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Statutory Proximate Cause

Sandra F. Sperino

STATUTORY PROXIMATE CAUSE

*Sandra F. Sperino**

INTRODUCTION

Federal statutes often use general causal language to describe how an actor's conduct must be connected to harm for liability to attach. For example, a statute might state that harm must be "because" of certain conduct.[1] Federal courts have recently relied on this general causal language and other arguments to apply the common law idea of proximate cause to several federal statutes.[2]

While legal scholarship has explored the relationship between statutes and the common law generally,[3] it has not considered whether particular common law doctrines are especially problematic in the statutory context. This Article argues that using proximate cause in statutes raises many theoretical, doctrinal, and practical

* Associate Professor, University of Cincinnati College of Law. I would like to thank Jessie Allen, Susan Bandes, Marianna Bettman, William Corbett, Alex Glashausser, Joan Howarth, Emily Houh, Brad Mank, Darrell Miller, Noga Morag-Levine, Douglas Mossman, Lumen Mulligan, Michael Solimine, Paul Stancil, Jane Stapleton, Howard Wasserman, Verna Williams, and Verity Winship for their helpful comments on earlier drafts of this article. I owe special thanks to Jane Baron for her continued mentoring and insightful feedback on this project. This Article has also benefited from suggestions made by participants in the Junior Faculty Federal Courts Workshop, a workshop at the Maurer School of Law, Indiana University, the Sixth Annual Colloquium on Current Scholarship in Labor and Employment Law, the University of Cincinnati College of Law Summer Workshop Series, and the Michigan State University College of Law Junior Faculty Workshop. Christian Dennery provided research assistance.

1 *See, e.g.*, 38 U.S.C. § 4311(a) & (b) (2006) (using words "because" and "on the basis of").

2 *See infra* note 79.

3 *See, e.g.*, GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 5 (1982); WILLIAM D. POPKIN, STATUTES IN COURT 45, 67 (1999); Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908) (examining the relationship between legislation and judge-made law).

problems, and that, to date, courts have engaged in crude statutory interpretation that largely ignores these issues.

Court interpretation relies on demonstrably weak textual, intent, and purpose-based arguments to justify using proximate cause. Courts have not been sufficiently attentive to congressional direction, separation of powers, the relationship of modern statutes to the common law, and whether proximate cause is theoretically stable. I coin the term "statutory proximate cause" to highlight the special issues that arise when this common law principle is used in statutes.[4]

In statutory proximate cause cases courts assume that federal statutes are comparable to common law torts, such as negligence. While statutes are often torts in the broad sense that they are civil actions that do not arise from a contract, this definition is not helpful to understanding whether proximate cause should be applied to a particular statute.

The Article highlights how, at its core, proximate cause is a mechanism for limiting liability for conduct that statutes otherwise arguably prohibit. Courts assume that congressional intent related to proximate cause resides only in narrow causal language and ignore that Congress often expresses intent related to liability limits throughout statutory regimes. Indeed, in many instances Congress has provided a complex system of interlocking liability limits that strongly suggests that the space for proximate cause is not coterminous with the common law. More importantly, if a modern statute contains gaps regarding the extent of liability, there is no reason to generally assume those gaps should be filled by reference to the common law.

Proximate cause is a notoriously flexible and theoretically inconsistent concept. This Article argues that the term is often an empty vessel, into which the courts can pour multiple meanings. Courts often use the broad idea of proximate cause as a framework for discussion, selectively quoting available sources to reach a particular outcome. Proximate cause is so slippery and used in so many different iterations, that it does not provide potential litigants with enough guidance to judge the likely outcome of disputes either *ex post* or *ex ante*.

Anticipating increased future judicial forays into statutory proximate cause, this Article argues that courts must conduct more sophisticated inquiries into whether statutes incorporate common law proximate cause and demonstrates why courts should be reluctant to import it. It explains how courts can often use explicit statutory provisions or other doctrines to limit liability. It calls for courts to abolish

4 This Article does not consider how proximate cause should apply to criminal statutes.

interpretive canons that currently favor using proximate cause and sets forth an architecture for courts to use in those instances when proximate cause is needed.

Parts I and II provide the analytical groundwork for the Article by providing examples of statutes that raise statutory proximate cause problems and discussing proximate cause, separation of powers, and statutory interpretation. Part III demonstrates the faulty arguments courts have used when engaging in statutory proximate cause inquiries. Part IV describes issues that make proximate cause especially problematic with regard to statutes, arguing that many statutes do not map well onto the traditional torts in which proximate cause developed. Part V develops an architecture for statutory proximate cause inquiries.

I. Proximate Cause: The Work of Aladdin's Lamp[5]

To consider whether proximate cause should enjoy a place in statutes, it is first necessary to have an understanding of tort causation, separation of powers, and statutory interpretation. An exhaustive description of these topics is not especially helpful to the task at hand, especially given the extensive scholarship that deals with these subjects individually. Rather, this Part and the following one perform a framing function, identifying and defining the key attributes of these topics relevant to the underlying inquiry.

At common law, causation often embraces two different kinds of issues: cause in fact and legal or proximate cause.[6] "Conduct is a factual cause of harm when the harm would not have occurred absent

5 *See* Leon Green, *Proximate Cause in Texas Negligence Law*, 28 Tex. L. Rev. 471, 471–72 (1950) ("No other formula . . . so nearly does the work of Aladdin's lamp."). For further discussion of proximate cause, see, e.g., Patrick J. Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 Wash. U. L.Q. 49, 51 (1991); William M. Landes & Richard A. Posner, *Causation in Tort Law: An Economic Approach*, 12 J. Legal Stud. 109 (1983) (endeavoring to analyze causation within an economic paradigm of torts); Steven Shavell, *An Analysis of Causation and the Scope of Liability in the Law of Torts*, 9 J. Legal Stud. 463 (1980) (defending causation principles as a mechanism for maximizing social welfare); Richard W. Wright, *Causation in Tort Law*, 73 Cal. L. Rev. 1735, 1740 (1985) (attempting to develop a "more satisfactory" explanation of causation).

6 The distinction between these two concepts is often blurred. *See* Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 Vand. L. Rev. 941, 945 (2001) (recognizing the overlap between different aspects of causation and arguing that cause-in-fact and normative judgments about liability should be clearly distinguished).

the conduct."[7] In some tort cases, such as negligence cases, factual cause is a necessary, but not a sufficient basis for imposing liability on a defendant for harm. In these cases, courts impose a requirement of legal cause, also called proximate cause.

Four attributes of proximate cause are important for purposes of statutory analysis. First, courts have not arrived at a consistent concern or set of concerns that underlie it. Second, proximate cause inherently relates to policy. While courts express proximate cause in different ways, every iteration serves a liability-limiting function, in that it further defines the scope of prohibited conduct in cases where an actor can be described as factually causing an event. Proximate cause expresses a normative preference about where the line should be drawn. Third, the goals of proximate cause have evolved over time and are still evolving. Finally, courts vary the use of proximate cause in tort cases, depending on whether the underlying tort is an intentional one or not. Together, these four attributes make it difficult to apply proximate cause to statutes.

Defining proximate cause is notoriously tricky.[8] Leading torts commentators indicate that "[t]here is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion."[9] Considered broadly, proximate cause is essentially concerned with problems regarding intervening actions, a foreseeable plaintiff, the scope of risk of the defendant's actions, and/or policy concerns.[10] While it is possible to

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7 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 26 (2010).

8 *See* BLACK'S LAW DICTIONARY 250, 1346 (9th ed. 2009) (providing multiple definitions for proximate cause and indicating that the following terms also reflect proximate cause: "direct cause," "efficient cause," "legal cause," "procuring cause," and "remote cause," among others); Kelley, *supra* note 5, at 51. Further, the definition of proximate cause has changed over time. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 29 cmt. a (2010).

9 W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 263 (5th ed. 1984).

10 This section details the major components of proximate cause as they have been expressed both in tort cases and in the *Restatement*. The *Restatement* has recently started to use the words "scope of liability" to refer to proximate cause and has also focused the inquiry on the scope of risk. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 29 cmt. a (2010). Applying the *Restatement* sections to physical harm cases may not be appropriate in statutes where the harms are emotional or economic in nature. Reference to these sections is only meant to explain the possible scope of proximate cause. This section omits the direct test that is found in early common law cases because of its waning relevance to modern proximate cause inquiries. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 29 cmt. b (2010) ("[C]onduct need not be close in space or time to

describe these concerns separately, in some cases, two or more concerns overlap.

Some courts use proximate cause to determine whether some intervening action cuts off the original actor's liability.[11] In thinking about superseding cause, the court is often determining that the acts of a third party interrupt the sequence of conduct, consequence, and injury between the defendant and plaintiff such that the liability of the defendant is no longer appropriate.[12]

At times proximate cause is concerned with reasonably anticipated consequences or the slightly different, but often related, question of whether the harm caused was within the scope of risk of the defendant's conduct.[13] Some courts have identified proximate cause as considering whether the plaintiff was foreseeable.[14] Each of these iterations is hopelessly tied up in goals and policies related to the underlying cause of action, because none of them can be defined irrespective of it. And any of these iterations is likely to result in a wide variety of potential outcomes.[15]

In some iterations, proximate cause is described without reference to any particular goal, but rather generally as line drawing, determining when as a matter of policy a defendant should not be liable, even though its actions caused the injury in question.[16] Importantly,

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the plaintiff's harm to be a proximate cause."); Kelley, *supra* note 5, at 52. However, courts continue to use words like direct and remote to define proximate cause.

11 The term "superseding cause" is often used to refer to an intervening force that is sufficient to cut off liability from the original tortfeasor. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 34 cmt. b (2010).

12 John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 970 (2010).

13 *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 29 (2010) ("An actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious."); Robert L. Fischman, *The Divides of Environmental Law and the Problem of Harm in the Endangered Species Act*, 83 IND. L.J. 661, 688 (2008); Kelley, *supra* note 5, at 92. The *Restatement* explains that the risk test is congruent with the foreseeability test, if the latter test is "properly understood and framed." RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 29 cmt. e (2010).

14 *See, e.g.*, Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting); s*ee also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 29 cmt. f (2010) (discussing *Palsgraf*).

15 KEETON ET AL., *supra* note 9, § 42, at 274.

16 *See* Stapleton, *supra* note 6, at 985–86 (listing the following concerns that might be involved in proximate cause line drawing: "(1) the perceived purpose of the recognition of a pocket of obligation in the circumstances; (2) the costs of legal rules and their administration; (3) the dignity of the law; (4) the interest in individual freedom; (5) the recklessness or intention to harm, if any, of the defendant; (6) the relative wrongfulness of different actors; (7) the concern that the extent of liability

five members of the Supreme Court have recently embraced this line-drawing function of proximate cause.[17] In a recent case the Court explained that the term "proximate cause" is "shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability."[18] It then quoted the dissent in *Palsgraf*, which noted that "because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point."[19]

The Supreme Court has referred to proximate cause as a generic label the courts use to describe "the judicial tools used to limit a person's responsibility for the consequences of that person's own acts."[20] It also has quoted a noted torts treatise referring to proximate cause as reflecting "ideas . . . of what is administratively possible and convenient."[21] In this iteration, it appears the Court is more concerned about proof issues. For example, if an injury is less direct, it is more difficult to determine how much of the plaintiff's damages can be traced to the violation (a factual causation issue) and whether the courts would need to engage in complex decisions regarding how to apportion damages among multiple plaintiffs to eliminate the risk of multiple recoveries.[22] These latter concerns are actually not proximate cause concerns, but courts often use proximate cause to resolve these issues.

The Supreme Court has recently bemoaned the lack of consensus regarding proximate cause definitions, noting that common law formulations include, among others, "the immediate or nearest antecedent test; the efficient, producing cause test; the substantial factor test; and the probable or natural and probable or foreseeable consequence test."[23] Members of the Court cannot agree on what exactly proximate cause is designed to accomplish.[24] While five members of the Court recently adopted the line-drawing account of proximate cause, four members of the Court have stated that proximate cause

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not be wholly out of proportion to the degree of wrongfulness; (8) the fact that the defendant was acting in pursuit of commercial profit; [and] (9) whether allowance of recovery for such consequences would be likely to open the way to fraudulent claims" (footnotes omitted)).

17 *See* CSX Transp., Inc. v. McBride, 131 S. Ct. 2630 (2011).

18 *Id.* at 2637.

19 *Id.* (quoting *Palsgraf*, 162 N.E. at 103 (Andrews, J., dissenting)).

20 Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268 (1992).

21 *Id.* (quoting KEETON ET AL., *supra* note 9, § 41, at 264).

22 *Id.* at 269.

23 *CSX*, 131 S. Ct. at 2642 (internal quotation marks omitted).

24 For another description of proximate cause, see *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 469–70 (2006) (Thomas, J., concurring in part and dissenting in part).

relates to whether there is "some direct relation between the injury asserted and the injurious conduct alleged," whether the injuries are "too remote, purely contingent, or indirect," and whether the connection between the wrong and the injury are so "tenuous . . . that what is claimed to be a consequence is only fortuity."[25]

As demonstrated in the famous *Palsgraf* case, there is no clear line separating one rationale from another, and court opinions regarding proximate cause are typically difficult to reduce to a consistent line of reasoning.[26] At least one commentator has asserted that proximate cause has no inherent meaning, but substitutes for other elements of a cause of action when the decision on that element is difficult.[27] Indeed, it is questionable whether proximate cause has a meaning that is independent of the underlying cause of action to which it is attached.

Recently, Chief Justice Roberts has suggested that a lack of fixed meaning for proximate cause is not problematic. Rather, proximate cause is not meant to provide a mechanical or uniform test, but furnishes "illustrations of situations which judicious men upon careful consideration have adjudged to be on one side of the line or the other."[28] While the Chief Justice is correct that proximate cause concerns limits on liability, the rationales used to both justify the limit and to decide where the line is drawn are incredibly important. Different rationales may lead the courts to different results.

Importantly, the courts' and commentators' understanding of proximate cause has changed over time and not necessarily in a straight trajectory toward a more reasoned approach.[29] Thus, early iterations of proximate cause that required the event to be the nearest in time or space have largely been rejected in recent iterations.[30] The *Restatement (First) of Torts* embraced an idea of legal cause that included concepts from factual cause and proximate case analysis, while the *Restatement (Third) of Torts* separates factual and proximate cause.[31] These changes over time are important because it makes it

25 *CSX*, 131 S. Ct. at 2645–46 (Roberts, C.J., dissenting) (alteration in original) (quoting Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 838 (1996); *Holmes*, 503 U.S. at 268–74).

26 *See* Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928). Indeed, even in *Palsgraf*, Justice Cardozo addressed concerns about causation as it relates to duty. *Id.* at 99–100.

27 *See* Green, *supra* note 5, at 471.

28 *CSX*, 131 S. Ct. at 2652 (quoting *Exxon Co.*, 517 U.S. at 839).

29 *See* KEETON ET AL., *supra* note 9, § 42, at 276–79 (discussing various tests).

30 *Id.* at 276.

31 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 26 (2010); RESTATEMENT (FIRST) OF TORTS § 430 (1934) (indicating that to establish

difficult for courts to borrow proximate cause ideas from one time period and apply them to another. In such instances, the courts may be using the term "proximate cause," but be referring to different tests.

Not only does proximate cause have evolving contested underpinnings and goals, common law courts also apply it differently, depending on the nature of the underlying tort. The *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* notes that when an actor intentionally causes harm he is liable, even if the harm was unlikely to occur, and that intentional actors are liable for a broader range of harms than negligent actors.[32] In deciding the scope of liability, the *Restatement (Third)* notes that the following play important roles in the analysis: "the moral culpability of the actor . . . , the seriousness of harm intended and threatened by those acts, and the degree to which the actor's conduct deviated from appropriate care."[33]

Proximate cause rarely plays a role in intentional tort cases.[34] There are many reasons for this. In intentional tort cases "the defendant's wrongful conduct is closely linked—temporally and conceptually—to the plaintiff's harm."[35] Few intentional tort cases involve multiple causal factors.[36] Further, the intent requirement makes it clearer that the defendant should be held accountable for its actions, and courts express less concern about extending liability in this context.[37] Thus, the necessity and strength of proximate cause doctrine severely diminishes in the intentional tort context. When proximate cause is relevant in intentional tort cases, proximate cause analysis

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legal cause the plaintiff must be in the class of persons to which the defendant's actions create a risk of causing harm); *id.* § 431 (defining legal cause as being a substantial factor in bringing about the harm, without an exception to relieve the defendant of responsibility); *id.* § 433 (defining legal cause with concepts such as whether there was a continuous force or series of forces and whether the harm was highly extraordinary given the defendant's conduct).

32 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 33 (2010). Some question whether traditional notions of proximate cause work well in non-traditional common law tort cases. *See* Stapleton, *supra* note 6, at 946.

33 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 33 (2010). The *Restatement* view is even more nuanced, noting that where intent is established by showing that the defendant was substantially certain, proximate cause should not be as narrow as it is with other intent cases. *Id.* cmt. d.

34 *Id.* cmt. e (noting the "paucity" of legal opinions discussing proximate cause in intentional tort cases).

35 Jill E. Fisch, *Cause for Concern: Causation and Federal Securities Fraud*, 94 IOWA L. REV. 811, 832 (2009).

36 *Id.*

37 *Id.* at 832–33.

may cut off liability for the defendant in fewer circumstances than it would when applied to negligence.[38]

As this Part demonstrates, the underlying goals of proximate cause are multiple, contested, and evolving. The use of proximate cause varies across tort actions and many of proximate cause's underlying concerns relate to policy concerns. Each of these attributes of proximate cause is central to the statutory proximate cause question.

II. STATUTES, SEPARATION OF POWERS, AND INTERPRETATION

A. Hypothetical Statutes

This Article argues that to date, the Supreme Court has drawn from a narrow stable of arguments to create a fairly standard, yet coarse, analysis to consider when to apply proximate cause to statutes. In almost every recent statutory proximate cause case, the Court has applied proximate cause to the statute.[39] To understand the problems with this standard account, it is necessary to describe the features of statutes where the standard analysis is problematic.

While it is impossible to describe the features of all federal statutes, it is possible to describe four categories of features that highlight the inadequacies of current statutory proximate cause analysis. In each category of cases, assume that Congress used the words "because of" or some similar causal language to define when liability will occur and did not use the term of art "proximate cause."[40]

Category A. Imagine a statute with the following features. Congress enacted a statute that provides for liability that mimics common law negligence, making only minor changes in the common law regime. The statute is fairly short and does not provide the courts with much guidance on how to interpret the statutory terms.

Category B. Category B statutes are similar to those in Category A with one important change. When Congress enacted the statutes, it

38 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 33 (2010) ("An actor who intentionally or recklessly causes harm is subject to liability for a broader range of harms than the harms for which that actor would be liable if only acting negligently."); *id* cmt. a (noting that its scope of risk standard is inadequate with respect to intentional torts); 57 AM. JUR. 2D *Negligence* § 421 (2004) (noting that proximate cause applies in strict liability). *But see* Michael L. Rustad & Thomas H. Koenig, Parens Patriae *Litigation to Redress Societal Damages from the BP Oil Spill: The Latest Stage in the Evolution of Crimtorts*, 29 UCLA J. ENVTL. L. & POL'Y 45, 68 (asserting that courts do not typically apply proximate cause to strict liability).

39 *See* cases cited *infra* note 79.

40 These categories are used to make the Article's analysis more concrete. Some statutes may have traits that do not fall within any category or that combine some traits of multiple categories.

did not base fault on negligence, but rather required intentional conduct.

Category C. Category C statutes may have negligence or intent-based fault standards, but they differ from the statutes in Categories A and B because the statutes do not contain fairly short operative provisions. Rather, Congress enacted a complex regime that speaks to liability limits in various types of provisions. For example, these statutes might describe who can sue or be sued, the type of conduct that is prohibited, and the type of conduct that is allowed under the statute.

Category D. The Category D statutes are radically different from the statutes in either Category A or B. The statutes use fault models that do not mimic traditional tort categories such as negligence. In fact, these statutes radically alter common law expectations and obligations. Like Category C statutes, these statutes contain numerous expressions about liability limits throughout the statute. Congress also enacted these statutes in the past several decades.

The current arguments used in statutory proximate cause cases are problematic in each category but raise especially important separation of powers concerns in Categories C and D. In Category D cases, the standard account ignores the relationship of modern statutes and the common law, by assuming modern statutes are grounded in the common law. In Category C and D cases, the standard account causes courts to ignore congressional expressions about liability limits. In Category B and D cases (and some in Category C) the courts are making incorrect assumptions about tort law by assuming proximate cause applies evenly across all tort regimes. Even in Category A cases, where applying common law proximate cause seems most appropriate, the standard arguments ignore problems raised by the evolving and contested nature of proximate cause. Taken together, these four examples demonstrate that the courts should not apply a uniform analysis to statutory proximate cause questions.

B. Statutory Interpretation as an Expression of Institutional Competition

Under the Constitution, Congress is vested with legislative power, and the courts have the power to interpret the laws that Congress creates.[41] Separation of powers thus contemplates a line between construing an existing statutory regime and creating a statutory regime.[42]

41 U.S. CONST. art. I, § 1.

42 This sentence is not meant to imply that the Constitution carefully defines where this line is to be drawn. POPKIN, *supra* note 3, at 44 ("All that was clear was that the boundaries within which judges operated . . . were narrower than those set by the formal principle of parliamentary sovereignty in England."). Further, it may be diffi-

This Article coins the term "statutory proximate cause" to highlight that a court's obligations are different when it is using proximate cause in statutes, than when the court is acting in a common law capacity.

Consider the following example. Assume that a statute clearly indicates that only employers with fifteen or more employees can be sued. If the courts interpreted the statute as allowing employers with only six employees to be sued, the courts would likely be violating separation of powers principles by creating new requirements in a statutory regime in contravention of express statutory language. Even if Congress has the power to override such a decision by subsequent action,[43] the courts would have violated core constitutional principles under almost all statutory interpretation theories.[44]

Admittedly, most statutory interpretation implicates more difficult questions than the prior hypothetical, often because Congress has not spoken clearly or at all about its choice regarding a particular legal question. Further, there is strong disagreement regarding the appropriate role of the courts in making statutory inquiries, such as whether the courts should only consider Congress's expectations as actually expressed in statutory language, whether they should arrive at intent from other sources, or whether courts have broader powers to engage in common law decision making or decision making that relies on the broader purposes of the underlying statutory regimes.[45] These are the tensions inherent in competing models of statutory interpretation.[46]

Courts considering statutory proximate cause questions rarely describe how they are undertaking their constitutional role, including

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cult for courts to separate the tasks of interpretation and rulemaking, since the judiciary performs both functions, but in different contexts. J.M. Balkin, Review Essay, *Constitutional Interpretation and the Problem of History*, 69 N.Y.U. L. REV. 911, 928 (1988).

43 *See* Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 520–21 (2009) (discussing separation of powers concerns in the context of congressional statutory amendments).

44 *See* Max Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388, 395 (1942) ("No American court has probably ever declared that it might, if it chose, disregard a statute.").

45 *See generally* CALABRESI, *supra* note 3 (arguing that courts should play a role in diminishing the importance of outdated statutes); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994) (arguing for a more fluid notion of statutory interpretation); POPKIN, *supra* note 3 (discussing the role of the courts in statutory interpretation).

46 *See generally* T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988) (describing various statutory interpretation techniques).

how they are balancing statutory language and purpose with the common law.[47] To date, courts have failed to emphasize the important difference between pure common law decision making and statutory interpretation. In the statutory context, the courts should be considering the commands of the legislative and executive branches regarding the underlying statutory regime and respecting the appropriate balance between judicial, legislative, and executive power. In the common law context, when judges are placing limits on causes of action, they are often limiting doctrines that the judiciary itself created. In contrast, with statutory proximate cause cases, the courts are often being asked to place a court-created limit on a legislatively created cause of action.[48]

There is special reason to be concerned about separation of powers issues regarding proximate cause. At its core, proximate cause is a policy question about how far liability should extend in a particular instance. Given its contested foundations and its indeterminacy, it is important to question whether courts are creating law when they decide statutory proximate cause questions. This is especially true when courts fail to consider statutory guidance about the limits of liability[49] and when court analysis is shallow and unconvincing.

C. Statutory Interpretation

Statutory interpretation is a complex task that is the subject of deep debate within legal and academic circles. For purposes of this discussion, three aspects of statutory interpretation are important: its goals, the techniques used to reach those goals, and its temporal orientation.

Given the wide-ranging discussions about statutory interpretation in academic literature, it is necessary to begin this Part with a few caveats. First, this Part does not make any evaluative or normative claim about the value of any particular statutory construction methodology. Rather, it simply describes the most commonly used methodologies to determine whether the courts might use them to incorporate proximate cause analysis. Second, the Part does not suggest that statutory interpretation can be neatly pressed into the described categories. There is much debate within the academic community about where

47 *See infra* note 79 (identifying a variety of cases in which courts apply proximate cause).

48 *See, e.g.*, Staub v. Proctor Hosp., 131 S. Ct. 1186, 1191 (2011) (considering proximate cause under USERRA when proximate cause is not needed to resolve the question before the Court).

49 *See infra* Part III.E.

the delineations between the methodologies lie. Third, this Part does not exhaustively discuss statutory interpretation, a topic that has been widely and well considered in a variety of books and articles.[50] Rather, it discusses the kinds of statutory interpretation methods that courts have used or might use with regards to statutory proximate cause and serves as background for later critiques of how courts purport to use these methods.

When courts interpret statutes, they draw from a menu of methodologies, such as textualism, intentionalism, purposivism, and common law decision making,[51] each with its own underlying goals and techniques.[52] These methodologies are often the ways that courts express their belief about their authority to make a particular decision about a statute.[53] In addition to these methodologies, judges also have opinions about whether construction is originalist in its orientation or whether it allows for the meaning of words to develop over

50 *See generally* POPKIN, *supra* note 3, at 7–115 (tracing the history of statutory interpretation); J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987) (discussing how deconstructionist principles apply to interpretation); Carlos E. González, *Turning Unambiguous Statutory Materials into Ambiguous Statutes: Ordering Principles, Avoidance, and Transparent Justification in Cases of Interpretive Choice*, 61 DUKE L.J. 583 (2011) (discussing how statutory interpretation lacks ordering rules). Additional articles are cited throughout this section.

51 *See* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 78 (2006) (noting that the line between textualism and purposivism is not "cut-and-dried"); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 355–56 (2005) (noting situations where textualist interpretive methods overlap with other methods). William Popkin describes the process of statutory construction as "moving back and forth between words and other indicia of meaning without preconceived notions about whether the words are clear." William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541, 594 (1988). William Eskridge and Philip Frickey similarly describe the process as "polycentric" and not "linear and purely deductive." William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 348 (1990). Indeed they suggest "that an interpreter will look at a broad range of evidence—text, historical evidence, and the text's evolution—-and thus form a preliminary view of the statute." *Id.* at 352. This view would then be refined by political and other considerations. *Id.* at 347. They also suggest that different methods should be accorded different weights in the consideration process, with the text enjoying primacy. *Id.* at 353–54.

52 *See* Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 429 n.6 (noting that textualists, purposivists and intentionalists disagree about how and whether to recognize gaps and what to do if the statute has gaps, or vague or ambiguous provisions).

53 *See* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 593–94 (1995) (noting that to engage in statutory construction courts must adopt "at least implicitly—a theory about [their] own role by defining the goal and methodology of the interpretive enterprise and by taking an institutional stance in relation to the legislature").

time. This Article shows how, in many instances, courts rely on weak claims to justify applying proximate cause to statutes.[54]

Statutory construction usually begins with a court's attempt to find the plain meaning of a statute. This search for meaning often begins with the text of the statute. One method of statutory interpretation, textualism, considers the text to be the primary or sole interpretative object. Although the meaning of textualism is itself debated,[55] its key feature is the primacy of the statutory language in determining statutory meaning, without considering legislative history.[56] A textualist methodology often relies on the dictionary meaning of words, whether the words are terms of art, the grammatical structure of a statute, and the meaning of the contested words across the statutory regime.[57]

In contrast to textualism, judges using an intentionalist methodology are often trying to determine the intent of the legislature as expressed in the text of the statute and other sources, such as legislative history.[58] For purposes of this discussion it is possible to ignore

54 *See infra* Part III.

55 *See* John F. Manning, *Second-Generation Textualism*, 98 CAL. L. REV. 1287 (2010) (exploring the evolution of textualism and critiques of first-generation textualism's premises); *see also* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) (examining new textualism in comparison to the traditional approach); Philip P. Frickey, *Faithful Interpretation*, 73 WASH. U. L.Q. 1085, 1087, 1090 (1995) (discussing "new textualism" and its tendency to merge with other interpretive methods); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749 (1995) (expressing concern over the Supreme Court's extreme reliance on textualist tools).

56 *But see* Manning, *supra* note 51, at 78 ("Properly understood, textualism is not and could not be defined either by a strict preference for enacted text over unenacted context, or by a wholesale rejection of the utility of purpose."); Nelson, *supra* note 51, at 355 (noting that textualism may not be so narrowly defined and suggesting that consideration of the purpose behind a statute is countenanced by the textualist approach). Nelson further suggests that textualists may be just as concerned about the intent of the legislators as intentionalists, but believe that legislative history is more likely to provide an inaccurate picture of the collective legislature's intent. *Id.* at 362–63. Further, there is strong disagreement regarding whether the courts are required to determine the meaning of the statute at the time of its enactment or whether the meaning of the statute can vary over time. *See* Aleinikoff, *supra* note 46, at 21.

57 *See* Manning, *supra* note 55, at 1309 n.101.

58 The term "intentionalist" may be used to describe several different methods of statutory construction that allow the use of legislative history and other signals of intent, but these methods may differ significantly. *See* Thomas W. Merrill, Essay, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 366–67 (1994); *see also* Eskridge & Frickey, *supra* note 51, at 325–27 (highlighting the difference between "actual intent" and "conventional intent" strains of intentionalism).

questions about when intent comes into play in such an analysis and the difficulties inherent in determining legislative intent,[59] to focus on whether there is any indication either inside or outside the statutory language that suggests a congressional intent to use proximate cause.

In some instances, textualism and intentionalism provide the same answer to the interpretive question because the legislature expressed its intent in the actual language of the statute. However, in more difficult cases, the text and other sources of legislative intent point in different directions.

The third way jurists commonly interpret statutes is by considering whether the broad purposes of a statute support a particular interpretation.[60] For example, a court might look to the broad, remedial purposes of a statutory regime to serve as a guide on whether to read a particular statutory provision broadly or narrowly.[61] The statute's purpose is sometimes stated within the statute itself or within its legislative history. At times, courts assign a particular statute a purpose or set of purposes.

A fourth method courts use to interpret statutes is a common law methodology. This method has been described as allowing courts to consider "current values, such as ideas of fairness, related statutory polices, and constitutional values" without masking these considerations as textual, intent, or purpose concerns.[62]

Courts often use common law reasoning with respect to statutory regimes when the statute was designed to codify existing common law. In these instances, "the resulting statute might well be interpreted as maintaining a significant role for further judicial development and refinement of the law."[63] Courts sometimes use this method when preemptive lawmaking is required to preserve the statutory mandate. Preemptive lawmaking might be required when "collateral or subsidiary rules are necessary in order to effectuate or to avoid frustrating the

59 *See* ESKRIDGE, *supra* note 45, at 16–25 (discussing difficulties with locating useful expressions of intent); Nelson, *supra* note 51, at 362–63 (describing Justice Scalia's concern that legislators might "salt the *Congressional Record* with misleading statements that further their own special agendas" if courts find the entire legislature's intent in such isolated statements).

60 *See* McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 861–62 (2005).

61 *See* Bd. of Cnty. Comm'rs v. EEOC, 405 F.3d 840, 846 n.6 (10th Cir. 2005) (noting that definitions in statute must be read broadly to effectuate the statute's liberal purpose).

62 Eskridge & Frickey, *supra* note 51, at 359. The author is not expressing an opinion about the validity of common-law decision making.

63 Michael Abramowicz & John F. Duffy, *The Inducement Standard of Patentability*, 120 YALE L.J. 1590, 1618 (2011).

specific intentions of the draftsmen."[64] Courts also use common law reasoning to create federal common law related to a statute when Congress has granted the courts the authority to round out a statutory regime, either expressly or implicitly.[65]

Whatever method a court uses, courts sometimes use common law principles as persuasive authority to interpret particular statutory language. Courts have used the common law as a gap filler when traditional statutory construction techniques fail.[66] Gaps may occur for many reasons, including when the statute is ambiguous, when it contains inconsistent provisions, or when it appears that Congress simply failed to address a particular issue in a particular regime.[67]

Another line of statutory interpretation would allow a judge to use pragmatic reasoning or practical reasoning.[68] These theories of statutory interpretation reject any grand theory of interpretation and instead reason that judges should look to relevant statutory language, available legislative history, "the context in which the legislation was enacted, the overall legal landscape, and the lessons of common sense and good policy."[69]

Further, some commentators favor dynamic statutory interpretation, in which courts interpret a statute based not only on its text and historical context, but on its "present societal, political, and legal context."[70] Under this approach a court would be permitted to weigh the text and the history of the statute, with current values and policies, as well as subsequent changes in society and law.[71]

For purposes of this discussion, it is important to note that judges also may rely on certain canons of construction, including canons that

64 Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 36 (1985).

65 *See id.* at 40.

66 *See id.* at 5; *see also* William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 662–67 (1982) (discussing common law interpretation).

67 *See* Merrill, *supra* note 64, at 33.

68 *See generally* Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking Is Better than Judicial Literalism*, 53 WASH. & LEE L. REV. 1231 (1996) (arguing for a pragmatic approach to interpreting environmental regulations).

69 Eskridge & Frickey, *supra* note 51, at 321.

70 William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987).

71 *See id.* at 1484.

allow the judge to presume that statutes are adopted against a background of common law.[72]

To properly apply tort concepts to a statute, the courts should convincingly invoke one or more of the accepted reasons for doing so: the statutory language contains the principle, there is evidence that the legislature intended the application of the principle, the statutory goals call for the principle, there is a proper basis for common law decision making, pragmatic considerations justify it, or evolving societal understandings call for proximate cause. If, after applying one or more of these methodologies, the interpretation of a statute is still unclear, the courts may rely on agency interpretations of the statute, using administrative deference doctrines.[73]

In addition to deciding whether a basis exists for using proximate cause, the court must also determine whether proximate cause should be viewed at the time of the statute's enactment or at the time of the court's opinion.[74] As discussed in Part III.C., to date the courts have largely ignored this temporal question.

When modern courts consider statutory proximate cause questions they largely rely on statutory interpretation arguments.[75] In other words, they appear to be claiming to act within a constitutional space defined by the boundaries of traditional statutory interpretation, by considering the text of the statute, its purposes, or congressional intent.[76] The next Part shows how many of these traditional arguments are faulty or weak.

This Article does not contend that the only constitutionally permissible space is defined by traditional statutory interpretation. To the extent that courts are claiming the right to engage in pure common law decision making, they should do so explicitly.[77] It is difficult to determine a court's motivation or goals with respect to proximate

72 *See* James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1 (2005).

73 *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984). Under the *Chevron* doctrine, courts will defer to an agency's construction of a statute when the underlying statutory regime is silent or ambiguous regarding the particular question, when the agency's interpretation is permissible, and when Congress has granted authority to the agency to interpret the statute. *Id.* at 843–44.

74 *See* Eskridge, *supra* note 70, at 1484.

75 *See supra* note 51.

76 *See infra* Part III. This Article does not argue that courts must rely on these kinds of arguments to properly import proximate cause. Rather, it demonstrates why courts must, at least, provide convincing arguments about why they are invoking proximate cause so that it is possible to determine whether the courts are acting within an appropriate constitutional space.

77 *See* CALABRESI, *supra* note 3, at 105.

cause if it does not honestly set forth the assumptions under which it is working. Most importantly, to engage the important conversation about how modern statutes should interact with the common law, it is critical to understand how courts approach this inquiry. Under the current model, it is difficult to tell whether the courts simply do not fully understand the consequences of their decisions, whether they misunderstand tort law, or whether they are using legal fictions for other purposes.

Interpretive questions about proximate cause issues are especially complex because the space for arguably appropriate court action varies according to the statutory regime. A statute that specifically adopts the words "proximate cause" is different than a statute that carefully expounds the limits of liability.

A judge's individual beliefs about statutory interpretation also affect how he or she perceives the arguable space. Likewise, the potential space for proximate cause might be different depending on the reason courts provide for invoking it. For example, courts would be using proximate cause inappropriately in cases where the statute clearly speaks to the limits of liability, but the courts just disagree with where the line should be drawn. On the other hand, courts might have greater or different appropriate roles to play if the case before them was truly unanticipated by Congress or if the court was invoking the concept to protect fundamental values.[78] However, even in these latter cases, this Article argues that there are reasons to reject using proximate cause to reach these goals.

III. CORE INTERPRETIVE PROBLEMS WITH STATUTORY PROXIMATE CAUSE

The Supreme Court has increasingly applied proximate cause to statutes.[79] This Part discusses key arguments courts use when

78 *See* POPKIN, *supra* note 3, at 48 (discussing how courts might play a more robust role in statutory interpretation when protecting fundamental values).

79 *See, e.g.*, Staub v. Proctor Hosp., 131 S. Ct. 1186, 1191 (2011) (applying proximate cause to the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)); Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 453 (2006) (restating that proximate cause is required to sue under the Racketeer Influenced and Corrupt Organizations Act (RICO)); Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 342–346 (2005) (requiring proximate cause for claims involving securities fraud); Sosa v. Alvarez-Machain, 542 U.S. 692, 703–04 (2004) (examining proximate causation with respect to the Federal Tort Claims Act); Archer v. Warner, 538 U.S. 314, 325–26 (2003) (Thomas, J., dissenting) (discussing proximate causation as being required by language in the Bankruptcy Code); Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 267–68 (1992) (requiring proximate cause for a successful claim under

approaching this interpretive task. It demonstrates how courts often rely on weak arguments or on assumptions that cannot be applied generally to all statutes, while failing to realize how key aspects of proximate cause make it especially problematic when used in statutes. The arguments courts deploy to justify using proximate cause appear to be innocuous but actually conceal numerous unanswered questions about how statutes interact with the common law.

A. Weak Textualist Claims

The clearest case for applying proximate cause would be if the statute itself expressly uses the words "proximate cause." Congress has used these words in many statutes.[80] One strong argument against implying proximate cause from general causal language is that Congress understands how to designate proximate cause by name.[81]

Most statutes do not use the words "proximate cause." Courts often find general causal language in a statute, such as the words "because of" or "by reason of," and then conclude that these terms

RICO); Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 535–36 (1983) (discussing proximate cause in relation to a claim under the Clayton Act); *see also, e.g.*, Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 767 (2004) (reasoning that the National Environmental Policy Act (NEPA) requires a causal standard similar to proximate cause); Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 839–41 (1996) (discussing proximate cause in admiralty context, not in statutory context); Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 713 (1995) (O'Connor, J., concurring) (discussing proximate causation as related to the Endangered Species Act (ESA)); Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 536–37 (1995) (discussing whether language in the Extension of Admiralty Jurisdiction Act required proximate causation). *But see, e.g.*, CSX Transp., Inc. v. McBride, 131 S. Ct. 2630, 2641–44 (2011) (refusing to import traditional common law proximate cause into FELA, but holding that the statutory language has a different proximate cause limit).

80 *See, e.g.*, 33 U.S.C. § 2704(c)(1) (2006) (providing that plaintiffs may recover damages in excess of cap if a showing of proximate cause is made); Act of June 5, 1924, ch. 261, § 2, 43 Stat. 389 (stating that the United States would be liable for "any disease proximately caused by [federal] employment"); Act of Oct. 6, 1917, ch. 105, § 306, 40 Stat. 398, 407 (stating that the United States would be liable to member of Armed Forces for post-discharge disability that "proximately result[ed] from [a pre-discharge] injury"); Act of Sept. 7, 1916, ch. 458, § 1, 39 Stat. 742, 742–43 (stating that the United States would not be liable to an injured employee whose "intoxication . . . is the proximate cause of the injury").

81 *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 283 (1998).

refer to both cause in fact and proximate cause.[82] This argument often serves as an anchor for statutory proximate cause analysis.[83]

This is a weak textualist claim because it allows courts to anchor common law proximate cause by using any general causal language in a statute, whether or not the statute's words mimic the words the common law uses. These claims also fail to consider the complexity of proximate cause. Proximate cause as used in the Article is a concept drawn from tort law. To the extent that some statutory regimes are unlike common law torts, it is not clear why causal language would be assumed to mean proximate cause, or at least not a proximate cause standard that is coterminous with the common law. Using the common law seems especially suspect for statutory regimes that radically alter the common law, such as civil rights legislation.

Even if a statute is tort-like, proximate cause does not apply evenly across all tort regimes. Proximate cause plays a different role in intentional tort cases than it does in negligence cases. If a statute provides an intentional tort, it is unlikely that general causal language is meant to express robust proximate cause. Further, the liability limiting principles that underlie proximate cause may be expressed in places other than the causal language. Focusing solely on general causal language can diminish other portions of the statutory regime. Each of these problems is discussed in more detail in subsequent sections of this Article.

At best, the use of general causal language makes it possible to claim that Congress meant for proximate cause principles to limit the statute. However, this is not a sufficient argument, on its own, to justify statutory proximate cause. This is because it is also possible that Congress intended to use general causal language to refer to cause in fact and did not necessarily intend proximate cause. Unlike the term "proximate cause," other causal language, such as "because of" or "by reason of" are not always terms of art and cannot automatically be equated with proximate cause. Further, general causal language will not indicate which version of proximate cause the court should use and also will not inform courts whether proximate cause is coterminous with the common law.

The courts will always need more than general causal language to credibly argue that the statute should include common law proximate cause. For many regimes, the statute contains no extra indicators of congressional intent regarding proximate cause. This Article argues

82 *See Holmes*, 503 U.S. at 266–68.

83 *See Jerome B. Grubart, Inc.*, 513 U.S. 527 at 536 (indicating that "caused by" language in statute requires proximate cause).

that in such cases, courts should be reluctant to apply proximate cause to the statute. It also argues that courts should be careful about using proximate cause even when there are other indications that general causal language could be construed to mean proximate cause.

B. Weak Intent and Purpose Claims

Courts have used two weak intent claims to recognize proximate cause: that the particular statute derives from a common law tradition and that civil statutes in general are presumed to draw from a common law tradition.[84] When applying proximate cause, courts also use a weak purpose-based argument: that it is unlikely that Congress meant to allow all factually injured plaintiffs to recover.

The first intent-based argument courts use to justify proximate cause is the idea that the underlying cause of action derived from a common law tradition that incorporated proximate cause analysis.[85] An example of this argument is helpful to understand it.

In *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, the Supreme Court considered whether plaintiffs had standing to sue under the Clayton Act.[86] The Clayton Act allows "'[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws'" to file suit.[87] The Clayton Act does not specifically reference proximate cause; however, in framing the standing issue, the Court noted the corollaries between antitrust standing and proximate cause.[88]

The Court characterized its inquiry as trying to determine what Congress intended.[89] The Court noted that the Clayton Act language was originally enacted as part of the Sherman Act in 1890, and it looked to the passage of the earlier act to resolve the standing issue.[90] Even though the Court did not cite any discussion of proximate cause in the debates leading to the Sherman Act, the Court noted that there

84 It is possible that a particular statute's legislative history or purpose may directly discuss proximate cause; however, the major recent Supreme Court opinions have not relied on such arguments. For examples, see the cases cited *supra* note 79.

85 *See* Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 529–31 (1983).

86 *Id.* at 519. In this case a union and other plaintiffs alleged that a multiemployer association violated antitrust laws by, among other things, coercing certain third parties and association members to enter into agreements with nonunion firms. *Id.* at 520.

87 *Id.* at 529 (quoting 15 U.S.C. § 15 (1982)).

88 *See id.* at 531–36.

89 *Id.* at 530.

90 *Id.* at 529.

were general discussions about state common law with regard to remedies and other definitional terms.[91] Further, the Court noted that Congress appeared to have been "generally aware" that the statute would be "construed by common-law courts in accordance with traditional canons."[92]

The Court noted that while the language of the Clayton Act does not appear to limit liability for harm, its broad language, combined with the fact that it was enacted against a common law backdrop suggests that the language is subject to common law limitations. Given the unhelpfulness of the text, the Court reasoned it was required to evaluate "the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them."[93]

A second intent-based argument that courts make is that civil statutes in general are presumed to be adopted against a backdrop of tort law. In *Staub v. Proctor Hospital*,[94] the Supreme Court held that an employer may be liable for discrimination when an employee with discriminatory animus influenced, but did not make, the challenged employment decision.[95] The plaintiff in the case sued under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), which prohibits discrimination against an individual because of his or her military status.[96] To determine the meaning of USERRA's motivating factor language, the Court started with the premise that "when Congress creates a federal tort it adopts the background of general tort law."[97] In *Staub*, the Court made no inquiry into whether Congress adopted USERRA specifically using the common law as a background.

Noticeably, the Court never fully engaged questions regarding whether it had the authority to apply proximate cause to USERRA. Rather, it assumed that because USERRA is a "tort," that it embraces proximate cause.[98]

Courts also rely on a purpose-based argument to justify proximate cause: that it is unlikely Congress intended to allow all factually injured plaintiffs to recover. For example, in *Holmes v. Securities Inves-*

91 *Id.* at 531.

92 *Id.* at 531 n.22.

93 *Id.* at 535.

94 131 S.Ct. 1186 (2011)

95 *Id.* at 1194

96 *Id.* at 1190–91.

97 *Id.* at 1191. The proximate cause discussion in *Staub* is arguably dicta. Nonetheless, it highlights an approach courts use to import proximate cause into statutes.

98 *See id.* at 1193.

tor Protection Corp.[99] the Court considered whether a plaintiff could recover under RICO. In doing so, it interpreted a provision that provides: "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."[100] Although it is not entirely clear whether the Court was discussing standing or proximate cause, it drew on proximate cause principles.[101]

The Court reasoned that it was unlikely Congress meant to allow all factually injured plaintiffs to recover and used proximate cause in its RICO analysis.[102] The Court's analysis is highly derivative, starting from the premise that Congress modeled RICO on the Clayton Act.[103] Thus, the case heavily relies on *Associated General Contractors.*[104] The Court noted that prior to 1914, lower federal courts had read the Sherman Act to incorporate common law principles of proximate cause.[105] Reasoning from past precedent that construed RICO's language to derive from the Sherman Act and the Clayton Act, the Court noted that congressional use of the Sherman Act language "presumably carried the intention to adopt 'the judicial gloss that avoided a simple literal interpretation.'"[106]

These legislative intent and purpose arguments are weak for several reasons. None of them rely on any direct expressions of congressional intent or purpose related to proximate cause specifically. Further, these intent arguments rest on inaccurate assumptions.

As explored throughout this Article, few statutes only codify the common law. Even those that rely heavily on the common law change it in important respects, such as by providing a limited remedy or by defining key terms. This Article argues that these additional provi-

99 503 U.S. 258 (1992).

100 18 U.S.C. § 1964(c) (1988). The Court quotes a truncated version of this statute in its opinion, however the statute is quoted in its entirety here. *See Holmes*, 503 U.S. at 258.

101 *See Holmes*, 503 U.S. at 266 n.10.

102 *Id.* at 266. There also was a question in the case whether the Court granted certiorari on the issue of whether the statute required proximate cause. *Id.* at 266 n.12. The proximate cause analysis in the case is also intertwined with issues related to standing. *See* Virginia G. Maurer, Holmes v. SPIC*: A New Direction for RICO Standing?*, 5 U. FLA. J.L. & PUB. POL'Y 73 (1992).

103 *Holmes*, 503 U.S. at 267.

104 *See id.* at 266–68.

105 *Id.* at 267.

106 *Id.* at 268 (quoting Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 534 (1983)).

sions often express congressional intent regarding the same goals addressed by proximate cause. Honest statutory interpretation requires courts to value these express provisions, which are more specific than general causal language and the amorphous intent claims used by the courts. When courts rely on general arguments about intent or purpose, they often ignore express provisions of the statute that speak to liability limits.

Further, the intent and purpose arguments are logically suspect as a general proposition. They ignore the changing relationship between statutes and the common law that has been noted for more than 100 years.[107] Many statues expressly abrogate common law understandings of legal rights and obligations. Indeed, some statutes radically upset traditional common law duties.[108] It is odd that these statutes would be read in tandem with common law limitations. For modern statutes, it is no longer fair to assume that they are derived from the common law.[109]

These intent and purpose arguments are buttressed by a faulty canon of construction that requires that Congress specifically indicate its intent to not adopt common law principles.[110] However, this presumption, if it is valid at all, should only apply to statutory regimes that mimic traditional common law torts for which proximate cause is usually invoked. If the statute in question does not do so, there is no reason to think that Congress needed to expressly or implicitly reject proximate cause.

It also is highly problematic to assume that Congress understands, in any meaningful way, what legislating against a backdrop of common law means in any particular regime. As a general matter, the common law itself is so vast that it is unlikely that a large percentage of the members of Congress understand it and then also understand how it would interact with specific statutory language. There is even more reason to be skeptical of this argument in the context of proximate cause, which is an evolving doctrine with contested rationales. Even when a statute does fall within a tort-like tradition, placing it within that organizational box provides little information about which version of proximate cause the courts should apply.

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107 *See* Pound, *supra* note 3 (arguing that legislation must be respected by the courts as much as, if not more than, the common law).

108 *See, e.g.*, Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended in scattered sections of 5 and 29 U.S.C.); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2006).

109 *See* CALABRESI, *supra* note 3, at 5.

110 *See* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 712 (1995) (O'Connor, J., concurring).

Even if there is some reason to think that Congress wanted courts to apply proximate cause or that some other reason demanded it, there also is little reason to believe that the common law idea of proximate cause should be the sole or even primary source in determining liability limitations. In some cases, courts should consider whether principles of administrative deference require them to look to regulations.[111] For some statutes, it is more likely that Congress intended the interstices to be filled by an administrative agency. Other administrative guidance, as well as the "gravitational force" of other statutes, might also be appropriate sources for an inquiry into liability limitation.[112]

It might be plausibly argued that Congress, in some general sense, wants the courts to be able to place sensible limits on statutes. This purpose argument is weak because there is little reason to assume that proximate cause is the only or even the best way to limit a statute's reach or to avoid absurd results.[113] As discussed in more detail below, courts often use proximate cause as a proxy for other concerns.[114] For example, courts turn to proximate cause instead of dealing with complex issues of factual causation. Statutes might directly address these other issues, as well as proximate cause, through various statutory provisions that fall outside general causal language. Even if proximate cause is the appropriate liability limiter, the courts must still determine its meaning from multiple evolving and contested goals. This Article argues that as a matter of prudence, courts should be reluctant to turn to proximate cause to resolve liability limitation problems.

C. Confusing Common Law Techniques with the Common Law

In many statutory proximate cause cases, courts appear to be using common law decision making techniques.[115] Many courts conflate common law techniques with a requirement that the common

111 *See, e.g.*, Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (considering several cases regarding the method of enactment by States of the Clean Air Act and EPA regulations); Skidmore v. Swift & Co., 323 U.S. 134 (1944) (considering an action brought under Fair Labor Stands Act in light of the opinions of the Administrator as appointed under the act).

112 CALABRESI, *supra* note 3, at 98.

113 For example, courts have long claimed the ability to interpret a statute in ways that avoid absurd results. *See* POPKIN, *supra* note 3, at 18, 20 (1999) (discussing how, in the 1600s, judges interpreted statutes so as to avoid absurd results).

114 *See infra* Part V.

115 *See* Baxter, *supra* note 66, at 662–67 (discussing why the Sherman Act might be more susceptible to common law decision making techniques); *see, e.g.*, Associated

law be used to fill statutory gaps. The second premise does not necessarily follow from the first.

This confusion results because, in some cases, the courts appear to both be using a common law methodology and applying that methodology to a statute that the court claims derives from the common law. For example, when interpreting the Sherman Act, the courts often claim to use common law techniques and claim that the statute itself derives from the common law.[116] This conflation is problematic in other statutory proximate cases, where the statute does not generally derive from the common law.

The reach to common law decision making, however, does not resolve the question of which underlying substantive law to use to make the decision. For some statutes, there may be credible arguments that the common law should provide the substantive law. However, for many statutes, the strongest argument that can be made is that the common law is persuasive authority to help resolve the causal question. In these latter instances, judges are not and should not be claiming that they are required to apply common law principles. If judges give primacy to the common law in these latter cases, they should describe why they are looking to the common law, rather than to other sources of meaning, such as the meaning of terms in similar statutes, agency interpretations, or the general purpose of the underlying statute or field of law.

D. The Temporal Orientation Problem

A judge considering a statutory proximate cause argument must determine the relevant point in time at which to view proximate cause. Judges differ regarding how they view the appropriate role of the court when interpreting statutory language. An originalist approach to statutory interpretation attempts to capture the meaning of the text at the time it was enacted.[117] Other approaches to statutory construction allow the meaning to develop over time.[118]

Despite the rigorous ongoing debate about originalism and dynamism, the courts largely ignore these issues when deciding statutory proximate cause cases. As discussed throughout this Article, the

Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 531 (1983).

116 *See* Baxter, *supra* note 66, at 662–67.

117 *See* W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 101 n.7 (1990) (indicating that the will of Congress is a "will expressed and fixed in a particular enactment").

118 *See generally* CALABRESI, *supra* note 3 (discussing the variety of circumstances under which statutes are passed, and the challenges posed for the courts by this variety).

meaning of proximate cause has not remained historically stable and continues to evolve. In theory then, a judge who considers a statutory proximate cause problem from an originalist perspective may therefore be conceiving a very different version of proximate cause than a judge considering the modern meaning of the words "proximate cause."

To date, court decisions have largely been oblivious to the evolving nature of proximate cause. Consider the Supreme Court's opinion in *Holmes*, in which the Court used a judicial gloss applied to the Sherman Act in the early 1900s[119] to RICO, which was enacted in 1970s. In doing so, the Court indicated that "[w]e may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used."[120] As discussed later, it is strange for the Court to presume this. The one thing that is certain about proximate cause is that its underlying goals are contested and evolving. Even if Congress knew that courts applied proximate cause principles to the Sherman Act, it is a stretch to also reason that Congress understood the particular version of proximate cause that courts applied to the Sherman Act.

Importantly, *Palsgraf*, which is considered to be a leading case regarding proximate cause, was not decided until 1928, well after the passage of the Sherman Act.[121] The *Restatement (First) of Torts* was issued in the 1930s.[122] Thus, it appears that when the Court is recognizing proximate cause principles by derivative reasoning from the Sherman Act, it is not referring to the more modern iterations of proximate cause expressed in either *Palsgraf* or the *Restatement (First) of Torts*, but rather to earlier rationales. Indeed, the Court noted that in the RICO context, Congress used the Clayton Act language, which is derivative of language from the Sherman Act. The Court noted: "[W]e can only assume it intended them to have the same meaning that courts had already given them."[123] However, the Court confuses the issue by citing a treatise edition from 1984 in discussing proximate cause in the RICO context.[124] This discussion illustrates that the courts have been inattentive to temporal orientation and the changing nature of proximate cause over time.

Even if courts can agree on whether statutory proximate cause is defined at the inception of the statute or the time of the decision,

119 Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 267 (1992).
120 *Id.* at 268.
121 Palsgraf v. Long Island R. Co., 162 N.E. 99 (N.Y. 1928).
122 Restatement (First) of Torts (1939).
123 *Holmes*, 503 U.S. at 268.
124 *Id.*

difficult questions exist about whether proximate cause becomes frozen in time in the statutory context or whether it can continue to evolve in a common law tradition. Judges also must determine which of several iterations of proximate cause the legislature intended or expressed. These temporal orientation issues are key to understanding what courts mean when they use the term "proximate cause."

E. Failure to Value Express Liability Limits

Many statutory proximate cause cases involve the same flawed, cursory reasoning. The court first looks for a causal term or terms in the statute and then reasons that this causal term means proximate cause because the same or similar causal language means proximate cause in the torts context. This argument ignores that many statutory regimes differ from tort causes of action in a fundamental way. Unlike common law torts, many statutes contain liability limiters not just in their causal language, but throughout the statutory regime. Since proximate cause is essentially about limiting liability, courts must consider these other provisions when determining the appropriate space, if any, for proximate cause to operate within the statutory regime.

In a torts case, it makes sense to look to the causal language as the primary source of liability limits, because in many instances, the tort consists of a limited number of elements. Consider negligence, which is often defined with four elements: breach, of a duty, causing, damages.[125] A common law negligence regime does not define the parties that may face liability or define the scope of conduct that might lead to liability. However, many statutes more specifically define prohibited conduct, the class of protected individuals, or the identity of potentially liable defendants. These statutory provisions speak to limits on liability, the same concern as proximate cause.

An example is helpful in illustrating this point. The *Staub* case discussed above strongly suggests that proximate cause will be applied in the employment discrimination context.[126] Title VII of the Civil Rights Act, the cornerstone employment discrimination statute, contains numerous provisions that already address liability limits. A Title VII claim may only be pursued by certain statutorily defined plaintiffs and may only be pursued against certain statutorily defined defend-

125 *See* Hirsch v. CSX Transp., Inc., 656 F.3d 359, 362 (6th Cir. 2011).

126 *See* Staub v. Proctor Hosp., 131 S.Ct. 1186, 1191 (2011) (noting that USERRA is very similar to Title VII).

ants.[127] Title VII not only defines prohibited discriminatory conduct, but the statute and subsequent case law define when employers are allowed to engage in certain conduct that might otherwise be construed as discriminatory.[128] It also contains odd burden-shifting features that give each party certain responsibilities to prove or disprove liability.[129] The statute also specifically indicates the type of damages for which defendants will be liable.[130] Short deadlines for filing suit and an administrative exhaustion requirement also make it unlikely that typical proximate cause factual scenarios will occur in employment cases.[131]

These attributes of federal employment discrimination law represent both explicit and implicit choices about the core concerns of proximate cause, limiting the courts' power to make contrary judgments. Under Title VII, there is a strong argument that the courts should not apply common law proximate cause because Congress already addressed many concerns related to proximate cause in express language. These interlocking statutory provisions represent choices made by Congress about the limits of liability. Given the need for consensus-building in legislation and the legislature's ability to craft more detailed regimes, these choices are often expressed throughout statutory regimes and through a variety of different mechanisms.[132] Arguments about proximate cause drawn from general causal language ignore that the core concern of proximate cause is limiting liability and that statutes speak to this concern through various mechanisms.

Further, if proximate cause is concerned with line drawing, the courts risk upsetting a complex statutory regime by assuming proximate cause from general causal language. At times, a statutory regime already balances the defendant's recklessness or intention to harm, the relative wrongfulness of the parties' conduct, whether the extent of liability was out of proportion to the degree of wrongfulness, and

127 *See* 42 U.S.C. § 2000e-2(a) (2006) (making it an unlawful employment practice for an employer to engage in certain types of conduct); Salamon v. Our Lady of Victory Hosp., 514 F.3d 217, 228 n.11 (2d Cir. 2008) (noting independent contractors are not protected by Title VII).

128 *See generally* Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69 (2011) (arguing that courts have narrowly construed Title VII's language to restrict the types of prohibited conduct).

129 *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i), (m) (2006).

130 42 U.S.C. § 1981a(a)(1) (providing compensatory and punitive damages for intentional discrimination claims).

131 *See, e.g.*, Brooks v. Midwest Heart Grp., 655 F.3d 796, 800 (8th Cir. 2011).

132 *See also* POPKIN, *supra* note 3, at 120 (discussing how worker's compensation laws abrogated the common law through various compromises).

the perceived purpose of the obligations created by the statutory regime.[133] Courts using proximate cause must at least be aware that common law proximate cause ideas might upset this balance.

Even if a statute does not address all proximate cause concerns, many at least address more of them than traditional common law torts, such as negligence. In these instances, courts must consider whether the concept of proximate cause in the statute is coterminous with the common law ideas of that term.

When courts only look to causal language to determine whether proximate cause is needed, they ignore the complex web of other limiting principles that are often contained in statutes. In many instances, these limiting principles will make it clear that Congress has already spoken to proximate cause concerns, eliminating the need for the courts to apply the doctrine. In others, the statutory provisions may leave a narrow space for proximate cause. Given the breadth of potential statutory language, it is also possible that some regimes may require a broader use of proximate cause, perhaps even broader than that typically used at common law.

F. Derivative Reasoning Problems

When the Supreme Court adopts proximate cause for one statute, courts often use this holding to justify applying it to other statutory regimes. This is highly problematic because courts' relationship with statutes may vary depending on a host of factors that are typically not reconsidered in the subsequent opinion.

Take the following example. In *Associated General Contractors*, the Supreme Court interpreted a remedial provision in the Clayton Act to incorporate proximate cause.[134] In that case, unions alleged that defendants, in violation of the antitrust laws, coerced third parties into entering business relationships with non-union firms.[135] The Court traced the remedy provision in the Clayton Act to the Sherman Act.[136] It reasoned: "The repeated references to the common law in the debates that preceded the enactment of the Sherman Act make it clear that Congress intended the Act to be construed in light of its common-law background."[137]

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133 *See* Stapleton, *supra* note 6, at 985–86.

134 Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519 (1983).

135 *Id.* at 521.

136 *Id.* at 530.

137 *Id.* at 531.

In construing the Sherman Act, the Court also emphasized a particular problem presented by its language. Its core substantive provision is so broad, that the courts have indicated that, "it cannot mean what it says."[138] And it observed that, "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation."[139] Further, the Court cited remedies jurisprudence that indicated that the "general tendency of the law . . . is not to go beyond the first step."[140] The Court also indicated that it should not grapple with complex problems involving indirect victims because the directly injured victims could be counted on to vindicate the law.[141]

The Sherman Act was enacted in the late 1800s, at a time when Congress often enacted statutes against a backdrop of the common law.[142] In interpreting the statute's language, the Court looked to treatises issued prior to 1890 and at court opinions decided in the decades after the statute's enactment.[143] It is not clear whether the Court is actually applying proximate cause to the statute or using proximate cause to develop a standing doctrine for antitrust.[144]

Several features of *Associated General Contractors* are important. First, the decision is made about a uniquely vague statute that the Court indicates derives from a common law background. Second, the Court conceives the purposes of antitrust law as not providing a remedy for every injury traced to it. Third, the Court provides a reason for limiting liability: that the law does not go beyond the first step. Fourth, the Court is engaging a statute enacted against a backdrop of common law and at a time when the expected relationship between the courts and statutes was different than it is now. Further, the Court created a standing/proximate cause doctrine using reasoning specific to the antitrust context.[145]

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138 *Id.* at 531 (internal quotations omitted); *see also* Baxter, *supra* note 66 (discussing why the Sherman Act might be more susceptible to common law decision making techniques).

139 *Associated Gen. Contractors*, 459 U.S. at 534 (internal quotations omitted).

140 *Id.* (internal quotations omitted).

141 *See id.* at 543–44.

142 *See id.* at 531–533; *see also* POPKIN, *supra* note 3, at 61 (noting how legislation changed in the late 1800s); *id.* at 67 (discussing how courts in the 1800s tried to reconcile the common law with statutes).

143 *Associated Gen. Contractors*, 459 U.S. at 532, n.24 & 533.

144 *See id.* at 535 ("There is a similarity between the struggle of common-law judges to articulate a precise definition of the concept of 'proximate cause,' and the struggle of federal judges to articulate a precise test to determine whether a party injured by an antitrust violation may recover treble damages." (footnote omitted)).

145 *Id.* at 537–538.

Although this reasoning is important to the Court's decision, it is downplayed in later cases that rely on its reasoning but that are not decided in the Sherman or Clayton Act context. Indeed, *Associated General Contractors* is cited in a cascade of subsequent decisions. In *Holmes v. Securities Investor Protection Corp.*,[146] the Court relied on it to recognize proximate cause ideas in RICO.[147] In a subsequent decision, *Anza v. Ideal Steel Supply Corp.*, the Supreme Court relied heavily on the *Holmes* decision to deny recovery based on proximate cause principles under a separate RICO provision.[148] Thus, *Anza* is derivative of *Holmes*, which is derivative of *Associated General Contractors*. The *Staub* Court cited *Anza* in support of the proposition that proximate cause can be applied USERRA.[149]

Whether a particular statutory proximate cause argument is appropriate varies depending on the statute at issue.[150] For example, applying Sherman Act decisions to other statutes is a problem because the Sherman Act's language has been construed to be so broad that it cannot be enforced as written and its statutory text has been described as "devoid of content."[151] Some commentators have asserted that antitrust law is incompatible with textualism.[152] Techniques used to interpret the Sherman Act may not apply to other statutes with more comprehensive language.

Given the specificity of the arguments needed to construct statutory proximate cause, it is unconvincing when courts import reasoning from one statutory regime to another regime, without careful examination of the similarities and differences between the statutes. Statutes vary in their specificity and ambiguity with respect to proximate cause issues. And statutes also vary with respect to the tools that might be available for conducting proximate cause analysis. Further, each statutory regime may have varying levels of desirable judicial intrusion. Unfortunately, courts continue to use derivate reasoning.

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146 503 U.S. 258, 259 (1992).

147 *Id.* at 267–268

148 547 U.S. 451, 456 (2006) ("Our analysis begins—and, as will become evident, largely ends—with *Holmes*.")

149 *See* Staub v. Procter Hosp., 131 S. Ct. 1186, 1193 (2011). It also cited *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). However, the portions of the *Sosa* decision pertaining to proximate cause are dicta and do not directly address when and how proximate cause is appropriate in the statutory context. *See Staub,* 131 S. Ct. at 1192 (citing *Sosa,* 542 U.S. at 704).

150 Craig Allen Nard, *Legal Forms and the Common Law of Patents*, 90 B.U. L. REV. 51, 53 (2010) (describing patent law as a "common law enabling statute.").

151 Daniel A. Farber & Brett H. McDonnell, *"Is There a Text in This Class?" The Conflict Between Textualism and Antitrust*, 14 J. CONTEMP. LEGAL ISSUES 619, 620 (2005).

152 *See id.* at 622.

To date, the courts have not adequately considered the complexity inherent in statutory proximate cause decisions. As this Part demonstrates, courts often rely on weak textual, intentionalist and purposivist arguments to justify proximate cause. In some instances, courts appear to use multiple arguments to strengthen the appearance of the argument in favor of proximate cause in a particular case. However, if each of the weak or incorrect arguments is stripped away, then it is clear that many statutory proximate cause cases rest on weak foundations.

Given the malleability of proximate cause, courts should explicitly provide the statutory interpretation goals, methodology and temporal orientation applied to each statutory proximate cause issue. Such explicit reasoning is necessary to determine whether the court is complying with its constitutional role and for later courts to determine whether a particular court's decision is limited to its particular circumstances. Notice that this Article does not challenge generally the ability of courts to apply common law principles to statutory regimes. Rather, it argues that proximate cause is so particularly problematic that courts should, as a matter of prudence, engage in a more sophisticated analysis before using it.

It is unclear whether courts are ignorant of the weakness of their arguments, whether they are purposefully engaging in legal fictions to mask other lawful purposes, or whether they are refusing to engage in "honest interpretation to hide raw policy-making."[153] While errors or a lack of candor do not automatically lead to the assumption that the courts are improperly exercising authority, it does suggest the possibility. Further, courts should, at a minimum, be guided by "articulable legal principles."[154] Given the important interests at stake in the statutory proximate cause context, it is important for courts to provide honest rationales for their decisions or at least rationales that provide plausible reasons for using proximate cause.

IV. Intersectionality Problems with Proximate Cause and Statutes

The prior Part discussed flawed reasoning courts use when considering statutory proximate cause questions. This Part demonstrates why proximate cause is generally a poor fit with statutory regimes.

153 Calabresi, *supra* note 3, at 88 (discussing honest interpretation); *see* Peter J. Smith, *New Legal Fictions*, 95 Geo. L. Rev. 1435 (2007).

154 Jared A. Goldstein, *Equitable Balancing in the Age of Statutes*, 96 Va. L. Rev. 485, 519 (2010) (arguing the courts should not apply equitable balancing in statutory cases).

This Part discusses the major questions and problems courts must grapple with before recognizing proximate cause.

At times, it appears the Court assumes that proximate cause principles will apply unless there is a clear indication that Congress intended to dispense with them.[155] This assumption is no longer warranted. Rather, courts should, as a matter of prudence, be extraordinarily reluctant to create statutory proximate cause, especially in cases where there is only weak textual, intentionalist, or purposivist support for the proposition. Applying proximate cause to statutes requires nuanced discussions about the interaction of torts and statutes. It also requires courts to examine the space each statute possibly reserves for statutory proximate cause. Many liability-limiting problems can often be addressed by using statutory provisions, by using administrative deference, by highlighting the problem for future legislative or agency attention, or by using other less troublesome doctrines. In those rare instances where proximate cause should be used, this Part describes problems courts will nonetheless create by using proximate cause.

A. A Tort is Not Always the Right Kind of Tort

When courts consider statutory proximate cause, they must first consider whether the statutory regime in general and the particular provision at issue are similar enough to torts that use proximate cause for borrowing to be appropriate. In the past, courts have assumed that statutory proximate cause is appropriate because civil statutes generally fall under the umbrella of torts[156] and that tort doctrines such as proximate cause can then be applied. This Part demonstrates that this fundamental premise does not probe deep enough to be meaningful.

Tort law can be defined as being "about the wrongs that a private litigant must establish to entitle her to a court's assistance in obtaining a remedy and the remedies that will be made available to her."[157] Many statutory regimes are only torts in the broadest sense of the term—they are civil actions that do not arise in contract.[158] Such a definition reveals little[159] about whether the statutes are similar to

155 *See* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 712 (1995) (holding that "harm" can include habitat modification).

156 *See* Staub v. Proctor Hosp., 131 S. Ct. 1186, 1191 (2011) ("[W]hen Congress creates a federal tort it adopts the background of general tort law.").

157 Goldberg & Zipursky, *supra* note 12, at 919.

158 *See* BLACK'S LAW DICTIONARY (9th ed. 2009).

159 Max Radin, *A Speculative Inquiry into the Nature of Torts*, 21 TEX. L. REV. 697, 698–99 (1943) (noting that it is of little value to say that a "tort is something that is actionable but is neither a contract nor a quasi-contract").

common law torts, such as negligence, in any meaningful way. As discussed in more detail below, it is in negligence cases that proximate cause most often applies, "contain[ing] the voraciousness of the negligence principle within tolerable bounds."[160]

Negligence concerns a relatively undefined relationship between the parties, which has no definite boundary for liability. Negligence also does not specifically define the type of activity that must occur to create liability. Thus, a person might be liable for a wide range of conduct and harms, as long as the defendant breached a duty of reasonable care. Further, negligence can exist when there are just slight deviations from community norms and liability may be out of proportion to the fault, especially in cases where there is no moral fault.[161]

In this malleable context of undefined relationships and relatively undefined duties, a similarly undefined limiting principle such as proximate cause makes more sense. This is especially true given that judges acting in common law capacities are responsible for the creation and evolution of non-statutory negligence law.

However, statutory regimes often do not resemble negligence in important respects. For example, a statute might define protected parties, potential defendants, or the relationship that must exist between parties for liability to attach.[162] The statute might prohibit actions, at least more precisely than the common law concepts of breach and duty.[163] Many statutes calibrate damages with liability, such that there is some legislative thought behind the proper liability for a particular violation.[164] Some statutes also provide plaintiffs the ability to prevail on intent-based and non-intent claims.[165] Many statutes contain affirmative defenses that allow defendants to escape or minimize liability in particularly defined instances.[166] As discussed in Part III.E., *supra*, statutes often contain various liability-limiting principles throughout their statutory language. Congress has continued to

160 Stapleton, *supra* note 6, at 956.

161 *See* KEETON ET AL., *supra* note 9, at 282.

162 *See, e.g.*, 42 U.S.C. § 2000e-2(a) (2006) (making it an unlawful employment practice for an employer to engage in certain types of conduct); Salamon v. Our Lady of Victory Hosp., 514 F.3d 217, 228 n.11 (2d Cir. 2008) (noting independent contractors are not protected by Title VII).

163 *See, e.g.*, Family and Medical Leave Act, 29 U.S.C. §§ 2601–2654 (2006).

164 *See, e.g.*, 42 U.S.C. § 1981a(a)(1) (2006) (providing compensatory and punitive damages for intentional discrimination claims, but not for disparate impact claims).

165 *See* Sperino, *supra* note 128, at 74–81 (discussing frameworks used to evaluate discrimination claims).

166 *See, e.g.*, 42 U.S.C. § 2000e-2(k)(1)(A) (2006) (describing employer's affirmative defense in Title VII disparate impact cases).

amend certain statutes to increase, decrease, or clarify the appropriate bounds of liability.[167]

To the extent that a statute has some or all of these traits, it becomes less like common law negligence, where proximate cause has its greatest applicability. Courts that reason that a statute is a tort generally are not classifying the statute with enough precision. Rather, any court considering statutory proximate cause questions must ask whether the statute they are interpreting is enough like common law torts that use proximate cause.

This more nuanced reasoning is important because even within the general realm of torts proximate cause is not used uniformly. Rather, the doctrine of proximate cause morphs depending on the context in which it is being applied, with proximate cause hardly ever being an issue in intentional tort cases.[168]

As discussed earlier, various reasons exist for this differential treatment. First, "the requirement in negligence cases that the plaintiff's harm be an expectable or foreseeable consequence of the defendant's actions does not apply to intentional torts."[169] Second, courts express less concern about limiting a defendant's liability in situations where the defendant has acted with the requisite intent, which in many instances means that the defendant is considered to be morally blameworthy.[170] Third, in intentional tort cases, "the defendant's wrongful conduct is closely linked—temporally and conceptually—to the plaintiff's harm."[171] Fourth, the risks of inefficient over-deterrence are lessened in intentional tort cases.[172] And, traditional intentional tort cases typically do not involve multiple causes.[173]

However, courts fail to distinguish between intentional and non-intentional torts in the statutory proximate cause context. For example, in the *Staub* case, the Court emphasized that USERRRA requires intentional action; however, the Court did not discuss whether proxi-

167 *See, e.g.*, 42 U.S.C. § 2000e-2(k)(1)(A) (2006) (amending Title VII to clarify how disparate impact analysis should proceed).

168 *See* AM. JUR. 2D *Negligence*, § 422 (2004) (discussing proximate cause and intentional torts); David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1773 n.30 (1997) (stating that the rule of proximate cause is so broad in intentional torts that it almost has "the full reach of factual causation").

169 Fisch, *supra* note 35, at 832.

170 *Id.* at 832.

171 *Id.*

172 *Id.* at 833.

173 *Id.* at 832.

mate cause principles apply differently in this context than they would in a context of negligent conduct.[174]

Not only did proximate cause largely develop in the context of negligence and, to a lesser extent, strict liability, it also largely developed in response to cases involving physical actions. Thus, when courts cite extreme cases in which proximate cause limits liability, the examples are almost uniformly ones involving multiple physical actions. For example, the Supreme Court has indicated that proximate cause would limit liability under the Endangered Species Act if a tornado lifted fertilizer from a farmer's tilled field and deposited the fertilizer in a wildlife refuge where it injured an endangered species.[175] When statutes involve primarily economic harm or emotional injury, courts must determine whether concerns that developed in the physical harm context carry over to the new type of harm.[176]

Further, torts such as negligence play a loss-allocating role that is not shared by many statutes. For example, it would be difficult to argue that many civil rights statutes serve a loss-allocation function.

Given these differences, it is not sufficient to determine that a statute is like a tort in some general sense. Rather, it is necessary to ask which traditional tort the statutes most mimic. The answer to this question is not uniform across the statutory regimes, and may even vary within statutory regimes that embrace varying norms of fault. Further, some statutes vary so dramatically from common law causes of action that it may be difficult to map them onto any version of common law liability.[177]

B. Framing the Space For Proximate Cause

Courts considering statutory proximate cause questions must also identify the space a particular statute allows for proximate cause and

174 Staub v. Proctor Hosp., 131 S. Ct. 1186, 1191 (2011). Another feature of USERRA is important in the proximate cause inquiry. The statute allows for the plaintiff to prevail against the employer for the acts of its agents in certain circumstances. *Id.* at 1192. Thus, questions about whether a defendant should be liable relate to, among other things, both agency and cause.

175 Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 713 (1995).

176 For some statutes, it may be even more difficult to characterize the harms. Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115, 2147 (2007) (noting that discrimination claims "often articulate a type of injury—disproportionately experienced by members of subordinated groups—that cannot be pinned down as psychological, economic, or physical in nature, or as either individual or group based").

177 *See, e.g.*, Goldstein, *supra* note 154, at 529–30 (discussing how environmental law differs from common law).

the version of proximate cause to be applied. As discussed in detail in Part I, *supra*, proximate cause does not have a fixed meaning or goal, outside of a general principle of limiting liability. Proximate cause may be concerned with problems regarding intervening actions, a foreseeable plaintiff, the scope of risk of the defendant's actions, or policy.[178] In some instances, proximate cause may be used as a proxy for other concerns, and in some cases one or more of these rationales may animate proximate cause.[179] This nuance is often cloaked in court language that renders proximate cause as a unitary concept. For example, in *Staub* the Court reasoned that the use of causal factor language in a statute incorporates "the traditional tort-law concept of proximate cause."[180]

In the statutory context, it is important how courts frame the goals of proximate cause with respect to a particular statute. Some or all of those goals may already be addressed in the statute, leaving little or no space for the court to fill with common law ideas. Indeed, statutes often express liability-limiting principles through a broad range of provisions, in contrast to traditional tort law. Congress might express limits by defining the parties who may sue, by using affirmative defenses, by providing limited remedies, by narrowly proscribing prohibited conduct, or by defining statutory terms. Having courts develop a proximate cause analysis without considering these provisions would allow them to intrude upon an interconnected web of congressional judgments about how and when liability should be limited.

When determining the space that might exist for proximate cause, courts must also be mindful of the version of proximate cause they intend to apply. A statute may leave little or no space for some goals. For example, most of the traditional torts do not define the relationship that must exist between the plaintiff and the defendant to create liability.[181] Negligence applies in situations involving various kinds of plaintiffs and defendants. In general, a person or entity owes duties to the world.[182] This is radically different from many statutes,

178 *See supra* Part I.

179 *See supra* Part I.

180 Staub v. Proctor Hosp., 131 S. Ct. 1186, 1193 (2011).

181 *See, e.g.*, Hirsch v. CSX Transp., Inc., 656 F.3d 359, 362 (6th Cir. 2011) (describing elements of negligence).

182 At times, either by common law or statutes, certain types of potential defendants are exempted from liability; however, the modern trend is to reduce the available exemptions. Victor E. Schwartz & Leah Lorber, *Defining the Duty of Religious Institutions to Protect Others: Surgical Instruments, Not Machetes, Are Required*, 74 U. CIN. L. REV. 11, 12 (2005) (discussing how charitable immunity waned in the 20th century).

which define the appropriate plaintiffs and/or the appropriate defendants in a narrow fashion. Thus, if proximate cause is concerned about whether the plaintiff was foreseeable, some statutes already speak to this concern, either diminishing or eliminating the space for proximate cause to accomplish this goal.[183] However, there might be greater space for other proximate cause rationales within the same statutory regime.

Two other examples are helpful in showing why the particular proximate cause rationale might affect the outcome of statutory analysis. The reasonable foresight doctrine is premised, in part, on the idea that it is inefficient to hold defendants liable for the full harm caused by their negligent activity.[184] Some statutory regimes may not have the same efficiency goals. If the core concern of proximate cause is actually duty, many statutes actually speak to this concern more specifically than common law negligence. The question in duty cases is whether the defendant and the plaintiff stand in relation to one another in a way that creates a legally recognized obligation.[185] Many statutes define prohibited conduct more specifically than common law negligence.

Each statute may have a varying degree of space within which proximate cause can plausibly operate and this space depends on the statute's other liability limits. In some statutory contexts, court interpretations of the statute in other areas may likewise limit the space for proximate cause.

Further, if a court uses one rationale to apply proximate cause to a statutory regime, it does not follow that the court can then use the same reasoning to read a different rationale into another statute. In *Associated General Contractors of Calif., Inc. v. Calif. State Council of Carpenters*,[186] the Court looked to contemporary ideas of proximate cause in 1890 when the Sherman Act was enacted.[187] In doing so, it cited treatises explaining the meaning of proximate cause. One treatise stated that "natural, proximate, and legal results are all" that can be recovered for, and the other indicated that the reason for this rule is to be "found in the impossibility of tracing consequences through successive steps to the remote cause, and the necessity of pausing in

183 *See generally* Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 ILL. L. REV. 1 (forthcoming 2013).

184 Mark F. Grady, *Proximate Cause Decoded*, 50 UCLA L. REV. 293, 300 (2002) (arguing that proximate cause is two doctrines: one focusing on multiple causes and one focusing on cases with multiple risks).

185 KEETON ET AL., *supra* note 9, at 274.

186 459 U.S. 519 (1983)

187 *Id.* at 532 & n.24.

the investigation of the chain of events at the point beyond which experience and observation convince us we cannot press our inquiries with safety."[188] Subsequent courts cited *Associated General Contractors* for the idea that it is appropriate to apply proximate cause to statutes but then applied a different version of proximate cause.[189]

In many cases, the courts fail to identify the type of proximate cause being applied to the regime or even apply different versions of the doctrine within the same opinion. This raises several important questions. It is questionable whether the majority opinions that rest on conflicting rationales can actually be classified as majority opinions in their expression of proximate cause. In some instances, it is possible that a particular factual issue credibly implicates multiple, overlapping goals of proximate cause. However, in other instances, judges may actually disagree about the type of proximate cause to be applied. In these latter instances, subsequent courts will be left with little guidance, other than a general idea that proximate cause can be applied to the statute.

Further, if courts are not identifying the goals of proximate cause related to a particular statutory regime, the term "proximate cause" may serve as nothing more than an empty vessel into which courts can apply any meaning they see fit, whether the meaning comports with the underlying statute or not.

In defining the available space for proximate cause, courts must also articulate the constitutional space in which they are operating. The space for proximate cause might change depending on what reason is given. For example, if the problem before the court is one that Congress never anticipated, the courts may have greater leeway to handle the unanticipated case. When courts do not clearly express why they are recognizing proximate cause, they risk using it in cases where liability limits are clearly contained within a statute's language, intent, or purpose. Requiring courts to define the available space for proximate cause is important in its own right in that it will help future litigants and those affected by the statutes to determine whether and

188 *Id.* (quoting respectively J. LAWSON, RIGHTS, REMEDIES, AND PRACTICE 1740 (1890) and T. COOLEY, LAW OF TORTS 73 (2d ed. 1888)). The Court also relies on a treatise discussing problems regarding remoteness; however, this refers to concerns about the certainty of damages. *Id.* at 532 n.25.

189 *See, e.g.*, Service Emps. Int'l Union Health & Welfare Fund v. Philip Morris, Inc., 249 F.3d 1068, 1070–71 (D.C. Cir. 2001) (discussing how the district court used the proximate cause standard from RESTATEMENT (SECOND) OF TORTS § 431 (1965) to evaluate proximate cause); Quade v. Rodriguez, No. 2:07-CV-64, 2009 WL 2170146, at *7–8 (E.D. Tenn. July 21, 2009).

how proximate cause is likely to be used in respect to a specific statute.

C. Proximate Cause Is Evolving

Courts also must consider how proximate cause's changing nature affects statutory interpretation. Thus courts must consider how statutes interact with the common law, whether applying proximate cause freezes that doctrine in the statute, and how courts as an institution interact with statutes over time.

Proximate cause is an evolving common law doctrine.[190] Several of the underlying rationales of proximate cause are considered to be outdated.[191] As discussed in section III.D, this feature of proximate cause should raise important statutory interpretation questions regarding temporal orientation, but, to date, the courts have largely ignored these issues.[192]

These problems can be illustrated by the Supreme Court's use of Sherman Act proximate cause to import the concept into a RICO provision.[193] Congress enacted the Sherman Act in the late 1800s, and RICO in 1970.[194] During the interim between the two Acts, several important legal developments occurred regarding proximate cause: the *Palsgraf* case and the *Restatement (First) of Torts*.[195] Importantly, by 1970, many early iterations of proximate cause had been largely rejected. It is highly debatable that in 1970 Congress both understood that the Sherman Act used proximate cause and that it understood which version of proximate cause the courts used in the early 1900s. This argument is less compelling given that the concept of proximate cause was undergoing rapid development in the twentieth century. Nonetheless, the Supreme Court reasoned that "[w]e may fairly credit . . . Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used . . . ."[196] Further confusion is invited because modern itera-

190 *See supra* Part I.

191 *See supra* Part I.

192 *See supra* Part III.D.

193 *See* Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 266 (1992) (stating that it is very unlikely that "Congress meant to allow all factually injured plaintiffs to recover" and thus RICO should not be read expansively); *id.* at 259.

194 Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (2006)); Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified as amended at 18 U.S.C. §§ 1961–68 (2006)).

195 Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928); RESTATEMENT (FIRST) OF TORTS (1939).

196 *Holmes*, 503 U.S. at 268.

tions of proximate cause separate the concept from factual cause, while earlier versions of legal cause encompassed both inquiries.[197]

Whenever courts apply common law concepts to statutes they naturally implicate large questions about the proper interplay of statutes, the common law, and the courts. How these questions are resolved also depends on how judges view their constitutional role and the appropriate methods for complying with it. Statutory proximate cause cases present interesting dilemmas for judges.

Consider a judge who believes that the court's function is to interpret statutes using textualist tools and that the meaning of the statute is fixed at the time of the legislation's passage. If that judge uses some of the weak textual analysis described earlier, the judge can reason that it is proper to recognize proximate cause with respect to a statute. If the judge is being consistent with his or her statutory interpretation philosophy, the judge will be required to determine the meaning of proximate cause at the time the legislature enacted the statute. For statutes enacted long ago, this version of proximate cause is likely to be different than modern iterations. For example, the *Staub* decision refers to the *Restatement (Second) of Torts*, which has already been updated.[198] Indeed, any fixed version of proximate cause is likely to become out of sync with the evolving common law.

Judges who believe that common law statutory concepts can evolve with the underlying common law face a different set of challenges. They will be tasked with determining when the statutory concept becomes so divorced from the common law that the statutory concept must be adapted. This includes the possibility that the concept of proximate cause might be significantly diminished or abolished over time.

Closely related to this temporal orientation question is the question of whether courts should view statutes as independent islands of obligation or whether they should integrate statutes within the broader legal landscape.[199] Courts might also be concerned about how the body of law in a particular area develops.

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197 *See* Stapleton, *supra* note 6, at 957 (stating that sometimes proximate cause is used to mean legal cause as articulated in early *Restatements* but sometimes it is used in a more limited way).

198 Staub v. Proctor Hosp., 131 S. Ct. 1186, 1192 n.2 (citing RESTATEMENT (SECOND) OF TORTS §§ 435, 435B, cmt. a (1965)).

199 W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 100–01 (1991) (articulating that the court should interpret ambiguous terms in light of recent and past legislation as it is the court's role "to make sense . . . out of the *corpus juris*"). This inquiry also overlaps with statutory interpretation methodologies. *See* POPKIN, *supra* note 3, at 157 ("[One strand of textualism] rests on a *normative* conception . . . that [assumes] legis-

Notice that these different viewpoints about temporal orientation make it difficult for a court composed of judges with these differing viewpoints to reach agreement on anything other than the broad principle that proximate cause should be used with respect to a particular regime. Thus, it is not surprising that statutory proximate cause opinions often contain a hodge-podge of selected quotes, rather than a detailed analysis of proximate cause.[200] Because courts use the term "proximate cause" to describe an array of goals and motivations, it is also likely that when subsequent courts rely on a prior statutory proximate cause case, they may not intend the same doctrine as that used by an earlier court.

Further, the very nature of the relationship between the common law, statutes, and the courts is evolving.[201] Guido Calabresi notes that early statutes were often written in broad operative language that lent itself to common law-like interpretive techniques.[202] It is an interesting question whether modern judges approaching a statutory proximate cause question with regard to an old statute must also place themselves in the same posture with respect to the statute that the enacting Congress would have expected them to take, if such a posture is even discoverable.[203] This question is especially complex for statutes that have been repeatedly amended over time. To date, courts have not addressed any of these issues in statutory proximate cause cases.

D. Proximate Cause is Not Theoretically Stable.

Proximate cause is not theoretically stable. This feature causes two problems in the statutory proximate cause context. First, courts interpreting federal statutes will have the same problems state courts have had in defining proximate cause. Second, this indeterminacy

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lation is a radically separate source of law, not part of a broader legal fabric that the judge has a responsibility to develop.").

200 POPKIN, *supra* note 3, at 157.

201 For further discussion of this idea see CALABRESI, *supra* note 3; Pound, *supra* note 3.

202 CALABRESI, *supra* note 3, at 5.

203 *See generally* Brian G. Slocum, *Overlooked Temporal Issues in Statutory Interpretation*, 81 TEMP L. REV. 635 (2008) (considering whether new or modified rules of interpretation should be applied only prospectively or also retrospectively); *see also* POPKIN, *supra* note 3, at 38 (arguing that it is difficult to understand how earlier generations of judges would have viewed the appropriate function of statutory interpretation); *id.* at 45 (noting that in the late 1700s, the line between statutes and common law was not clearly delineated); *id.* at 61 (noting how legislation changed in the late 1800s); *id.* at 67–68 (discussing how courts in the 1800s tried to reconcile the common law with statutes).

means that courts are making relatively unguided choices among conflicting policies.

In defining the key attributes of proximate cause, the federal courts will have the same problems that state courts have had. Harkening back to first-year torts, many lawyers can remember the confused mash of cases selected to demonstrate the proximate cause inquiry. These cases are known for their contradictory language and inability to articulate a common rationale for proximate cause.[204] There is simply no fixed proximate cause analysis. As one court noted:

> Although many legal scholars have attempted to lay down a single standard to determine proximate causation, . . . no satisfactory universal formula has emerged. Instead, proximate cause is always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent.[205]

The sheer number of considerations and possibilities for each statutory regime makes it likely that courts will apply proximate cause idiosyncratically. At its core, proximate cause "is practical politics."[206] Proximate cause also is highly indefinite.

Given that there is no agreed upon source for the common law, courts applying common law doctrines are always making important choices about where common law is best expressed. When using proximate cause in statutes, it is unclear whether courts are simply borrowing common law definitions, whether they are creating a federal common law for federal statutes generally or for the particular statute in question,[207] or whether they are simply investing their own ideas into the empty vessel of proximate cause. More importantly, courts have not considered which of the options is preferred as a normative matter.

Each choice poses interesting problems. If the court believes it is creating a special definition of proximate cause for a particular fed-

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204 CSX Transp., Inc. v. McBride, 131 S. Ct. 2630, 2637 (2011) (noting that common law proximate cause "formulations varied, and were often both constricted and difficult to comprehend").

205 John Crane, Inc. v. Jones, 586 S.E.2d 26, 29 (Ga. Ct. App. 2003).

206 Palsgraf v. Long Island R.R., 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting).

207 For a discussion regarding courts' power to create federal common law, see Goldstein, *supra* note 154, at 519. When courts apply common law principles to statutory regimes, those principles are often applied differently. *See* RESTATEMENT (THIRD) OF AGENCY, Introduction (2006) (discussing how courts import common law principles into statutory analysis but vary the underlying principles given the particular statutory regime).

eral statute, the court-created doctrine would vary by statute. It also would likely take into account other core policy concerns of the statute, such as whether the statute is a liberal one, what ideas it expresses about victim compensation, the likelihood of overdeterrence, and whether, without proximate cause, liability will be out of proportion to the degree of wrongfulness of the defendant's actions.

Even if one believes that courts have the power to create federal common law, the choice to create a specific proximate cause standard for each statute means that the statute's version of proximate cause is likely to be out of line with other articulations of proximate cause. This raises important issues about whether common law doctrines should remain consistent across statutory regimes or whether it is more appropriate to develop specific versions of proximate cause for each statute. It also creates questions about what should occur when the statute is amended or when court doctrines related to the statute change in ways that would alter the proximate cause question.

V. A Statutory Proximate Cause Architecture

This Part develops an architecture to guide courts regarding whether proximate cause should be used in statutes. Given the difficult theoretical, doctrinal and practical problems raised, the architecture is premised on a strong reluctance to use proximate cause. Such reluctance is necessary because statutory proximate cause necessarily implicates difficult questions about separation of powers and the relationship between statutes and the common law that the courts have to date been unable or unwilling to honestly resolve. Further, given its evolving nature and indeterminacy, proximate cause is especially susceptible to disingenuous interpretation. Given these problems and the courts' collective refusal to resolve them in any meaningful way, it is reasonable to urge extreme caution in this area.

It is first necessary to diminish any claims that proximate cause is needed to prevent statutes from spiraling into absurdity. Despite its imprecision, it might be argued that proximate cause is still useful or that it is the best solution to a difficult problem.[208] Indeed, the Supreme Court Justices are masters at positing parades of horribles to conjure the need for proximate cause. For example, the Justices have indicated that proximate cause is needed in the environmental context to prohibit a farmer from being liable when a tornado picks up

208 *CSX Transp.*, 131 S. Ct. at 2645 (Roberts, C.J., dissenting).

fertilizer from his property and deposits it far away, killing endangered animals.[209]

These examples are often straw-men arguments as they do not correlate either with the case before the Court or the types of cases being considered by the courts. If courts risk upsetting separation of powers and other important concerns, they must first examine whether the need for proximate cause is real and substantial.

However, even in cases where it might seem tempting to use proximate cause, the courts often jump to it without considering other possibilities. Consider statutes in Categories C and D that contain numerous provisions that address liability limits. For these statutes, questions about the appropriate limits of liability may actually exist within the statute itself. Given courts' fixation on weak textual claims related to general causal language, they have often failed to consider whether the statute's language itself already addresses the question of whether liability should be limited. For example, if a statute specifically defines the parties who can claims its benefits, the parties who are subject to liability, and the prohibited actions, it is questionable whether proximate cause is even needed. At a minimum, courts considering proximate cause must explore whether the statute speaks to the common law doctrine's underlying goals.

Case law suggests that courts are often using proximate cause to avoid other issues. For example, in the *Staub* decision, the Supreme Court fails to draw a clear line between factual cause, proximate cause, and agency principles.[210] In some instances courts are using proximate cause because they are unwilling to resolve questions relating to damages, standing, or factual cause.[211] The thread of proximate cause analysis that plays strongest in the RICO context is the idea of proof problems that would occur in its absence. Notably, these proof concerns relate to problems in the plaintiff's ability to prove factual causation.[212] Further, the Court noted that in RICO cases, the defendant's conduct can be deterred because directly injured victims

209 Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 713 (1995) (O'Connor, J., concurring); *see also CSX Transp.*, 131 S. Ct. at 2651 (positing that a person might be liable if he drops a piano, it cracks the sidewalk, and weeks later a person riding a bicycle down the street is injured after driving into cones the workmen have placed around the site to repair the sidewalk).

210 Staub v. Proctor Hosp., 131 S. Ct. 1186, 1191–93 (2011).

211 Notice that this Part is not advocating turning questions of proximate cause into duty questions. Rather, courts should carefully consider whether they are disguising duty questions in the language of proximate cause to justify importing the latter concept. *See* Stapleton, *supra* note 6, at 954–55.

212 *See* Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 273 (1992).

have incentives to prosecute such claims.[213] Given the inherent problems with proximate cause, it is reasonable to require courts to at least consider other possible avenues to resolve the issue before resorting to proximate cause.[214]

Some of these alternative methods provide an additional benefit in that they more clearly signal to Congress when liability will and will not attach.[215] Therefore, they provide a clearer issue for Congress to consider regarding whether to overrule a court's decision. In theory, proximate cause is an issue for a jury,[216] and it may be difficult for Congress to determine how interpreting a statute as containing proximate cause actually affects litigants.

It is often preferable to limit liability through these other mechanisms because they provide the parties with more certainty than proximate cause would. In many instances, proximate cause is confusing and indeterminate, and whether it exists depends on a determination by a jury.[217] However, limiting liability by defining the appropriate parties, defining the type of harm that must occur, and using factual cause, provides the parties with the ability to determine whether conduct is prohibited prior to trial. Further, it is unlikely that a particular jury would be able to fully appreciate the policy concerns that would be at issue.[218] There is evidence that juries often do not understand proximate cause jury instructions.[219]

The first step in a statutory proximate cause architecture is for the court to make a real inquiry into whether proximate cause is actu-

213 *Id.* at 269–70.

214 There may be limited instances when the court is facing dual concerns, but proximate cause provides the less entangled avenue. This Article does not argue that proximate cause may never be applied to statutes, but rather, that it should be applied sparingly.

215 *See* Stapleton, *supra* note 6, at 953 (reasoning that characterizing the issue as a duty issue sends a "powerful systemic message"). One might argue that Congress implicitly approves of statutory proximate cause because it has failed to enact new legislation in response to proximate cause. The lack of a congressional override is a weak argument in support of legitimacy given the real costs and likelihood of legislative reform. Further, some of the statutory proximate cause cases are fairly recent and their full consequences may not be fully realized until courts apply the doctrine in individual cases.

216 KEETON ET AL., *supra* note 9, § 45, at 320–21.

217 *See* Stapleton, *supra* note 6, at 954–55.

218 *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmt. f (2010).

219 The inconsistent theoretical foundations of proximate cause and its changing nature make it difficult to define for juries. Jurors often misunderstand proximate cause instructions. Walter W. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 88–95 (1988).

ally needed in the first place. In constitutional cases, there is a canon of construction that directs courts to avoid constitutional questions when possible.[220] This Article suggests a similar stance for proximate cause and statutes.

Next, a court must determine whether there is an honest interpretive analysis that calls for proximate cause. Given the stakes, it is reasonable to ask courts to refrain from using demonstrably incorrect legal fictions. For many modern statutes, general causal language cannot be read as strong congressional support for proximate cause, especially for those statutes that strongly contradict the common law. For many modern statutes, courts also will need to strongly consider whether it is fair to assume Congress legislated against the backdrop of the common law.[221]

In this step it is also important for courts to evaluate whether the underlying statute in general and the provision at issue specifically are like common law negligence or strict liability, such that it would even be appropriate to draw from proximate cause principles. For statutes involving intentional acts, like those in Category B, there is a strong argument that proximate cause either plays no role or a deeply diminished role. For statutes like those in Category D, where the statute is not enacted against the backdrop of the common law, the courts must determine why it is nonetheless appropriate to import it.

The third step requires courts to determine the space left for proximate cause in the particular regime. To do so, the court must identify the specific goal or goals of proximate cause that the court intends to apply. Even if it is appropriate to use proximate cause in a statute, statutory proximate cause may not be coterminous with common law proximate cause. In certain instances, the statute may already speak to certain proximate cause goals, leaving no room for proximate cause to operate.

Further, courts must consider whether it is appropriate to look to the common law to fill gaps about liability limits. In other words, even if the courts find that a statute needs a device like proximate cause, there may be no reason for courts to use the common law to create that device. For certain statutory regimes, it makes more sense to develop a limit on liability that comports with the underlying statutory

220 *See, e.g.*, Ricci v. DeStefano, 129 S. Ct. 2658, 2664–65, 2672 (2009) (deciding statutory question first and declining to reach constitutional issue).

221 A counter-argument may be that Congress knows that courts assume Congress legislates against the backdrop of the common law and should take this into account when issuing legislation. Given the enormity and complexity of the common law, it is difficult to imagine how Congress could take all of its implications into account when legislating.

regime. This version of proximate cause may not be coterminous with common law ideas.

Identifying the particular goals of proximate cause serves several other functions. First, it diminishes courts' ability to use proximate cause as an empty vessel, into which they can pour amorphous ideas. Second, it provides better guidance for subsequent courts regarding the specific meaning of proximate cause. In conducting this third step, courts should refrain from language that suggests proximate cause is a unified concept and should also recognize the hazards of derivative reasoning.

Even if the court is able to credibly claim that proximate cause is necessary, it must recognize that difficult issues still remain. The most challenging is to consider the appropriate temporal frame through which to view proximate cause, at the time of the statute's enactment or through a modern lens. Courts will also need to consider whether the goal of statutory proximate cause is to unify proximate cause law generally or to create a specific proximate cause for each statute. It may also need to define the appropriate sources for proximate cause. Importantly, courts should not rotely apply vague notions of proximate cause broadly across textually different statutes.

Of course, legislators could also help to resolve the proximate cause dilemma. When creating statutes, they could use and define causal terms to make it clear whether proximate cause should be used. However, given the number of statutes already created, courts are still likely to face unresolved statutory proximate cause questions, even if legislators consider proximate cause questions in future statutes.[222]

Conclusion

This Article creates an architecture through which courts can engage statutory proximate cause questions more deeply and with greater care. To date, courts have approached this task casually and without recognizing that statutory proximate cause raises important concerns related to separation of powers and the interaction of the common law with statutes. In many instances, they have relied on weak interpretive claims or outdated assumptions to justify proximate cause. As we become farther removed from the common law's apogee, the courts must become more attuned to whether certain common law doctrines create special problems when used in statutes, especially evolving, amorphous doctrines like proximate cause.

222 It is also possible that Congress could enact a statute that gives direction about causal language generally or for a specific set of statutes.