DISCRIMINATION STATUTES, THE COMMON LAW, AND PROXIMATE CAUSE

*Sandra F. Sperino**

The Supreme Court recently interpreted causal language in the Uniformed Services Employment and Reemployment Rights Act (USERRA) to include the common-law concept of proximate cause. This Article anticipates that courts will incorporate proximate cause more broadly into the primary federal discrimination statutes and argues that courts should not interpret the statutes in this way. The Article demonstrates the theoretical and practical difficulties of importing proximate cause principles into employment discrimination law.

The Article demonstrates how only weak textual, intent, or purpose-based arguments support courts' use of proximate cause in Title VII. Many of these arguments are premised on the idea that the federal discrimination statutes are torts. This Article challenges this assumption and argues that describing a cause of action as a tort does not provide any meaningful guidance about whether to import proximate cause. Proximate cause is a notoriously flexible and theoretically inconsistent concept. Proximate cause has no independent descriptive power and is highly dependent on the underlying tort to which it is attached. Employment discrimination claims do not fit within any traditional tort and therefore do not align well with traditional articulations of proximate cause.

When courts import proximate cause, they are not simply importing a concept from the common law, but rather are engaging in an unguided policy choice—a choice that will allow courts to further limit the reach of federal discrimination law. Importantly, the federal discrimination statutes already contain express limits on liability that

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eliminate or severely constrain the space available for courts to import and define proximate cause.

INTRODUCTION

The Supreme Court has recently hinted that courts should apply proximate cause to federal discrimination statutes.[1] This Article anticipates future judicial forays into this area and argues that courts should not make proximate cause an element of a federal discrimination claim. This Article is part of a broader conversation about how the courts have been inattentive to the dangers inherent in applying proximate cause to federal statutes generally.[2] Importing proximate cause raises profound questions about the nature of discrimination law and its interaction with the common law.

Courts and commentators often presume that the primary substantive provisions of federal employment discrimination statutes were adopted against the backdrop of common-law torts.[3] This Article challenges this core assumption and also explains why identifying a cause of action as a tort in some general sense does not provide any meaningful basis for courts to apply proximate cause to it. This Article demonstrates the dangers of importing common-law principles into discrimination law, using the lens of proximate cause and the core federal civil rights statute, Title VII of the Civil Rights Act of 1964.[4] This discussion intersects with concerns about the tortification of discrimination law.

The Article discusses how only weak textual, intent, or purpose-based arguments support courts' use of proximate cause in Title VII. Title VII is a complex statute in which Congress expressed ideas about lim-

1. Staub v. Proctor Hosp., 131 S. Ct. 1186, 1191 (2011). The statement in *Staub* is arguably dicta; however, as this Article demonstrates, unsupported statements in one Supreme Court case often are extrapolated and extended in later cases.

2. *See, e.g.*, GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 5 (1982); WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 45, 67–68 (1999); Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908).

3. *Staub*, 131 S. Ct. at 1191 ("[W]e start from the premise that when Congress creates a federal tort it adopts the background of general tort law."); *see also* Cheryl Krause Zemelman, *The After-Acquired Evidence Defense to Employment Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility*, 46 STAN. L. REV. 175, 196–97 (1993) (discussing sources supporting view that Title VII is a tort). This Article does not claim that there is no connection between torts and statutory employment discrimination law. Rather, it challenges the claim that the statutes' primary substantive provisions are generally drawn from tort law.

4. 42 U.S.C. §§ 2000e–2000e-17 (2006) (Title VII). Although the Article primarily uses Title VII examples, it also considers other major federal discrimination statutes such as the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA). 29 U.S.C. §§ 621–634 (2000) (ADEA); 42 U.S.C. §§ 12101–12300 (1994 & Supp. V 2000) (ADA). Where relevant differences exist between these statutes and Title VII, they are indicated in either the text or footnotes. The Article does not consider proximate cause in the retaliation or failure to accommodate context, although many of the issues would be similar. It is not making arguments about the role of proximate cause in cases brought pursuant to 42 U.S.C. § 1981.

iting liability throughout the statutory regime. Title VII defines the plaintiffs who may sue, limits the defendants who are prohibited from discriminating, and identifies the kinds of acts for which liability can be imposed.[5] It also contains time limits for filing suit, affirmative defenses, and burdens of production and persuasion that further limit the statute's reach.[6] These expressions eliminate, or at least severely constrain, the space available for courts to import and define proximate cause. Given these limits, the substantive discrimination provisions, unlike tort law, do not need proximate cause to buttress factual cause.

More importantly, Title VII differs significantly from common-law torts, like negligence, where courts commonly apply proximate cause. Proximate cause has no independent descriptive power and is highly dependent on the underlying tort to which it is attached.[7] Employment discrimination claims do not fit within any traditional tort and therefore do not align well with traditional articulations of proximate cause.

The Article demonstrates the theoretical and practical difficulties of importing proximate cause principles into employment discrimination law. The notoriously flexible and inconsistent theoretical underpinnings of proximate cause make it likely that courts purporting to import proximate cause will actually be making relatively unguided policy decisions. They will use the broad idea of proximate cause as a framework for discussion, selectively quoting available sources to reach a particular outcome. The Article demonstrates why this approach is especially problematic in the federal employment discrimination context and argues that Title VII already addresses liability limits.

How the courts resolve this question is important for several reasons. First, importing proximate cause principles into employment discrimination law will further limit the reach of federal discrimination law, in line with already conservative interpretations of factual causation.[8] Second, the lower courts will be able to use proximate cause principles to inappropriately grant summary judgment in favor of employers.[9] Third, using proximate cause in discrimination statutes will create confusion in an already complicated area.[10] Fourth, if courts enshrine proximate cause

5. *See infra* Part II.

6. *See infra* Part II.

7. *See infra* notes 45–46 and accompanying text.

8. *See, e.g.*, Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 177 (2009) (holding ADEA plaintiffs must establish but-for causation).

9. Even though proximate cause is a question of fact, the fear is that courts will transform it into a legal inquiry by finding that there is no question for a jury to resolve. 65A C.J.S. *Negligence* § 981 (2012).

10. Cook v. IPC Int'l Corp., 673 F.3d 625, 628 (7th Cir. 2012) (noting that the district court judge in a cat's paw case instructed jury incorrectly because of "vague judicial terminology, such as 'motivating factor' and 'proximate cause' (the latter has been a part of the judicial vocabulary for the last 150 years, yet its meaning has never become clear)" that "confuses judges, jurors, and lawyers alike" (citations omitted)).

as an element of a federal discrimination claim, defendants will not be held liable for some acts, even if those acts are taken because of a protected trait. Finally, how the courts approach this issue may serve as a roadmap for the courts to import even more common-law principles into employment law.

Part I lays the analytical groundwork for this discussion by describing the Supreme Court's decision in *Staub v. Proctor Hospital* and by identifying the traditional rationales for applying proximate cause. Part II describes key features of federal employment discrimination law and shows how Title VII already limits liability. Part III demonstrates how courts are likely to use weak claims to import proximate cause into employment law. It also frames statutory interpretation as an expression of courts' beliefs about separation of powers. Part IV demonstrates how federal employment discrimination statutes do not map well onto the traditional torts in which proximate cause analysis developed and rejects other fundamental arguments used to import proximate cause. It also describes practical and theoretical problems with using proximate cause in the employment discrimination context. Part V shows why proximate cause is not necessary in discrimination cases and provides a framework for future analysis.

I. PROXIMATE CAUSE AND THE CAT'S PAW

To understand the dangers of importing proximate cause into employment discrimination law, it is necessary to understand proximate cause generally and how the Supreme Court strongly hinted that this concept should apply to Title VII.

A. Staub v. Proctor Hospital

In *Staub v. Proctor Hospital*, the Supreme Court considered whether cat's paw cases are cognizable under the Uniformed Services Employment and Reemployment Rights Act (USERRA).[11] USERRA prohibits an employer from terminating an individual, if the individual's military service is a motivating factor in the decision.[12]

A cat's paw case is one in which a biased individual takes an action against another person based on a protected trait, but an unbiased individual ultimately makes the challenged employment decision.[13] For example, a biased supervisor could place a bad evaluation in an employee's

11. 131 S. Ct. 1186, 1189–90 (2011). For a comprehensive discussion of *Staub*, see Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431 (2012).

12. 38 U.S.C. §§ 4311(a), (c) (2006).

13. *See Staub*, 131 S. Ct. at 1190. The term cat's paw refers to a fable in which a monkey convinces a cat to pull chestnuts from a fire. The cat burns its paws trying to obtain the chestnuts and the monkey eats all of the chestnuts. *Id.* at 1190 n.1.

file, and a second supervisor (not knowing about the bias of the first supervisor) would then decide to terminate the employee in a reduction in force based on the bad evaluation. In *Staub*, the plaintiff alleged that two supervisors were hostile to his military obligations and falsely reported he violated company rules.[14] The vice president of human resources then made the decision to terminate Staub based on the rule violations.[15]

The primary question in *Staub* was whether the employer could be held liable for violating USERRA when the final decision maker did not consider the plaintiff's military service when making the decision to terminate the plaintiff's employment.[16] The Court approved the use of a cat's paw theory, at least in a limited set of circumstances. The Court held that "if a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA."[17]

With this sentence, the Supreme Court imports proximate cause into cat's paw analysis and potentially into employment discrimination more broadly. Courts are likely to apply the case's reasoning outside of the USERRA context, because the *Staub* decision emphasizes the similarities between USERRA and Title VII.[18]

There are several important facets of *Staub*. First, the Court states that "when Congress creates a federal tort it adopts the background of general tort law."[19] There is no meaningful discussion, however, of whether employment discrimination statutes generally are torts or whether USERRA in particular is a tort. Second, the Court does not discuss why it uses proximate cause language, nor does it define what it means by proximate cause. Third, *Staub* makes proximate cause an element of a claim. Thus, the proximate cause question is not whether a particular type of damage is proximately caused by conduct, but whether the conduct in question creates any liability.[20]

Importantly, it appears that the Court reaches for proximate cause

14. *Id.* at 1189.

15. *Id.*

16. *Id.* at 1189, 1191.

17. *Id.* at 1194 (footnotes and emphasis omitted).

18. *Id.* at 1191. The proximate cause language in *Staub* is arguably dicta, because the case's core issue relates to factual cause. As discussed later in this Article, however, dicta in one employment discrimination case often has far-reaching consequences in later decisions.

19. *Id.* at 1191.

20. When this Article discusses proximate cause, it makes a distinction between proximate cause as an element of the cause of action and proximate cause as a damages concept. In negligence cases, these concepts are blurred because damages are an element of the cause of action. In discrimination cases, however, the harm is the unequal treatment based on a protected trait, which may result in varying kinds of damages. This Article is discussing proximate cause in the context of whether liability for differential treatment exists.

because it is concerned that it might be unfair to hold employers liable in all instances when biased conduct somehow factually causes an employment decision.[21] This Article demonstrates why proximate cause is not a good theoretical fit with employment discrimination statutes and why it is not necessary to limit liability.

B. Proximate Cause

At common law, causation often embraces two different kinds of issues: cause in fact and legal or proximate cause.[22] "Conduct is a factual cause of harm when the harm would not have occurred absent the conduct."[23] In some tort cases, such as negligence cases, factual cause is a necessary, but not sufficient, basis for imposing liability on a defendant for harm.[24] 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 decisions about where liability should end. 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 intentional. Together, these four attributes make it difficult to apply proximate cause to statutes.

Defining proximate cause is notoriously tricky.[25] 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."[26] Considered broadly, proximate cause is essentially concerned with problems regarding intervening actions, a foreseeable plaintiff, the scope of risk of the defendant's ac-

21. *See Staub*, 131 S. Ct. at 1193.

22. The distinction between these two concepts is often blurred. Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 VAND. L. REV. 941, 945 (2001).

23. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 (2010) [hereinafter RESTATEMENT (THIRD)].

24. *See id.* § 29.

25. BLACK'S LAW DICTIONARY 250 (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); Patrick J. Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 WASH. U. L.Q. 49, 51 (1991). Further, the definition of proximate cause has changed over time. RESTATEMENT (THIRD), *supra* note 23, § 29.

26. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 263 (W. Page Keeton ed., 5th ed. 1984).

tions, and/or policy concerns.[27] While it is possible 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.[28] 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 liability of the defendant is no longer appropriate.[29]

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.[30] Some courts have identified proximate cause as considering whether the plaintiff was foreseeable.[31] 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 them.[32] Proximate cause is defined against the backdrop of the surrounding tort elements, especially factual cause, and has no independent descriptive power.[33]

In some iterations, courts do not express a specific goal for proximate cause, but rather, describe it generally as being concerned with line drawing—determining when as a matter of policy a defendant should not be liable, even though the defendant's actions caused the injury in question.[34] Importantly, five members of the Supreme Court have recently

27. 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), *supra* note 23, ch. 6, special note on proximate cause. Using *Restatement* sections applicable 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 id.* § 29 cmt. b ("[C]onduct need not be close in space or time to the plaintiff's harm to be a proximate cause."); Kelley, *supra* note 25, at 52. Some courts still rely on arguments about directness when discussing proximate cause. *See, e.g.*, CSX Transp., Inc. v. McBride, 131 S. Ct. 2630, 2645 (2011) (Roberts, C.J., dissenting).

28. 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), *supra* note 23, § 34 cmt. b.

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

30. RESTATEMENT (THIRD), *supra* note 23, § 29 ("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 25, at 92. The *Restatement* explains the risk test is "congruent" with the foreseeability test, if the latter test is "properly understood and framed." RESTATEMENT (THIRD), *supra* note 23, § 29 cmt. e.

31. Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting); RESTATEMENT (THIRD), *supra* note 23, § 29 cmt. f (discussing *Palsgraf*).

32. KEETON ET AL., *supra* note 26, at 274.

33. *See id.* at 273.

34. Stapleton, *supra* note 22, 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

embraced this line-drawing function of proximate cause.[35] 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."[36] It then quoted the dissent in *Palsgraf v. Long Island Railroad Co.*, 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."[37]

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."[38] It also has quoted a noted torts treatise referring to proximate cause as reflecting ideas of "what is administratively possible and convenient."[39] 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 damages.[40]

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."[41] Members of the Court cannot agree on what exactly proximate cause is designed to accomplish.[42] Recently, Justices have adopted the line-drawing account of proximate cause, and four members of the Court have stated that proximate cause 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 is so "tenuous . . . that what is claimed to be consequence is only fortuity."[43]

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

35. CSX Transp., Inc. v. McBride, 131 S. Ct. 2630, 2637 (2011).

36. *Id.*

37. *Id.* (quoting Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting)).

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

39. *Id.* (quoting KEETON ET AL., *supra* note 26, at 264).

40. *Id.* at 269. While courts use proximate cause terminology in these instances, these questions are often actually issues relating to cause in fact or allocation of fault.

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

42. 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).

43. *CSX*, 131 S. Ct. at 2645–46 (Roberts, C.J., dissenting) (citations and internal quotation marks

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.[44] 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.[45] Importantly, the meaning of proximate cause is dependent on the surrounding elements of the underlying tort.[46]

Recently, Chief Justice Roberts has suggested that a lack of fixed meaning for proximate cause is not problematic.[47] 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.'"[48] While the Chief Justice is correct that proximate cause concerns liability limits, the rationales used to both justify the limit and to decide where the line is drawn are significant. 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.[49] Early iterations of proximate cause that required the event to be the nearest in time or space have largely been rejected in recent iterations.[50] The *Restatement (First) of Torts* embraced an idea of legal cause that included concepts from factual cause and proximate cause analysis, while the *Restatement (Third) of Torts* separates factual and proximate cause.[51] These changes over time are important because they make it 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" to mean different concepts.

Not only does proximate cause have evolving, contested underpinnings and goals, common-law courts also apply it differently, depending

omitted).

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

45. Leon Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 471, 471–72 (1950).

46. *See id.*

47. *CSX*, 131 S. Ct. at 2652 (Roberts, C.J., dissenting).

48. *Id.* (citation omitted).

49. KEETON ET AL., *supra* note 26, at 276–79.

50. *Id.* at 276.

51. RESTATEMENT (THIRD), *supra* note 23, § 26 cmt. a; RESTATEMENT (FIRST) OF TORTS § 430 (1934) (indicating that to establish 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).

on the nature of the underlying tort.[52] The *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* notes that when an actor intentionally causes harm it 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.[53] In deciding the scope of liability, the *Restatement (Third)* notes that the following factors 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."[54]

Proximate cause rarely plays a decisive role in intentional tort cases.[55] There are many reasons for this. In intentional tort cases "the defendant's wrongful conduct is [usually] closely linked—temporally and conceptually—to the plaintiff's harm."[56] Few intentional tort cases involve multiple causation.[57] Conduct intended to cause harm is considered more blameworthy, and courts have had fewer qualms about the scope of liability.[58] 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 may cut off liability for the defendant in fewer circumstances than it would when applied to negligence.[59]

As this Section 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. Each of these attributes of proximate cause is central to the question of whether it should be imported into discrimination law.

52. *See* 57A AM. JUR. 2D *Negligence* § 437 (2004).

53. RESTATEMENT (THIRD), *supra* note 23, § 33. Some question whether traditional notions of proximate cause work well in non-traditional common-law tort cases. Stapleton, *supra* note 22, at 946.

54. RESTATEMENT (THIRD), *supra* note 23, § 33. 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.* § 33 cmt. d.

55. *Id.* § 33 cmt. e (noting the "paucity" of legal opinions discussing proximate cause in intentional tort cases).

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

57. *Id.*

58. *Id.* at 832–33.

59. RESTATEMENT (THIRD), *supra* note 23, § 33 ("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.* § 33 cmt. a (noting that its scope of risk standard is inadequate with respect to intentional torts); 57A 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 (2011) (asserting that courts do not typically apply proximate cause to strict liability).

II. TITLE VII AND ITS LIABILITY LIMITS

The major federal employment discrimination statutes differ in a fundamental way from the common law from which proximate cause derives. Proximate cause is typically associated with common-law negligence claims, which have two core features. First, judges created common-law negligence.[60] Second, negligence law only broadly defines its contours and does not specifically define the parties and the conduct to which it applies.[61] Thus, negligence is expressed in general terms such as breach, causation, and duty. In general, a person or entity owes duties to the world.[62]

This Part explores how the employment discrimination statutes are radically different. They not only explicitly provide for a liability standard, but also come packaged with a complex web of other limiting principles.[63] This Part explores key features of these statutory regimes that are important for purposes of proximate cause: the different "types" of discrimination cases, the causal language, the definitions of potential parties and discriminatory conduct, the deadlines for filing suit, court-created agency principles, and the damages provisions.

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. Importantly, if the courts import proximate cause into discrimination law, these limits suggest that the proximate cause applied to the statute would not be coterminous with the common law.

A. The Different "Types" of Discrimination Cases

There are three major federal employment discrimination statutes: Title VII, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act.[64] The courts have developed complex terminology and frameworks to describe the types of facts that can establish liability under the federal employment discrimination statutes.[65] This

60. 57A AM. JUR 2D *Negligence* § 2 (2004).

61. *Id.* § 6.

62. 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 twentieth century).

63. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 27 (1994) (discussing compromises made to pass Title VII).

64. 42 U.S.C. §§ 2000e–2000e-17 (2006) (Title VII); 29 U.S.C. §§ 621–634 (2000) (ADEA); 42 U.S.C. §§ 12101–12300 (1994 & Supp. V 2000) (ADA). When this Article refers to the ADA, it is only referring to those portions dealing with employment discrimination.

65. The author is largely skeptical of these types and frameworks, but they are helpful for describing the current state of employment discrimination law. *See, e.g.*, Sandra F. Sperino, *Rethinking*

inquiry often involves two steps, with the courts first placing the conduct within a certain theory of liability and then analyzing the claim through various proof structures.[66]

Originally, all of the different "types" of discrimination were derived from the primary operative language of Title VII, which is considered to be the cornerstone federal discrimination statute.[67] Title VII provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[68]

Although not identical, the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA) have similarly broad operative language.[69] None of the statutes explicitly reference proximate cause.

Courts often divide discrimination law into two separate ideas: intentional discrimination and disparate impact.[70] The courts have further subdivided intentional discrimination cases by describing them as either direct evidence or circumstantial evidence cases. Cases that involve explicitly discriminatory policies or conduct are called direct evidence cases and are analyzed under a fairly simple formulation, requiring a plaintiff to establish that a decision was taken because of a protected trait.[71] Plaintiffs who do not have direct evidence

Discrimination Law, 110 MICH. L. REV. 69 (2011).

66. *See generally id.* (describing the development of various frameworks).

67. *See id.* at 73.

68. 42 U.S.C. § 2000e-2(a) (2006).

69. 29 U.S.C. § 623(a) (2006) (ADEA). The ADA prohibits discrimination "against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a) (Supp. II 2009). It then further defines discrimination in a separate subsection, containing seven separate definitional sections. *Id.* § 12112(b). It is plausible that the ADA's multiple provisions have different causal implications. The causal questions related to the ADA have only been marginally considered by the courts and will not be a focus for this Article.

70. *See* Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1368 (2009) ("Few propositions are less controversial or more embedded in the structure of Title VII analysis than that the statute recognizes only 'disparate treatment' and 'disparate impact' theories of employment discrimination." (internal quotation marks omitted)).

71. *See, e.g.*, Stone v. Autoliv ASP, Inc., 210 F.3d 1132, 1137 (10th Cir. 2000) (indicating that a

and who allege that improper consideration of a protected trait was the cause of their harm often proceed through the three-part *McDonnell Douglas* burden-shifting framework,[72] which is described in more detail in the next Section.

Courts also organize Title VII cases by categorizing them as either single-motive cases or mixed-motive cases. Single-motive cases often are analyzed under the frameworks described in the prior paragraph and are often cases of competing narratives between the plaintiff's and the employer's reason for the job-related action. Title VII mixed-motive cases, which involve claims that both legitimate and discriminatory reasons caused an action, are analyzed using the statutory language added in the 1991 amendments.[73]

Other subsets of intentional discrimination are harassment and pattern or practice cases. Harassment cases are analyzed under a multiple-part framework developed by the courts.[74] The plaintiff must prove the harassment was "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[75] Pattern or practices cases usually involve claims by numerous individuals that the defendant had an actual policy of discrimination or that its conduct demonstrated that discrimination was the norm.[76]

Outside of the intentional discrimination context, plaintiffs can proceed on disparate impact claims. Disparate impact occurs when a specific employment practice creates a disproportionate impact on a protected group unless the defendant can prove an affirmative defense, which differs by statutory regime.[77] Under Title VII, the defendant can prevail if it can demonstrate that the practice is job-related and consistent with business necessity.[78] Under the ADEA, the defendant can prevail if it demonstrates that the practice was based on a reasonable factor other than age.[79]

To date, the courts have not embraced negligent discrimination as a

company policy of discrimination constitutes direct evidence). Outside of the context of facially discriminatory policies, the courts have had difficulty defining what constitutes direct evidence, and its definitions vary. Argyropoulos v. City of Alton, 539 F.3d 724, 733 (7th Cir. 2008); Vaughn v. Epworth Villa, 537 F.3d 1147, 1154–55 (10th Cir. 2008); Rojas v. Florida, 285 F.3d 1339, 1342 n.2 (11th Cir. 2002) (per curiam).

72. *See, e.g.*, Pye v. Nu Aire, Inc., 641 F.3d 1011, 1019 (8th Cir. 2011). This is not always the case. *See, e.g.*, Coffman v. Indianapolis Fire Dep't, 578 F.3d 559, 563 (7th Cir. 2009) (allowing a plaintiff to make a case of discrimination without resorting to *McDonnell Douglas,* if the plaintiff has "either direct or circumstantial evidence that supports an inference of intentional discrimination"); Taylor v. Peerless Indus. Inc., 322 F. App'x. 355, 360–61 (5th Cir. 2009) (applying a modified *McDonnell Douglas* framework). It is questionable whether the divide between direct and circumstantial evidence should continue to exist after *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 92 (2003) (holding direct evidence is not required to obtain mixed-motive instruction). Nonetheless, courts continue to make the distinction.

73. 42 U.S.C. § 2000e-2(m). The Supreme Court has held that but-for cause is required under the ADEA. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 177 (2009). This question has not been definitively resolved in the ADA context.

basis for liability.[80] Further, the courts have not interpreted the federal discrimination statutes as allowing for claims of unconscious bias, to fully remedy pregnancy discrimination, or to fully account for structural discrimination.[81] Unconscious bias claims rely on research that suggests that many people harbor bias that is not explicitly part of their recognized decision-making process.[82] Structural discrimination posits that discrimination is not always the result of an identifiable bad actor or formal policy, but rather "[i]t often takes form in a fluid process of social interaction, perception, evaluation, and disbursement of opportunity."[83]

The current construction of the statutes limits the necessity of applying proximate cause principles because the types of conduct that will result in liability are narrowly circumscribed. Unless the alleged conduct satisfies the analytical framework for a particular theory of discrimination, the courts will not impose liability. Interestingly, it is unclear how cat's paw cases fit into the current analytical structures.

74. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986).

75. *Id.* (internal quotation marks omitted).

76. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 360 (1977).

77. 42 U.S.C. § 2000e-2(k).

78. 42 U.S.C. § 2000e-2(k)(1)(A)(i). A plaintiff can also prevail in a disparate impact case under Title VII, if it can demonstrate that the employer could have used less discriminatory alternate practices. 42 U.S.C. § 2000e-2(k)(1)(A)(ii). This option is not available under the ADEA. Smith v. City of Jackson, Miss., 544 U.S. 228, 243 (2005).

79. Meacham v. Knolls Atomic Power Lab., 554 U.S. 84, 93 (2008).

80. *See, e.g.*, Aaron v. Sears, Roebuck & Co., No. 3:08 CV 1471, 2009 WL 803586, at *2 (N.D. Ohio Mar. 25, 2009) ("He also alleges Defendant was merely 'negligent' in its hiring practices, which does not rise to the standard of intentional discrimination required by Title VII."); Jalal v. Columbia Univ., 4 F. Supp. 2d 224, 241 (S.D.N.Y. 1998) ("Title VII, however, provides no remedy for negligent discrimination . . . ."). *See generally* David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993) (setting forth a theory of negligent discrimination). It should be noted that courts do recognize employer liability for negligence where the employer has failed to take action to prevent or correct harassment; however, that liability depends on there first being a showing of harassment. *See, e.g.*, Zarazed v. Spar Mgmt. Servs., Inc., No. Civ.A 05-2621, 2006 WL 224050, at *7 (E.D. Pa. Jan. 27, 2006). Further, the third step in the Title VII disparate impact analysis arguably relies on a negligence standard. 42 U.S.C. § 2000e-2(k)(1)(A)(ii). For an interesting discussion of how Title VII arguably does encompass a negligence standard, see Zatz, *supra* note 70.

81. Sperino, *supra* note 65, at 85. For an excellent account of the limits of pregnancy discrimination protections, see Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567 (2010). Discrimination law also does not fully address the ways that workers are required to perform identity work. Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000).

82. Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 746 (2005); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322–25 (1987).

83. Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 91 (2003).

B. Factual Cause Language

The factual cause standards in employment discrimination law also play an important role in limiting liability.[84] This Section highlights that liability-limiting role, as well as three other features of factual cause that are important in this context. First, many of the factual cause standards do not mimic traditional tort articulations of these concepts, either in the actual statutory language or court interpretations of such language.[85] Second, even when tort-like language is used, the factual cause standard is proved in ways that are unlike tort law, and the factual cause standards are intertwined with underlying judgments about the likelihood of discrimination and who should be responsible for certain conduct. Finally, employment discrimination statutes often provide bracketed liability, prohibiting certain conduct, but also indicating the circumstances under which an employer will not be liable for harm that might otherwise be categorized as discriminatory.

The development of causal standards under the federal discrimination statutes has been fraught with controversy, and the standards continue to evolve.[86] Without making any normative assertions, it is possible to describe the current state of the law and the places where the law is likely to develop. The courts initially considered causation questions by interpreting Title VII.[87] Three separate causal strands are important: the development of the *McDonnell Douglas* test, so-called mixed-motive analysis, and disparate impact analysis.

In *McDonnell Douglas Corp. v. Green*, the Supreme Court created a three-part, burden-shifting test for analyzing individual disparate treatment cases.[88] Under *McDonnell Douglas*, a court first evaluates the

84. Robert Belton, *Causation in Employment Discrimination Law*, 34 WAYNE L. REV. 1235, 1244–45 (1988) (discussing how factual cause is a liability-limiting principle).

85. *See id.* at 1248–49 (discussing traditional common law concepts of but-for causation and substantial factor).

86. *See id.* at 1259 (discussing early cases using but-for causation). This Article does not intend to describe all of the factual cause standards that arise in discrimination law. That subject is worth several law review articles and has been widely discussed. *See, e.g.*, *id.* at 1240; Michael C. Harper, *The Causation Standard in Federal Employment Law:* Gross v. FBL Financial Services, Inc., *and the Unfulfilled Promise of the Civil Rights Act of 1991*, 58 BUFF. L. REV. 69, 75 (2010) (discussing historical development of causation in disparate treatment cases); Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 500–11 (2006); Charles A. Sullivan, *Disparate Impact: Looking Past the* Desert Palace *Mirage*, 47 WM. & MARY L. REV. 911, 929 (2005); Zatz, *supra* note 70, at 1374–76 (discussing causation in disparate treatment cases).

87. It is not clear whether in some of the original cases interpreting Title VII's main operative provisions, the Supreme Court was concerned with causation questions. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). *But see* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). The cases have, however, subsequently been considered to have causation implications.

88. 411 U.S. at 802, 804. Some circuits will allow a plaintiff to make a case of discrimination without resorting to *McDonnell Douglas*, if the plaintiff has "either direct or circumstantial evidence that supports an inference of intentional discrimination." Coffman v. Indianapolis Fire Dep't, 578 F.3d 559, 563 (7th Cir. 2009).

prima facie case, which requires proof that "(i) [the plaintiff] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."[89] If the prima facie case is proven, a rebuttable presumption of discrimination arises.[90] The burden of production then shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection."[91] If the defendant meets this requirement, the plaintiff can still prevail by demonstrating that the defendant's reason for the rejection was simply pretext.[92]

Even though the factual cause standard in discrimination cases is not sole causation, courts often treat the *McDonnell Douglas* test as if it focuses on *the* employer's non-discriminatory reason for its action. *McDonnell Douglas* is sometimes characterized as incorporating but-for cause.[93] However, *McDonnell Douglas* also contains an overlooked causal standard. Under the test, it is possible for the plaintiff to prevail if he or she establishes the prima facie case, and the defendant is unable to articulate a legitimate, non-discriminatory reason for its decision.[94] The prima facie case does not require the plaintiff to establish but for causation, but only to prove certain facts that the courts have determined are sufficient to suggest discrimination might be at work.[95] Within the prima facie case is an important presumption, that discrimination is a common facet of employment.[96] Traditional common-law articulations of cause do not mimic the three-part, burden-shifting structure of *McDonnell Douglas*, and the test is not drawn from common-law sources.[97]

Cases that proceed under this framework are usually cases of com-

89. *McDonnell Douglas*, 411 U.S. at 802. The factors considered in the prima facie case may vary depending on the factual scenario presented in the case. *Id.* at 802 n.13. The problem with reliance on comparator evidence is well argued in Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728 (2011).

90. Harper, *supra* note 86, at 76.

91. *McDonnell Douglas*, 411 U.S. at 802.

92. *Id.* at 804; Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255–56 (1981). In *St. Mary's Honor Center v. Hicks*, the Court considered whether the factfinder's rejection of the employer's asserted reason for its action mandated a finding for the plaintiff. 509 U.S. 502, 507 (1993). The Supreme Court held that while the factfinder's rejection of the employer's proffered reason permits the factfinder to infer discrimination, it does not compel such a finding. *Id.* at 510–11. Courts continue to use the *McDonnell Douglas* test to analyze claims under the ADEA, but the Supreme Court has not directly addressed whether the test applies to the ADEA. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000).

93. Belton, *supra* note 84, at 1240. *But see* Price Waterhouse v. Hopkins, 490 U.S. 228, 240 n.6 (1989) (explaining how references to but-for causation in pretext cases only suggested that if plaintiff proved such causation she would prevail, not that but-for cause is required to be proven to prevail).

94. *See Burdine*, 450 U.S. at 254.

95. *See Price Waterhouse*, 490 U.S. at 240–42.

96. Sullivan, *supra* note 86, at 929.

97. *See McDonnell Douglas*, 411 U.S. at 802–07.

peting narratives, in which the plaintiff is advocating that an action or set of actions was taken because of a protected trait and the employer is asserting that this is not the case.[98] In practice, *McDonnell Douglas* causes courts to focus on narrow visions of how discrimination happens and therefore makes it unlikely that a plaintiff trying to prevail on a strange scenario will survive the test.

McDonnell Douglas focuses on the plaintiff's alleged reason for conduct versus the defendant's articulation of a legitimate reason for its decision. Given the test's focus on competing narratives, it was unclear whether a plaintiff could prevail if she alleged both legitimate and discriminatory reasons played a role in an employment decision and whether the defendant could escape liability if it proved a legitimate reason partly motivated the decision.[99] In the 1989 case of *Price Waterhouse v. Hopkins*, the Supreme Court interpreted Title VII as allowing so called "mixed-motive" claims and created a test for evaluating such claims.[100] The Supreme Court plurality opinion did not purport to draw its test from traditional common-law causation principles, and it specifically indicated that to equate the causal standard in Title VII as requiring "but-for" cause is to misunderstand it.[101] Indeed, it is clear that the plurality opinion tried to balance several objectives unique to employment law: the idea that employment decisions should be based on merit and the idea that employers retain certain prerogatives to make decisions.[102]

Unhappy with the *Price Waterhouse* test, Congress amended Title VII in 1991 and made it easier for plaintiffs to establish liability.[103] Congress indicated that a plaintiff could prevail on a discrimination claim

98. *See, e.g.*, *id.* at 796.

99. *See Price Waterhouse*, 490 U.S. at 232, 237.

100. *Id.* at 241–43. The employer has the ability to avoid liability by proving an affirmative defense—that it would have made the same decision, even if it had not allowed the protected trait to play a role. *Id.* at 244–45.

101. *Id.* at 240–49. *But see id.* at 262–63 (O'Connor, J., concurring) (noting that statute requires but-for causation and characterizing the burden shift as being like burden shifts in tort cases). The affirmative defense is drawn from a First Amendment case. *Id.* at 248–49 (citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977)).

102. *Id.* at 242, 243–44; *see also id.* at 263–64 (O'Connor, J., concurring) (noting that dissent's call for a but-for causation standard was not inconsistent with plurality opinion, considering tort concepts of burden shifting).

103. *See, e.g.*, Porter v. Natsios, 414 F.3d 13, 19 (D.C. Cir. 2005). This provision is referred to as a mixed-motive provision for ease of identification. There is significant debate regarding whether this provision should be limited to the mixed-motive context. *See, e.g.*, Henry L. Chambers, Jr., *The Effect of Eliminating Distinctions Among Title VII Disparate Treatment Cases*, 57 SMU L. REV. 83 (2004); William R. Corbett, *An Allegory of the Cave and the* Desert Palace, 41 HOUS. L. REV. 1549 (2005); William R. Corbett, McDonnell Douglas*, 1973–2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199 (2003); Jeffrey A. Van Detta, *"Le Roi Est Mort; Vive Le Roi!": An Essay on the Quiet Demise of* McDonnell Douglas *and the Transformation of Every Title VII Case After* Desert Palace, Inc. v. Costa *into a "Mixed-Motives" Case*, 52 DRAKE L. REV. 71, 76 (2003). *See generally* Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *Is Dead, Whither* McDonnell Douglas*?*, 53 EMORY L.J. 1887 (2004) (arguing that the new approach established in the 1991 amendments to Title VII will apply to most individual discrimination cases).

under Title VII by establishing that a protected trait played a motivating factor in an employment decision.[104] Congress relied on the affirmative defense created in *Price Waterhouse*, but indicated that it would be a partial defense to damages, rather than a complete bar to recovery.[105] The employer must establish that it would have made the same decision absent consideration of the protected trait.[106] In other words, if a protected trait played a role in the decision, the employer can still reduce the damages for which it is liable, if it can show that use of the protected trait was not necessary to causing its ultimate decision.[107] This two-tiered factual cause standard does not mimic traditional tort cause standards, especially given that if the employer prevails on the second step, the employer wins only a partial defense to damages.[108]

Strangely, the Supreme Court, in *Gross v. FBL Financial Services, Inc.*, has interpreted the ADEA as requiring a plaintiff to establish but-for cause.[109] This standard also departs from traditional common law, however, which allows plaintiffs to use alternate causal standards, such as showing an action was a substantial factor in causing harm.[110] The *Staub* decision, in which the Supreme Court used proximate cause in the context of USERRA, is in tension with *Gross*, as *Staub* appears to embrace common-law proximate cause concepts, while *Gross* rejects applying the full breadth of common-law factual cause concepts.

It also is difficult to map these statutory factual cause standards onto tort causal standards because in disparate treatment cases the causal inquiry is intertwined with language of intent. Although there is a strong argument that plaintiffs should not be required to prove intent in discrimination cases, courts often characterize individual disparate treatment cases as requiring intent.[111] This issue is further confused because courts have not clarified what intent means and whether it is synonymous with the common-law meaning of the term.[112] The courts have never

104. 42 U.S.C. § 2000e-2(m) (2006). Although the courts have not clarified the exact meaning of "motivating factor," at least one commentator refers to it as requiring miniminal causation. Katz, *supra* note 86, at 505–06. It is not clear how the 1991 amendments interact with the *McDonnell Douglas* test. Harper, *supra* note 86, at 93. *See generally* Zimmer, *supra* note 103 (discussing the 1991 amendments and how they relate to *McDonnell Douglas* and *Price Waterhouse*).

105. 42 U.S.C. § 2000e-2(m). When Congress added the motivating factor language to Title VII, it did not make similar changes to the ADEA or ADA. Catherine T. Struve, *Shifting Burdens: Discrimination Law Through the Lens of Jury Instructions*, 51 B.C. L. REV. 279, 289, 318 (2010).

106. 42 U.S.C. § 2000e-5(g)(2)(B).

107. *See* Katz, *supra* note 86, at 502.

108. *See* Belton, *supra* note 84, at 1277.

109. 557 U.S. 167, 176 (2009).

110. *See supra* note 85 and accompanying text.

111. Lewis v. City of Chicago, 130 S. Ct. 2191, 2199 (2010); Ricci v. DeStefano, 557 U.S. 557, 577 (2009).

112. D. Don Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather Than Intent*, 60 S. CAL. L. REV. 733, 735–37 (1987) (distinguishing motive from intent and concluding that Title VII should use motive). Further, the meaning of intent is less clear after *Ricci v. DeStefano*, 557 U.S. 557 (2009). Stephen M. Rich, *Against Prejudice*, 80 GEO. WASH. L. REV.

carefully articulated how the causal standards interact with the intent requirement. And it is difficult to separate intent from causation as the statutory words "because of," which are used to discuss causation, are also used to explain intent.[113]

In the early 1970s, the Supreme Court was faced with the question of whether Title VII's primary operative language only recognized intentional discrimination. In *Griggs v. Duke Power Co.*, the Court held that Title VII not only prohibited intentional discrimination, but also policies and practices that created "built-in headwinds" to the hiring of employees that correlated with a protected trait.[114] In *Griggs*, the Court articulated a reason for recognizing a category of discrimination called disparate impact and began to provide a rudimentary structure for evaluating it.[115]

Subsequent cases created a fuller structure for evaluating disparate impact cases under Title VII.[116] Unhappy with this structure, Congress amended Title VII in 1991 to add a proof standard for disparate impact cases.[117] A complaining party can establish disparate impact by demonstrating that "a respondent uses a particular employment practice that causes a disparate impact" on the basis of a protected trait and "the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."[118] The plaintiff may still prevail by demonstrating that the employer refuses to adopt a less discriminatory alternate employment practice.[119]

In the Title VII disparate impact context, factual causation is multitiered.[120] In the first step, the plaintiff must demonstrate a certain outcome (a statistically disproportionate outcome), something doing the causing (a specific employment practice), and a causal connection be-

1, 7 (2011) (arguing the case moves away from an animus-based notion).

113. Rich, *supra* note 112, at 45–47. Teasing out the underlying meaning of courts, it appears they require an actor to take some action that is later judged to be motivated by the use of a protected trait and that this action caused certain outcomes. Zatz, *supra* note 70, at 1374–76 (discussing causation in disparate treatment cases). There are strong arguments that discrimination should not be concerned with narrow concepts of motivation, intent, or causation. *See* Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 94–97 (1991). Factual cause questions may play varying roles in cases, depending on the underlying claim. In pattern or practice cases, the causal requirement plays diminished significance, because the plaintiff is required to demonstrate that discrimination was the standard operating procedure of the company. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977).

114. 401 U.S. 424, 432 (1971).

115. *Id.* at 431.

116. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

117. *See Ricci*, 557 U.S. at 570.

118. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

119. *Id.* § 2000e-2(k)(1)(A)(ii).

120. For an excellent discussion of disparate impact causation under Title VII, see Ramona L. Paetzold & Steven L. Willborn, *Deconstructing Disparate Impact: A View of the Model Through New Lenses*, 74 N.C. L. REV. 325 (1996).

tween the two.[121] The exact causal connection has not been defined,[122] although there is support for the idea that disparate impact requires something more or different than traditional but-for causation.[123] Even if the defendant is able to establish its affirmative defense, Title VII still allows a plaintiff to prevail on the third step in the inquiry under an analysis that appears similar to a negligence standard; however, this standard can only be applied after the first two steps of the disparate impact inquiry are completed.[124]

Further, the factual cause inquiry often is intertwined with societal discrimination outside the workplace. For example, in *Griggs*, one reason that an employer requiring a high school diploma had a disparate impact based on race was because of existing societal inequality related to education.[125] The courts made a policy choice about when the employer would be held liable for an impact that is caused by both the employer's practices and external factors. In other contexts, courts have rejected disparate impact claims even if the plaintiff could fit within the articulated framework because the court believed that Title VII, as a matter of policy, did not prohibit employers from engaging in the actions taken.[126]

Although the first step in the ADEA disparate impact analysis is similar to that of Title VII cases, the remaining analysis is different.[127] An employer may escape disparate impact liability under the ADEA, if it demonstrates an employment decision was based on reasonable factors other than age.[128] Thus, the ADEA provides a scope of liability that is different than that found under Title VII. The Supreme Court explained this difference was due to textual differences between the statutes.[129] It also explained that many reasonable employment practices could correlate with age, creating a statistical disparity, but nonetheless be nondiscriminatory.[130] Importantly, none of the disparate impact tests mimic the way traditional factual cause inquiries are articulated or proven.

Another feature of the causal standards is also important. Employment discrimination factual cause standards are often bracketed, describing both when the plaintiff might potentially prevail and also de-

121. Katz, *supra* note 86, at 495–96. Under Title VII, the plaintiff is not required to identify a specific practice in all instances. 42 U.S.C. § 2000e-2(k)(1)(B)(i).

122. Belton, *supra* note 84, at 1291–92.

123. *Id.* at 1267.

124. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i)–(ii).

125. Paetzold & Willborn, *supra* note 120, at 352.

126. Stout v. Baxter Healthcare Corp., 282 F.3d 856, 861 (5th Cir. 2002) (finding that plaintiff cannot prevail on disparate impact claim that short leave times create disparate impact for pregnant women).

127. Smith v. City of Jackson, Miss., 544 U.S. 228, 233–39 (2005).

128. *Id.* at 241–42.

129. *Id.* at 240–42.

130. *Id.* at 241–42.

scribing circumstances when the defendant can escape liability or limit damages.[131] Thus, the statutes explicitly address situations in which the defendant should not be liable, even if the plaintiff makes some showing of factual cause. The bracketed nature of the factual cause question in discrimination cases addresses many of the issues that would be relegated to proximate cause analysis in tort law.

C. The Definition of Potential Parties and Discriminatory Conduct

As discussed in more detail below, proximate cause often is used to limit the reach of negligence, which creates liability across a broad spectrum of relationships and for a broad spectrum of conduct. Employment discrimination liability is critically different because it applies in only a narrow set of circumstances and spectrum of relationships. The discrimination statutes also specifically indicate circumstances when an employer will not be liable for discrimination, even if the conduct might otherwise be considered discriminatory without the statutory exception.[132]

Under Title VII it is unlawful for an employer, employment agency, or certain labor organizations to engage in certain types of behavior.[133] Although the Supreme Court has never decided the question, the lower courts have largely rejected individual supervisor or co-worker liability.[134] In most cases, the courts are considering the liability of the employer or a labor union for certain actions.[135] And, these actions must happen to a person or group of persons protected under the statutes. The statutes generally protect applicants for employment, employees, and former employees,[136] but usually do not protect independent contractors and volunteers.[137]

Even within this narrow band of protected relationships, not all dis-

131. *See, e.g.*, 42 U.S.C. § 2000e-2(e) (2006) (allowing employers to take action based on a "bona fide occupational qualification" (BFOQ)); Price Waterhouse v. Hopkins, 490 U.S. 228, 242 (1989) (discussing how BFOQ brackets causal standard). These brackets are provided through various mechanisms. For example, Congress created the BFOQ limit. The courts originally created the liability brackets for motivating factor and disparate impact cases, and Congress responded to these brackets in Title VII by amending the statute in 1991.

132. *See* 42 U.S.C. § 2000e-2(e).

133. *Id.* § 2000e-2(a)–(c). Similar restrictions are provided in the ADEA. 29 U.S.C. § 623(a)–(c) (2006). Some joint labor-management committees may also be liable for discriminatory conduct. 42 U.S.C. § 2000e-3(a). The ADA, whose statutory provisions are structured differently, prohibits a "covered entity" from discriminating in certain ways enumerated by the statute. 42 U.S.C. § 12112(a), (b) (2006), *amended by* Pub. L. No. 110-325, 122 Stat. 3553 (2008). The term "covered entity" is defined to include employment agencies and labor organizations. *Id.* § 12111(2).

134. *See, e.g.*, Creusere v. Bd. of Educ., 88 F. App'x 813, 822 n.12 (6th Cir. 2003); Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1179 (9th Cir. 2003).

135. *See, e.g.*, cases cited *supra* note 134.

136. 42 U.S.C. §§ 2000e(f), 2000e-2(a); Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997) (indicating that Title VII applies to former employees).

137. Broussard v. L.H. Bossier, Inc., 789 F.2d 1158, 1160 (5th Cir. 1986) (holding that independent contractors are not protected by Title VII); Smith v. Berks Cmty. Television, 657 F. Supp. 794, 795 (E.D. Pa. 1987) (same for volunteers).

criminatory conduct is prohibited. Title VII requires that there be an unlawful employment practice, as the statute defines that term.[138] Thus, in many cases, the plaintiff is challenging actions listed in the statutory language, such as failure to hire, failure to promote, demotion, or termination.[139] In these cases, there is certainty about the type of harm Congress sought to prevent.

The federal employment discrimination statutes also provide for liability when the "terms, conditions, or privileges of employment" were negatively affected because of a protected trait.[140] Courts have interpreted this language to require that actions rise to a certain level of seriousness to be cognizable under Title VII.[141] Some conduct, such as minor social slights, never rises to the required level of seriousness. Actions such as changing an employee's working conditions without changing the employee's pay or placing a negative evaluation in an employee's file may or may not affect the terms and conditions of employment, as that term is understood in a legal sense.[142] In the harassment context, the Supreme Court has required that the behavior be severe or pervasive and be both objectively and subjectively hostile.[143]

Therefore, "liability hinges upon the showing of a causal connection between some discriminatory action attributable to a statutory employer and some adverse employment action suffered by an employee."[144] By statute, employment discrimination law thus deals with a narrow universe of victims, actors, and actions.

This universe is further circumscribed by available affirmative defenses that allow the employer to take protected traits into consideration in certain instances. For example, under the "bona fide occupation qualification" (BFOQ) provision, the employer is allowed to make employment decisions based on a person's protected class in limited instances.[145] Title VII protects certain seniority systems from statutory reach, even though they arguably perpetuate past discrimination.[146] Under the

138. 42 U.S.C. § 2000e-2(a).

139. *See, e.g.*, Cooper v. United Parcel Service, Inc., 368 F. App'x 469, 472–73 (5th Cir. 2010) (alleging termination because of race).

140. 42 U.S.C. § 2000e-2(a). Outside of the disparate impact context, the full implications of the second portion of Title VII's main operative provisions have not been fully explored.

141. *See, e.g.*, *Cooper*, 368 F. App'x at 474–75 (citing cases demonstrating what constitutes an adverse employment action).

142. *See, e.g.*, *id.* at 474 (indicating that lateral transfer is not cognizable); *see also* Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121, 1129 (1998) (discussing where courts should draw lines regarding liability).

143. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986).

144. Stephen F. Befort & Alison L. Olig, *Within the Grasp of the Cat's Paw: Delineating the Scope of Subordinate Bias Liability Under Federal Antidiscrimination Statutes*, 60 S.C. L. REV. 383, 384 (2008).

145. 42 U.S.C. § 2000e-2(e).

146. *Id.* § 2000e-2(h).

ADEA, the employer is allowed to make decisions based on a reasonable factor other than age, even if those decisions have a disparate impact based on age.[147] Under the ADA, an employer may discriminate against an individual because of a disability, if the person is not qualified to perform the job with or without accommodation.[148] Thus, unlike many common-law causes of action, the major federal employment discrimination statutes not only prohibit certain conduct, they indicate when conduct will not result in liability.

D. Other Limits

Federal discrimination law also has other liability-limiting principles, such as the deadlines for filing suit, court-created limits on employer liability, and limits on damages.[149] Each of these devices confines employment discrimination liability within a fairly fixed range.

The federal employment discrimination statutes do not contain normal statutes of limitations. Rather, plaintiffs must file a Charge of Discrimination with a federal or state agency within a specified time and then must file the lawsuit within a specified time period.[150] If a plaintiff does not file the Charge within the required period, the claim is usually barred.[151] The time period for filing the Charge of Discrimination varies by the type of conduct at issue.[152] For discrete discriminatory conduct, such as a termination, plaintiffs must file a Charge within 180 or 300 days of the discriminatory act.[153]

The potential scope of federal employment discrimination law also is limited by court-created doctrine that restricts the circumstances under which an employer will be held liable for discriminatory conduct. In 1986, the Supreme Court recognized sexual harassment as a cognizable claim under Title VII.[154] The Court struggled, however, with the question of whether employers should be automatically liable for sexual harassment and left this question unresolved.[155] In 1998, the Supreme Court

147. Meacham v. Knolls Atomic Power Lab., 554 U.S. 84, 93 (2008).

148. *See* Tusing v. Des Moines Indep. Cmty. Sch. Dist., 639 F.3d 507, 518 (8th Cir. 2011).

149. *See* 42 U.S.C. § 2000e-5(b)–(g).

150. *Id.* § 2000e-5(e)(1). The requirements under the ADEA vary slightly but still require the filing of a Charge. *See* Lowe v. Am. Eurocopter, LLC, No. 1:10CV24-A-D, 2010 WL 5232523, at *2 (N.D. Miss. Dec. 16, 2010) (discussing how Title VII requires plaintiffs to receive a right-to-sue letter from the Equal Employment Opportunity Commission, while ADEA does not contain this requirement).

151. 42 U.S.C. § 2000e-5(e)(1).

152. *Id.*; Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 109–10 (2002). The period begins when the plaintiff has notice of the discriminatory action. Del. State Coll. v. Ricks, 449 U.S. 250, 259 (1980); *see also* 42 U.S.C. § 2000e-5(e)(3)(A) (providing limits for compensation decisions); Lewis v. City of Chicago, 130 S. Ct. 2191, 2199 (2010) (describing how limits work in disparate impact cases); *Morgan*, 536 U.S. at 117 (discussing harassment).

153. 42 U.S.C. § 2000e-5(e)(1); *Morgan*, 536 U.S. at 110.

154. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 73 (1986).

155. *Id.* at 72.

decided whether employers would be liable for sexual harassment by supervisors in two cases, *Burlington Industries, Inc. v. Ellerth*[156] and *Faragher v. City of Boca Raton*.[157] The Court held that employers would be able to escape liability in certain instances if the employer proved a court-created affirmative defense.[158] Agency doctrine is explained further in Part IV.D, *infra*. For now, it is important to understand that an employer will not be held liable for all discriminatory conduct that happens in the workplace and that the agency analysis does not mimic traditional common-law agency.

Unlike traditional common-law torts, the major federal employment discrimination regimes contain damages provisions that explicitly limit and calibrate damages to each particular regime.[159] These limits are important because they minimize concerns that employers will face liability that is disproportionate to the conduct at issue.

Title VII and the ADA share a similar remedies structure that uses the definitions of damages provisions, as well as statutory caps, to limit liability. Compensatory damages under Title VII and the ADA are defined differently than they are in a typical tort context. Compensatory damages include "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses,"[160] but do not include back pay, interest on back pay, or other relief authorized under section 706(g) of the Civil Rights Act of 1964.[161] Title VII and the ADA both cap the total combined compensatory and punitive damages a plaintiff may recover.[162] The size of the cap depends on the number of employees employed by an employer.[163] The highest cap, which applies to employers with more than 500 employees, is $300,000 and has not been adjusted since 1991.[164]

The ADEA limits damages by restricting the types of damages available to plaintiffs. Under the ADEA, the only monetary relief that a plaintiff may be awarded is front pay, back pay, and a liquidated damag-

156. 524 U.S. 742 (1998).

157. 524 U.S. 775 (1998). By describing agency doctrine, the author is not expressing agreement with it. For a critique of agency doctrine, see Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3, 4–5 (2003).

158. *Ellerth*, 524 U.S. at 766; *Faragher*, 524 U.S. at 780.

159. 42 U.S.C. § 2000e-5(g) (2006) (providing that courts may "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate"); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1072–73 (amending Title VII to provide for compensatory and punitive damages); EEOC v. Waffle House, Inc., 534 U.S. 279, 285 (2002) (noting the similarity between ADA and Title VII remedies).

160. 42 U.S.C. § 1981a(b)(3).

161. *Id.* § 1981a(b)(2).

162. *Id.* § 1981a(b)(3).

163. *Id.*

164. *Id.* § 1981a(b)(3)(D).

es award.[165] The plaintiff may not be awarded compensatory or punitive damages.[166] Each of these regimes provides limited damages. The pre-existing damage limits are expressions about the extent of liability and must be considered when deciding whether to import proximate cause.[167]

E. The Space for Proximate Cause

The employment discrimination statutes contemplate limits on liability in multiple ways. These direct expressions eliminate, or at least significantly constrain, any space potentially available for common-law proximate cause to operate. Any proximate cause analysis used in employment discrimination statutes cannot be coterminous with common law. Further, any proximate cause analysis must be conducted by defining its specific goal or goals.

As discussed above, proximate cause is often associated with whether there is a foreseeable plaintiff, whether there is an intervening cause, whether consequences could be reasonably anticipated, or the slightly different, but often related, question of whether the harm caused was within the scope of risk of the defendant's conduct.[168] Proximate cause is also described through a line-drawing rationale.[169]

The employment discrimination statutes and related court-created agency doctrine address questions regarding the foreseeability of the plaintiff and reasonably anticipated consequences by limiting the types of plaintiffs who have viable claims and by requiring those plaintiffs to have certain statutorily defined relationships with the defendant.[170] The federal employment statutes also prescribe the types of conduct that result in liability. Given the way the courts have interpreted these provisions, the employer faces a fairly limited spectrum of acts that will result in liability. Thus, an employer will not be held liable if one of its employees engages in sexual harassment that is not severe or pervasive.[171] Nor will it be held liable if a plaintiff is subject to minor social slights or other actions that are not considered to rise to the level of an adverse employment action, even if these actions are taken because of a protected trait.[172]

165. 29 U.S.C. §§ 216(b), 626(b) (2006).

166. *Id.* § 216(b). *But see* Carol Abdelmesseh & Deanne M. DiBlasi, Note, *Why Punitive Damages Should Be Awarded for Retaliatory Discharge Under the Fair Labor Standards Act*, 21 HOFSTRA LAB. & EMP. L.J. 715, 748 (2004) (discussing whether punitive damages are available for retaliation claims).

167. Importantly, when caps are placed on tort causes of action, such as medical malpractice, the underlying tort action already incorporates proximate cause. In the employment discrimination context, courts would be explicitly recognizing proximate cause after Congress has spoken about liability limits.

168. *See supra* Part I.B.

169. *See supra* Part I.B.

170. *See supra* Part II.C.

171. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998).

172. *Id.*

Additionally, the statutes specifically enunciate instances in which it is lawful for an employer to take actions based on a protected trait. Thus, an employer could hire a person based on her sex, if sex is a bona fide occupational qualification for the position.[173] Congress has provided (or the courts have interpreted the discrimination statutes as providing) a defined spectrum of potential liability that directly addresses the core concerns of proximate cause.[174] Court-created agency doctrine further limits when an employer will be liable for the acts of individuals.[175]

If proximate cause is concerned about whether some intervening action cuts off the original actor's liability,[176] Congress has already spoken to this concept, as well, at least for certain statutes. Congress amended Title VII in 1991 to indicate what a plaintiff must prove when more than one cause contributed to the discrimination.[177] In doing so, Congress chose to impose liability on employers, even if the employer could prove it would have taken the same decision absent the protected trait.[178]

If proximate cause is concerned with line drawing, the courts risk upsetting a complex statutory regime by importing proximate cause. The statutory regime considers 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 the perceived purpose of the obligations created by the statutory regime.[179] Further, in the employment discrimination context, these policy decisions have evolved over time, as the courts have interpreted the statutory language and Congress has responded to the courts' interpretations.

Importantly, any court considering using proximate cause in discrimination statutes must specifically define which of its underlying goals it is trying to further.[180] As discussed throughout this Article, the language of the statute clearly addresses many of proximate cause's goals. To the extent that the language does not fully address all of proximate cause's goals, the language at least severely diminishes the available space for the common-law doctrine. Statutory proximate cause is not coterminous with common-law proximate cause.

173. 42 U.S.C. § 2000e-2(e) (2006).

174. *See supra* Part II.C.

175. *See supra* notes 155–58 and accompanying text.

176. 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), *supra* note 23, § 34 cmt. b.

177. 42 U.S.C. § 2000e-2(m).

178. *Id.* § 2000e-5(g)(2)(B).

179. *See* Stapleton, *supra* note 22, at 985–86.

180. *See* discussion *supra* Part I.B.

III. WEAK STATUTORY INTERPRETATION

Over the past thirty years, the Supreme Court has issued several important opinions regarding whether proximate cause should be used in interpreting statutory regimes.[181] In other work, I demonstrate how courts often use weak textual, intent, and purpose-based arguments to justify importing proximate cause into statutes and how the courts are insufficiently sensitive to separation of powers concerns.[182] This Part explores how those same kinds of weak arguments are likely to be used by the courts in the employment discrimination context. It begins in Section A by briefly exploring statutory interpretation and separation of powers. Section B demonstrates why common arguments used to import proximate cause into statutes generally do not apply to discrimination statutes.

A. Statutory Interpretation and Separation of Powers

In thinking about statutory interpretation, it is important to remember that it is a way courts often express concerns about separation of powers. Under the Constitution, Congress is vested with legislative power, and the courts have the power to interpret the laws that Congress creates.[183] Separation of powers thus contemplates a line between construing an existing statutory regime and creating a statutory regime. While there is strong disagreement regarding how much latitude courts have to interpret statutes,[184] there is at least agreement that this space is often more constrained than it would be in a pure common-law context.

181. Staub v. Proctor Hosp., 131 S. Ct. 1186, 1191 (2011) (considering proximate cause under USERRA); Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 453 (2006) (under the Racketeer Influenced and Corrupt Organizations Act (RICO)); Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 342–46 (2005) (in case alleging securities fraud); Sosa v. Alvarez-Machain, 542 U.S. 692, 703–04 (2004) (under Federal Tort Claims Act); Archer v. Warner, 538 U.S. 314, 325–26 (2003) (Thomas, J., dissenting) (under Bankruptcy Code); Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 267–68 (1992) (under RICO); Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 535–36 (1983) (under Clayton Act); *see also* Pac. Operators Offshore, LLP v. Valladolid, 132 S. Ct. 680, 692 (2012) (Scalia, J., concurring) (noting that proximate cause is typically applied in negligence cases); Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 754 (2004) (reasoning that the National Environmental Policy Act (NEPA) requires a causal standard similar to proximate cause); Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 713 (1995) (O'Connor, J., concurring) (under the Endangered Species Act (ESA)). *But see* CSX Transp., Inc. v. McBride, 131 S. Ct. 2630, 2641 (2011) (refusing to import traditional common-law proximate cause into Federal Employers' Liability Act (FELA), but holding that the statutory language itself places a different proximate cause limit on the statute).

182. Sandra F. Sperino, *Statutory Proximate Cause*, 88 NOTRE DAME L. REV. (forthcoming 2013).

183. U.S. CONST. art. I, § 1.

184. *See* CALABRESI, *supra* note 2, at 5; POPKIN, *supra* note 2, at 45, 67; William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation As Practical Reasoning*, 42 STAN. L. REV. 321, 348 (1990); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 78 (2006); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 355–56 (2005); William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541, 594 (1988).

There also is strong disagreement regarding the appropriate methods and goals courts may use when construing statutes. These are the tensions inherent in competing models of statutory interpretation, such as textualism, intentionalism, and purposivism.[185] This Article does not make any normative claims about these competing visions of statutory interpretation. Rather, it argues that to the extent courts interpret statutes in ways that are disingenuous or not credible, then it is proper to be skeptical about whether courts are interpreting statutes or overstepping their judicial role.

B. Common Statutory Proximate Cause Analysis

This Section demonstrates that most arguments used to justify importing proximate cause into other statutes are not convincing in the employment discrimination context. It focuses on textual, intent, and purpose-based arguments because these are the kinds of arguments courts tend to use in statutory proximate cause cases.[186]

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.[187] None of the major federal employment discrimination statutes use the words "proximate cause."[188] One strong argument against implying proximate cause from general causal language is that Congress understands how to designate proximate cause by name. If Congress does not use the words "proximate cause," the legislature did not intend to limit the statute using proximate cause principles.[189]

Further, the language in Title VII's primary operative provisions is different than traditional tort articulations of cause. As discussed earlier, Title VII's primary operative provisions, which were originally enacted in 1964, contain two subparts.[190] Although the first subpart uses "because of" language, courts have not interpreted Title VII's factual cause standards to be consistent with the common law.[191] Further, courts seem to use this language to refer to both intent and causation. In 1991, Congress

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

186. *See generally* cases cited *supra* note 181 (Supreme Court opinions considering proximate cause in the context of various statutes).

187. *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 (United States liable for "any disease proximately caused" by federal employment); Act of Oct. 6, 1917, ch. 105, § 306, 40 Stat. 407 (United States 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. 742–43 (United States not liable to injured employee whose "intoxication . . . is the proximate cause of the injury").

188. *See supra* Part II.A.

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

190. *See supra* note 68 and accompanying text.

191. *See supra* Part II.B.

added new language to Title VII to provide a structure for disparate impact claims and to allow a plaintiff to prevail by establishing that a protected trait is a motivating factor in a decision.[192] Neither of these provisions mimics traditional tort language regarding causation.

Any discussion of Title VII's operative language would also need to consider that the central provision has two subparts. The second subpart provides that the employer cannot "limit, segregate, or classify his employees or applicants for employment *in any way*."[193] This language is different than traditional ways of articulating causation.

In other instances, courts often look to general causal language within a statute and then conclude that these terms refer to both cause in fact and proximate cause.[194] The modern federal employment discrimination statutes provide that certain actions cannot be taken "because of" a defined protected class.[195] Given this "because of" language it is certainly plausible to make a superficial argument that proximate cause should be imported.[196] In negligence cases, common-law courts use the term "causation" to refer to both factual and legal cause,[197] and it could be argued that those words "because of" have the same meaning in federal discrimination law. If the courts import proximate cause analysis into discrimination law, this kind of cursory statutory interpretation is likely to occur.

This argument fails as a convincing statutory anchor for discrimination claims for several reasons. First, as discussed throughout this Article, employment discrimination law is not generally drawn from tort law, so it is difficult to understand why courts would assume causal language was meant to import tort concepts.[198] A major contribution of this Article is to demonstrate that courts' claims that discrimination law draws from common-law torts are not specific enough to be meaningful.

Second, this argument ignores that proximate cause varies, depending on whether the underlying claim is based on negligence or intentional conduct. As discussed in Part IV.A, none of the discrimination claims

192. *See supra* notes 103–08 and accompanying text.

193. 42 U.S.C. § 2000e-2(a) (2006) (emphasis added).

194. *See, e.g.*, Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 265–68 (1992).

195. 42 U.S.C. § 2000e-2(a) (Title VII); 29 U.S.C. § 623(a) (2006) (ADEA). USERRA's language is both similar and dissimilar to Title VII language. USERRA prohibits certain actions from being taken "on the basis of" military status. 38 U.S.C. § 4311(a) (2006). USERRA later provides that an employer engages in unlawful discrimination when military status "is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service." *Id.* § 4311(c)(1).

196. Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 536 (1995) (indicating that "caused by" language in statute requires proximate cause).

197. 42 U.S.C. § 2000e-2(a); *see, e.g.*, A.B. *ex. rel.* C.D. v. Stone Cnty. Sch. Dist., 14 So. 3d 794, 800 (Miss. Ct. App. 2009). The author is not making any claims about whether this argument should rely on purely textualist claims or also on legislative history or underlying statutory purpose.

198. *See* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1229 (2001) (noting that super-statutes change the common-law baseline).

map well onto tort claims, like negligence, where proximate cause is most commonly invoked.

Third, relying on general causal language ignores that Congress expresses concerns about limiting liability throughout statutory regimes. As shown in Part II, the employment discrimination statutes are complex regimes that calibrate limits on liability through a variety of mechanisms. These expressions are often more concrete and direct than the general causal language and must be considered when deciding whether space remains for proximate cause.

Finally, both Congress and the courts have rejected common-law analysis in the factual cause context. For example, in the 1991 amendments to Title VII, Congress indicated that a plaintiff could prevail in a discrimination case by showing that a protected trait played a motivating factor in an employment decision.[199] This motivating factor standard does not mimic common-law articulations of factual cause.[200] In the ADEA context, the Supreme Court held the "because of" language in the ADEA only referred to "but-for" causation, even though common-law courts often use that terminology to refer to other factual cause standards.[201]

Even if a weak argument exists that courts may anchor proximate cause in general causal language, other features of employment discrimination statutes also point away from proximate cause. Congress did not refer to proximate cause when enacting Title VII. Indeed, any discussion of legislative history with respect to Title VII of the Civil Rights Act of 1964 is necessarily short, because "[t]he legislative history of Title VII has virtually been declared judicially incomprehensible."[202] Given the broad scope of the Civil Rights Act of 1964, of which Title VII was just one portion, there was little discussion regarding the meaning of the words in Title VII. Nor did Congress engage in any extensive discussion about Title VII and the common law. There is evidence that when Congress looked to prior law, it looked at other discrimination statutes and executive orders that pre-dated Title VII.[203]

Congress did discuss causal language before enacting the 1991 amendments to Title VII. It is clear from the legislative history, howev-

199. 42 U.S.C. § 2000e-2(m).

200. Katz, *supra* note 86, at 502, 505–06.

201. *See, e.g.*, Lasley v. Combined Transp., Inc., 261 P.3d 1215, 1219–20 (Or. 2011) (noting that factual cause means whether the conduct played a substantial factor in harm).

202. Beverly v. Lone Star Lead Constr. Corp., 437 F.2d 1136, 1138 n.7 (5th Cir. 1971); *see also* CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985) (exploring the tortured legislative history of Title VII); H.R. Rep. No. 914 (1963), *reprinted in* EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 2112 (describing how ambiguous the statutory language is).

203. EEOC, *supra* note 202, at 1 (describing early federal discrimination statutes); *id.* at 2 (describing the Fair Employment Practice Committee); *id.* at 3–5 (describing executive orders); *id.* at 5–6 (describing state anti-discrimination statutes).

er, that Congress largely focused not on the common-law definitions of terms, but rather on responding to earlier Supreme Court decisions, which created frameworks for disparate impact and mixed-motive claims.[204] As discussed in Part II.B, these court-created frameworks did not derive from the common law.

In other contexts, courts also have used two weak intent claims to import proximate cause into regimes: that the particular statute derives from a common-law tradition[205] and that civil statutes in general are presumed to draw from a common-law tradition.[206] This second argument played a role in *Staub*, the decision where the Court used proximate cause in the context of USERRA and hinted such analysis would apply to Title VII. 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."[207] In *Staub*, the Court made no inquiry into whether Congress adopted USERRA specifically using the common law as a background.

There is no legislative history for Title VII that suggests its primary operative provisions derive from a common-law tradition. Indeed, the federal employment discrimination statutes create significant exceptions to common-law notions of at-will employment.[208] Further, there is no

204. 137 CONG. REC. 28,717 (1991) (discussing the compromises needed to pass the Civil Rights Act of 1991 and also noting that its terms of art were created by the courts and not by the legislature); *id.* at 28,715 (noting that purpose of the disparate impact provisions was to put *Griggs* back in place); *id.* at 28,720 (noting that the purpose of the Act was also to respond to *Price Waterhouse*); *id.* at 56,750 (indicating that amendments are designed not to turn Title VII into a national tort law); *id.* at 56,780 (noting that it would be problematic to use tort-style remedies for Title VII); 1 BERNARD D. REAMS, JR. & FAYE COUTURE, THE CIVIL RIGHTS ACT OF 1991: A LEGISLATIVE HISTORY OF PUBLIC LAW 102-166, 505 (1994) (looking at disparate impact causal language in reference to *Griggs* and how courts had interpreted standard since *Griggs*); *id.* at 507–08 (arguing that the purpose of the amendments is to restore and codify *Griggs*); *id.* at 508 (specifically noting that courts are not dealing with common-law standards with respect to disparate impact). The legislative history does contain some discussion of the appropriate causal standard. 137 CONG. REC. S15,319 (daily ed. Oct. 29, 1991) (noting that cause is required in disparate impact, but not indicating proximate cause specifically); REAMS & COUTURE, *supra*, at 498 (discussing how the term "causal connection" would be a better choice for disparate impact analysis and invoking *Palsgraf*, but not truly discussing proximate cause); *id.* at 504 (further discussing putting word "cause" into disparate impact and discussing the proximate relationship, but not discussing proximate cause); *id.* at 505 (discussing the word "contributes" in statutory language and equating it with causes in part, without reference to common law understandings; also using the words "significant part"). It is especially difficult to determine how arguments regarding the 1991 amendments would affect proximate cause analysis because it is unclear how the 1991 amendments affect the original statutory language. ESKRIDGE, *supra* note 63, at 80 (discussing how 1991 amendments did not seriously consider original intent of the legislature in 1964).

205. Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 529, 531 (1983).

206. Staub v. Proctor Hosp., 131 S. Ct. 1186, 1191 (2011). The proximate cause discussion in *Staub* is arguably dicta. Nonetheless, it highlights an approach courts use to import proximate cause into statutes.

207. *Id.*

208. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 628–29 (1996) (discussing how discrimination statutes are different than the common law); Howard v. Wolff Broadcasting Corp., 611 So. 2d 307, 312–13 (Ala. 1992) (noting that common law does not prohibit terminating an employee because of her sex).

reason to generally presume that modern statutes derive from the common law.

The only intent argument that can credibly be made regarding employment discrimination law is that the statutes are ambiguous as to proximate cause or that Congress intentionally left gaps in the statutes, such that the courts are required to exercise a gap-filling role. As discussed in Part II, however, the employment discrimination statutes expressly address many of the underlying concerns of proximate cause. Even if there arguably is room for proximate cause, it would not be coterminous with common-law proximate cause.

Proximate cause also might be used in a statute, if the purpose of the statute suggests it. Courts commonly recite three purposes for the federal employment discrimination statutes. First, the Supreme Court has stated that the purpose of Title VII is "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."[209] It has also indicated that the purpose of the statute is not to provide a remedy for discrimination, but to prevent it from happening in the first place.[210] Other courts have noted that Title VII is a broad civil rights statute.[211]

When proximate cause is an element of a case and the plaintiff is unable to establish the element, there is a finding of no liability for the defendant. If proximate cause is applied to employment discrimination cases, the courts would essentially be saying that even though a plaintiff's protected class played a role in an employment action, what happened to that plaintiff is not discrimination. Such reasoning is contrary to the broad purposes of the employment discrimination statutes. There are strong reasons for calling actions discrimination, even if the employer is absolved of liability or its liability is limited through other mechanisms.

Despite general purposes that point in the direction of broad liability within the existing statutory restrictions, the Supreme Court has used the purposes of Title VII to limit when an employer would be liable for certain discriminatory acts.[212] Further, in other contexts, the Court has read proximate cause as being consistent with congressional direction to liberally construe the statute.[213] Thus, the broad purposes of Title VII will likely not deter courts from importing proximate cause.

When importing proximate cause into statutes, courts also use an-

209. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973).

210. Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998). The use of proximate cause impacts whether Title VII is concerned only with remedying past harms or whether it is a broader expression of public policy.

211. Hart v. J.T. Baker Chem. Co., 598 F.2d 829, 831 (3d Cir. 1979) ("We believe that broad remedial legislation such as Title VII is entitled to the benefit of liberal construction.").

212. *Faragher*, 524 U.S. at 806–07 (allowing employers to escape liability in certain instances).

213. Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 274 (1992).

other weak purpose-based argument: that it is unlikely that Congress intended to allow all factually injured plaintiffs to recover.[214] Given the narrow spectrum of relationships and harms addressed by the employment discrimination statutes, plaintiffs are not usually alleging cases that are factually absurd in the same way that some negligence claims can be. Further, discrimination statutes protect fundamental societal interests, but do so in a narrow way. Given the statutory restrictions, all viable discrimination claims involve conduct that has occurred in or related to the workplace, that has met particular factual cause standards, and that has been deemed serious enough to affect the terms or conditions of a person's employment. Given this narrow space, there are strong arguments that even attenuated claims should fall within the statutes' coverage.

This purpose argument also 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. As discussed in Part II, the employment discrimination statutes already provide limits, and there is no reason that courts should look to proximate cause before considering whether the absurd result can be avoided through other mechanisms. This fact is especially important because proximate cause draws from multiple evolving and contested goals and thus introduces confusion into statutory analysis. As a matter of prudence, courts should be reluctant to turn to proximate cause to resolve liability limitation problems.[215]

Finally, it might be argued that Title VII has a gap that the courts could fill by using a common-law or some other similar kind of interpretive technique. When engaging in common-law decision making, the court could then look to the proximate cause doctrine to fill the gap.

Such an argument rests on many faulty premises. First, it assumes that the statute does not already address the underlying concerns of proximate cause. Second, it assumes that common-law proximate cause is the appropriate place to ground such decision making. As discussed throughout this Article it is unclear why judges would look to the common law to define terms in a statutory regime whose operative provisions are not drawn from the common law and that does not mimic the common law, especially given that the courts have interpreted the factual cause standards differently than the common law. Further, it is important not to confuse the common law with common-law decision mak-

214. *Id.* at 266 n.10.

215. This Section has examined interpretation largely through the lens of textualism, intentionalism, and purposivism because these are the arguments the courts use to justify their conclusions regarding statutory proximate cause. Sperino, *supra* note 182, Part II. Outside the proximate cause context, courts sometimes use a common-law methodology when preemptive lawmaking is required to preserve the statutory mandate. *See* Eskridge & Frickey, *supra* note 184, at 359. Judge Posner of the Seventh Circuit Court of Appeals has suggested that a common-law construction approach would be inappropriate in Title VII cases. *See* Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 818–19 (1983).

ing. In other words, judges may claim to be doing the latter, without using the common law as the baseline for its reasoning.

It is also necessary to be skeptical about whether judges are using arguments about torts and common law as a façade for other goals. As discussed in later Sections, the Supreme Court has claimed in the past that it is applying common-law agency principles to Title VII, while enunciating legal standards that depart significantly from the common law.[216] If judges are not actually importing common-law proximate cause, they should not claim its mantle in order to do other work. Rather than pretend to apply the common law, the judges should explain that they are engaging in policy-based gap filling and explain why they have the authority to do so. Only through more explicit dialogue can we properly understand the relationship between the courts, the common law, and modern statutes.

This Part demonstrates the common text, intent, or purpose-based arguments that courts use to import proximate cause into statutes generally do not apply to the employment discrimination statutes. More importantly, even if the courts could find an appropriate statutory hook for proximate cause, this would not assist the courts in determining which of proximate cause's many goals should be imported into the statutory regime.

IV. FUNDAMENTAL PREMISES AND POSSIBLE PROBLEMS

Even if some plausible statutory hook existed for importing proximate cause into employment discrimination statutes, theoretical, doctrinal, and practical reasons militate against it. This Part addresses broader concerns about using proximate cause in employment discrimination cases.

A. Employment Discrimination Claims Do Not Map Well Onto Common-Law Torts

The Supreme Court has indicated that federal discrimination statutes were created in reference to tort law.[217] However, this premise is not demonstrably true for most modern employment discrimination statutes. Indeed the primary operative provisions of these statutes are so contrary to the common law that it is odd to presume that while they created large exceptions to common-law notions of at-will employment, they retained its underlying concepts.[218] In most states, without the existence of federal

216. *See infra* Part IV.D.

217. Staub v. Proctor Hosp., 131 S. Ct. 1186, 1191 (2011).

218. *See, e.g.*, Family and Medical Leave Act, 29 U.S.C. §§ 2601–2654 (2006); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2006); Belton, *supra* note 84, at 1242 (noting that discrimination law does not derive from the common law). This argument relates to broader claims

employment discrimination law or a state-law corollary, the common law would allow the employer to terminate an individual based on a protected trait.[219] Further, as discussed in Part II.B, the courts and Congress have not followed traditional common-law articulations for defining factual cause. To date, no court has convincingly explained why it assumes that federal discrimination statutes draw from the common law.[220] Even if it could be argued that the discrimination statutes derive from tort law or from the common law, this statement would provide no meaningful guidance on whether to use proximate cause.

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."[221] Another common definition of a tort is a "civil wrong, other than breach of contract, for which the court will provide a remedy."[222] In this general sense, it is appropriate to conceive of federal employment discrimination law as a "contemporary extension[] of tort law"[223] and placing it within this general category is not problematic.

Indeed, courts and commentators have often referred to employment discrimination law as a tort. In *Staub*, for example, the Court indicated that "when Congress creates a federal tort it adopts the background of general tort law."[224] And a leading torts treatise indicates that "[c]ivil rights violations are torts."[225]

Once courts proceed beyond these general statements about torts and discrimination law, their analysis becomes problematic.[226] These general statements are not nuanced enough to determine whether proximate cause should be imported into employment discrimination law. They ignore that neither proximate cause nor employment discrimination law is monolithic. Rather, each changes depending on the factual

about statutes and the common law generally, which were explored in Sperino, *supra* note 182. The changing relationship between statutes and the common law has been noted for more than 100 years. Pound, *supra* note 2.

219. Howard v. Wolff Broadcasting Corp., 611 So. 2d 307, 312–13 (Ala. 1992).

220. *See, e.g.*, Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 448 (2003) (drawing from common-law concepts of employee without providing convincing rationale, but ultimately creating a different definition relying on EEOC Compliance Manual); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 71–72 (1986) (suggesting, without much support, that Title VII might refer to common-law concepts of agency).

221. Goldberg & Zipursky, *supra* note 29, at 919.

222. KEETON ET AL., *supra* note 26, § 1, at 2.

223. Goldberg & Zipursky, *supra* note 29, at 919.

224. Staub v. Proctor Hosp., 131 S. Ct. 1186, 1191 (2011).

225. 1 DAN B. DOBBS, THE LAW OF TORTS, § 44, at 81 (2001).

226. For example, calling discrimination statutes a tort has important implications regarding whether Title VII should be conceived as a mechanism for remedying individual harms or whether it should be construed more broadly. *See* MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW (2010); Dennis P. Duffy, *Intentional Infliction of Emotional Distress and Employment At Will: The Case Against "Tortification" of Labor and Employment Law*, 74 B.U. L. REV. 387 (1994); Zemelman, *supra* note 3, at 193–97.

circumstances in which it is used. Such concern is noted in the *Restatement (Third) of Torts*, which warns that "provisions on scope of liability in this Chapter, which are centered on liability for physical and emotional harm, may not be appropriate in other contexts."[227]

Placing employment discrimination within the realm of torts is dangerous if its placement there means it must be fixed within one or more of the traditional categories of tort law, such as intentional torts, negligence, or strict liability. And, in order to apply proximate cause principles to discrimination law, it is necessary to draw on these traditional categories because proximate cause is not a fixed concept.

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.[228] 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."[229] 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.[230] Third, in intentional tort cases, "the defendant's wrongful conduct is [usually] closely linked—temporally and conceptually—to the plaintiff's harm."[231] Fourth, the risks of inefficient overdeterrence are lessened in intentional tort cases.[232] And, finally, many traditional intentional tort cases do not involve multiple causes.[233]

Given these differences, it is not sufficient to determine that employment discrimination cases are like torts in some general sense. Rather, it is necessary to ask which traditional tort do the statutes most mimic. The answer to this question is not uniform across the statutory regimes, but rather varies with the type of claim, depending on whether it is a disparate treatment claim, a harassment claim, or a disparate impact claim.[234] Importantly, it would never be appropriate to apply a single notion of proximate cause to all discrimination claims.

Even if one is willing to abandon a unified application of proximate cause, it is quite difficult to map employment discrimination claims onto traditional tort causes of action. This discussion begins by describing

227. RESTATEMENT (THIRD), *supra* note 23, § 29 cmt. c.

228. Belton, *supra* note 84, at 1250; David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1773 n.30 (1997).

229. Fisch, *supra* note 56, at 832.

230. *Id.* at 832–33.

231. *Id.* at 832.

232. *Id.* at 833.

233. *Id.* at 832.

234. *See* Derek W. Black, *A Framework for the Next Civil Rights Act: What Tort Concepts Reveal About Goals, Results, and Standards*, 60 RUTGERS L. REV. 259, 265–66 (2008) (arguing that civil rights law should not be bound to one concept of fault).

overarching difficulties with comparing employment discrimination law to negligence law and then considers whether each of the types of employment discrimination have analogs in traditional tort categories.

One of the central problems with borrowing a proximate cause analysis largely applied in the context of negligence law is that the standard was mostly developed in the context of physical harms. 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.[235]

Discrimination claims outside of the harassment context ordinarily do not involve physical injury in the same way.[236] Indeed, it is difficult to define the harms of discrimination in a singular way. The harms of discrimination are often economic in nature, but discrimination also involves harms to personal dignity, equality norms, as well as group harms. As Martha Chamallas has noted, "such 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."[237] The "multidimensional quality of the harm" in employment discrimination cases "defies categorization under traditional headings" and makes it problematic to map traditional proximate cause onto discrimination.[238]

Even if one ignores these difficulties, none of the traditionally recognized discrimination types is enough like negligence to justify importing proximate cause. For disparate treatment law, the closest tort analogy is intentional torts, not negligence. But this comparison, too, is only true in a general sense, because it ignores two important factors: whether individual disparate treatment cases actually require a showing of intent and whether the intent required is similar to the type required in intentional tort cases.

Describing the intent necessary for traditional common-law intentional torts is not an easy task. However, it is possible to rely on rudimentary descriptions of this intent to show the difficulty of importing proximate cause into employment discrimination cases. Common-law intent is often described as being concerned with the subjective mental state of the actor, which is ascertained from the available evidence. The

235. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 713 (1995) (O'Connor, J., concurring).

236. Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115, 2140 (2007).

237. *Id.* at 2147.

238. *Id.* at 2146–47.

defendant is liable if it engaged in a volitional act that it knew or with a substantial certainty knew that its actions would cause interference with other people or property.[239] Some torts impose a higher intent requirement, essentially requiring something like mens rea.[240]

Scholars disagree on whether disparate treatment cases require a showing of intent, both as a descriptive and a normative matter.[241] Even if it is possible to say that, as a descriptive matter, courts require plaintiffs to establish intent in disparate treatment cases, this intent standard is itself inconsistent. When some courts describe intent, they describe it as requiring animus, which is more akin to the higher mens rea-like requirement imposed for a few intentional torts.[242] Courts have been skeptical of arguments that the defendant could be liable for intentional discrimination if it knew with substantial certainty that its actions were causing differential treatment based on a protected trait.[243] Thus, the concept of intent in employment discrimination cases fits uncomfortably within traditional tort descriptions of intent. This fact is important for proximate cause analysis. If proximate cause is less robust in intentional tort cases than it is in negligence cases, it should play even less of a role in cases that require a stricter definition of intent than that required for most intentional torts.

It is at least possible to state that most intentional discrimination cases, at least descriptively, are not negligence cases. Applying a proximate cause analysis developed in the negligence context is therefore problematic. In many disparate treatment cases, the discriminatory actors are acting in a morally blameworthy way, and at least their conduct results in a socially undesirable end. Even if the actors are not acting at the direction of the employer, agency analysis has been used to determine that there is some reason to hold the employer liable for the actions. Negligence law is often detached from ideas of wrongdoing,[244] and so may be less concerned with allowing some defendants to escape liability to accomplish other goals.

Further, as discussed throughout this Article, negligence law needs the idea of proximate cause given the unknowable nature of the relation-

239. Garratt v. Dailey, 279 P.2d 1091, 1093–94 (Wash. 1955). The exact articulation of intent varies depending on the intentional tort at issue.

240. Black, *supra* note 234, at 278–79.

241. *See, e.g.*, *id.* at 270–71; Oppenheimer, *supra* note 80, at 920–21; Stacy E. Seicshnaydre, *Is the Road to Disparate Impact Paved with Good Intentions?: Stuck on State of Mind in Antidiscrimination Law*, 42 WAKE FOREST L. REV. 1141, 1145 (2007); Charles A. Sullivan, *Accounting for* Price Waterhouse: *Proving Disparate Treatment Under Title VII*, 56 BROOK. L. REV. 1107, 1118, 1136–37 (1991). *See generally* Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495 (2001) (analyzing the intent requirement in the context of disparate treatment claims involving more than one actor).

242. *See* Black, *supra* note 234, at 278–79.

243. *See generally* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (rejecting idea that plaintiffs might be able to establish this claim on a nationwide basis).

244. Goldberg & Zipursky, *supra* note 29, at 925–26.

ships and conduct that might create liability. The employment discrimination statutes more narrowly define the relationships and conduct at issue. Given the notion of intent commonly applied in disparate treatment cases, the actors' actions are closely linked to the resulting harm. Indeed a central criticism of modern employment discrimination law is its focus on ferreting out a discrete set of events that can be connected to specific actors.[245]

Negligence's causal standards allow for multiple causes to satisfy the requirements of factual cause. Many intentional discrimination cases do not involve multiple causes. Even those that do involve multiple causes are fundamentally different than multiple cause negligence cases. In negligence cases, questions about multiple cause usually involve independent actors. When there are multiple causes in employment discrimination cases, these multiple causes are often created by the employer or its employees. When the plaintiff or other outside actors are in part responsible for the adverse action, the plaintiff may not be able to establish that discrimination was a motivating factor in the action or the plaintiff's recovery may be diminished if the employer can establish the same-decision defense.[246] Agency doctrine also may prevent the employer from being liable for the action.

There are some ways, however, that intentional discrimination cases are unlike intentional torts and that may make proximate cause analysis more appealing than in the traditional intentional tort context. Given that the employer is the entity held liable for the actions of individuals, it is possible that without proximate cause, there is a risk of overdeterrence. Further, in some multiple cause cases, the employer may be held liable even when the plaintiff's conduct or the conduct of others contributed to the final decision. These policies, however, are already handled by either the substantive employment discrimination law or ancillary doctrines.[247]

Disparate impact shares traits with strict liability and negligence, depending on how the plaintiff would prevail in a given suit.[248] In some cases, a plaintiff may prevail by establishing a particular employment

245. *See, e.g.*, Tristin K. Green, *Insular Individualism: Employment Discrimination Law After* Ledbetter v. Goodyear, 43 HARV. C.R.-C.L. L. REV. 353, 354 (2008).

246. For example, the plaintiff may not be able to establish that the protected trait played a motivating factor in the decision. 42 U.S.C. § 2000e-2(m) (2006).

247. Similar concerns exist for harassment cases. The Supreme Court has noted that "[s]exual harassment under Title VII presupposes intentional conduct." Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 756 (1998). *But see generally* L. Camille Hébert, *The Disparate Impact of Sexual Harassment: Does Motive Matter?*, 53 U. KAN. L. REV. 341 (2005) (considering the viability of a disparate impact sexual harassment claim); Robert A. Kearney, *The Disparate Impact Hostile Environment Claim: Sexual Harassment Scholarship at a Crossroads*, 20 HOFSTRA LAB. & EMP. L.J. 185, 215 (2003) (considering the viability of a disparate impact sexual harassment claim). The closest common-law corollary for harassment claims is not negligence, but rather intentional infliction of emotional distress (IIED). IIED, however, is not an exact fit with harassment.

248. Oppenheimer, *supra* note 80, at 931–36.

practice created a large disparity based on a protected trait, if the employer is not able to establish an affirmative defense to liability.[249] In Title VII cases, the defendant may prevail by showing that its practice was job-related and consistent with business necessity.[250] The defendant is liable whether or not it intended to create the disparity, and even if it took reasonable measures to try to prevent it. Thus, these cases share commonalities with strict liability.

In Title VII disparate impact cases, a plaintiff also may prevail by establishing that the employer could have adopted less discriminatory alternate practices, but chose not to do so.[251] These cases sound more like negligence as the employer is being held liable for its failure to take reasonable care to prevent disparate results.[252]

Even though disparate impact might be more closely analogized to torts cases where proximate cause analysis is appropriate, the analogy is still inapt. The substantive standard requires the plaintiff to prove much more than a tort plaintiff. The plaintiff must identify the specific employment practice at issue and that practice must be tied to a specific kind of outcome.[253] Further, courts require significant statistical proof regarding disparity based on a protected trait.[254] The affirmative defenses allowed in disparate impact cases do not mimic common-law defenses.

In many contexts, disparate impact effectuates a policy decision about when employers will be liable for allowing societal discrimination to enter the workplace. Congress and the courts have addressed the inherent policy questions about whether employers should be liable for disparate impact. In the Title VII context, Congress specifically codified statutory language to overrule a more defendant-friendly standard enunciated by the Supreme Court.

Another feature of employment discrimination law separates it from other doctrines. Under the federal discrimination statutes, individual supervisors and coworkers cannot typically be held liable for discriminatory conduct.[255] In most cases, the use of proximate cause to limit the

249. 42 U.S.C. § 2000e-2(k)(l)(A)(i).

250. *Id.*

251. *Id.* § 2000e-2(k)(1)(A)(ii).

252. Oppenheimer, *supra* note 80, at 931–36.

253. *Id.* at 929–30. Under Title VII, a plaintiff may allege that combined practices created a disparate impact only if the plaintiff can show that the practices are not capable of separation. 42 U.S.C. § 2000e-2(k)(1)(B).

254. Bridgeport Guardians, Inc. v. City of Bridgeport, 933 F.2d 1140, 1146 (2d Cir. 1991) (holding that statistical evidence must reveal "a disparity so great that it cannot reasonably be attributed to chance").

255. *See supra* note 134 (citing cases). State discrimination law may allow recovery in some instances. In instances involving physical violence, battery, or assault, criminal or tort law may provide recovery against the individual employee. In rare instances, plaintiffs may be able to proceed against the perpetrator under intentional or negligent infliction of emotional distress theories. Chamallas, *supra* note 236, at 2120, 2133 (noting the varying degrees to which workplace intentional infliction of emotional distress claims have been successful). In many instances, however, courts have been reluc-

employer's liability will mean that no one will be held responsible for the underlying conduct.

Perhaps most importantly, the move to tort law would clearly be a change from the way the courts and Congress initially perceived Title VII's primary operative provisions. It is unlikely that the courts would have interpreted Title VII as providing for disparate impact claims, if the statute was supposed to mimic common-law understandings of causation. Likewise, the courts would not create the *McDonnell Douglas* test if they thought Title VII mimicked the common law. Subsequent amendments to Title VII make a tort analysis less compelling. Congress's addition of a disparate impact framework does not mimic traditional common law. The motivating factor framework with its limited affirmative defense to damages does not reflect the common law. If the courts apply common-law proximate cause principles to Title VII they would need to integrate these principles with a factual cause analysis that does not sound in traditional tort law.

The most convincing application of proximate cause would be if courts recognized a claim for negligent discrimination. However, even though the two claims might have a cursory resemblance, it is likely that negligent discrimination claims would not fit comfortably within the common-law tradition. First, as discussed throughout this Article, the discrimination statutes only allow liability in a set of cases that is already more narrowly circumscribed than negligence law. Second, it is unlikely that the courts will create a negligent discrimination standard that mimics negligence law in all important ways. These same arguments hold for unconscious and structural discrimination, which have less causal resemblance to negligence law, but might end up resembling strict liability claims.

As this Section demonstrates, all employment discrimination claims cannot be analogized to common-law torts where proximate cause usually plays a role. At best, a court wanting to apply proximate cause would need to analyze each type of discrimination claim to see if there is an analytical fit. It is difficult to match the types of discrimination to traditional torts.

B. Integrating Specific Proximate Cause Goals

The Supreme Court has indicated that the use of causal factor language in a statute "incorporates the traditional tort-law concept of proximate cause."[256] This statement suggests that there is a fixed and constant theoretical and factual application of proximate cause. In defining the key attributes of proximate cause, however, the federal courts will have

tant to allow recovery for common-law torts for workplace incidents. *Id.* at 2120.

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

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.[257] 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.[258]

In *Staub*, for example, the Court described proximate cause as being concerned with whether there is a "direct relation between the injury asserted and the injurious conduct alleged," with whether the cause is "too remote, purely contingent, or indirect" and with whether the cause was of "independent origin that was not foreseeable."[259] The Supreme Court did not identify a consistent guiding principle for proximate cause in the USERRA context. It is likely that courts applying proximate cause analysis to employment discrimination claims will import different versions of proximate cause, depending on where they look for guidance.[260]

Given this malleability, it is not enough for a court to declare that general notions of proximate cause apply to employment discrimination statutes generally or to any specific claim. Rather, courts considering statutory proximate cause questions must also identify the space a particular claim allows for proximate cause and the specific goal or goals to be imported. 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. Even if after exploring the statutes' language and purposes, the court finds there is space for proximate cause, it is unlikely to be a version of proximate cause that is coterminous with the common-law doctrine.

For example, there is no plausible basis for an employment discrimination proximate cause analysis to be based on concerns about whether the plaintiff is foreseeable, given the required relationships to state a cognizable claim and the agency analysis that only imputes liability in certain instances. As discussed earlier, concerns about intervening actions are usually not present because employment discrimination doc-

257. 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").

258. John Crane, Inc. v. Jones, 586 S.E.2d 26, 29 (Ga. Ct. App. 2003) (quoting Atlanta Obstetrics & Gynecology Grp. v. Coleman, 298 S.E.2d 16 (Ga. 1990)).

259. *Staub*, 131 S. Ct. at 1192 (internal quotation marks omitted).

260. David W. Robertson, *Negligence Liability for Crimes and Intentional Torts Committed by Others*, 67 TUL. L. REV. 135, 138 (1992) (discussing how Louisiana applies a different proximate cause analysis than the one suggested by the *Restatement*).

trine already describes what actors the employer has responsibility for and in what context. With regard to scope of risk, the factual cause standards often bracket the scope of liability, specifically indicating when the defendant should escape liability or be liable for reduced damages.

Importantly, even if the courts are able to select a specific proximate cause goal to apply to discrimination law, they also will need to recognize that none of the proximate cause goals have descriptive power independent of the underlying tort to which the proximate cause analysis applies. For example, if courts choose the foreseeable plaintiff rationale for proximate cause, it is impossible to apply traditional negligence ideas about when the plaintiff is foreseeable because that analysis is being driven by the underlying goals of negligence law and the other elements of the negligence analysis.

In other statutory proximate cause cases, the courts have not been careful to explain which of the proximate cause goals they are applying to a specific statute or problem.[261] The *Staub* case itself contained a collection of selected quotes, rather than a detailed analysis of proximate cause.[262] This is especially dangerous in the employment discrimination context because it suggests that courts are engaging in raw policy-making, without reference to congressional judgments.

C. Statutes and the Common Law

If courts import proximate cause into discrimination statutes, three difficult questions would remain. First, should courts look primarily to the common law to fill arguable gaps? Second, should courts use "pure" common law or should proximate cause reflect discrimination goals? Third, should the concept of proximate cause evolve or does it become frozen in time in the statutory context?

This Article argues that the employment discrimination statutes already limit liability and that any textual claim that Title VII's statutory language includes proximate cause is weak. For the sake of argument, this Section assumes that courts will hold that a proximate-cause-like principle is needed in federal employment discrimination law.

Even if courts believe that the statutes have a gap that needs filling, it is not clear why the courts would look to the common law for such a limit. Title VII's primary operative provisions are exceptions to common-law assumptions about the relationship between employees and employers, which are stated in the presumption of at-will employment. Given this, and the fact that Title VII is a statute, there is little reason to believe that the common-law idea of proximate cause should be the sole or even primary source in determining liability limits.

261. Sperino, *supra* note 182.
262. *Staub*, 131 S. Ct. at 1192.

As discussed earlier, there is evidence that state statutes informed Congress when it enacted Title VII. Another potential source of information about liability limits is the complex dialogue between the courts and Congress about when liability should attach in mixed-motive and disparate impact cases.

Further, the Equal Employment Opportunity Commission (EEOC) could issue regulations interpreting how proximate cause should operate under the federal discrimination statutes.[263] 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.[264] The administrative deference question becomes tricky, however, in the discrimination context because Congress has granted the EEOC rulemaking authority under some of the statutory regimes, but not others.[265] There is a solid argument that, at least for some of the discrimination statutes, Congress intended the interstices to be filled by an administrative agency.[266]

Further, there is a question whether courts should be importing "pure common law" or whether they should be creating a proximate cause doctrine that responds to a particular statute, to employment law broadly, or to employment discrimination law.[267] Resolving this issue will require the courts to consider core issues about statutes generally, such as whether statutes are separate islands of obligation or whether the courts' role is to integrate statutes within the broader legal fabric. To date, the courts have had difficulty with this question and have at times

263. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984); Skidmore v. Swift & Co., 323 U.S. 134 (1944).

264. *Chevron*, 467 U.S. at 843–44, 865–66.

265. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 6, 122 Stat. 3553 (granting EEOC authority to issue regulations); Nancy M. Modesitt, *The Hundred-Years War: The Ongoing Battle Between Courts and Agencies over the Right to Interpret Federal Law*, 74 MO. L. REV. 949, 976–77 (2009) (discussing how Congress did not provide rulemaking authority to the EEOC under Title VII).

266. Looking to the EEOC for guidance regarding the general question of whether the common law applies to employment discrimination law does not provide a clear course. While the EEOC has often explained that it draws from common-law principles in certain areas, a closer examination actually shows that the EEOC is using the common law as a jumping off point from which to create standards specific to employment discrimination law. *See, e.g.*, Disparate Impact and Reasonable Factors Other Than Age Under the ADEA, 77 Fed. Reg. 19,080, 19,083 (Mar. 30, 2012) (to be codified at 29 C.F.R. pt. 1625) (explaining how tort principles could be used to analyze ADEA disparate impact claims); Brief for the U.S. and the EEOC as Amicus Curiae Supporting Petitioner in Part at 20–21, Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440 (2003) (No. 01-1435), 2002 WL 31746517. In at least one case, the EEOC argued that proximate cause principles apply to discrimination claims, but the EEOC defined proximate cause as determining whether biased conduct had a negligible effect on an employment decision. Brief for Respondent at 14, BCI Coca-Cola Bottling Co. of Los Angeles v. EEOC, 549 U.S. 1334 (2007) (No. 06-341), 2007 WL 951131.

267. *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).

created doctrines that unify employment discrimination law, while at other times creating important distinctions between the primary discrimination statutes.[268]

If proximate cause is incorporated into Title VII, it also is not clear whether the concept becomes frozen in time in the statutory context. When courts import proximate cause into statutes in other instances, they have ignored temporal orientation problems.[269] The meaning of proximate cause has not remained historically stable and continues to evolve over time. 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."[270]

This issue would come into play in the employment discrimination context because the major statutes were enacted at different times and continue to be amended. Section 1981 was originally enacted in 1866.[271] Congress enacted Title VII in 1964. Between 1866 and 1964, significant changes occurred in common-law proximate cause doctrine. *Palsgraf*, which is considered to be a leading case regarding proximate cause, was decided in 1928,[272] and the *Restatement (First) of Torts* was issued in the 1930s.[273] If an originalist perspective is used, it is difficult to argue that the same proximate cause analysis should be applied to § 1981 and Title VII.[274] Additionally, Congress has amended and is likely to keep amending the employment discrimination statutes' causal language.[275] Courts continue to interpret the statutes' causal language.[276] Courts not only will be required to determine whether the meaning of proximate cause changes with these underlying amendments and court opinions, but also whether and how the statutes should respond to changes in the underlying common law.

268. *See* Sperino, *supra* note 182.

269. *Id.*

270. W. Va. Univ. Hosp., Inc. v. Casey, 499 U.S. 83, 101 n.7 (indicating that the will of Congress is a "will expressed and fixed in a particular enactment"). *See generally* CALABRESI, *supra* note 2 (arguing that courts should have the ability to interpret statutes in response to changed circumstances).

271. Runyon v. McCrary, 427 U.S. 160, 168 n.8 (1976). Even though § 1981 does not contain causal language, courts often use Title VII disparate treatment frameworks in § 1981 cases. *See, e.g.*, Amini v. Oberlin Coll., 440 F.3d 350, 358 (6th Cir. 2006) (applying *McDonnell Douglas* to § 1981 claim). Section 1981 provides: "All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . ." 42 U.S.C. § 1981(a) (2006).

272. Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928).

273. RESTATEMENT (FIRST) OF TORTS (1934).

274. This Article does not generally discuss § 1981.

275. *See* Protecting Older Workers Against Discrimination Act, H.R. 3721, 11th Cong. (2009) (suggesting changes to causal standards in employment statutes; bill was not enacted); *supra* Part II.B (discussing amendments to discrimination statutes).

276. *See, e.g.*, Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 177 (2009).

D. The Inherent Policy Choice

At its core, proximate cause considers whether the defendant should be liable for all of the consequences of its behavior.[277] In other words, "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."[278] If the courts choose to import proximate cause, there is no clear way to determine which of the doctrine's goals should be enshrined into the statute. Thus, the courts will be making important choices about what Title VII provides when it imports proximate cause. Indeed, many of the goals of proximate cause can only be addressed based on assumptions about how the underlying substantive law should respond to competing policy demands.

This is true even if the courts choose to cloak the proximate cause analysis in textual language. Assume that contrary to the arguments raised in this Article that a court reasons that Congress imported common-law proximate cause into Title VII by using the terms "because of." Given that proximate cause has no independent descriptive power, the courts will still need to make important policy choices about what proximate cause means in reference to the elements and goals of the employment discrimination statutes. However, these choices will be masked in an analysis that simply purports to adopt non-controversial common-law principles.

If courts use a gap-filling rationale, they will more explicitly be making these policy choices. Allowing courts to develop a liability-limiting principle like proximate cause makes more sense in traditional tort regimes in which the underlying doctrine is created by the courts and described in broad strokes. This is not the case, however, with federal employment discrimination law. Having courts develop a proximate cause analysis would allow them to intrude upon an interconnected web of congressional judgments about how and when liability should be limited. The statutory regimes already address some of the core policy concerns, such as the extent of liability being out of proportion to the degree of wrongfulness and the relative wrongfulness of the actors.[279]

There is good reason to be concerned about the courts' role. First, in *Staub*, the Court engaged in cursory reasoning to casually import proximate cause into USERRA.[280] Second, the Court's development of agency principles under Title VII provides a likely roadmap for how the courts will handle statutory proximate cause.

Staub failed to appreciate, yet alone answer, the complex questions

277. Stapleton, *supra* note 22, at 951.
278. Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 103 (N.Y. 1928).
279. Stapleton, *supra* note 22, at 985–86.
280. Staub v. Proctor Hosp., 131 S. Ct. 1186, 1192 (2011).

raised by proximate cause. In *Staub*, the Court made no inquiry into whether Congress actually adopted USERRA specifically using the common law as a background. Although the Court noted that intentional torts are different than other kinds of torts,[281] it did not incorporate this observation into its proximate cause analysis.

Noticeably, the Court never fully engaged questions regarding whether it had the authority to import proximate cause into USERRA. Rather, it assumed with no explicit discussion that because USERRA is a "tort," that it embraces proximate cause.[282] When defining proximate cause, the Court provided a handful of rationales and did not indicate the specific goal of proximate cause it was trying to effectuate. The Court indicated that the concept requires a direct relationship between the injury asserted and the conduct alleged and that it excludes "link[s] that are too remote, purely contingent, or indirect."[283] It also noted that a cause can only be superseding if it is of an origin that was not foreseeable.[284] *Staub* also failed to draw a clear line between factual cause, proximate cause, and agency principles. For example, in the core pages of the opinion, it alternated between these ideas without fully discussing how each would play out in the cat's paw context.[285]

In *Staub*, the proximate cause analysis was arguably dicta. However, in employment discrimination cases, there are reasons to be concerned that casual statements in one case might be heavily relied upon in subsequent cases without direct reexamination. In *Meritor Savings Bank v. Vinson*, the Court held that sexual harassment claims could proceed, but then noted, with only a cursory discussion, that the employer would not be held automatically liable for all harassment that occurred in the workplace.[286] The Court noted in *Meritor* that the use of the word "agent" in Title VII evinced an intent to place a limit on the actions for which employers would be held liable and then cited the *Restatement*.[287] The Court indicated that agency principles might play a role in such cases, but declined to further describe what role they would play.[288]

In *Faragher* and *Ellerth*, the Court took on the question left open in *Meritor*. In *Faragher*, the Court transformed *Meritor*'s non-committal phrasing into strong pronouncements. The Court indicated that *Meritor* expressed the idea that courts look to the common law of agency to develop employer liability standards, even though *Meritor* cannot be read

281. *Id.* at 1191.
282. *Id.* at 1193.
283. *Id.* at 1192 (quoting Hemi Group, LLC v. City of New York, 130 S. Ct. 983, 989 (2010)).
284. *Id.*
285. *Id.* at 1191–93.
286. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 71–72 (1986).
287. *Id.* at 72.
288. *Id.*

this broadly.[289] Although the *Faragher* Court noted that the *Meritor* Court cautioned that "common-law principles may not be transferable in all their particulars to Title VII," the *Faragher* Court transformed *Meritor*'s citing of the *Restatement* into an embrace of common-law agency principles.[290]

With this move, agency principles entered Title VII with very little discussion about why they should be imported. The Court's agency analysis is a great example of how casual references in one case can be repurposed as foundational discussions for later cases. Noticeably, the Court did not seriously grapple with whether Title VII, either descriptively or normatively, was created against a backdrop of the common law. None of the opinions engaged in a searching analysis of the text, intent, or purpose of Title VII with regard to whether the statutes contain common-law agency principles. Nor did the Court explore what the use of the common law in the statutory regime says about the appropriate link between the common law and statutes.

After using the label of common-law agency, the Court then created an agency analysis for Title VII that does not mimic the common law of agency. The Supreme Court held that employers will be automatically liable if they take a tangible employment action against employees.[291] In cases where the employer does not take a tangible employment action, the employer can prevail if it provides a two-part affirmative defense.

The Court thus used the common-law label of agency to justify creating a completely different agency analysis for Title VII claims.[292] Professor Michael Harper noted the Court "cited no common law cases in their cursory, formal, and rather abstract discussion of the Restatement exception on which they relied."[293]

Even though *Faragher* and *Ellerth* were issued on the same day, they did not create a uniform rationale for why agency analysis should be imported into Title VII. For example, in *Ellerth*, the Court's opinion focused on the strands of agency analysis that impute liability to the employer when the employer is aided by the agency relationship.[294] In *Faragher*, by contrast, the Court noted that liability might be imputed because

289. Faragher v. City of Boca Raton, 524 U.S. 775, 791 (1998).

290. *Id.* at 792.

291. *Id.* at 807.

292. *Id.* at 797, 802 n.3 (noting that "[t]he proper analysis here, then, calls not for a mechanical application of indefinite and malleable factors" from the *Restatement* and also indicating in a footnote that the Court was not using pure common law). *See generally* David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 CORNELL L. REV. 66 (1995) (describing how Title VII agency principles do not mimic common-law agency).

293. Michael C. Harper, *Employer Liability for Harassment Under Title VII: A Functional Rationale for* Faragher *and* Ellerth, 36 SAN DIEGO L. REV. 41, 55 (1999).

294. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 760–61 (1998).

the supervisor is aided by the employer,[295] but also noted that liability might be appropriate because the supervisor is acting as a proxy for the company[296] or because the supervisor is acting within the scope of his authority.[297] Even stranger, *Faragher* then appears to not rely on any of these rationales and instead conducts "an inquiry into the reasons that would support a conclusion that harassing behavior ought to be held within the scope of a supervisor's employment."[298]

Faragher and *Ellerth* demonstrate how a Title VII proximate cause analysis might develop. Choosing a consistent theoretical reason (or even set of reasons) is important, because the theoretical choice can lead to dramatically different outcomes in cases. For example, if the courts view proximate cause as centering on whether the plaintiff is foreseeable, then proximate cause analysis should play no limiting role because the discrimination statutes define those who may be foreseeably harmed.

Not only did the Supreme Court fail to resolve the proper theoretical basis for importing agency principles, it could not even agree on the proper source from which to derive those principles. For example, *Ellerth* relied heavily on the *Restatement*, which it believed enunciated the "general common law of agency, rather than . . . the law of any particular State."[299] However, *Faragher* explicitly rejected "a mechanical application of indefinite and malleable factors set forth in the Restatement."[300]

This same dynamic is likely to play out in the proximate cause context. As discussed throughout this Article, proximate cause is articulated differently, depending on the source. Thus, if courts import proximate cause, there will either be disagreement about appropriate sources or the courts will pretend that the sources are more uniform than they really are.

Even though the courts will purport to apply common-law principles, they are likely to not apply even the "general common law" as articulated in sources, but rather change the underlying common-law principles to fit with employment discrimination.[301] In adopting an agency analysis for Title VII, the Court specifically noted that "common-law principles may not be transferable in all their particulars to Title VII."[302] This caveat changed the underlying agency analysis in important ways.

295. *Faragher*, 524 U.S. at 791.
296. *Id.* at 790.
297. *Id.* at 791.
298. *Id.* at 797.
299. *Ellerth*, 524 U.S. at 754.
300. *Faragher*, 524 U.S. at 797.
301. *Ellerth*, 524 U.S. at 755.
302. *Id.* at 764 (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986)). In *Faragher*, the Court appears to rely more heavily on a prior Title VII case than it does on common-law agency principles. *Faragher*, 524 U.S. at 792.

For example, in the agency cases, the Court created an affirmative defense to liability in cases where a supervisor harasses an employee but does not commit a tangible employment action.[303] In doing so, the Court indicated that it was accommodating "the agency principles of vicarious liability," as well as "Title VII's equally basic policies of encouraging forethought by employers."[304] The affirmative defense has no corollary in common law.

After all of these retreats from the common-law standard, it is fair to say that the Supreme Court did not import common-law agency into Title VII, but rather used vague and amorphous ideas centered around a theme of agency to create a new analysis for Title VII. It is likely this same dynamic will play out in the proximate cause context.[305] This raises serious questions about whether the courts should be able to use the language of proximate cause to engage in raw policymaking about the proper reach of employment discrimination law. Further, it is strange that the courts feel the need to invoke the mantle of the common law in cases that depart dramatically from the common law. If the courts want to claim the ability to engage in such far-reaching gap filling, they should do so explicitly and explain both why they have the authority to do so and why they are making the policy choices they are making.

The Supreme Court has narrowly interpreted the employment discrimination statutes in the past, and Congress has repeatedly been required to amend the statutes to change the court-created results. It is likely that the courts will find ways to use proximate cause to render summary judgment in favor of the employer, even in cases that should arguably proceed to jury trial. It is not likely an accident that concerns about proximate cause in employment discrimination law are arising near the same time that the Supreme Court was asked to consider certifying the largest employment discrimination case ever.[306]

Importing proximate cause into Title VII raises difficult questions. When courts have used proximate cause in other statutes, they have not convincingly addressed these issues,[307] and there is little reason to think they will do so in discrimination law.

303. *Ellerth*, 524 U.S. at 765.

304. *Id.* at 764.

305. An even worse outcome would be if courts selectively drew upon proximate cause principles that were not modified for the employment discrimination context.

306. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011). It is also worth noting that the Chamber of Commerce strenuously argued in favor of applying tort proximate cause principles in *Staub*. Brief of Chamber of Commerce of the United States of America as Amicus Curiae in Support of Respondent at 19–22, Staub v. Proctor Hosp., 131 S. Ct. 1186 (2011) (No. 09-400), 2010 WL 3611964.

307. Sperino, *supra* note 182.

V. THE FUTURE OF PROXIMATE CAUSE

Despite the imprecision of proximate cause and the problems that it creates in the statutory context, it might be argued that proximate cause is still useful to handle bizarre or attenuated cases.[308] This Part demonstrates why the courts do not need to reach for proximate cause. It also argues that a recent Supreme Court case considering proximate cause issues under the Federal Employers' Liability Act (FELA)[309] provides a better model for employment discrimination statutes.

A. Proximate Cause Is Unnecessary

As a descriptive matter, there should be few employment discrimination cases that even arguably raise proximate cause questions. Employment discrimination law differs from traditional tort law in that employment discrimination law is not a field in which a duty is owed "to the whole world."[310] This key difference renders many core proximate cause concerns moot in the run-of-the-mill employment discrimination case. As established in Part II, the run-of-the-mill employment discrimination case is unlikely to require proximate cause, given all of the limits already applied to such claims.[311]

The classic scenarios in which courts invoke proximate cause are marked by freakishness or attenuation.[312] For example, in *Palsgraf*, a passenger carrying an unmarked package of fireworks dropped the package as he was being helped onto a moving train, resulting in the explosion of the fireworks and the tipping over of a penny scale to injure Ms. Palsgraf.[313] Because employment discrimination cases usually do not involve long causal chains of physical events, they are unlikely to look like traditional proximate cause cases. Nonetheless, in *Staub*, the Court used proximate cause to discuss why cat's paw liability would be appropriate. One way to think about whether proximate cause should be imported into Title VII is to imagine extreme cat's paw cases and to use those to demonstrate why proximate cause is unnecessary.

Within the category of intentional discrimination, courts have used

308. *See* CSX Transp., Inc. v. McBride, 131 S. Ct. 2630, 2644–52 (2011) (Roberts, C.J., dissenting).

309. *Id.* at 2634 (majority opinion).

310. Stapleton, *supra* note 22, at 945.

311. RESTATEMENT (THIRD), *supra* note 23, § 29 cmt. a ("Ordinarily, the plaintiff's harm is self-evidently within the defendant's scope of liability and requires no further attention. Thus, scope of liability functions as a limitation on liability in a select group of cases . . . . ").

312. *See, e.g.*, Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 713 (1995) (O'Connor, J., concurring) (positing that proximate cause would limit liability under the Endangered Species Act when a farmer's fertilizer is lifted by a tornado from tilled fields and deposited miles away in a wildlife refuge where it harms animals).

313. This is the way the facts in *Palsgraf* are typically explained. Saul Levmore, The Wagon Mound Cases*: Foreseeability, Causation, and Mrs. Palsgraf*, *in* TORT STORIES 129, 147–48 (Robert L. Rabin & Stephen D. Sugarman eds., 2003).

the term "cat's paw" to describe cases in which one individual acts with a discriminatory motive, but another individual makes the decision to take the employment action against the individual.[314] Although the exact contours of the cat's paw theory have not been worked out, these cases often involve a biased supervisor or co-worker who provides false information to a decision maker and the decision maker then makes a negative decision based on the false information.[315] In *Staub*, the Supreme Court identified cat's paw cases as being those cases that arise when the official who takes an action has "no discriminatory animus but is influenced by previous company action that is the product of a like animus in someone else."[316]

The Supreme Court has only decided cat's paw liability where a supervisor acted with bias.[317] Currently, the courts have not determined the outer limits of cat's paw liability. It is possible, however, to posit the types of cases in which cat's paw liability might be recognized. It is possible that courts might entertain cat's paw cases in which a co-worker of the plaintiff passes on false, negative information about the plaintiff to a supervisor based on animus and the supervisor then acts on that negative evaluation. It also is possible that a supervisor could place a facially neutral false evaluation in an employee's file based on discriminatory animus. The employer could then use the information in a different context to take a negative action against the employee. For example, consider a case in which a supervisor rates an employee as needing improvement in an evaluation. During a subsequent reduction in force, another employee might use the negative evaluation to terminate the plaintiff.

Thus, some cat's paw cases have attributes that might make proximate cause analysis tempting. Cat's paw cases always involve multiple actors. The actors are often acting at different periods of time and based on differing motives. And, it is possible that the actions of the discriminatory actor may be distant in time from the action that is taken against the employee.

Still, proximate cause is not necessary to resolve cat's paw cases. First, cat's paw theory is still in its infancy. If past substantive developments in employment discrimination serve as a guide, it is likely the Supreme Court will find ways to substantively limit cat's paw cases.[318] *Staub*

314. *See supra* note 13; *see also* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 151–52 (2000) (holding that the fact that the official decision maker did not harbor animus was not controlling, because the individual with the animus was the decision maker behind the plaintiff's termination).

315. *See supra* Part I.A.

316. Staub v. Proctor Hosp., 131 S. Ct. 1186, 1191 (2011).

317. *Id.* at 1194.

318. *See, e.g.*, Michael Selmi, *The Supreme Court's Surprising and Strategic Response to the Civil Rights Act of 1991*, 46 WAKE FOREST L. REV. 281 (2011) (discussing the Supreme Court's response to the 1991 amendments to Title VII).

hints at what some of these limits might be.[319]

Even assuming for the sake of argument a broadly defined cat's paw theory, none of the traditional reasons for applying proximate cause principles apply to it. The most applicable argument would be one of superseding cause—that the later non-discriminatory act of the decision maker cuts off liability for the original actor. The Supreme Court explicitly rejected this argument in *Staub*, reasoning that to be superseding the second event must not be foreseeable.[320]

Superseding cause is likely not the right legal concept, as the cat's paw cases involve a second non-culpable act breaking the chain of causation. In tort law, superseding cause is usually used in cases where the second event is criminal in nature or tortious, where the intervening force operates independently of the original action, and/or where the second act is extraordinary in nature.[321] Further, a cause is not superseding if the action of the original actor created the same risk of harm that was brought about by the second action.[322] Consider the reduction in force scenario discussed above. When a supervisor records a negative evaluation in a file of an employee, that supervisor reasonably anticipates that a job-related consequence will happen to a particular person.

What a court might be concerned about in such a scenario is whether it is fair or proper as a matter of public policy to hold the employer liable. It does not follow, however, that proximate cause would be the right doctrine to resolve the problem. As discussed throughout this Article, there are only weak textual, intent, or purpose-based arguments in favor of proximate cause, and the employment discrimination statutes do not map well onto common-law torts. Further, once proximate cause is invoked, the courts are left without guidance about how to choose between its multiple, contested goals to solve the policy-based problem.

It might be tempting to argue that in these instances the employer is an innocent party to whom liability should not attach. However, when making a policy choice between the plaintiff and the employer, there are strong arguments in favor of placing liability on the employer. First, all of the employment discrimination statutes have the broad, liberal purpose of prohibiting employment discrimination. Second, the employer is the party best able to minimize discrimination. It controls the processes it uses to engage in official decision making, including the decision to

319. *Staub*, 131 S. Ct. at 1191–93 (discussing factual cause and agency principles).

320. *Id.* at 1192.

321. RESTATEMENT (SECOND) OF TORTS § 442 (1965) (listing circumstances in which second event will be superseding); *id.* § 442A (noting that the second act is not superseding if the original actor creates or increases the risk of harm); *id.* § 447 (discussing negligence of second actor). The concept of superseding cause may be of diminishing importance in the *Restatement*. RESTATEMENT (THIRD), *supra* note 23, § 34 cmt. a (discussing how importance of superseding cause is diminishing in tort cases),

322. RESTATEMENT (SECOND) OF TORTS § 442B (1965).

have an attenuated chain of decision makers. It controls the training it gives regarding those processes. It controls whether decision makers conduct independent investigations of the underlying facts and how strenuous those investigations are. The "bad" actors in a cat's paw case would be employees of the company or those for whom the company would be liable under an agency or negligence analysis.[323] All of the wrongful actions for which the plaintiff would be suing would be connected to the workplace.

Further, the underlying goals of Title VII strongly militate against using common-law proximate cause. As one commentator has explained:

> Title VII exists to strike down an entire socio-economic structure of conduct (which it forbids) and attitudes and expectations (which it is meant to change by the moral force and suasion of the law). This interpretation of Title VII is in harmony with Title VII's plain language, which simply forbids any discrimination, any different treatment "because of . . . race, color, religion, sex, or national origin."[324]

The Supreme Court has indicated that Title VII does not tolerate discrimination "subtle or otherwise."[325] Given these important differences between tort law and Title VII, it is difficult to argue that the same liability limits should exist for both.

Another policy-based argument in the cat's paw scenario is that it is unrealistic to expect an employer to go to the expense that investigating potential cat's paw cases would entail. As with many pockets of employment discrimination cases, other parts of employment discrimination doctrine can do the heavy lifting in this regard. As discussed earlier, it is likely that the courts will limit the kind of cat's paw cases that will create liability. They will likely do this by limiting the cases in which the plaintiff will be able to establish factual cause,[326] by balancing the nondiscrimination mandate with the at-will doctrine, by allowing employers to take advantage of available affirmative defenses,[327] and by employing the tight administrative filing requirements to limit the claims that can be brought. Further, it is likely that the courts will use the special agency

323. In *Staub*, the Court expressed no view about liability for information provided by coworkers. *Staub*, 131 S. Ct. at 1194 n.4.

324. Gudel, *supra* note 113, at 98.

325. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973).

326. *Staub*, 131 S. Ct. at 1192 (discussing the motivating factor standard); Christian v. Wal-Mart Stores, Inc., 252 F.3d 862, 877 (6th Cir. 2001) (indicating that the plaintiff "must offer evidence that the supervisor's racial animus was the cause of the termination or somehow influenced the ultimate decisionmaker"); *see also* Befort & Olig, *supra* note 144, at 402 (discussing how causation analysis should operate in cat's paw cases); Sara Atherton Mason, Note, *Cat's Paw Cases: The Standard for Assessing Subordinate Bias Liability*, 38 FLA. ST. U. L. REV. 435 (2011) (discussing the various standards courts have used in cat's paw cases).

327. For example, an employer can establish that it would have made the same decision without considering the protected trait. *See* 42 U.S.C. § 2000e-2(m) (2006).

analysis developed for Title VII to limit employer liability.[328]

More importantly, there is some value to identifying actions taken in part based on a protected trait as discrimination, even if other ways are used to reduce or eliminate liability. In the Title VII context, Congress found it preferable to reduce the available damages in certain mixed-motive cases, rather than declare what happened to the plaintiff as falling outside the realm of discrimination. If proximate cause becomes an element of a discrimination claim that a plaintiff must prove, then the employer will not face liability for discrimination if the plaintiff is unable to prove it.

This idea that it is expressively better to label certain conduct as discriminatory is seen in the Court's agency analysis with regard to supervisors. Indeed, even though the agency analysis is flawed, it may do much of the work that might otherwise fall to proximate cause, determining which sets of actions that occur in the workplace will be imputed to the employer. The difference between using proximate cause and agency principles to limit liability is important for several reasons. First, as theoretically inconsistent as the agency doctrine is, the courts have already invested time interpreting and analyzing it. Second, the agency analysis still leaves room for a court to declare conduct as violating the statute, even if the defendant is not held liable for the particular infraction. This is an important difference.

B. Roadmap for Future Proximate Cause Cases

Future courts considering proximate cause in the discrimination context should reject applying the concept to Title VII, the ADEA, or the ADA. As this Article has demonstrated, there is scant textual, intent, or purpose-based support for using proximate cause. More importantly, there is little reason to assume that Congress adopted these statutes' primary operative language against the backdrop of the common law or that Congress intended to keep common-law causal concepts after creating exceptions to at-will employment that altered the common-law relationship between employees and employers.

Importantly, if courts use proximate cause in employment discrimination statutes, they cannot credibly argue that a singular concept of proximate cause exists or that the common law uniformly defines the term. Rather, courts must recognize that proximate cause is an umbrella term that describes an evolving doctrine with contested goals.

If a court imports proximate cause into discrimination law, it must at least identify the goal or goals it is using and describe why these goals

328. The Court in *Staub* suggested that agency analysis might later be used to limit employer liability for cat's paw cases. 131 S. Ct. at 1192; Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277 (4th Cir. 2004) (using agency principles to limit employer liability in cat's paw case).

are not adequately addressed by the existing statutory regime. At the very least, courts must acknowledge that statutory proximate cause in the discrimination context should not be coterminous with common-law proximate cause. Using proximate cause will not result in certainty and will draw courts into larger questions about the appropriate interaction of the common law and statutes.

In most recent cases in which the Supreme Court considered whether to apply proximate cause to a statute, the Supreme Court chose to apply the concept.[329] However, in one case, *CSX Transportation, Inc. v. McBride*, the Court did not follow this general trend and refused to apply common-law proximate cause analysis to a case brought under FELA.[330] Although *Staub* and *CSX* were both issued in the same term, they reach different conclusions about the appropriate use of proximate cause.

Congress enacted FELA in the early 1900s to respond to the rising number of railroad accidents affecting railroad employees.[331] The statute provides that railroad common carriers "shall be liable in damages to any person suffering injury while . . . employed . . . for such injury or death resulting in whole or in part from the negligence of the . . . carrier."[332] While this text may be clearer than the discrimination statutes' language with regard to proximate cause, FELA sounds in negligence and thus has arguably closer analytic ties to negligence concepts than discrimination law.

The *CSX* opinion raised important points applicable to discrimination law. The Supreme Court noted that Congress created FELA to supplant the common law.[333] The Court also noted that concerns about absurd results had not actually materialized in FELA cases[334] and noted that other limits within FELA confined the universe of potential claims.[335] It also indicated that the appropriate view of FELA was that it contained a proximate cause-like restriction, but one that was different than the common-law concept.[336] In a portion of the opinion that was only joined by four Justices, the Justices noted lack of consensus about the meaning of proximate cause.[337]

While *CSX* provides a model for future employment discrimination proximate cause analysis, it is a minority opinion in a wider context of cases that generally favor applying proximate cause to statutes. Further, Chief Justice Roberts's dissent, joined by Justices Scalia, Kennedy, and

329. *See* cases cited *supra* note 181.
330. 131 S. Ct. 2630, 2634 (2011).
331. *Id.* at 2636.
332. 45 U.S.C. § 51 (2006).
333. *CSX*, 131 S. Ct. at 2638.
334. *Id.* at 2641.
335. *Id.* at 2644.
336. *Id.* at 2641.
337. *Id.* at 2642.

Alito, cited *Staub* for the proposition that common-law proximate cause should be applied to FELA.[338] While *CSX* provides a good model for proximate cause inquiries, there are reasons to be skeptical that it will be the prevailing model. The case is contrary to the trend in statutory proximate cause cases generally and the courts' recent tendency to interpret discrimination statutes narrowly.

CONCLUSION

It is likely that courts will use the *Staub* decision to reflexively import proximate cause principles into employment discrimination law.[339] This Article argues that using proximate cause in the employment discrimination statutes is unnecessary and fraught with numerous theoretical, practical, and doctrinal difficulties. It also implicates important questions regarding separation of powers concerns, the nature of employment discrimination claims, and the interaction of statutes with the common law. To date, the courts have not adequately considered the complexity inherent in statutory proximate cause decisions.

338. *Id.* at 2645 (Roberts, C.J., dissenting).

339. *See, e.g.*, Hampton v. Vilsack, 685 F.3d 1096, 1099 (D.C. Cir. 2012) (describing district court decision using the term "proximate cause"); Chattman v. Toho Tenax Am., Inc., 686 F.3d 339, 352–53 (6th Cir. 2012).