ENTERTAINMENT STUDIO NETWORKS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF TORTS SCHOLARS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

Mark P. Gergen
University of California School of Law
215 Boalt Hall
Berkeley, CA 94720
(510) 643-9577
mgergen@law.berkeley.edu

John Fabian Witt
Yale Law School
127 Wall Street
New Haven, CT 06520

Paul Hoffman
Counsel of Record
UCI Law Civil Rights Litigation Clinic
401 E. Peltason, Suite 1000
Irvine, CA 92697
(310) 717-7373
hoffpaul@aol.com

I

QUESTION PRESENTED

Does a claim of race discrimination under 42 U.S.C. § 1981 fail in the absence of but-for causation?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued: Page(s)

Cases—Continued: Page(s)

Statutes:

Other Authorities:

Other Authorities—Continued: Page(s)

INTEREST OF AMICI

Amici are law professors who study the history of American tort law.[1]

Our interest is to clarify the historical record. Petitioner devotes a section in its brief to the claim "But-For Causation Was The *Sine Qua Non* of Tort Liability When Section 1981 Was Enacted In 1866." Br. for Pet'r at 23–27. This claim is inaccurate. There was no general rule requiring but-for causation in 19th century tort law.

These amici take no position on other issues raised in this case. This brief has been prepared by individuals affiliated with U.C. Berkeley School of Law and Yale Law School, but does not purport to present either school's institutional views.

SUMMARY OF ARGUMENT

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 ("Section 1981"), courts rejected a but-for requirement.

Damage was presumed for many intentional torts, including torts involving conduct similar to the conduct covered by Section 1981. These presumptions made it unnecessary for the plaintiff to establish a loss that would not have occurred absent the defendant's wrong.

---

[1] This brief was prepared entirely by amici and their counsel. No other person made any financial contribution to the preparation or submission of this brief. All parties have filed notices of blanket consent to the submission of amicus curiae briefs.

Some intentional torts that required a plaintiff to establish damage also permitted a plaintiff to establish liability in the absence of but-for causation. These rules were explained in moral terms and were not understood to be exceptions to a general requirement of but-for causation.

To be sure, some 19th century negligence cases and treatises rejected liability for negligence when a plaintiff would have suffered the same loss absent the defendant's negligence. But these authorities did not establish a background rule for tort law. To the contrary, courts tailored causation tests in tort to suit the moral issue at hand. When appropriate, courts even established liability in certain negligence cases absent but-for causation.

ARGUMENT

I. Damage Was Presumed for Many Torts, Including Torts Involving Conduct Similar to Conduct Covered by Section 1981

Petitioner asserts "but-for causation [w]as the *sine qua non* of [tort] liability" in 1866. Br. for Pet'r at 25. All of the cases Petitioner cites as authority for this proposition involve negligence claims. Section III of this Brief addresses these cases and the status of the but-for rule in negligence. This Section explains that but-for causation was not required—much less a "*sine qua non* of liability"—for the many torts with presumed damage. *Id.* These include intentional torts that involved conduct similar to the conduct covered by Section 1981.

Two well-established general maxims animated tort law in the 19th century. The most general of these maxims was that a tort requires the concurrence

of two things: "actual *or legal damage* to the plaintiff, and a wrongful act committed by the defendant." C. G. Addison, *Wrongs and Their Remedies: Being a Treatise on the Law of Torts* 1-2 (2d ed. 1864) (emphasis added).

The second maxim followed from the first: "no action lies for a loss without an injury—*damnum absque injuria*." 1 Francis Hilliard, *The Law of Torts or Private Wrongs* 85 (2d ed. 1861). Courts and treatise writers invoked this maxim to explain, for example, why an innocent victim could not recover from a nonnegligent defendant who had committed no wrong in inflicting the harm. *See* John Fabian Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* 43-50 (2004).

An action did lie, by contrast, for a legal injury without an accompanying loss. Courts recognized such actions at common law a century and a half ago and still do today. Conduct can be actionable without the plaintiff having to prove actual damage (meaning harm or loss) because, as the first maxim asserted, some cases establish a presumption of damages, or what Addison called "legal damage." Hilliard, the author of the first American treatise on tort law, described such conduct as involving a "wrong or violation of a private right" for which "damage will be presumed." Hilliard, *supra*, at 87 (2d ed. 1861) (emphasis omitted). Hilliard ticked off example after example, and dwelled on the example of the classic 1703 English case of *Ashby v. White*, (1703) 92 Eng. Rep. 126 (K.B.), which "held that an action lies for refusing a vote, though the candidate voted for was elected." Hilliard, *supra*, at 87 (2d ed. 1861). The presumption of damage eliminated the need to

establish the defendant's wrong caused the plaintiff any actual damage.

Leading torts jurist Thomas Cooley stated that Hilliard's presumption of damage applied to "any distinct legal wrong, which in itself constitutes an invasion of the right of another." Thomas M. Cooley, *A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract* 69 (1879). He distinguished such an in-itself wrong from "an act or omission" that "is not in itself a distinct wrong, and can only become a wrong to any particular individual through injurious consequences resulting therefrom." *Id.*

Justice Joseph Story wrote the leading American decision making the point. *Webb v. Portland Mfg. Co.*, 29 F. Cas. 506 (C.C.D. Me. 1838), held that conduct can be tortious without a showing that the defendant's wrongful conduct caused actual damages to the plaintiff. *Webb* involved a dispute between competing mills over the right to draw water from a river. The defendant argued that no action lay, whatever the parties' legal rights with respect to use of the water, because the plaintiff's mill was not harmed by the defendant's diversion of the water. *Id.* at 507.

Justice Story rejected this argument. He explained:

> I can very well understand that no action lies in a case where there is damnum absque injuria, that is, where there is a damage done without any wrong or violation of any right of the plaintiff. But I am not able to understand, how it can correctly be said, in a legal sense, that an action will not lie, even in case of a wrong or violation of a right, unless it is followed by some

> perceptible damage, which can be established, as a matter of fact; in other words, that injuria sine damno is not actionable.

Id.[2] To make the point, Justice Story cited Hilliard's favorite example: "the great case of *Ashby v. White*." *Id.* at 508.

---

[2] *See also Amsterdam Knitting Co. v. Dean*, 43 N.Y.S. 29, 30–31 (App. Div. 1897), *aff'd*, 162 N.Y. 278 (1900) (citing *Webb v. Portland Mfg. Co.*, 29 F. Cas. 506 (C.C.D. Me. 1838)) (holding that defendant erecting an embankment in a creek and thus changing water flows for the plaintiff's property "was a proper one for equity to interpose by way of injunction, though no actual damage was shown" because "plaintiff has the legal right to have the water . . . enter its mill pond as it was accustomed to do"); *Townsend v. Bell*, 17 N.Y.S. 210, 211–12 (Gen. Term 1891) (holding that when upstream defendants polluted the plaintiff's water source, "it is not a defense to defendants that others also pollute the stream . . . . [I]t is urged by defendants that no actual damages to plaintiff is shown. The cases hold that this is not necessary to support an injunction in such instances. The plaintiff's right [to unpolluted water] is interfered with."); *Barnes v. Sabron*, 10 Nev. 217, 247 (1875) ("The rule of law is, that in cases for the diversion of water, where there is a clear violation of a right and equitable relief is prayed for, it is not necessary to show actual damage; every violation of a right imports damage."); *Stein v. Burden*, 24 Ala. 130, 148 (1854) (upholding a lower court's ruling that "a riparian proprietor was entitled to damages for any disturbance of his right, without proof of actual damage"); *Parker v. Griswold*, 17 Conn. 288, 302 (1845) ("[I]t is now settled, by the uniform course of decisions, both in *England* and in this country, that where one has a right to the use of a stream naturally flowing through his land, capable of being used for a beneficial purpose, and it is diverted therefrom by another, it is not necessary for the person having such right, in an action for such diversion, to prove . . . that he sustained any specific damage by such diversion.").

The English treatise writer Underhill drew the same injuria-sine-damnum lesson as Justice Story. He explained that "although an action will not lie for a *damnum sine injuriâ*, yet the converse does not hold good in every case . . . . A wrongful act, whereby a private right is infringed, requires no proof of damage." Arthur Underhill, *A Summary of the Law of Torts, or Wrongs Independent of Contract* 6–7 (1873). Underhill contrasted "breaches of duty . . . no man can be said to suffer, unless some actual loss or damage is thereby caused to him." *Id.* at 7.

Nineteenth-century tort plaintiffs routinely made out such claims for legal or presumed injury without a showing of actual damage caused by the wrongful conduct at issue. In the classic North Carolina trespass case *Dougherty v. Stepp*, 18 N.C. 371 (1835), for example, Chief Justice Thomas Ruffin ruled that unauthorized entry onto land constituted a trespass regardless whether it caused damage. "From every such entry against the will of the possessor," Ruffin wrote, "the law infers some damage." *Id.* at 372.[3]

---

[3] *See also Sharpe v. Levert*, 26 So. 100, 102 (La. Ct. App. 1899) ("[A] trespass cannot be justified or continued on the ground of its being beneficial to the party trespassed upon."); *Sefton v. Prentice*, 37 P. 641, 643 (Cal. 1894) ("[A] man has no right to commit a trespass upon the property of another because . . . it would do the owner of the property no harm."); *Bragg v. Laraway*, 27 A. 492, 495 (Vt. 1893) ("[T]respass *quare clau*sum is maintainable for an entry upon the land of another, although there is no real damage . . . ."); *Smethurst v. Journey*, 6 Del. 196, 197 (Del. Super. Ct. 1855) ("[E]very such entry was in itself a trespass, in which the law implied damage . . . ."); *Appleton v. Fullerton*, 67 Mass. 186, 194 (1854) ("[I]t was a violation of the right of the plaintiff as owner, it was in law a trespass . . . ."); *Nicodemus v. Nicodemus*, 41 Md. 529, 537–38 (1875) (holding that plaintiff was entitled to pecuniary damages because

Courts offered reasons for the presumption of damages in trespass cases, to be sure. As the Supreme Court of Vermont put it in 1893, "repeated acts of the kind [trespasses] might be used as evidence of title, and thereby the right of the plaintiff might be injured." *Bragg v. Laraway*, 27 A. 492, 495 (Vt. 1893). But that is precisely the point. Nineteenth-century courts adopted a bespoke approach to damages causation, tailoring the doctrine to the structure of the particular tort at issue.[4] Among the torts for which damages were presumed were the

---

defendant trespassed even without causing actual damage to property).

[4] The law of libel and slander developed at length the distinction between conduct that was actionable without proof of damage and conduct that was actionable only with proof of damage. Words that were actionable without a showing of damage were called slander per se. One category of slander per se was to falsely accuse a person of being unfit for their trade, profession, or office. 2 Franklin Fiske Heard, *A Treatise on the Law of Libel and Slander*, 23 et seq. (1860). A right protected by Section 1981 is the right to pursue a livelihood. The other categories of slander per se were "words importing a crime punishable by law . . . or imputing to [a person] some foul and loathsome disease, which would expose him to the loss of his social pleasures . . . ." *Id.* at 2.

personal torts of battery[5] and false imprisonment.[6] Thus, a malicious touching of another person in a way

[5] *See Kirland v. State*, 43 Ind. 146, 150 (1873) (explaining that battery "either willfully committed, or proceed from a want of due care" is an exception to the principle of *damnum absque injuria*); *Johnson v. State*, 17 Tex. 515, 517 (1856) ("The least touching of another's person, wilfully [sic] and in anger, constitutes in law a battery; and every battery includes an assault. The act of laying hands on the person of the party assailed, under the circumstances, was sufficient to constitute a common assault and battery . . . ."); *Norton v. State*, 14 Tex. 387, 394 (1855) (holding that "every unlawful touching of another's person is an assault and battery" and that battery resulting in physical injury merely "render[s] it of an aggravated nature"); *Hunt v. People*, 53 Ill. App. 111, 112 (Ill. App. Ct. 1894) (affirming a criminal conviction for assault and battery based on jury instructions which did not require that the victim was injured because "[a]t the common law the least touching of the person of another in anger was a battery, for, as it is said, the law can not draw the line between different degrees of violence, and therefore totally prohibits the lowest stage of it."); *Coward v. Baddeley*, (1859) 157 Eng. Rep. 927; 4 H. & N. 478 ("Any injury whatever, be it never so small, being it actually done to the person of a mann in an angry, or revengeful, or rude, or insolent manner, as by spitting in his face, or any way touching him in anger, or violently jostling him out of the way, are batteries in the eyes of the law.").

[6] *See Gallimore v. Ammerman*, 39 Ind. 323 (1872) (holding that damage is presumed in false imprisonment cases "unless it should be shown that the acts were rendered rightful and legal by some competent excuse or authority. Such excuse or authority must come from the defendant."); *Judson v. Reardon*, 16 Minn. 431, 437 (1871) (holding that in false imprisonment cases, if the defendant's imprisonment of the plaintiff "was illegal, it was, in law, malicious, and would support the verdict [for plaintiff], for it would be the willful doing of an injurious act without lawful excuse, from which the law implies malice . . . ."); *Burch v. Franklin*, 7 Ohio N.P. 155 (Ohio Ct. Com. Pl. 1897) ("The gravamen of the trespass—false imprisonment—is the unlawful act of the defendant, but it has been held that it is not necessary

that was considered to be an affront to their dignity was considered to be actionable without a showing of damage. Cooley explained: "Thus, to lay hands on another in a hostile manner is a battery, though no damage follows." Cooley, *supra*, at 162.

Indeed, a plaintiff was not required to allege even an emotional or mental injury when the defendant's conduct was a clear affront to the plaintiff's dignity. Waterman explained:

> In every case where the act complained of was wantonly done, and there is nothing in the evidence that shows improper conduct in the plaintiff at the time he retained the injury, he will be entitled to the presumption that he has suffered, in his feelings as every honorable man would be likely to do under similar circumstances.

Thomas W. Waterman, *A Treatise on the Law of Trespass in the Twofold Aspect of Wrong and Remedy* 249 (1875).

Mid-nineteenth-century courts appreciated full well that cases involving discrimination on the basis of race involved the sort of dignitary injury for which damages could be awarded without a showing of

---

for the plaintiff in his petition to aver that the imprisonment was unlawful. Imprisonment, it is said, is presumed wrongful; if there is a legal excuse for it, this is in defense."); *Blanchard v. Burbank*, 16 Ill. App. 375, 383 (1885) (citing *Webb v. Portland Mfg. Co.*, 29 F. Cas. 506 (C.C.D. Me. 1838)) (finding jury instructions in a civil false imprisonment suit "erroneous in holding that in this case actual damages must be proved, and can not be inferred or presumed . . . ."); "If the party is under restraint, and the officer manifests an intention to make a caption, it is not necessary there should be actual contact." Thomas M. Cooley, *A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract* 170 (1879).

harm. In *Chicago & N.W. Ry. Co. v. Williams*, 55 Ill. 185, 186–87 (1870), the defendant's brakeman refused the plaintiff, "a colored woman," seating in the "ladies' car" of a train, forcing her to sit in the men's car. The jury awarded $200 damages. The defendant appealed, challenging the judge's instruction to the jury that it "may give damages above the actual damages sustained . . . ." *Id.* at 190. The Supreme Court of Illinois upheld the award of damages, holding:

> If 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. But we apprehend, that if the act is wrongfully and wantonly committed, the party may recover, in addition to the actual damages, something for the indignity, vexation and disgrace to which the party has been subjected.

Id. The defendant's "act," the court concluded, "was, in itself, wrongful." *Id.*

II. Some Intentional Torts Requiring a Showing of Actual Damage Nonetheless Allowed Liability in the Absence of But-For Causation

Even some intentional torts that theoretically required a plaintiff to establish damage nonetheless made it possible for a plaintiff to establish liability in the absence of but-for causation. It would be anachronistic to say these rules were exceptions to a general rule of but-for causation, or to say these rules show there was some other general rule on factual cause. Nineteenth-century tort doctrine contained a

suite of bespoke causation rules tailored to the moral structure the tort in question. There were no general rules on factual causation in the 19th century. G. Edward White has observed that rules on factual causation emerged relatively late in the development of tort law. He attributes this to causation not being at issue in "intentional tort cases or cases where an act-at-peril standard of liability governed . . . ." G. Edward White, *Tort Law in America: An Intellectual History* 314 (1980).[7]

The first example is from the law of fraud. The test to determine whether a defendant's misrepresentation induced the plaintiff to act was whether the misrepresentation was a material factor in the plaintiff's decision, not whether it was a but-for cause of the decision. Bigelow explains:

> It is not necessary to prove that the plaintiff relied solely upon the defendant's representations. It is sufficient if the representations were relied upon by the plaintiff as constituting one of the substantial inducements to his action. It is indeed sometimes said that the false representations

---

[7] In its brief on behalf of the petitioners, the United States quotes Professor White asserting a "but-for" test in nineteenth-century tort law. Brief for the United States as Amicus Curiae Supporting Pet'rs, at 6, Aug. 2019, (quoting G. Edward White, *The Emergence and Doctrinal Development of Tort Law, 1870-1930*, 11 U. ST. THOMAS L.J. 463, 464-65 (2014)). Professor White's article makes clear he is talking about personal injury negligence cases, where the but-for approach played a more substantial though still not exclusive role. *Id.* at 464–65 (discussing "the scope of liability for accidental personal injuries"); *see infra* pp. 14–17 (describing the limits of but-for causation even in negligence cases).

> must have been such that without them the transaction complained of would not have taken place. But it is has well been said it is not possible for any man, in the aggregate of inducements which led to the transaction, to determine whether the result would have been attained with some of the inducements wanting. Nor should the guilty party be permitted to allege in excuse that the innocent party might have acted as he did, if less deceit had been practised upon him. If a man resort to unlawful means and accomplish an unlawful purpose, the law will not stop to measure such inducements.

2 Melville M. Bigelow, *The Law of Fraud and the Procedure Pertaining to the Redress Thereof* 88-89 (1877).[8]

---

[8] *See also Moline-Milburn Co. v. Franklin*, 37 Minn. 137, 139 (1887) ("It is not necessary that the false representations should have been the sole motive; it is enough if they had a material influence upon plaintiff, although combined with other motives. In other words, it is not necessary that [defendant]'s representations were the sole operating cause inducing plaintiff to take the note; it is enough if they constituted one of the substantial inducements to such action."); *Fishback v. Miller*, 15 Nev. 428, 442 (1880) (reversing lower court holding in civil fraud case partly because jury instructions were erroneous when they told the jury to find against the party alleging fraud "unless they are satisfied that [the] representations were the sole and exclusive inducement to the purchase . . . ."); *Safford v. Grout*, 120 Mass. 20, 25 (1876) ("It is not necessary that the false representations should have been the sole or even the predominant motive; it is enough if they had material influence upon the plaintiff, although combined with other motives."); *James v. Hodsden*, 47 Vt. 127, 137 (1874) ("[I]t is never possible for any man, in the aggregate of inducements that effected the sale, to determine whether the result would have been attained with some of the inducements abated . . . [If the defendant]

A similar rule applied in trademark law. A leading American case stating the rule is from early in the 20th century.

> One who has fraudulently appropriated the trade-marks and labels of another will hardly be heard to say that he would have been equally successful had he used honest indicia and labels. It would be casting an intolerable burden upon the complainant in such cases if, after proving the fraud, the infringement and the profits, he were compelled to enter the realms of speculation and prove the precise proportion of the infringer's gains attributable to his infringement. The argument reduces itself to this: The defendant says: "If I had been honest I could have sold at least a part of these goods and as you have failed to show what that part is you are entitled to recover nothing." The answer is: "You were not honest."

Saxlehner v. Eisner & Mendelson Co., 138 F. 22, 24 (2d Cir. 1905).

---

resorts to unlawful means and accomplishes a fraudulent purpose, the law will not stop to measure the force of such inducements. It is enough that the party was deceived and cheated, and the defendant's falsehood and fraudulent practices contributed to that end."); *Cabot v. Christie*, 42 Vt. 121, 127 (1869) ("If the false representations were material and relied upon, and were intended to operate and did operate as one of the inducements to the trade, it is not necessary to enquire whether the plaintiff would or would not have made the purchase without this inducement."); *Benton v. Pratt*, 2 Wend. 385, 390 (N.Y. Sup. Ct. 1829) (holding that the elements of civil fraud are "an unqualified falsehood, with a fraudulent intent as to a present or existing fact, and a direct, positive and material injury resulting therefrom to the plaintiff. This is sufficient to sustain the action.").

III. The But-For Approach was Not Even the Exclusive Causation Test in 19th Century Negligence Cases

There are 19th century cases involving accidental harms in which courts find no liability for negligent conduct because the plaintiff would have suffered the same loss absent the defendant's negligence. Petitioners and the United States as amicus dwell on such cases at length in their briefs. But such cases are beside the point. Nineteenth century courts and treatise writers evaluated the issue of causation as turning on the appropriate structure of the tort in question. For many negligence claims, but-for causation established the warranted relationship between plaintiff and defendant. Even in negligence torts, however, the courts found room to displace the but-for inquiry when moral considerations appropriate to the tort at hand so dictated.

A. The Status of the But-For Rule in Early Negligence Law.

Petitioner relies on Jeremiah Smith as authority for the claim that the but-for rule was well-established in the 19th century. Petitioner cites this statement by Smith: "[t]he 'but for' requirement is generally one of the indispensable elements to make out a legal cause." Jeremiah Smith, *Legal Cause in Actions of Torts*, 25 Harv. L. Rev. 103, 109 (1911). Br. for Pet'r at 24. But in the 1911–12 sequence of articles on which Petitioner relies, Smith was writing about the negligence tort, not the intentional torts that offered closer analogues to Section 1981.

Moreover, even in negligence cases, Smith readily assented to the limits of the but-for test, which he

stated "is not likely to be sustained in a well-considered opinion of an appellate court." Smith, *supra*, at 108.[9] In particular, Smith observed that the but-for test did not apply in a negligence case "[w]here two tortfeasors are simultaneously operating independently of each other, and the separate tortious act of each is sufficient in and of itself to produce the damaging result." Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 Harv. L. Rev. 303, 312 (1912). Smith, like any number of jurists before and after him, agreed that the but-for test was unsatisfactory when it left a plaintiff without a claim because multiple wrongdoers' acts were independently sufficient to invade the interest in question.

Discontent with the but-for approach led Smith to articulate a different test altogether. "Defendant's tort," he concluded, "must have been a *substantial factor* in producing the damage complained of." *Id.* at 309 (emphasis added). Smith's contemporary Leon Green adopted the same "substantial factor" test. As Green saw it, the but-for test was "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

---

[9] Smith's major criticism of the but-for test in negligence law is that it is over-inclusive. Smith critiques other tests applied by courts, including the "immediate cause" test (Smith described this as "[t]he test or rule which is quoted in the law books more frequently than any other," Smith, *supra*, at 106 (1911)); "the distinction between cause and condition," *id.* at 110, the "Last (or Nearest) Wrongdoer Rule," *id.* at 111, "The Probable Consequence Rule," *id.* at 114, and a "rule of non-liability for improbable consequences," *id.* at 123. In the passage quoted by Petitioner, Smith is arguing that these tests presuppose the existence of but-for causation and require something in addition.

fact whether the defendant should be held responsible." Leon Green, *Are There Dependable Rules of Causation*, 77 U. Pa. L. Rev. 601, 605 (1929). Dubious about the usefulness of any general rule on causation, Green thought the cases embodied something like a "substantial factor" rule as the least bad alternative. *Id.* at 607.

The first Restatement of Torts, promulgated by the American Law Institute in 1934, adopted Smith's and 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." Br. for Pet'r at 25. 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. *See* Restatement of Torts § 9 cmt. b (1934) ("In order that a particular act or omission may be the legal cause of an invasion of another's interest, the act or omission must be a substantial factor in bringing about the harm . . . ."). The substantial factor test appears in Sections 279 and 280, which cover the "causal relation necessary to liability for intentional invasions of interests of personality, land, and chattels." *See id.* §§ 279–80. As for negligence torts, the First Restatement followed Smith's approach once again, adopting a constrained version of the but-for test, see Restatement of Torts § 432(1) (1934), that added Smith's exception for cases of multiple sufficient causes, *see id.* § 432(2). When the tort in question warranted dropping the but-for approach, the Restatement authors followed the courts and did so, even in negligence cases.

The First Restatement's account of damages causation in negligence cases offered a further basis for departing from the but-for test. It provided:

> [I]f the actor's negligence, either of act or omission, results in harm of the sort from which the duty was designed to protect the other, his negligence may be regarded as a substantial factor in bringing about the harm in spite of the fact that the same harm might possibly have been sustained had the actor not been negligent. In order to prevent the actor's negligent conduct from being a substantial factor, it must clearly appear that the required precautions would have proved unavailing or that the harm would have been sustained even had the negligent act not been done.

Restatement of Torts § 432 cmt. c (1934). Cooley's 19th century treatise states a factual presumption for this type of case that is even more favorable to the plaintiff. *See* Thomas M. Cooley, *A Treatise on the Law of Torts* 665 (1879). In discussing the liability of a railway for failing to sound an alarm when approaching a crossing, Cooley explains:

> He has shown fault in the railway company when he has shown the failure to sound the alarm; and as the injury is precisely such as one as the alarm was intended to prevent, some presumption that the injury resulted from the neglect may well be indulged unless his own fault was manifest.

Id.

B. Petitioner's Leading Nineteenth-Century Dicta is Actually About Proximate Causation, Not Cause-in-Fact

The Restatement (Third) of Torts: Liability for Physical Harm and Emotional Harm presents the "but-for" as a test of factual causation that should be kept distinct from the issue of proximate causation. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 26, cmt. a (2010). In the 19th century, courts and treatise writers often did not separate the issue of factual causation from the issue of proximate causation.[10] Because modern lawyers are taught to think of causation as a factual issue, they often fail to realize when reading 19th century cases and treatises that the authors are addressing what today would be considered an issue of proximate causation.

Petitioner falls into this common confusion when it quotes a passage from Hilliard as purportedly recognizing "the indispensability of but-for causation." Br. for Pet'r at 24–25. Petitioner's quoted passage from Hilliard quotes in turn from Chief Justice Lemuel Shaw in *Marble v. City of Worcester*, 4 Gray 395 (1855) to state that

> '[w]here two or more causes concur to produce an effect, and it cannot be determined which contributed most largely, or whether, without the concurrence of both, it would have

[10] The view that causation was not primarily a factual issue persisted well into the 20th century. *See, e.g.*, Robert J. Peaslee, *Multiple Causation and Damage*, 47 Harv. L. Rev. 1127, 1128 (1934) ("How far causal acts shall involve legal responsibility is very largely settled upon moral considerations, often denominated justice.").

> happened at all, and a particular party is responsible only for the consequences of one of those causes, a recovery cannot be had.'

1 Francis Hilliard, *The Law of Torts or Private Wrongs* 78-79 (3d ed. 1866) (quoting *Marble*, 4 Gray at 397).

Hilliard's and Shaw's passage misstates the law of multiple sufficient causes, even in the nineteenth century.[11] But Hilliard and Shaw are not addressing what would be called an issue of factual causation today. They are analyzing cases where necessary antecedents were said to have an insufficiently proximate connection to the harm at issue to sustain liability for that harm. Both Hilliard and Shaw are asking whether there are moral and legal reasons to cut off liability from attaching to wrongdoers who are concededly causes-in-fact of the injury in question. Such authorities relate indirectly, if at all, to cases of wrongdoing that did not bear a but-for causal relation to the plaintiff's injury.

In *Marble v. City of Worcester*, for example, a horse broke free and struck a pedestrian when a

---

[11] *Cook v. Minneapolis, St. Paul, S.S.M. Ry. Co.*, 74 N.W. 561 (1898), a leading 19th century case involving multiple sufficient causes, set forth the majority rule. The court reasoned that "where two causes, each attributable to the negligence of a responsible person, concur in producing an injury to another, either of which causes would produce it regardless of the other, it is reasonable to say that there is a joint and several liability, because, whether the concurrence be intentional, actual or constructive, each wrongdoer, in effect, adopts the conduct of his co-actor." *Id.* at 566. By contrast, "where a cause set in motion by negligence, reaches to the result complained of in a line of responsible causation, and another cause, having no responsible origin, reaches it at the same time, so that what then takes place would happen as the effect of either cause . . . then the consequence cannot be said . . . to relate to negligence as its antecedent." *Id.*

sleigh driver lost control of his sleigh after hitting a hole in the ice in the street. *Marble*, 4 Gray at 395. The pedestrian sued the city, claiming the city was responsible for the hole. *Id.* at 396. What made the case unusual is that the horse ran some fifty rods (more than 800 feet) before running over the plaintiff. *Id.* at 395. The city's poor maintenance of the street was almost certainly a necessary cause of the injury. Chief Justice Shaw's view is that the injury was too remote in time and space from the hole in the ice for the hole to be treated as the legal or proximate cause of the injury. *Id.* at 402–06.

Hilliard makes clear that he is analyzing this same problem of proximate rather than but-for causation. The sentence immediately following his quotation from Shaw in *Marble* states that "this relation of cause and effect cannot be made out by including the independent, illegal acts of third persons." Hilliard, *supra*, at 79 (3d ed. 1866). That the illegal act of a third person was also a necessary cause of harm is irrelevant as a matter of factual causation. But Hilliard, like some other 19th century jurists, thought it crucial for the analysis of what we would now call proximate cause that a third party's illegal act prevented assigning legal responsibility for the harm to the defendant.[12]

---

[12] Hilliard follows this with several pages of examples of cases in which courts find cause does not exist. Hilliard, *supra*, at 79–82 (3d ed. 1866). In every example the defendant's wrongful conduct and the third person's illegal act are both necessary causes of the harm.

CONCLUSION

Tort doctrine in the 19th century drew on different approaches to causation depending on the moral questions at stake in different torts. For many intentional torts, damage causation was presumed. These included the torts most similar to the conduct covered by Section 1981. Some intentional torts that required proof of damage adopted causation rules that made it possible to establish damage in the absence of but-for causation. In negligence cases, courts often did not allow recovery in the absence of but-for causation, but even here the law dropped the "sine qua non" requirement when the situation warranted. When jurists addressed causation doctrine, they tailored it to the moral considerations appropriate to the circumstances of the tort in question.

Respectfully submitted,

Mark P. Gergen
University of California
School of Law
215 Boalt Hall
Berkeley, CA 94720
(510) 643-9577
mgergen@law.berkeley.edu

John Fabian Witt
Yale Law School
127 Wall Street
New Haven, CT 06520

Paul Hoffman
Counsel of Record
UCI Law Civil Rights
Litigation Clinic
401 E. Peltason,
Suite 1000
Irvine, CA 92697
(310) 717-7373
hoffpaul@aol.com