

## SETTING THE STANDARD FOR PROXIMATE CAUSE IN THE WAKE OF *BANK OF AMERICA CORP. V. CITY OF MIAMI*\*

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*The Supreme Court's recent opinion in Bank of America Corp. v. City of Miami has created fresh uncertainty around the interpretation of the Fair Housing Act. The Supreme Court held for the first time that there is a proximate cause requirement under the Fair Housing Act but expressly declined to decide the standard for meeting that requirement. This Article responds to that open question. It contextualizes Bank of America within the Court's growing body of statutory proximate cause doctrine and uses the case as a starting point for addressing the broader question of how to determine the meaning of proximate cause in all statutory claims.*

*The Article argues that the Supreme Court and lower courts must adopt a uniform analytical framework for determining proximate cause in statutory claims. The Article demonstrates that the Supreme Court's failure to do so thus far has produced deep doctrinal incoherence, culminating in the Court's inability to articulate a standard for proximate cause under the Fair Housing Act in Bank of America. The Article proposes that courts should uniformly apply the "scope of liability" framework as set forth in the recent Restatement (Third) of Torts. It contends that the scope of liability framework properly anchors proximate cause in the statutory scheme, ensures doctrinal determinacy, and prevents improper judicial legislation.*

*The Article then applies this framework to arrive at the proper standard for proximate cause under the Fair Housing Act.*

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*Through extensive legislative history analysis, the Article concludes that the standard for proximate cause under the Fair Housing Act is satisfied where the harm caused by unlawful discrimination results from direct effects on the housing market and falls within one of the three core areas of congressional concern underlying the Act's enactment.*

INTRODUCTION .....	531
I. <i>BANK OF AMERICA CORP. V. CITY OF MIAMI</i> .....	536
A. <i>Background on Reverse Redlining and Bank of America</i> .....	536
B. <i>Bank of America Opinion</i> .....	539
II. PROXIMATE CAUSE .....	542
A. <i>Proximate Cause Doctrine in Common Law</i> .....	543
B. <i>Proximate Cause in Statutory Claims</i> .....	547
III. THREE ANALYTICAL FRAMEWORKS IN STATUTORY PROXIMATE CAUSE DOCTRINE .....	552
A. <i>Roots of the Three Frameworks: Associated General Contractors of California, Inc. v. California State Council of Carpenters</i> .....	553
B. <i>The Three Frameworks</i> .....	554
1. <i>Common Law Framework</i> .....	554
2. <i>Public Policy Framework</i> .....	556
3. <i>Legislative Intent Framework</i> .....	559
C. <i>The Production of Doctrinal Incoherence</i> .....	562
IV. SCOPE OF LIABILITY FRAMEWORK .....	568
A. <i>The Scope of Liability Framework</i> .....	569
B. <i>Avoidance of Improper Judicial Legislation</i> .....	572
C. <i>Benefits of Scope of Liability Framework for Doctrinal Determinacy</i> .....	577
D. <i>Scope of Liability as a Framework for Doctrinal Coherence</i> .....	580
V. APPLYING THE SCOPE OF LIABILITY FRAMEWORK TO THE FAIR HOUSING ACT .....	584
A. <i>Scope of the Risks: Individual-Level Harms and the Lack of Economic Mobility</i> .....	586
B. <i>Scope of the Risks: Residential Segregation and Urban Decay</i> .....	591
C. <i>Scope of the Risks: Social Costs of Slums</i> .....	595
D. <i>Scope of the Risks: External Economic Costs</i> .....	597
E. <i>Scope of Liability</i> .....	599

2019]	<i>THE PROXIMATE CAUSE STANDARD</i>	531
CONCLUSION.....		600

## INTRODUCTION

The Supreme Court’s recent decision in *Bank of America Corp. v. City of Miami*<sup>1</sup> threw the Fair Housing Act (“FHA”) into a state of legal uncertainty on the eve of its fiftieth anniversary.<sup>2</sup> The Supreme Court held for the first time that there is a proximate cause requirement under the FHA but expressly declined to decide the standard for meeting that requirement.<sup>3</sup> In the suit, the City of Miami (“the City”) alleged that Bank of America and Wells Fargo (collectively, “the Banks”) had engaged in racially discriminatory predatory lending in violation of the FHA.<sup>4</sup> The City asserted that these actions caused financial harm by precipitating disproportionate foreclosures and blight in minority neighborhoods, which thereby decreased property tax revenues and increased demand for municipal services.<sup>5</sup> Under the Court’s proximate cause holding, on remand the City will be required to show a “sufficiently close connection” between its financial injuries and the Banks’ unlawful discriminatory conduct.<sup>6</sup> However, what specifically the City must show has not yet been determined. The Court refrained from “draw[ing] the precise boundaries of proximate cause” and remanded the case to the lower courts to gain “the benefit of [their] judgment” on this purely legal question.<sup>7</sup>

1. 137 S. Ct. 1296 (2017).

2. The Fair Housing Act was enacted as Title VIII of the Civil Rights Act of 1968 on April 11, 1968, just seven days after the assassination of Dr. Martin Luther King Jr. *See* Fair Housing Act, Pub. L. No. 90-284, §§ 801–819, 82 Stat. 73, 81–89 (1968) (codified at 42 U.S.C. §§ 3601–3619 (2012)). Thus, April 11, 2018, marked the fiftieth anniversary of the Fair Housing Act.

3. *Bank of Am.*, 137 S. Ct. at 1306. The Court also held that the City of Miami satisfied the “‘cause-of-action’ (or ‘prudential standing’) requirement.” *Id.* at 1303. The Court concluded that the city’s alleged injuries fell “‘within the zone of interests’ that the FHA protects,” and therefore the city had standing to sue. *Id.*

4. *Id.* at 1300–01.

5. *Id.* at 1301.

6. *Id.* at 1305.

7. *Id.* at 1306; *see also* Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 840 (1996) (referring to the determination of the proper standard for proximate cause as a “legal question”). The parties in *Bank of America* had already briefed the question of the proper standard for proximate cause and the Eleventh Circuit had already ruled on this question. *See* City of Miami v. Wells Fargo & Co., 801 F.3d 1258, 1267 (11th Cir. 2015), *vacated sub nom.* Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296 (2017); City of Miami v. Bank of Am. Corp., 800 F.3d 1262, 1282 (11th Cir. 2015), *vacated*, 137 S. Ct. 1296 (2017); Brief for Petitioners at 45–58, *Bank of Am.*, 137 S. Ct. 1296 (2017) (No. 15-1111); Brief of Respondent at 31–57, *Bank of Am.*, 137 S. Ct. 1296 (2017) (No. 15-1111).

The *Bank of America* decision is best understood as part of a recent trend in which the Court is importing proximate cause requirements into statutes whose plain texts are silent on the issue.<sup>8</sup> Scholar Sandra Sperino coined the term “statutory proximate cause” to describe this development.<sup>9</sup> Since 1983, the Supreme Court has declared a proximate cause requirement under the National Environmental Policy Act (“NEPA”), the Federal Tort Claims Act, the Securities Exchange Act, and the Uniformed Services Employment and Reemployment Rights Act (“USERRA”), among other statutes.<sup>10</sup> Although these statutes do not expressly state a proximate cause requirement, the Court has nevertheless determined that Congress implicitly intended to impose some limitation on the “ripples of harm” that are recoverable.<sup>11</sup>

Despite this ample precedent, lower courts tasked with setting the standard for proximate cause under the FHA will be without meaningful guidance. The doctrine that has emerged on statutory proximate cause is wholly incoherent, consisting of a morass of unintelligible standards that future cases similar to *Bank of America* cannot possibly apply. The Court’s standards vary wildly, including whether the harm caused is a direct result of the unlawful conduct,<sup>12</sup> whether the unlawful conduct “played a part—no matter how small—in bringing about the injury,”<sup>13</sup> and whether there was an intervening cause between the unlawful conduct and the harm that was

8. See Sandra F. Sperino, *Statutory Proximate Cause*, 88 NOTRE DAME L. REV. 1199, 1199–1200 (2013) [hereinafter Sperino, *Statutory Proximate Cause*].

9. *Id.* at 1200.

10. See, e.g., *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132–40 (2014) (requiring proximate cause under the Lanham Act); *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 705 (2011) (requiring proximate cause under the Federal Employers Liability Act); *Staub v. Proctor Hosp.*, 562 U.S. 411, 419–20 (2011) (requiring proximate cause under USERRA); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 342–46 (2005) (requiring proximate cause in securities fraud claims); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 703–04 (2004) (evaluating proximate cause under the Federal Tort Claims Act); *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 754 (2004) (applying proximate cause to NEPA); *Holmes v. Sec. Inv’r Prot. Corp.*, 503 U.S. 258, 267–68 (1992) (requiring proximate cause under the Racketeer Influenced and Corrupt Organizations Act (“RICO”)); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535–36 (1983) (requiring proximate cause under the Clayton Act).

11. *Bank of Am.*, 137 S. Ct. at 1299. “A violation of the FHA may, therefore, ‘be expected to cause ripples of harm to flow’ far beyond the defendant’s misconduct.” *Id.* at 1306 (quoting *Associated Gen. Contractors*, 459 U.S. at 534); see also Sperino, *Statutory Proximate Cause*, *supra* note 8, at 1219.

12. *Lexmark*, 572 U.S. at 137–40 (holding that the standard for proximate cause under the Lanham Act requires the plaintiff to show that the injury “flow[ed] directly” from the unlawful conduct).

13. *CSX Transp.*, 564 U.S. at 705.

“superseding,”<sup>14</sup> among others.<sup>15</sup> These standards have flexible meanings, as what is considered “direct,” for instance, differs across the cases.<sup>16</sup> Moreover, the Court has provided little to no reasoning for the variation within and among standards, leaving lower courts and commentators to speculate about the principles underlying them.<sup>17</sup>

This Article uses *Bank of America* as a starting point to confront the question of how to determine the meaning of proximate cause in all statutory claims. It is the first piece of scholarship to confront this question directly and also the first to provide critical commentary on *Bank of America* through the lens of statutory proximate cause doctrine.<sup>18</sup> The Article makes four key contributions.

14. *Staub*, 562 U.S. at 419–20 (holding that the standard for proximate cause under USERRA requires the plaintiff to show that the link between the unlawful conduct and the injury was direct and not “too remote, purely contingent, or indirect” and that any intervening cause was not “superseding”).

15. *See, e.g., Holmes*, 503 U.S. at 268–70 (holding that the proximate cause standard under RICO requires the plaintiff to show that its injuries were directly caused by the defendant’s conduct).

16. *See infra* Section II.B.

17. *See infra* Section II.B.

18. Sperino’s article, *Statutory Proximate Cause*, highlighted the problems associated with importing proximate cause into statutory causes of action. *See generally* Sperino, *Statutory Proximate Cause*, *supra* note 8. She did not offer a theory for the proper way to determine the meaning of proximate cause in statutory claims once the court has declared the requirement to exist. No other scholarship has provided analysis on statutory proximate cause doctrine as a whole. *Cf.* Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1, 57 (2013) (arguing that proximate cause doctrine in employment discrimination statutes is “fraught with numerous theoretical, practical, and doctrinal difficulties”). Only three articles focused on *Bank of America* have been published to date. *See* Jesse D.H. Snyder, *How Patent Law Keeps the Hope of Fair Housing Alive for All, Even after Bank of America Corp. v. City of Miami*, 21 HARV. LATINX L. REV. 107, 121–24 (2018); Jesse D.H. Snyder, *No Need for Cities to Despair After Bank of America Corporation v. City of Miami: How Patent Law Can Assist in Proving Predatory Loans Directly Cause Municipal Blight Under the Fair Housing Act*, 70 ME. L. REV. 63, 77–85 (2017) [hereinafter Snyder, *No Need for Cities to Despair*]; *The Supreme Court, 2016 Term—Leading Cases*, 131 HARV. L. REV. 373, 380–82 (2017). *The Supreme Court, 2016 Term—Leading Cases* discusses the Court’s holding regarding proximate cause in brief detail and makes only general claims, such as “[t]he Court’s proximate cause holding required overturning no longstanding precedents and is broadly in line with recent decisions involving other statutes.” *See The Supreme Court, 2016 Term—Leading Cases*, *supra*, at 380–83. In *No Need for Cities to Despair*, Snyder discusses the proximate cause holding but does not situate it within the statutory proximate cause body of case law. Snyder, *No Need for Cities to Despair*, *supra*, at 76–79. Snyder instead looks to patent law to inform analysis on causation between discriminatory predatory lending and the financial harms alleged by the City. *See id.* at 79–85. Snyder’s analysis appears to treat proximate cause as factual cause, focusing on how the City can factually prove the link between its harms and the defendant’s conduct. *See id.* As will be discussed in Section II.A and Section IV.B, concerns about speculation and whether the

First, the Article situates *Bank of America* within the Supreme Court's body of statutory proximate cause case law. The Article demonstrates that the proximate cause analysis in *Bank of America* both reflects and solidifies the incoherence of the Court's doctrine. By characterizing the Court's decision to remand as the culmination of this incoherence, the Article argues that the doctrine has become so unworkable that even the Court itself could not figure out how to properly apply it in *Bank of America*.

Second, the Article systematically unpacks the doctrinal incoherence in statutory proximate cause case law and, in doing so, points toward a new, more productive focal point for doctrinal commentary. While scholars have extensively belabored the inconsistencies and weaknesses among the various formulations of proximate cause, this Article shifts the focus to the Court's analytical frameworks to arrive at those formulations in the statutory context.<sup>19</sup> The Article demonstrates that the Supreme Court has adopted a host of different frameworks to determine the meaning of proximate cause in statutory claims. Surveying the Court's entire body of case law on statutory proximate cause, the Article synthesizes the analytical frameworks the Court has employed into three categories: (1) common law, (2) public policy, and (3) legislative intent. The Article then shows how the Court's fluctuation among these three frameworks is the source of the incoherence in statutory proximate cause doctrine.

Third, the Article proposes a structured framework for proximate cause analysis in all statutory claims. Specifically, the Article argues that courts should adopt the "scope of liability" framework, as set forth in the recent *Restatement (Third) of Torts*, to determine the meaning of proximate cause in a given statutory

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plaintiff can factually establish a link between the harm alleged and the unlawful conduct fall within the realm of factual cause, not proximate cause. *See infra* Sections II.B, IV.B.

19. *See, e.g.*, Jessie Allen, *The Persistence of Proximate Cause: How Legal Doctrine Thrives on Skepticism*, 90 DENV. U. L. REV. 77, 86–88 (2012); Terry Christlieb, *Why Superseding Cause Analysis Should Be Abandoned*, 72 TEX. L. REV. 161, 186 (1993); Peter C. Haley, *Paradigms of Proximate Cause*, 36 TORT & INS. L.J. 147, 147–48 (2000); Patrick J. Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 WASH. U. L.Q. 49, 104–05 (1991); James Angell McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149, 197–99 (1925); Daniel Joseph Shapiro, *Holmes v. Securities Investor Protection Corporation: Proximate Cause Dims the Bright-Lines of RICO Standing*, 53 LA. L. REV. 1911, 1933–34 (1993); Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 VAND. L. REV. 941, 1005–09 (2001) [hereinafter Stapleton, *Legal Cause*]; Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause*, 44 WAKE FOREST L. REV. 1247, 1275 (2009); *see also infra* Section II.A.

context.<sup>20</sup> Under the scope of liability framework, courts would identify the class of harms (termed the scope of the risks) that the statutory prohibitions were intended to address.<sup>21</sup> The standard that results is based on the outcome of this analysis: proximate cause is satisfied where the harm resulting from the unlawful conduct falls within the scope of risk of the statute.<sup>22</sup> The Article argues that the scope of liability framework is the optimal framework for proximate cause analysis in statutory claims because (1) it strengthens doctrinal determinacy by forcing courts to employ the tools of statutory interpretation to arrive at the standard for proximate cause, and (2) it protects against improper judicial legislation by ensuring that the standard for proximate cause aligns with the statutory scheme.

Fourth, the Article applies the scope of liability framework to determine the standard for proximate cause under the FHA. Through extensive legislative history analysis, the Article identifies the scope of the risks of the FHA. It demonstrates that the FHA was enacted to protect against three distinct categories of harms that result from discrimination in the housing market: (1) individualized psychological and economic harms, (2) the social and financial ruin of cities caused by ghettoization,<sup>23</sup> and (3) entrenched residential segregation. Based on this analysis, the Article contends that the standard for proximate cause under the FHA is satisfied where unlawful discrimination causes harm within these categories through direct effects on the housing market.

The Article proceeds in five parts. Part I describes *Bank of America* and the Supreme Court's holding regarding proximate cause under the FHA. Part II traces the conceptual evolution of proximate cause doctrine in tort law and its recent application in statutory causes of action, presenting and unpacking the widespread incoherence in the Supreme Court's various standards for proximate cause in statutory claims. Part III demonstrates that this incoherence is a function of the Court's inability to settle on a consistent analytical

20. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 (AM. LAW INST. 2010).

21. *See id.* § 29 cmt. d.

22. *See id.*

23. Racially isolated urban slums are often referred to as "ghettos" in the congressional debates and hearings on the FHA. Senator Joseph Tydings defined "ghetto" during the FHA debates as "restricted areas in which all members of a minority group are forced to reside no matter where they desire or can afford to live." 113 CONG. REC. 22,848 (1967) (statement of Sen. Joseph Tydings). This is typically how the term was used. *See infra* Section V.B. In this Article, the term is intended solely to give accurate meaning to the content of the legislative history; it is not meant to condone the language.

framework to determine the meaning of proximate cause in statutory claims. It synthesizes the analytical frameworks the Court has applied into three categories: common law, public policy, and legislative intent. Part IV argues that a scope of liability framework is the most appropriate framework to determine the meaning of proximate cause in statutory claims. Part V applies the scope of liability framework to arrive at the proper standard for proximate cause under the FHA.

# I. *BANK OF AMERICA CORP. V. CITY OF MIAMI*

## A. *Background on Reverse Redlining and Bank of America*

The City sued Bank of America and Wells Fargo for engaging in racially discriminatory predatory lending.<sup>24</sup> While there is no uniform definition of the term “predatory lending,” a definition offered by Professors Kathleen C. Engel and Patricia A. McCoy is frequently cited:

[P]redatory lending [is] a syndrome of abusive loan terms or practices that involve one or more of the following five problems: (1) loans structured to result in seriously disproportionate net harm to borrowers, [e.g., loans that contain unaffordable balloon payments], (2) harmful rent seeking, [e.g. prepayment penalties], (3) loans involving fraud or deceptive practices, (4) other forms of lack of transparency in loans that are not actionable as fraud, and (5) loans that require borrowers to waive meaningful legal redress.<sup>25</sup>

24. *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1300–01 (2017).

25. Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1260 (2002) (footnote omitted); see also Ngai Pindell, *The Fair Housing Act at Forty: Predatory Lending and the City as Plaintiff*, 18 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 169, 172 (2009). The rise in predatory lending in the 1990s and early 2000s was facilitated by the growth in subprime lending, which expanded opportunities for abusive lending practices. See Charles L. Nier III & Maureen R. St. Cyr, *A Racial Financial Crisis: Rethinking the Theory of Reverse Redlining to Combat Predatory Lending Under the Fair Housing Act*, 83 TEMP. L. REV. 941, 977–78 (2011); John P. Relman, *Foreclosure, Integration, and the Future of the Fair Housing Act*, 41 IND. L. REV. 629, 634–35 (2008) (“As the subprime market grew, the opportunities for abusive practices grew with it.”). Subprime financial products are designed to provide credit to borrowers who do not qualify for prime loans, such as people who have weak credit histories or high debt-to-income ratios. Nier & St. Cyr, *supra*, at 944. The subprime market expanded dramatically in the 1990s and the early 2000s. See AMAAD RIVERA ET AL., UNITED FOR A FAIR ECON., FORECLOSED: STATE OF THE DREAM 2008, at 4–5 (Christina Kasica et al. eds., 2008), [http://srwolf.com/reports/StateOfDream\\_01.16.08\\_Foreclosed.pdf](http://srwolf.com/reports/StateOfDream_01.16.08_Foreclosed.pdf) [<https://perma.cc/3WGU-5W78>]. Experts attribute the rise in subprime lending during this period to a combination of factors, including deregulation, technological advances in automated underwriting, and the advent of securitized



The FHA broadly prohibits discrimination in the housing market on the basis of race and other characteristics and specifically declares discrimination in mortgage lending unlawful.<sup>26</sup> Despite this express prohibition, predatory loans were targeted at minority borrowers of predominantly minority communities in the late 1990s and early 2000s.<sup>27</sup> Through racial steering and other illegal practices, banks disproportionately issued high-cost loans, often with adjustable interest rates and other classic predatory characteristics, to minority borrowers as compared to similarly qualified white borrowers.<sup>28</sup> This

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mortgages. Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 AM. SOC. REV. 629, 632 (2010).

26. See 42 U.S.C. §§ 3604(b), 3605(a) (2012).

27. See George Galster & Erin Godfrey, *By Words and Deeds: Racial Steering by Real Estate Agents in the U.S. in 2000*, 71 J. AM. PLAN. ASS'N 251, 251–52 (2005) (discussing “steering,” a tactic where real estate agents “differentially direct clients toward particular neighborhoods and away from others based on race or ethnicity”); Frank Lopez, *Using the Fair Housing Act to Combat Predatory Lending*, 6 GEO. J. ON POVERTY L. & POL’Y 73, 78 (1999) (documenting tactics banks have used to target predatory loan products, including soliciting door-to-door, repeatedly calling borrowers at their homes, and encouraging lenders to sign documents before reading them or with key terms missing). Critics also often point to the structural incentives created by the mortgage lending industry as a major contributing factor to the patterns of discrimination in predatory lending that emerged in the late 1990s and early 2000s. See, e.g., Alex Gano, *Disparate Impact and Mortgage Lending: A Beginner’s Guide*, 88 U. COLO. L. REV. 1109, 1141–48 (2017) (discussing how some banks paid their brokers’ commissions on subprime loans and the still-popular practice of “discretionary pricing”). During the 1990s, the residential mortgage industry moved away from a lending system based on “‘credit rationing,’ where interest rates and creditworthiness requirements were fixed and loanable funds rationed, to a system of ‘risk-based pricing,’ where lenders would offer differential loan products and interest rates to borrowers . . .” *Id.* at 1126.

28. See U.S. DEP’T OF HOUS. & URBAN DEV., UNEQUAL BURDEN: INCOME & RACIAL DISPARITIES IN SUBPRIME LENDING IN AMERICA (2000), [http://www.huduser.org/Publications/pdf/unequal\\_full.pdf](http://www.huduser.org/Publications/pdf/unequal_full.pdf) [<https://perma.cc/NF98-FQF5>]; Raymond H. Brescia, *Subprime Communities: Reverse Redlining, The Fair Housing Act and Emerging Issues in Litigation Regarding the Subprime Mortgage Crisis*, 2 ALB. GOV’T L. REV. 164, 216 (2009); Galster & Godfrey, *supra* note 27, at 251–52; Nier & St. Cyr, *supra* note 25, at 947–49; Pindell, *supra* note 25, at 174; see also Robert B. Avery, Kenneth P. Brevoort & Glen B. Canner, *The 2007 HMDA Data*, 94 FED. RES. BULL. A107, A125, A127 (2008). Several studies have found a racial gap in the probability of receiving a subprime or higher interest rate even after controlling for underwriting criteria. See, e.g., McKinley Blackburn & Todd Vermilyea, *A Comparison of Unexplained Racial Disparities in Bank-Level and Market-Level Models of Mortgage Lending*, 29 J. FIN. SERVICES RES. 125, 136 (2006); Debbie Gruenstein Bocian, Keith S. Ernst & Wei Li, *Race, Ethnicity and Subprime Home Loan Pricing*, 60 J. ECON. & BUS. 110, 110, 117–21 (2008). But see Marsha J. Courchane, *The Pricing of Home Mortgage Loans to Minority Borrowers: How Much of the APR Differential Can We Explain?*, 29 J. REAL EST. RES. 399, 433 (2007) (“The empirical results suggest, however, that relatively little of the aggregate differences in APRs paid by minority and non-minority borrowers are attributable to the differential treatment of borrowers.”); Michael LaCour-Little, *The Home Purchase Mortgage Preferences of Low- and Moderate-Income Households*, 35 REAL EST. ECON. 265, 287 (2007) (“Borrower race

practice, known as “reverse redlining,” was widespread throughout the country.<sup>29</sup>

Municipalities across the country sought to recoup certain losses that they experienced as a result of banks’ discriminatory practices by filing suit under the FHA.<sup>30</sup> In 2013, the City did the same, filing separate complaints against the Banks for discriminatory, predatory lending in violation of the FHA.<sup>31</sup> The City’s complaints charged that the Banks intentionally issued riskier mortgages on less favorable, predatory terms to African American and Latino borrowers than they issued to similarly situated white, non-Latino customers in violation of §§ 3604(b) and 3605(a) of the FHA.<sup>32</sup> The allegedly predatory terms “included, among others, excessively high interest rates, unjustified fees, teaser low-rate loans that overstated refinancing opportunities, [and] large prepayment penalties . . . .”<sup>33</sup> The City further alleged that the Banks induced defaults on loans in a discriminatory manner by failing to extend refinancing and loan modifications to minority borrowers on fair terms.<sup>34</sup>

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. . . is only positive and significant in the use of Special Program Loans and is negative and significant in the choice of FHA, contrary to previous results in the literature suggesting that minorities were more likely to choose FHA, possibly due to steering.”).

29. See Brescia, *supra* note 28, at 216. Some scholars have argued that recent practices of “reverse redlining” are a direct continuation of historical redlining. See, e.g., GEORGE LIPSITZ, *THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS* 27 (rev. & expanded ed. 2006).

30. See, e.g., *County of Cook v. HSBC N. Am. Holdings, Inc.*, 136 F. Supp. 3d 952, 956 (N.D. Ill. 2015); *City of Los Angeles v. Wells Fargo & Co.*, 22 F. Supp. 3d 1047, 1051 (C.D. Cal. 2014); *Mayor of Balt. v. Wells Fargo Bank, N.A.*, 677 F. Supp. 2d 847, 848 (D. Md. 2010); *City of Birmingham v. Citigroup Inc.*, No. CV-09-BE-467-S, 2009 WL 8652915, at \*1 (N.D. Ala. 2009). None of these cases reached the circuit courts of appeal. District courts reached varied holdings on key legal issues, including standing, requirements for causation, and equitable tolling of the statutes of limitations under the FHA. See, e.g., *Mayor of Balt.*, 677 F. Supp. 2d at 851 (granting defendant’s motion to dismiss because the plaintiff failed to plead a sufficient causal connection between Wells Fargo’s actions and the harms alleged); *City of Birmingham*, 2009 WL 8652915, at \*5 (granting Citigroup’s motion to dismiss for lack of standing). But see *County of Cook*, 136 F. Supp. 3d at 957–67 (denying HSBC’s motion to dismiss and holding the county properly stated a claim for relief; properly pleaded causation, including proximate cause; and showed a continuing violation of the FHA such that the statute of limitations had not yet begun to toll); *City of Los Angeles*, 22 F. Supp. 3d at 1047–48, 1057–58 (denying Wells Fargo’s motion to dismiss because the City of Los Angeles adequately pleaded causation, proximate cause, continuing violation sufficient to delay the tolling of the two-year statute of limitations, and other requirements under the FHA).

31. *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1301 (2017).

32. *Id.* at 1300–01.

33. *Id.* at 1301.

34. *Id.*

The City charged that the Banks' discriminatory conduct disproportionately caused foreclosures and vacancies in minority communities in Miami, which "(1) 'adversely impacted the racial composition of the City,' (2) 'impaired the City's goals to assure racial integration and desegregation,' [and] (3) 'frustrate[d] the City's long-standing and active interest in promoting fair housing and securing the benefits of an integrated community . . .'"<sup>35</sup> The complaints further alleged that those foreclosures and vacancies harmed the City by decreasing the property values of both the foreclosed properties themselves and of nearby properties, thereby "reduc[ing] property tax revenues to the City."<sup>36</sup> Moreover, the City claimed that the Banks' actions forced the City to spend more on municipal services to remedy blight and unsafe and dangerous conditions that exist in areas where properties were foreclosed as a result of the Banks' illegal lending practices.<sup>37</sup> The City presented statistical analyses tracing the City's financial losses to the Banks' discriminatory practices.<sup>38</sup>

#### B. Bank of America *Opinion*

The district court dismissed the City's complaints.<sup>39</sup> The district court held that, to make out a claim under the FHA, the City was required to demonstrate that its injuries were proximately caused by the Banks' unlawful conduct.<sup>40</sup> At the time the district court issued its

35. *Id.* (alteration in original) (citations omitted).

36. *Id.* (alteration in original).

37. *Id.*

38. *Id.* at 1302.

39. See *City of Miami v. Wells Fargo & Co.*, No. 13-24508-CIV-DIMITROULEAS, 2014 WL 11380948, at \*1 (S.D. Fla. 2014), *aff'd in part, rev'd in part*, 801 F.3d 1258 (11th Cir. 2015), *vacated sub nom.* *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296 (2017); *City of Miami v. Bank of Am. Corp.*, No. 13-24506-CIV, 2014 WL 3362348, at \*7 (S.D. Fla. 2014), *aff'd in part, rev'd in part*, 800 F.3d 1262 (11th Cir. 2015), *vacated*, 137 S. Ct. 1296 (2017). The City filed separate complaints against the Banks. The complaints in each case were nearly identical. *City of Miami v. Wells Fargo & Co.*, 801 F.3d 1258, 1260 (11th Cir. 2015), *vacated sub nom.* *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296 (2017) ("The complaints in each case were largely identical . . ."). The cases were heard separately by the district court and by the Eleventh Circuit, but both Eleventh Circuit opinions issued nearly identical rulings in the two cases. See *id.* at 1258, 1265 (noting that the Eleventh Circuit's reasoning is set forth in detail in the companion case *Bank of America* and that their legal conclusions in that case apply equally here and dictate the same results); see also *City of Miami v. Bank of Am. Corp.*, 800 F.3d 1262, 1262 (11th Cir. 2015), *vacated*, 137 S. Ct. 1296 (2017). The Supreme Court granted certiorari in both cases and consolidated them for review. *Bank of Am.*, 137 S. Ct. at 1296.

40. *Bank of Am.*, 2014 WL 3362348, at \*3–7. The district court's rulings addressed a number of distinct legal issues, including the City's unjust enrichment claim, the statute of limitations, and standing, but the focus of this Article relates solely to its holding regarding proximate cause and, thus, the proximate cause holding will be the only one discussed in

opinion, no circuit courts of appeals had yet applied proximate cause to the FHA.<sup>41</sup> The district court nevertheless concluded that the requirement existed and that the City had failed to satisfy it because the causal chain linking the Banks' conduct and the City's injuries was "too attenuated" and relied on the conduct of third parties.<sup>42</sup> The Eleventh Circuit reversed.<sup>43</sup> It agreed with the district court that proximate cause was required under the FHA but held that the standard was whether the City's injuries were a foreseeable consequence of the Banks' conduct.<sup>44</sup> The circuit court concluded that the City had alleged facts sufficient to satisfy this standard.<sup>45</sup> The Supreme Court granted certiorari.<sup>46</sup>

The Supreme Court agreed with the circuit and district courts that proximate cause is a required element of a claim under the FHA.<sup>47</sup> The Supreme Court and lower courts reached this conclusion based on a recently decided Supreme Court case, *Lexmark International, Inc. v. Static Control Components, Inc.*,<sup>48</sup> which held that proximate cause—traditionally a common law tort concept—is a presumptively required element of all statutory claims.<sup>49</sup> The

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detail in the remainder of the Article. See *Wells Fargo & Co.*, 2014 WL 11380948, at \*1 (discussing the City's unjust enrichment claim); *Bank of Am.*, 2014 WL 3362348, at \*1–7 (discussing standing, under the FHA, including proximate cause and the statute of limitations).

41. See *Bank of Am.*, 137 S. Ct. at 1306 (making reference to the fact that no other circuit courts of appeal, aside from the Eleventh Circuit, had found proximate cause to be a requirement under the FHA); *Wells Fargo & Co.*, 801 F.3d at 1267 (incorporating by reference the Eleventh Circuit's analysis of proximate cause under the FHA in *Bank of America* and citing no other circuit courts of appeals in its analysis of a proximate cause requirement under the FHA); *Bank of Am.*, 800 F.3d at 1279 (noting that two other circuits have recognized that "[i]f the City's claim is functionally a tort action, then presumably the City must adequately plead proximate cause . . . ." (citing *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1167–68, 1168 n.38 (9th Cir. 2013))); *Bank of Am.*, 2014 WL 3362348, at \*3 (citing no circuit court of appeals decision to support its holding that proximate cause is a requirement under the FHA). But see *Samaritan Inns, Inc. v. District of Columbia*, 114 F.3d 1227, 1234–35 (D.C. Cir. 1997) (indirectly discussing proximate cause as it relates to proving lost profits damages but not directly linking it to the FHA).

42. *Bank of Am.*, 2014 WL 3362348, at \*5. The court reached this conclusion by applying the Supreme Court's holding in *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014), which declared proximate cause a presumptive requirement in all statutory causes of action. See *id.* at \*3 (citing *Lexmark*, 572 U.S. at 133).

43. *Wells Fargo & Co.*, 801 F.3d at 1267; *Bank of Am.*, 800 F.3d at 1289.

44. *Bank of Am.*, 800 F.3d at 1282.

45. *Id.*

46. *Bank of Am.*, 137 S. Ct. at 1302.

47. *Id.* at 1305.

48. 572 U.S. 118 (2014).

49. *Bank of Am.*, 137 S. Ct. at 1305 (citing *Lexmark*, 572 U.S. at 129).

Supreme Court reasoned that *Lexmark*'s general presumption is applicable to the FHA because a claim for damages under the FHA is "akin to a 'tort action.'"<sup>50</sup>

The Supreme Court, however, rejected both the district court and the Eleventh Circuit's standards for proximate cause.<sup>51</sup> The Court declared that proximate cause analysis is controlled by "the nature of the statutory cause of action."<sup>52</sup> The Court reasoned that the context of the FHA necessitated a proximate cause standard stricter than that provided by foreseeability:

In the context of the FHA, foreseeability alone does not ensure the close connection that proximate cause requires. The housing market is interconnected with economic and social life. A violation of the FHA may, therefore, "be expected to cause ripples of harm to flow" far beyond the defendant's misconduct. Nothing in the statute suggests that Congress intended to provide a remedy wherever those ripples travel. And entertaining suits to recover damages for any foreseeable result of an FHA violation would risk "massive and complex damages litigation."<sup>53</sup>

Without further reasoning, the Court then proclaimed that "proximate cause under the FHA requires 'some direct relation between the injury asserted and the injurious conduct alleged.'"<sup>54</sup> It stated that a damages claim under the statute is analogous to common law tort claims, and "[the Court] ha[s] repeatedly applied directness principles to statutes with 'common-law foundations.'"<sup>55</sup> The Court then added that "[t]he general tendency' in these cases, 'in regard to damages at least, is not to go beyond the first step.' What falls within that 'first step' depends in part on the 'nature of the statutory cause of action,' and an assessment 'of what is administratively possible and convenient[.]'"<sup>56</sup> The Court ended its analysis there.<sup>57</sup> Rather than proceeding to announce a specific standard, the Court expressly declined to "draw the precise boundaries of proximate cause under the FHA and to determine on which side of the line the City's

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50. *Id.* (quoting *Meyer v. Holley*, 537 U.S. 280, 285 (2003)).

51. *Id.* at 1306.

52. *Id.* (quoting *Lexmark*, 572 U.S. at 133).

53. *Id.* (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 534, 545 (1982)).

54. *Id.* (quoting *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992)).

55. *Id.* (quoting *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457 (2006)).

56. *Id.* (first quoting *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 10 (2010); then quoting *Lexmark*, 572 U.S. at 133; and then quoting *Holmes*, 503 U.S. at 268).

57. *See id.*

financial injuries fall.”<sup>58</sup> Claiming to lack the benefit of the lower courts’ judgment, the Court invited them to define “in the first instance, the contours of proximate cause under the FHA.”<sup>59</sup>

The Court’s decision to remand to the lower courts is a direct product of the deep incoherence in the Court’s statutory proximate cause case law. As Parts II and III will demonstrate, the Court’s precedent has become so jumbled and inconsistent that *Bank of America* is best understood as the culmination of this incoherence.

## II. PROXIMATE CAUSE

Before discussing the Supreme Court’s proximate cause doctrine, it is necessary to clarify the distinction between proximate cause (also known as “legal cause”) and factual cause (also known as “cause in fact”). At common law, causation requires both factual cause and proximate cause.<sup>60</sup> The concept of factual cause is “an ordinary, matter-of-fact inquiry into the existence . . . of a causal relation as laypeople would view it.”<sup>61</sup> To determine factual cause, courts ask whether the alleged injuries would have occurred absent the defendant’s conduct.<sup>62</sup> As will be discussed in greater detail *infra*, the concept of proximate cause, by contrast, is concerned with whether the alleged harm is sufficiently connected to the injurious conduct so as to be considered legally cognizable.<sup>63</sup> Thus, proximate cause is focused not on whether the injury can be attributed to the wrongful conduct as a matter of fact but on whether the degree of connection

58. *Id.*

59. *Id.* I use the word “claiming” because the lower courts *had* already lent their judgment on the question of the proper standard for proximate cause under the FHA. See *City of Miami v. Wells Fargo & Co.*, 801 F.3d 1258, 1260, 1267 (11th Cir. 2015), *vacated sub nom.* *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296 (2017); *City of Miami v. Bank of Am. Corp.*, 800 F.3d 1262, 1282 (11th Cir. 2015), *vacated*, 137 S. Ct. 1296 (2017) (holding that the appropriate standard for proximate cause under the FHA is “foreseeability”); *City of Miami v. Bank of Am. Corp.*, No. 13-24506-CIV, 2014 WL 3362348, at \*5 (S.D. Fla. 2014), *aff’d in part, rev’d in part*, 800 F.3d 1262 (11th Cir. 2015), *vacated*, 137 S. Ct. 1296 (2017) (holding that proximate cause under the FHA required the plaintiff to show that the injuries were not “too attenuated” and did not rely on the conduct of third parties).

60. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §§ 26, 29 (AM. LAW INST. 2010).

61. *Paroline v. United States*, 572 U.S. 434, 444 (2014) (quoting *FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY*, 4 HARPER, JAMES, AND GRAY ON TORTS § 20.2, at 100 (3d ed. 2007)).

62. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26; see also *Haley*, *supra* note 19, at 148.

63. *Id.* § 29.

between the wrongful conduct and the harm is sufficient to give rise to legal liability.<sup>64</sup>

A. *Proximate Cause Doctrine in Common Law*

The modern-day concept of proximate cause is typically traced to the foundational torts case *Palsgraf v. Long Island Railroad Co.*<sup>65</sup> *Palsgraf* involved a plaintiff who was injured when a railroad guard accidentally pushed a passenger, causing the passenger to drop a box containing fireworks.<sup>66</sup> The box was wrapped in newspaper such that there was nothing to suggest it contained hazardous material.<sup>67</sup> The fireworks exploded, dislodging some scales on the railroad track that struck the plaintiff and caused her injuries.<sup>68</sup> Chief Judge Cardozo, writing for the majority, cast the issue as whether the plaintiff had a legally protected interest that had been violated.<sup>69</sup> Cardozo reasoned that whether the plaintiff had a legally protected interest depended on whether her injuries were within the “range of apprehension” of a risk reasonably perceived by the defendant.<sup>70</sup> Cardozo then held that negligence liability does not extend where conduct that “threatens an insignificant invasion of an interest in property results in an unforeseeable invasion of an interest of another order.”<sup>71</sup> Judge Andrews, in dissent, framed the issue as one of proximate cause.<sup>72</sup> In a quotation now often cited in cases and commentary on proximate cause, Andrews provided a definition for the concept: “What we . . . mean by the word ‘proximate’ is 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. This is not logic. It is practical politics.”<sup>73</sup>

64. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 263 (5th ed. 1984); see also Kelley, *supra* note 19, at 52; Stapleton, *Legal Cause*, *supra* note 19, at 968.

65. 162 N.E. 99 (N.Y. 1928). For excellent histories of the evolution of proximate cause doctrine, see generally H.L.A. HART & TONY HONORE, CAUSATION IN THE LAW 130–304 (2d ed. 1985); Kelley, *supra* note 19, at 54–82; Stapleton, *Legal Cause*, *supra* note 19, at 969–81; Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735 (1985); Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001, 1004–11 (1988).

66. *Palsgraf*, 162 N.E. at 99.

67. *Id.* at 99, 101.

68. *Id.* at 99.

69. *Id.*

70. *Id.* at 100.

71. *Id.* at 101.

72. See *id.* at 102 (Andrews, J., dissenting).

73. *Id.* at 103.

The disagreement between Judges Cardozo and Andrews in *Palsgraf* set the stage for the modern-day debate on proximate cause.<sup>74</sup> On one side of the debate stand those whose reasoning derives from Cardozo's view that proximate cause is rooted in the same principles as the standard of care for negligence liability, which extends liability to conduct posing a foreseeable risk of harm to others.<sup>75</sup> Since foreseeability is the basis for liability under general tort law, adherents to this view contend that a consistent standard for proximate cause asks whether the plaintiff's injury was a foreseeable result of the defendant's act.<sup>76</sup> Those on the other side of the debate, often classified as legal realists, follow Andrews's line of reasoning and believe that proximate cause is a reflection of policy choices about how far liability should extend.<sup>77</sup> They argue that proximate cause demands an inquiry into whether, as a fundamental policy of the law, the defendant's liability should extend so far as to cover the harm alleged.<sup>78</sup> The most critical theorists in this camp posit that proximate cause is simply judicial legislation disguised as doctrine.<sup>79</sup>

While these two theories serve as poles anchoring the modern debate, both the courts' and the academy's attempts to articulate the purpose and meaning of proximate cause have been extraordinarily muddled.<sup>80</sup> Within a span of only three years, from 2011 to 2014, the

74. Although *Palsgraf* served to frame the modern-day debate around proximate cause, the judges' differing viewpoints grew out of proximate cause theories that had been developing for quite some time. See, e.g., LEON GREEN, RATIONALE OF PROXIMATE CAUSE 77 (1927); Kelley, *supra* note 19, at 68–70. The doctrine emerged around the same time as other significant limitations on tort liability developed, including privity of contract, contributory negligence, and the statutory purpose limitation on negligence liability for breach of a statutory duty. Kelley, *supra* note 19, at 71. Scholars date modern proximate cause doctrine to the middle of the nineteenth century. The first major torts treatise, published in 1864, recognized proximate cause and described it as limiting liability to the consequences of the negligent act “that ensue in the ordinary and natural course of events.” C. G. ADDISON, WRONGS AND THEIR REMEDIES, BEING A TREATISE ON THE LAW OF TORTS 5 (2d ed. 1864).

75. See, e.g., Kelley, *supra* note 19, at 91. Justice Oliver Wendell Holmes, Jr. argued that this standard rests on two principles: “maximum deterrence of dangerous conduct consistent with maximum freedom for individual action when such deterrence is not possible.” *Id.* Theorists who believe that proximate cause simply adds a layer to the existing negligence standard thus believe that the goal of proximate cause should be to preserve freedom of action by protecting defendants from limitless liability for all the results that flow from a single negligent act. *Id.* at 104.

76. See *id.* at 92.

77. See *id.* at 104.

78. See Haley, *supra* note 19, at 148.

79. See Kelley, *supra* note 19, at 104.

80. See Allen, *supra* note 19, at 85–87. Each of the three versions of the *Restatement of Torts* has a different conception of proximate cause. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 (AM. LAW INST. 2010) (“An



Supreme Court described the concept of proximate cause as “shorthand for the policy-based judgment that not all factual causes contributing to an injury should be legally cognizable causes,”<sup>81</sup> as “serv[ing] . . . to preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity,”<sup>82</sup> and as reflective of “[t]he difficulty that can arise when a court attempts to ascertain the damages caused by some remote action.”<sup>83</sup>

Unable to settle on the purpose of the doctrine, the Supreme Court and lower courts have adopted a range of inconsistent standards for proximate cause. In some cases, courts ask whether the intervention of a third party or event leading to the harm discharges the defendant from liability by breaking the “chain of causation.”<sup>84</sup> In other instances, courts focus on the overall length of the chain of causation and ask whether the harm was “direct” or “remote.”<sup>85</sup> Yet another iteration is based on whether the plaintiff’s harm was “foreseeable”; a slight variation of that standard asks whether the harm caused to the plaintiff could be “reasonably foreseen.”<sup>86</sup> Courts at times combine the standards and at other times treat them as alternative formulations.<sup>87</sup> Moreover, the variation in standards is

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actor’s liability is limited to those harms that result from the risks that made the actor’s conduct tortious.”); RESTATEMENT (SECOND) OF TORTS § 431 (AM. LAW INST. 1965) (“The actor’s negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.”); RESTATEMENT OF TORTS: INTENTIONAL HARMS TO PERSONS, LAND, AND CHATTELS § 431 (AM. LAW INST. 1934) (“The words ‘legal cause’ are used throughout the Restatement of this Subject to denote the fact that the manner in which the actor’s tortious conduct has resulted in an invasion of some legally protected interest of another is such that the law regards it just to hold the actor responsible for such harm.”).

81. CSX Transp., Inc. v. McBride, 564 U.S. 685, 701 (2011).

82. Paroline v. United States, 572 U.S. 434, 445 (2014).

83. Lexmark Int’l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 135 (2014) (quoting Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 458 (2006)).

84. Stapleton, *Legal Cause*, *supra* note 19, at 969.

85. *Id.* at 968.

86. *Id.* at 968, 992.

87. See Allen, *supra* note 19, at 87–88, 87–88 nn.48–50 (discussing instances where courts have combined both formulations into one rule statement); Stapleton, *Legal Cause*, *supra* note 19, at 996 (categorizing the formulations as “alternative general rules”). The Supreme Court has recently lamented the lack of a uniform definition for proximate cause, summarizing that “[c]ommon-law formulations include, *inter alia*, 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.” CSX Transp., Inc. v. McBride, 564 U.S. 685, 701 (2011) (first citing Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 106–21 (1911); and then citing Jeremiah Smith, *Legal Cause in Actions of Tort (Concluded)*, 25 HARV. L. REV. 303, 311 (1912)).

only a part of the total doctrinal chaos—the standards themselves have also proven elusive. As scholars and courts alike frequently acknowledge, “directness,” “natural and probable cause,” “foreseeability,” and “superseding cause” are all malleable concepts that fail to denote consistent meaning.<sup>88</sup>

The fluidity in the Supreme Court’s and lower courts’ standards has led proximate cause to become “notoriously flexible and theoretically inconsistent, an empty vessel, into which the courts can pour multiple meanings.”<sup>89</sup> Leading torts commentators have levied harsh criticisms at the doctrine,<sup>90</sup> a major torts treatise denounced 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.”<sup>91</sup> The Second Circuit similarly admonished the doctrine:

“Proximate cause,” in short, has been an extraordinarily changeable concept. “Having no integrated meaning of its own, its chameleon quality permits it to be substituted for any one of the elements of a negligence case when decision on that element becomes difficult. . . . No other formula . . . so nearly does the work of Aladdin’s lamp.”<sup>92</sup>

88. For this reason, proximate cause is often held out as the primary example of doctrinal indeterminacy. *See* Allen, *supra* note 19, at 93, 93 n.79; *see also* W. PAGE KEETON ET AL., *supra* note 64, § 42, at 273; Sperino, *Statutory Proximate Cause*, *supra* note 8, at 1203. In an early influential article about proximate cause, Henry Edgerton criticized directness and foreseeability as too flexible of concepts to be meaningful. *See* Henry W. Edgerton, *Legal Cause*, 72 U. PA. L. REV. 211, 214–31 (1924). Regarding directness, he asked, “Is not directness a matter of degree?” *Id.* at 215. He then observed:

In most cases . . . the connection between the defendant’s act and the plaintiff’s injury may well be regarded . . . as involving a single step, or as involving several steps. The question is simply how far one’s taste will take him in the subdivision of what is indefinitely, or infinitely, subdivisible. Tastes differ.

*Id.* Regarding foreseeability, Edgerton asked: “Is the ‘foreseen danger’ a danger of the intervention of the identical force which does intervene, or is it enough if there is danger of the intervention of a force of similar character; and if the latter, how closely similar must it be?” *Id.* at 231. More recently, Jane Stapleton has argued that, “in disputes . . . concerning the nature of the consequence of which a complaint is made, the vacuity of the mere assertion of an outcome being ‘too remote’ or ‘not proximate’ is patent, especially in cases where the effect is instantaneous and spatially very near.” Stapleton, *Legal Cause*, *supra* note 19, at 969.

89. *See* Sperino, *Statutory Proximate Cause*, *supra* note 8, at 1200.

90. *See, e.g.*, W. PAGE KEETON ET AL., *supra* note 64, § 41, at 263.

91. *Id.*

92. AUSA Life Ins. Co. v. Ernst & Young, 206 F.3d 202, 217 n.8 (2d Cir. 2000) (quoting W. PAGE KEETON ET AL., *supra* note 64, § 42, at 276).

### B. *Proximate Cause in Statutory Claims*

Despite the criticisms of this common law concept, the Supreme Court has increasingly imported the concept of proximate cause into statutory claims.<sup>93</sup> In doing so, it has produced a parallel doctrine for proximate cause in statutory claims that is just as muddled, incoherent, and indeterminate as the doctrine that exists in common law claims. This section outlines the background of that doctrine and its convolutedness.

In 1983, the Supreme Court first expressly declared a proximate cause requirement under a statute—the Clayton Act—the text of which does not include the words “proximate cause.”<sup>94</sup> Since 2004, the Court has read a proximate cause requirement into statutes with growing frequency.<sup>95</sup> The statutes include USERRA, the Federal Employers Liability Act (“FELA”), and the Lanham Act, among others.<sup>96</sup> These statutes do not facially refer to proximate cause, but the Court has reasoned that the statutes’ structural resemblance to a common law tort, combined with the use of general causal language in the statutory text, indicate Congress’s intent to impose some limitation on the “ripples of harm”<sup>97</sup> that are recoverable.<sup>98</sup> In 2013, scholar Sandra Sperino coined the term “statutory proximate cause” to describe this development.<sup>99</sup> One year later, in 2014, the Court declared proximate cause a presumptive requirement in *all* statutory causes of actions, stating that “we generally presume that a statutory

93. See generally Sperino, *Statutory Proximate Cause*, *supra* note 8, at 1216, 1216 n.79.

94. See *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 529–35 (1983). In a 1982 case, the Supreme Court discussed proximate cause in a statutory claim but did so within the context of standing, not as an element of the cause of action. See *Blue Shield of Va. v. McCready*, 457 U.S. 465, 477–78 (1982).

95. See *supra* note 10 and accompanying text.

96. See *supra* note 10 and accompanying text.

97. *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1306 (2017) (quoting *Associated Gen. Contractors*, 459 U.S. at 534).

98. See Sperino, *Statutory Proximate Cause*, *supra* note 8, at 1200. Sperino observes that courts have justified applying proximate cause to statutory causes of action by relying on a variety of “demonstrably weak textual, intent, and purpose-based arguments.” *Id.* “Courts often find general causal language in a statute, such as the words ‘because of’ or ‘by reason of,’ and then conclude that these terms refer to both cause in fact and proximate cause.” *Id.* at 1217–18. Courts also make two types of legislative intent arguments: that the particular statute is the product of a common-law tort tradition and that civil statutes in general are enacted against a tort law backdrop. See *id.* at 1219–20; see also *Staub v. Proctor Hosp.*, 562 U.S. 411, 417 (2011); *Holmes v. Sec. Inv’r Prot. Corp.*, 503 U.S. 258, 266–68 (1992); *Associated Gen. Contractors*, 459 U.S. at 532–33.

99. See Sperino, *Statutory Proximate Cause*, *supra* note 8, at 1200.

cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute.”<sup>100</sup>

Despite the substantial body of case law that has emerged on statutory proximate cause, no clear precedent dictates how to determine the meaning of proximate cause in a given statutory context. Much like in the common law context, the Supreme Court has not articulated a uniform standard for statutory proximate cause. Standards that the Court has employed for proximate cause in statutory claims include whether the injury was “direct”<sup>101</sup> or in “direct relation” to the unlawful conduct;<sup>102</sup> whether a superseding cause extinguishes liability;<sup>103</sup> whether the harm caused was “‘too remote,’ ‘purely contingent,’ or ‘indirect,’”<sup>104</sup> and whether the harm is “substantial enough and close enough . . . to be recognized by law.”<sup>105</sup> The Court rarely acknowledges that the standard it is applying in one statutory context differs from that it has applied in another, and when it does so, it provides little to no reasoning for the inconsistency.

Yet the variation in the Court’s standards merely scratches the surface of the incoherence underlying statutory proximate cause doctrine. The Court’s failure to settle on what the announced standards substantively mean has resulted in a morass of conflicting case law that seems to have caused confusion not only in the lower courts but in the Supreme Court itself. Nowhere is this confusion better illustrated than in the Supreme Court’s case law on how to apply the “directness” standard to causal chains involving multiple steps—meaning at least one intermediate or intervening cause<sup>106</sup> between the conduct and the injury. The four most recent Supreme Court cases to confront this issue are *Hemi Group, LLC v. City of New York*,<sup>107</sup> *Staub v. Proctor Hospital*,<sup>108</sup> *Lexmark*, and *Bank of America*. In each case, the Court treats differently the issues of (1)

100. See *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132 (2014).

101. *Associated Gen. Contractors*, 459 U.S. at 540.

102. *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457 (2006).

103. *Staub*, 562 U.S. at 420.

104. *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 9 (2010) (quoting *Holmes v. Sec. Inv’r Prot. Corp.*, 503 U.S. 258, 269, 271 (1992)).

105. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 704 (2004).

106. The Court appears to use the terms “intervening cause” and “intermediate cause” interchangeably, and this Article discerns no underlying difference in the way the terms are applied.

107. 559 U.S. 1 (2010).

108. 562 U.S. 411 (2011).

how many steps are allowed in the causal chain and (2) how to evaluate multiple steps where they exist.

In *Hemi Group*, the Court held that the directness standard cannot be satisfied where a causal chain involves more than one step.<sup>109</sup> The Court first asserted that proximate cause under the statute at issue, the Racketeer Influenced and Corrupt Organizations Act (“RICO”),<sup>110</sup> requires directness, and, thus, “[a] link [between the conduct and the injury] that is ‘too remote,’ ‘purely contingent,’ or ‘indirect[t]’ is insufficient.”<sup>111</sup> The Court did not elaborate on what qualifies as “‘too remote,’ ‘purely contingent,’ or ‘indirect[t]’” and instead imported language from precedent that “[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step.”<sup>112</sup> After asserting that this general tendency applies to proximate cause inquiries under RICO, the Court held that proximate cause was not satisfied because it involved more than one step.<sup>113</sup>

Yet one year later, in *Staub*, the Court held that a causal chain involving two distinct steps satisfied the directness standard for proximate cause for a claim brought under a different statute, USERRA.<sup>114</sup> The Court made no reference to the standard it had employed a year earlier regarding the “general tendency of the law . . . not to go beyond the first step,”<sup>115</sup> neither expressly disavowing it nor attempting to explain why it did not apply in the particular statutory context at issue.<sup>116</sup> The Court instead set forth an additional test to determine whether a multistep chain satisfies the directness standard: the intervening cause must not be “superseding,” meaning that it must not be “a cause of independent origin that was not foreseeable.”<sup>117</sup>

109. See *Hemi Grp.*, 559 U.S. at 10.

110. RICO is a federal law that establishes criminal penalties and a private civil cause of action for acts involving organized crime. See 18 U.S.C. §§ 1961–1968 (2012). The civil cause of action is available where a private party is injured in his or her “business or property” by a “racketeer.” *Id.* § 1964.

111. *Hemi Grp.*, 559 U.S. at 9 (third alteration in original) (quoting *Holmes v. Sec. Inv’r Prot. Corp.*, 503 U.S. 258, 271, 274 (1992)).

112. *Id.* at 10 (alterations in original) (quoting *Holmes*, 503 U.S. at 271–72).

113. *Id.* (holding that, “[b]ecause the City’s theory of causation requires us to move well beyond the first step, that theory cannot meet RICO’s direct relationship requirement”).

114. *Staub v. Proctor Hosp.*, 562 U.S. 411, 419–20 (2011).

115. *Hemi Grp.*, 559 U.S. at 10 (quoting *Holmes*, 503 U.S. at 271–72).

116. *Staub*, 562 U.S. at 419–20.

117. *Id.* at 420 (quoting *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837 (1996)). The Court also repeated that directness excludes “link[s] that [are] too remote, purely contingent, or indirect.” *Id.* at 419 (alterations in original) (quoting *Hemi Grp.*, 559 U.S. at

Three years later, however, in *Lexmark*, the Court modified the directness standard yet again and articulated a new set of parameters for causal chains involving multiple steps.<sup>118</sup> Ignoring the precedent of *Staub*, the Court made the blanket statement that a causal chain involving an intervening step is not direct.<sup>119</sup> However, the Court held that proximate cause may be satisfied *even if* the directness standard is not met.<sup>120</sup> The Court determined that proximate cause is satisfied where the injury alleged is “integral” to the violation alleged and/or where the multistep causal chain will not give rise to “speculative . . . proceedings” or “intricate, uncertain inquiries.”<sup>121</sup> Despite the fact that Justice Scalia authored both opinions,<sup>122</sup> the Court did not explain why it was adopting an interpretation of the directness standard that was inconsistent with *Staub*.<sup>123</sup> It is therefore unclear whether the opinion reverses *Staub* or instead constitutes an alternative formulation that keeps *Staub* intact.

The Court’s opinion in *Bank of America* both reflects and solidifies the doctrinal incoherence created by these prior cases’ treatment of the directness standard. There, the Court declared that a

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9). Like in *Hemi Group*, the Court did not explain how to determine whether a given link is “too remote, purely contingent, or indirect.” *Id.* (quoting *Hemi Grp.*, 559 U.S. at 9). It simply concluded, without stating its reasoning, that the link at issue was not “remote” or “purely contingent.” *Id.*

118. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 (2014).

119. *Id.* at 139 (“To be sure, on this view, the causal chain linking Static Control’s injuries to consumer confusion is not direct, but includes the intervening link of injury to the remanufacturers.”). The Court made no reference to the criteria it had employed in *Hemi Group* for evaluating intervening links. *Id.* at 137–40; *see also Staub*, 562 U.S. at 419–20 (“Proximate cause requires only ‘some direct relation between the injury asserted and the injurious conduct alleged,’ and excludes only those ‘link[s] that [are] too remote, purely contingent, or indirect.’ . . . Nor can the [intervening cause] be deemed a superseding cause of the harm. A cause can be thought ‘superseding’ only if it is a ‘cause of independent origin that was not foreseeable.’” (first and second alterations in original) (footnote omitted) (first quoting *Hemi Grp.*, 559 U.S. at 10; and then quoting *Exxon Co.*, 517 U.S. at 837)).

120. *Lexmark*, 572 U.S. at 139 (stating that “[Plaintiff]’s allegations therefore might not support standing under a strict application of the ‘general tendency’ not to stretch proximate causation ‘beyond the first step’” and then determining that plaintiff nonetheless satisfied the requirements for proximate cause at the pleading stage (quoting *Holmes*, 503 U.S. at 271)).

121. *Id.* (alteration in original) (quoting *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 459–60 (2006)). The language “and/or” is used because it is unclear from the Court’s opinion whether proximate cause may be satisfied in either of these circumstances or whether each circumstance is a requisite element which must be met.

122. *See id.* at 120; *Staub*, 562 U.S. at 412.

123. *Lexmark*, 572 U.S. at 134–37 (discussing the directness standard without citing to or distinguishing away *Staub*).

directness standard must be met<sup>124</sup> but incorporated neither *Staub*'s nor *Lexmark*'s approaches to multistep causal chains. It instead distorted *Lexmark*'s holding and appeared to revive *Hemi Group* and other precedent that predates all three cases. The Court stated:

“The general tendency” in [cases requiring directness for proximate cause] “in regard to damages at least, is not to go beyond the first step.” What falls within that step depends in part on the “nature of the statutory cause of action,” and an assessment “of what is administratively possible and convenient.”<sup>125</sup>

Yet *Lexmark* held *not* that all causal chains must be characterized as constituting a single step in order to satisfy proximate cause but, quite to the contrary, that the chain may go beyond the first step if doing so does not introduce speculation.<sup>126</sup> Furthermore, the Court's statement in *Bank of America* that “what falls within that [first] step” of the causal chain depends in part on “what is administratively possible and convenient”<sup>127</sup> is particularly unsettling because in *Lexmark* the Court had not applied such factors to the proximate cause inquiry.<sup>128</sup> The Court in *Lexmark* specifically held that, although the difficulty of ascertaining damages and the risk of speculation are “‘motivating principle[s]’ behind the proximate-cause requirement,” these factors cannot serve as an “*independent* basis” to determine whether the requirement is satisfied.<sup>129</sup>

124. *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1306 (2017).

125. *Id.* (first quoting *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 10 (2010); then quoting *Lexmark*, 572 U.S. at 133; and then quoting *Holmes*, 503 U.S. at 268).

126. The Court stated:

[The Plaintiff]'s allegations therefore might not support standing under a strict application of “the general tendency” not to stretch proximate causation “beyond the first step.” But the reason for that general tendency is that there ordinarily is a “discontinuity” between the injury to the direct victim and the injury to the indirect victim, so that the latter is not surely attributable to the former . . . but might instead have resulted from “any number of [other] reasons.” That is not the case here. [The Plaintiff]'s allegations suggest that if [the first step occurred], then it would follow more or less automatically that [the injury occurred] for the same reason, without the need for any “speculative . . . proceedings” or “intricate, uncertain inquiries.”

*Lexmark*, 572 U.S. at 139–40 (third and seventh alterations in original) (first quoting *Holmes*, 503 U.S. at 271; and then quoting *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 458–60 (2006)).

127. *Bank of Am.*, 137 S. Ct. at 1299 (quoting *Holmes*, 503 U.S. at 268).

128. See *Lexmark*, 572 U.S. at 132–37.

129. See *id.* at 135 (quoting *Anza*, 547 U.S. at 457–58).

The Court's opinion in *Bank of America* does not expressly reject the Court's approaches to multistep causal chains in *Staub* and *Lexmark*.<sup>130</sup> It simply adds to the web of confusion, incorporating language from precedent selectively—and inaccurately—and announcing yet a different set of criteria for determining whether directness is satisfied where the causal chain involves multiple steps. Thus, it is unsurprising that the Court ultimately got stuck in the tangles of its own web. The Court was unable to further define the meaning of proximate cause in claims brought under the FHA and made the rare move of remanding to the district court on a purely legal question that had already been briefed by the parties and decided by both lower courts.<sup>131</sup> This dead-end moment was over a decade in the making: with each new statutory proximate cause case, the Supreme Court seemed to add a fresh twist to the concept while simultaneously looping back to old formulations, never expressly rejecting prior iterations and often subtly distorting them along the way.

### III. THREE ANALYTICAL FRAMEWORKS IN STATUTORY PROXIMATE CAUSE DOCTRINE

This part unravels the web of confusion that has emerged in statutory proximate cause doctrine. While the scholarship on proximate cause tends to concentrate on the inconsistent and unworkable formulations of the concept, this discussion shifts the focus to the Supreme Court's analytical approaches in reaching those formulations and their meanings. This part demonstrates that the Court has embraced competing analytical frameworks to determine the meaning of proximate cause in a statutory context. It then synthesizes the frameworks the Court has applied into three categories: (1) common law, (2) public policy, and (3) legislative intent. These frameworks are the source of deep disagreements within the Court, such that neither the Court nor the individual Justices have been able to settle on the proper one to apply. Justice Scalia, for example, at one time applied the legislative intent framework and, at another time, advocated for the common law framework.<sup>132</sup> This part argues that the incoherence in statutory proximate cause doctrine, which has culminated in the Court's dead-

130. *Bank of Am.*, 137 S. Ct. at 1305–06 (making no reference to *Staub* and citing *Lexmark* for general assertions about the existence of statutory proximate cause but not expressly rejecting any part of the *Lexmark* analysis).

131. *Id.* at 1306.

132. *See infra* Section III.C.



end analysis in *Bank of America*, is anchored in the coexistence of these three analytical frameworks.

A. *Roots of the Three Frameworks: Associated General Contractors of California, Inc. v. California State Council of Carpenters*

The first case to interpret the meaning of proximate cause in a statute that was facially silent on the concept, *Associated General Contractors of California, Inc. v. California State Council of Carpenters*,<sup>133</sup> provided the foundation for the emergence of the three analytical frameworks.<sup>134</sup> *Associated General Contractors* called on the Court to determine the meaning of proximate cause under the Clayton Act, which authorizes suits by parties “injured in [their] business or property by reason of anything forbidden in the antitrust laws . . . .”<sup>135</sup> Specifically, the issue before the Court was whether a union could establish proximate cause under the Clayton Act where it alleged that the defendant, a multiemployer association, coerced third parties to enter into business relationships with nonunion firms.<sup>136</sup> The union alleged that this coercion adversely affected the trade of “certain unionized firms and thereby restrained the business activities of the union.”<sup>137</sup>

The Court began its proximate cause analysis by engaging in statutory analysis. The Court observed that the legislative history shows that the Sherman Act (the predecessor to the Clayton Act) was enacted to guarantee customers the benefits of price competition and to protect the freedom of participants in the relevant market.<sup>138</sup> Explaining that the union was not a consumer or a competitor in the market affected by unlawful activity, the Court stated that “a union, in its capacity as bargaining representative, will frequently not be part of the class the Sherman Act was designed to protect.”<sup>139</sup> The Court next turned to common law standards of proximate cause, which it referred to as an “additional factor” in its analysis.<sup>140</sup> The Court considered whether the chain of causation between the asserted

133. 459 U.S. 519 (1983).

134. The language “otherwise facially silent on the concept,” means that the statute does not expressly include the words “proximate cause.”

135. *Associated Gen. Contractors*, 459 U.S. at 521 (alteration in original) (quoting 15 U.S.C. § 15(a) (2012)).

136. *Id.* at 520–21.

137. *Id.*

138. *Id.* at 530.

139. *Id.* at 540.

140. *Id.*

injury and the alleged antitrust violation was direct or indirect.<sup>141</sup> It concluded that because the chain included “several somewhat vaguely defined links,” the injuries suffered by the union were “only an indirect result” of the harm suffered by certain unionized firms.<sup>142</sup> The Court then proceeded to engage in a policy analysis. The plaintiffs’ damages claim was “highly speculative,” it reasoned, because the complaint did not specify the injuries the union actually suffered as a result of the unlawful coercion.<sup>143</sup> Further, indirect chains of causation, like the union’s, created the risk of duplicative recovery and would require courts to engage in complex proceedings to properly apportion damages.<sup>144</sup>

Based on these three factors—the statutory purpose, the common law, and policy—the Court determined that the causal chain asserted by the union was not cognizable under the Clayton Act.<sup>145</sup> This precedent directly fostered the rise of these three frameworks in the subsequent case law. While all three approaches were present in the Court’s analysis, no one approach was predominant; thus, the Court could select and move among them in subsequent cases with equal precedential support. In doing so, the Court created three distinct analytical frameworks that are in conflict with one another, dictating entirely different proximate cause analyses and, in many instances, outcomes.

### *B. The Three Frameworks*

#### 1. Common Law Framework

In one group of cases, the Supreme Court applies what this Article terms the “common law framework” to determine the meaning of proximate cause under a given statutory cause of action. Under this framework, the Court looks to the common law as the authoritative source of meaning for proximate cause. The Court selects from among the range of options available under tort law to declare a proximate cause standard, setting aside the statutory context and policy considerations. The Court generally ignores the absence of a settled common law standard for proximate cause and treats the standard it has announced as the exclusive standard established by authoritative common law precedent. Under this

141. *Id.*

142. *Id.* at 540–41.

143. *Id.* at 542.

144. *Id.* at 543–44.

145. *Id.* at 545–46.

framework, the Court also regards the common law standard itself as sufficient to dictate the meaning of proximate cause. Practically speaking, this often means that the Court describes the outcome as axiomatic once it has announced a particular standard.

*Staub* provides a classic illustration of the Court's application of the common law framework. In that case, the Court considered the meaning of proximate cause under USERRA.<sup>146</sup> Specifically, the Court considered whether proximate cause was satisfied where an employee, who was subject to discriminatorily motivated corrective action in violation of USERRA, was subsequently terminated based in part on that discriminatory action.<sup>147</sup> The Court cited to the discussion of the common law in *Associated General Contractors* and declared that proximate cause "requires only 'some direct relation between the injury asserted and the injurious conduct alleged,' and excludes only those 'link[s] that [are] too remote, purely contingent, or indirect.'"<sup>148</sup> The Court then concluded, without further reasoning, that the causal chain was not "remote" or "purely contingent."<sup>149</sup> The Court repeated this two-step line of reasoning—importation of a common law standard followed by a declaration that the standard is met—in the following two sentences of the opinion: "Nor can the ultimate decisionmaker's judgment be deemed a superseding cause of the harm. A cause can be thought 'superseding' only if it is a 'cause of independent origin that was not foreseeable.'"<sup>150</sup> The opinion contained no further analysis.

The common law framework appeared again in *Hemi Group*, where the Court determined the meaning of proximate cause in a civil RICO claim.<sup>151</sup> The Court began its proximate cause analysis by declaring that "[p]roximate cause for RICO purposes . . . should be evaluated in light of its common-law foundations."<sup>152</sup> The Court then cited to precedent for the proposition that the common law standard for proximate cause "requires 'some direct relation between the injury asserted and the injurious conduct alleged.' A link that is 'too

146. *Staub v. Proctor Hosp.*, 562 U.S. 411, 419–20 (2011).

147. *Id.* at 416–17.

148. *Id.* at 419 (alterations in original) (quoting *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 9 (2010)).

149. *Id.* ("We do not think that the [fact of the intermediate cause] automatically renders the link to the [unlawful conduct] 'remote' or 'purely contingent.'"). Here, too, the Court simply concluded that the standard was not met, without providing reasoning or justification. *Id.* at 420.

150. *Id.* at 420 (quoting *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837 (1996)).

151. *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 8 (2010).

152. *Id.* at 9.

remote,’ ‘purely contingent,’ or ‘indirec[t]’ is insufficient.”<sup>153</sup> After applying this standard to the facts of the case at issue, the Court provided a very limited explanation of why this particular common law formulation was selected rather than any other.<sup>154</sup>

## 2. Public Policy Framework

In a second set of cases, the Court adopted a “public policy framework.” Under this framework, the Court engages in policy analysis to determine the meaning of proximate cause in a given statutory claim. The Court identifies public policy factors that it deems relevant to proximate cause and then considers how those factors interact with the statutory cause of action and the facts of the case before it. Thus, in cases analyzed through this framework, the application of proximate cause is simply a reflection of, and a proxy for, a policy-based approach to limiting liability.

In *Holmes v. Securities Investor Protection Corp.*,<sup>155</sup> the Court applied a public policy framework to determine the meaning of proximate cause in a different type of civil RICO claim. The plaintiff, the Securities Investor Protection Corporation (“SIPC”), alleged that the defendants conspired in a stock-manipulation scheme in violation of RICO that ultimately caused multiple companies’ stock values to plummet.<sup>156</sup> Two broker-dealers had bought substantial amounts of these stocks with their own funds such that, when the stocks’ values declined as a result of the manipulation, the broker-dealers were left without sufficient funds to meet their obligations to customers.<sup>157</sup> This inability to make good on the obligations triggered SIPC’s statutory duty to advance funds to reimburse the broker-dealers’ customers.<sup>158</sup> The Court considered whether the defendant’s RICO violation—participation in a stock-manipulation scheme—could be considered a proximate cause of the plaintiff’s injury, having to pay out the claims

153. *Id.* (alteration in original) (quoting *Holmes v. Sec. Inv’r Prot. Corp.*, 503 U.S. 258, 268, 271, 274 (1992)).

154. *Id.* at 12 (criticizing the dissent’s suggestion that the proximate cause determination turns on foreseeability without otherwise explaining why the majority’s formulation of proximate cause was correct). The dissent in *Hemi Group* criticized the majority for misinterpreting the common law, claiming that “under the ‘directness’ theory of proximate causation, there is liability for both ‘all “direct” (or “directly traceable”) consequences and those indirect consequences that are foreseeable.” *Id.* at 25 (Breyer, J., dissenting) (quoting *W. PAGE KEETON ET AL.*, *supra* note 64, § 42, at 273).

155. 503 U.S. 258 (1992).

156. *Id.* at 261.

157. *Id.*

158. *Id.*

of broker-dealers who were unable to satisfy their obligations to customers.<sup>159</sup>

The Court began its analysis with a brief explanation of common law proximate cause standards.<sup>160</sup> However, this discussion served primarily as a backdrop; the Court did not treat the common law standards or the statutory context as authoritative. Instead, the Court turned its attention to the policy reasons underlying why the directness standard and the “general tendency not to go beyond the first step” were applied in *Associated General Contractors*.<sup>161</sup> The Court identified four specific policy concerns that support employing the directness standard for proximate cause: (1) the difficulty in determining the precise amount of damages attributable to the violation, as distinct from other intermediate causes, when a plaintiff’s injury is indirect; (2) the complications courts face in properly apportioning damages so as to avoid duplicative recovery when plaintiffs are further removed from the unlawful conduct; (3) the lack of need for deterrence when directly injured victims can be counted on to sue; and (4) the speculative nature of chains of causation that involve multiple steps.<sup>162</sup>

The Court then assessed whether these concerns were implicated in the chain of causation asserted by SIPC.<sup>163</sup> It determined that SIPC’s chain of causation was indeed speculative because the district court would need to determine that the broker-dealers’ inability to satisfy their obligations was caused by the stock manipulation and not, for example, by their poor business practices or other factors.<sup>164</sup> The Court also concluded that the district court would face difficulty in apportioning damages between the broker-dealers and SIPC if both parties were permitted to sue.<sup>165</sup> The Court further reasoned that

159. *See id.* at 268–70.

160. *Id.* at 268. It recognized that proximate cause took “many shapes” at common law, among them a directness of relationship between the conduct and the injury. *Id.* The Court cited to *Associated General Contractors* for the proposition that “directness” is a central element for proximate cause applied in the Clayton Act, which includes similar language on causation as RICO. *Id.* at 268–69 (citing *Associated Gen. Contractors of Cal., Inc., v. Cal. State Council of Carpenters*, 459 U.S. 519, 536 n.33 (1983)). The Court also quoted the statement in *Associated General Contractors* that “[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step.” *Id.* at 271 (quoting *Associated Gen. Contractors*, 459 U.S. at 534).

161. *Id.* at 269–70 (quoting *Associated Gen. Contractors*, 459 U.S. at 534).

162. *Id.*; *see also id.* at 272–73 (discussing the difficulty in determining whether injuries to nonpurchasing customers came from the alleged conspiracy as opposed to a myriad of other factors).

163. *Id.* at 270–74.

164. *Id.* at 272–73.

165. *Id.* at 273.

the broker-dealers could be counted on to sue, and, thus, there was no need to extend liability to SIPC in the interests of promoting deterrence.<sup>166</sup> Lastly, the Court proclaimed that “[a]llowing suits by those injured only indirectly [by a RICO violation] would open the door to ‘massive and complex damages litigation[, which would] . . . burde[n] the courts . . . .’”<sup>167</sup> The Court engaged in no further analysis to determine the meaning of proximate cause under RICO and concluded, based on this policy-based reasoning, that SIPC’s claim as a secondary victim “does, and should, run afoul of proximate-causation standards . . . .”<sup>168</sup>

The Supreme Court returned to the public policy framework in *Anza v. Ideal Steel Corp.*,<sup>169</sup> a case interpreting the requirements for proximate cause in yet another type of civil RICO claim.<sup>170</sup> The Court cited to the *Holmes* directness standard for proximate cause in civil RICO claims to begin its analysis.<sup>171</sup> However, the Court gave meaning to the proximate cause requirement by invoking policy factors that it described as “the directness requirement’s underlying premises.”<sup>172</sup> The factors the Court articulated and then proceeded to apply to the facts at issue mirrored those in *Holmes*: “the difficulty that can arise when a court attempts to ascertain the damages caused by some remote action,” “the [potentially] speculative nature of the proceedings,” and whether “the immediate victims of an alleged . . . violation can be expected to vindicate the laws by pursuing their own claims.”<sup>173</sup> It is unclear from the Court’s analysis whether the application of policy factors serves as a justification for the directness standard or as an aid to interpret what that standard means in the

166. *Id.*

167. *Id.* at 274 (third and fifth alterations in original) (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 545 (1983)).

168. *Id.* (concluding its proximate cause discussion after application of the policy-based arguments).

169. 547 U.S. 451 (2006).

170. *Id.* at 453. In *Anza*, Ideal Steel Corporation (“Ideal”) sued National Steel Supply (“National”), a competitor, claiming that National was engaged in an unlawful racketeering scheme aimed at “gain[ing] sales and market share at Ideal’s expense.” *Id.* at 453–54 (alteration in original) (citation omitted). Ideal alleged that National failed to charge the required New York sales tax to cash-paying customers, which allowed National to reduce its prices without affecting its profit margins. *Id.* at 454. It further alleged that National submitted fraudulent tax returns to New York State to conceal its conduct. *Id.*

171. *Id.* at 456–57 (“The *Holmes* Court turned to the common-law foundations of the proximate-cause requirement, and specifically the ‘demand for some direct relation between the injury asserted and the injurious conduct alleged.’” (quoting *Holmes v. Sec. Inv’r Prot. Corp.*, 503 U.S. 258, 268 (1992))).

172. *Id.* at 458.

173. *Id.* at 458–60.

particular context.<sup>174</sup> Regardless, the Court's analysis boils down to an application of policy factors to a given set of facts to determine the meaning of proximate cause in the statutory cause of action. The Court concluded that proximate cause was not satisfied because the policy factors weighed against recognizing the unlawful conduct as a proximate cause of the plaintiff's injury.<sup>175</sup>

### 3. Legislative Intent Framework

Finally, in a third set of cases, the Court has adopted a "legislative intent framework." In these cases, the Court interpreted how far Congress intended recovery to extend to determine the meaning of proximate cause under the statute at issue.<sup>176</sup> The Court in these cases thus performed a statutory analysis, employing the traditional tools of statutory interpretation to determine the extent of liability contemplated by Congress.

The Court fully embraced the legislative intent framework in *Department of Transportation v. Public Citizen*,<sup>177</sup> in which it considered the meaning of proximate cause under NEPA.<sup>178</sup> Under NEPA, a federal agency is required to provide an Environmental Impact Statement ("EIS") before it promulgates regulations that will cause significant environmental effects.<sup>179</sup> The plaintiff, a nonprofit organization, alleged that the Department of Transportation's issuance of regulations allowing cross-border operations of Mexican-domiciled trucks caused significant environmental effects.<sup>180</sup> The issue before the Court was whether, under NEPA, the Department of Transportation's issuance of these regulations proximately caused the environmental effects, triggering the Department of Transportation's obligation to provide an EIS.<sup>181</sup> The Court characterized the proper

174. The Court states in one part of its opinion that "[t]he requirement of a direct causal connection is especially warranted where the immediate victims of an alleged RICO violation can be expected to vindicate the laws by pursuing their own claims," suggesting that the policy concerns dictate the standard to be applied. *See id.* at 460. The Court states in another part of the opinion, however, that "[t]he attenuated connection between [plaintiff's] injury and [defendant's] injurious conduct thus implicates fundamental [policy] concerns expressed in *Holmes* . . . . [T]hese concerns help to illustrate why [plaintiff's] alleged injury was not the direct result of a RICO violation." *Id.* at 459.

175. *Id.* at 461.

176. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 345–46 (2005); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 538–41 (1983).

177. 541 U.S. 752 (2004).

178. *Id.* at 765–69.

179. *Id.* at 763.

180. *Id.* at 759–62.

181. *Id.* at 767.

inquiry for proximate cause as “look[ing] to the underlying policies or legislative intent [of the statute] in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not.”<sup>182</sup> The Court then applied this analytical framework, beginning by identifying the purposes of NEPA’s EIS requirement.<sup>183</sup> It described the purposes as twofold: (1) to ensure that the agency will take into account information concerning the environmental effects of a potential regulation, and (2) to guarantee that this information will be made available to all parties involved in the decision-making process.<sup>184</sup> The Court analyzed whether requiring the Department of Transportation to produce an EIS in the particular circumstances at issue would serve either of these purposes.<sup>185</sup> It concluded that such a requirement “would fulfill neither of these statutory purposes” and, thus, held that proximate cause was not satisfied.<sup>186</sup>

The Court again applied the legislative intent framework seven years later in *CSX Transportation, Inc. v. McBride*.<sup>187</sup> There, the Court sought to determine the meaning of proximate cause under FELA, which holds railroads liable for employees’ injuries resulting from a railroad carrier’s negligence.<sup>188</sup> To begin its analysis, the Court rejected the common law as the proper source to determine the meaning of proximate cause in the statutory context.<sup>189</sup> The Court pointed to the “lack of consensus” on the proper standard for proximate cause in the common law and offered up a lengthy list of the various formulations applied in that context.<sup>190</sup> It then cited to studies showing that jurors rarely understand these common law standards when they are incorporated into jury instructions.<sup>191</sup> Instead, the Court framed the proximate cause inquiry in more

182. *Id.* (quoting *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 n.7 (1983)).

183. *Id.* at 768. The Court also stated that there is a “rule of reason” inherent in NEPA, which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decision-making process. *Id.*

184. *Id.*

185. *Id.* at 768–69.

186. *Id.* at 768. The Court reasoned that the Department of Transportation had no discretion to decide not to issue the regulation at issue, and therefore the production of an EIS would be futile. *Id.*

187. 564 U.S. 685 (2011).

188. *Id.* at 688; *see also* 45 U.S.C. § 51 (2012).

189. *Id.* at 692–93, 702–03.

190. *Id.* at 701.

191. *Id.* at 702.



generalized terms that did not rely on any particular common law formulation, ultimately characterizing it as simply a framework for limiting liability.<sup>192</sup>

To determine those limits in the context of FELA, the Court first looked to the statutory text, which provides that a railroad is liable for damages for an employee's "injury or death resulting in whole or in part from [carrier] negligence."<sup>193</sup> The Court described this language as "straightforward" and reasoned that Congress's use of "less legalistic language" indicates the legislature's purpose to "loosen constraints on recovery."<sup>194</sup> The Court reasoned that this purpose would be undermined and the plain language blunted if it were to interpret the statute to impose common law requirements, such as that the injury must be reasonably foreseeable or must arise in a "natural or probable sequence" from the unlawful conduct for recovery to be allowed.<sup>195</sup> The Court also looked to the broader objectives of FELA to supplement its interpretation of the statutory language.<sup>196</sup> It summarized that FELA was enacted to enable broad recovery for injured railroad workers and was expressly intended to overcome the barriers to recovery imposed by the "harsh and technical rules" of state common law.<sup>197</sup> The Court found that these objectives supported its interpretation that, to establish proximate cause, the railroad worker must show only that the railroad "caused or contributed to" his or her injury.<sup>198</sup> Based on this statutory analysis, the Court declared that the standard for proximate causation under FELA is whether "[the railroad's] negligence played a part—no matter how small—in bringing about the injury."<sup>199</sup>

The Court also adopted the legislative intent framework in *Lexmark*.<sup>200</sup> There, the Court analyzed the meaning of proximate cause under the provision of the Lanham Act that prohibits false advertising.<sup>201</sup> The Court framed its inquiry by noting that

192. *See id.* at 701 ("To prevent 'infinite liability,' courts and legislatures appropriately place limits on the chain of causation that may support recovery on any particular claim." (quoting *W. PAGE KEETON ET AL.*, *supra* note 64, § 41, at 264)).

193. *Id.* at 703 (alteration in original) (quoting 45 U.S.C. § 51 (2012)).

194. *Id.* at 702–03.

195. *Id.* at 704–05.

196. *Id.* at 695–96.

197. *Id.* at 695 (quoting *Bhd. of R.R. Trainmen v. Va. ex rel. Va. State Bar*, 377 U.S. 1, 3 (1964)).

198. *Id.* at 705.

199. *Id.* (alteration in original).

200. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132–39 (2014).

201. *Id.* at 122.

“[p]roximate-cause analysis is controlled by the nature of the statutory cause of action. The question it presents is whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits.”<sup>202</sup> The Court also considered the underlying purpose of the false advertising provision of the Lanham Act.<sup>203</sup> The Court determined that this provision was designed to protect against unfair competition in the market and thus authorized suits for commercial injuries only.<sup>204</sup> The Court reasoned that because the Lanham Act authorizes suits for commercial injuries, an intervening step of consumer deception must not be “fatal to the showing of proximate causation,” as all commercial injuries rely on this intermediate step.<sup>205</sup> Based on this analysis, the Court concluded that, to satisfy proximate cause under the Lanham Act, a plaintiff “ordinarily must show economic or reputational injury flowing directly from the deception wrought by the defendant’s advertising; and that that occurs when deception of consumers causes them to withhold trade from the plaintiff.”<sup>206</sup>

### C. *The Production of Doctrinal Incoherence*

The three frameworks have been in constant tension with one another throughout the statutory proximate cause case law. The Court’s application of the three has fluctuated: it utilized the public policy framework in 1992, the legislative intent framework in 2004, public policy again in 2006, the common law framework in 2010 and

202. *Id.* at 133.

203. *Id.* at 131.

204. *Id.* The Court performed a “zone of interests” test to determine standing under the Lanham Act. *Id.* at 129–30. The “zone of interests” doctrine provides that a statutory cause of action extends only to plaintiffs whose interests “fall within the zone of interests protected by the law invoked.” *Id.* at 129 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). The zone of interests test is used to determine standing in statutory claims. *Id.* at 125–26.

205. *Id.* at 133.

206. *Id.* The *Lexmark* Court also considered policy factors in some parts of its analysis. The Court reasoned that the plaintiff’s claims did not involve “‘speculative . . . proceedings’ or ‘intricate, uncertain inquiries.’” *Id.* at 140 (quoting *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 459–60 (2006)). The Article, however, classifies the Court’s framework as legislative intent because the Court anchored the proximate cause inquiry in the statutory structure and purpose. The Court considered policy factors only at the very end of its analysis and appeared to view these factors as providing additional support, but not the primary justification, for its outcome. Further, although the Court very briefly stated general common law rules of proximate cause, it did not utilize these in its primary analysis. *See id.* at 132.

2011, and legislative intent again in 2011 and 2014.<sup>207</sup> In multiple cases, Justices have written dissents or concurrences criticizing the majority's chosen framework and arguing that one of the other two frameworks should apply. In *Anza*, where the Court embraced a public policy framework, Justice Thomas wrote a dissent criticizing that framework and advocating for a legislative intent approach.<sup>208</sup> In *CSX Transportation*, meanwhile, where the majority opinion applied a legislative intent framework, Chief Justice Roberts authored a dissenting opinion to which Justices Kennedy, Scalia, and Alito joined that advocated a common law approach.<sup>209</sup> Only a year prior to the Court's release of *CSX Transportation*, however, the Court had applied the common law framework in *Hemi Group*, where the dissent argued that doing so would undermine the legislative intent of RICO.<sup>210</sup>

Yet neither the Court nor the individual Justices in dissenting or concurring opinions have articulated principles to justify the fluctuation among frameworks. That is, the opinions have not provided explanations for why the public policy framework is the

207. For cases applying the public policy framework, see *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 458–61 (2006); *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 272–75 (1992). For cases applying the legislative intent framework, see *Lexmark*, 572 U.S. at 137; *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 702–05 (2011); *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 765–69 (2004). For cases applying the common law framework, see *Staub v. Proctor Hosp.*, 562 U.S. 411, 419–22 (2011); *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 9–10 (2010).

208. See *Anza*, 547 U.S. at 463–79 (Thomas, J., concurring in part & dissenting in part). Justice Thomas directly attacked the Court's use of policy factors to arrive at the meaning of proximate cause, arguing that the mere fact that it is difficult to ascertain the amount of damages or that it is unnecessary for deterrence are not proper reasons for the Court to determine that proximate cause is not satisfied. *Id.* at 466. Justice Thomas claimed that the statute itself was the proper source to draw upon for the meaning of proximate cause and that the majority's failure to do so led to an erroneous result because “civil RICO plaintiffs that suffer precisely the kind of injury that motivated the adoption of the civil RICO provision will be unable to obtain relief.” *Id.* at 475. In essence, Justice Thomas was arguing for application of the legislative intent framework the Court had adopted only two years prior in *Department of Transportation*.

209. *CSX Transp.*, 564 U.S. at 705–06 (Roberts, C.J., dissenting). The dissent framed its analysis by quoting language from *Staub*—where the Court had applied the common law framework—that “[w]hen Congress creates such a federal tort, ‘we start from the premise that Congress adopts the background of general tort law.’” *Id.* at 706 (quoting *Staub*, 562 U.S. at 417). Chief Justice Roberts reasoned that Congress had not included language in FELA expressly indicating that it was abrogating common law principles of proximate cause, and, thus, the common law applied. See *id.* at 708. He then summarized the various common law formulations of proximate cause. *Id.* at 719. Without selecting among them or providing guidance for the lower courts to do so, the Chief Justice maintained that these standards should dictate the meaning of proximate cause under the statute. *Id.*

210. *Hemi Grp.*, 559 U.S. at 23–24 (Breyer, J., dissenting).

more appropriate framework in one statutory context but legislative intent or common law is more appropriate in another. An analysis of *Staub* and *CSX Transportation*, released within a mere three-and-a-half months of one another, is illustrative. In *Staub*, the Court imported common law standards for the meaning of proximate cause without explaining why it adopted that framework rather than considering the legislative intent or policy factors.<sup>211</sup> The Court simply asserted the common law standards and applied them to the facts at issue, never considering or in any way addressing policy or the legislative intent around proximate cause.<sup>212</sup> Less than four months after the release of *Staub*, however, the Court expressly disavowed the blind application of the common law in *CSX Transportation*, emphasizing “the lack of consensus on any one definition of ‘proximate cause.’”<sup>213</sup> The Court made no mention of its contrary approach in *Staub* or to the fact that it had not found the lack of consensus problematic in that context.<sup>214</sup> Turning a blind eye to this discord, the Court performed an analysis of the legislature’s intended meaning of proximate cause.<sup>215</sup>

The dissent in *CSX Transportation* criticized the majority’s legislative intent approach and argued for the application of a common law framework.<sup>216</sup> However, the dissent put forth no principled reasoning for why this particular framework was the most appropriate one, merely quoting from *Staub* that, “[w]hen Congress creates such a federal tort, ‘we start from the premise’ that ‘Congress adopts the background of general tort law.’”<sup>217</sup> The dissenting Justices ignored the fact that the Court, many times in opinions they had joined, had taken a variety of approaches to determine the meaning of proximate cause. Justice Kennedy, for example, who joined the *CSX Transportation* dissent,<sup>218</sup> had been part of the majority in *Department of Transportation*, which embraced precisely that framework—legislative intent—against which he now voiced his

211. *Staub*, 562 U.S. at 419 n.2 (citing RESTATEMENT (SECOND) OF TORTS §§ 435, 435B (AM. LAW INST. 1965)).

212. *Id.* at 419–20.

213. *CSX Transp.*, 564 U.S. at 701–02 (citing W. PAGE KEETON ET AL., *supra* note 64, § 41, at 263).

214. *Id.*

215. *Id.* at 704–05.

216. *Id.* at 705–06 (Roberts, C.J., dissenting).

217. *Id.* at 706 (quoting *Staub*, 562 U.S. at 417).

218. *Id.* at 705.

opposition.<sup>219</sup> In *CSX Transportation*, he simply endorsed the dissenting opinion's view that common law proximate cause standards "suppl[y] the vocabulary" for determining the meaning of the concept.<sup>220</sup> Three years after *CSX Transportation*, the Court again applied the legislative intent framework in *Lexmark*, but in that case the opinion was unanimous, with the Justices who dissented in *CSX Transportation* joining the majority.<sup>221</sup> Once again, the Court provided no reasoning for why it chose to employ that particular framework.

The vacillation in frameworks, indeed, cannot be explained as merely a function of the Court's composition. The individual Justices appear to have no fidelity to one particular framework over any other: Justice Scalia signed onto both the common law and legislative intent frameworks, and Justices Ginsburg, Thomas, Breyer, and Kennedy have endorsed all three within a period of only a few years.<sup>222</sup> Thus, the inconsistency in the Court's approaches is not a

219. See *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 755, 768 (2004) (discussing the legislative purposes for the statute at issue).

220. *CSX Transp.*, 564 U.S. at 719 (Roberts, C.J., dissenting) ("Proximate cause supplies the vocabulary for answering such questions. It is useful to ask whether the injury that resulted was within the scope of the risk created by the defendant's negligent act; whether the injury was a natural or probable consequence of the negligence; whether there was a superseding or intervening cause; whether the negligence was anything more than an antecedent event without which the harm would not have occurred.").

221. Justices Scalia, Kennedy, and Alito joined Chief Justice Roberts's dissent in *CSX Transportation*. See *id.* at 705. All four Justices then joined the majority in *Lexmark*. See *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 120 (2014).

222. Justice Scalia authored the unanimous opinion in *Lexmark*, which utilized the legislative intent framework, and joined the dissent in *CSX Transportation*, which advocated for the common law framework. See *id.* at 120; *CSX Transp.*, 564 U.S. at 705 (Roberts, C.J., dissenting). Justice Ginsburg authored *CSX Transportation*, which illustrated the legislative intent framework, joined the majority in *Staub*, which used the common law framework, and joined the majority in *Anza*, in which the Court relied on the public policy framework. See *CSX Transp.*, 564 U.S. at 688; *Staub v. Proctor Hosp.*, 562 U.S. 411, 412 (2011); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 452 (2006). Justice Thomas joined the opinion in *Lexmark*, which utilized the legislative intent framework, joined in part of the majority in *CSX Transportation*, which advocated for the common law framework, and joined the majority in *Holmes*, which used the public policy framework. *Lexmark*, 572 U.S. at 120; *CSX Transp.*, 564 U.S. at 687; *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 260 (1992). Justice Breyer joined the majorities in *Lexmark* and *Staub*, which relied on the legislative intent and common law frameworks respectively, and concurred in *Anza*, where the Court utilized the public policy framework. *Lexmark*, 572 U.S. at 120; *Staub*, 562 U.S. at 412; *Anza*, 547 U.S. at 479. Justice Breyer wrote a dissent in *Anza*, but it was based on different grounds. See *Anza*, 547 U.S. at 479 (Breyer, J., concurring in part and dissenting in part). Justice Kennedy authored the majority in *Anza*, which utilized the public policy framework and joined the majorities in *Lexmark*, which used the legislative intent framework, and *Staub*, which used the common law framework. *Lexmark*, 572 U.S. at 120; *Staub*, 563 U.S. at 412; *Anza*, 547 U.S. at 452.

reflection of competing views among the Justices about the appropriate way to address proximate cause in statutory claims; the analytical allegiances of the individual Justices appear to be just as fluid.

The availability of three analytical frameworks in precedential parity instead serves as a mechanism for the Court to reach outcomes desired on independent grounds. The Court can pick its preferred outcome and then reach it based on whichever of the three frameworks will provide the strongest justification. Indeed, when the Court deviates from its prior framework, it usually does so to reach a standard or outcome that conflicts with the result it would have reached had it applied the prior analytical structure. For example, in *Department of Transportation*, the Court employed a legislative intent framework even though it had most recently applied a public policy framework in *Holmes*.<sup>223</sup> Applying the legislative intent framework, the Court concluded that proximate cause was not satisfied under NEPA because recognizing liability for the chain of causation at issue would not fulfill NEPA's purposes.<sup>224</sup> However, had the Court considered policy factors, as it had in *Holmes*, it quite likely would have had to reach a different outcome. Allowing suit for the plaintiff's alleged injury would not have introduced speculation into the proceedings nor would it have required the Court to craft complicated rules to avoid duplicative damages.<sup>225</sup> It also would not have opened the door to "massive and complex damages litigation."<sup>226</sup> These policy factors all would have weighed in favor of recognizing proximate cause, and, thus, had the Court applied a public policy framework, it would have surely found proximate cause. The Court, however, shifted its approach.

223. See *Dep't of Transp.*, 541 U.S. at 767–69; *Holmes*, 503 U.S. at 268–70.

224. *Dep't of Transp.*, 541 U.S. at 769.

225. NEPA's requirement that an administrative agency produce an EIS whenever it is promulgating a regulation that will cause an "environmental effect" has nothing to do with speculation. The Court's concern was in fact the opposite of speculation—it knew that the regulation at issue would have an environmental effect and was concerned that recognizing proximate cause would be futile because the agency would be bound to issue the regulation regardless of the outcome of the EIS. *Id.* at 769–70. Moreover, duplicative damages are inapposite to the NEPA provision at issue—the provision only provides for injunctive relief in the form of obligating the agency to produce the EIS. See *id.* at 756–57, 769–70.

226. *Holmes*, 503 U.S. at 274 (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 545 (1983)). Again, damages are not available under the NEPA provision at issue, and, thus, the policy concern that a finding of liability will lead to massive and complex damages litigation is inapplicable. See *Dep't of Transp.*, 541 U.S. at 763 (noting that the Court was deciding whether or not to set aside an agency's decision to prepare an EIS).

Similarly, in *Anza*, the Court applied a public policy framework but likely would have reached a different result had it employed the legislative intent framework as it had in the case most immediately prior, *Department of Transportation*. In *Anza*, the Court considered whether the defendant corporation, a competitor of the plaintiff corporation, proximately caused the plaintiff to lose sales by engaging in unlawful business conduct (specifically, failing to pay state taxes and submitting fraudulent tax returns) in violation of RICO.<sup>227</sup> The Court concluded that it would not be appropriate to recognize proximate cause because of the difficulty of ascertaining the precise damages attributable to the defendant's violation, the "speculative nature of the proceedings that would follow," and because the more immediately injured victim—in this case, the State of New York—could be counted on to sue.<sup>228</sup> However, had the Court performed a legislative intent analysis, it would have asked whether recognizing the defendant's conduct as a proximate cause of the plaintiff's injuries would advance RICO's purposes and most certainly would have had to answer that question in the affirmative.<sup>229</sup> Indeed, as Justice Thomas pointed out in his dissent, the plaintiff's injuries "are precisely those that Congress aimed to remedy through the authorization of civil RICO suits": competitive injuries resulting from organized crime.<sup>230</sup> Thus, under the legislative intent framework, the Court most likely would have found proximate cause satisfied. However, employing a different analytical framework, the Court reached a contrary result.

The same phenomenon is evident in the Court's decision to apply the legislative intent framework in *CSX Transportation* after adopting the common law framework in the prior two statutory proximate cause cases.<sup>231</sup> As the majority itself acknowledged, application of the common law standards for proximate cause would have led to a different outcome.<sup>232</sup> The Court's announced standard for proximate cause under FELA, whether the "negligence played a part—no matter how small—in bringing about the injury," expressly deviated

227. *Anza*, 547 U.S. at 457–58.

228. *Id.* at 459–60.

229. *See id.* at 474–75 (Thomas, J., dissenting).

230. *Id.* at 463, 457.

231. *See* *Staub v. Proctor Hosp.*, 562 U.S. 411, 417 (2011); *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 10 (2010).

232. *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 705 (2011) (noting that use of "stock proximate-cause" language might mislead the jury away from the standard Congress intended).

from common law formulations.<sup>233</sup> The Court declared the “legislative purpose” of Congress in enacting FELA was to “loosen constraints on recovery,” and, therefore, “there is little reason for courts to hark back to stock judge-made proximate-cause formulations.”<sup>234</sup>

The instability in the Court’s statutory proximate cause analysis came to a head in *Bank of America*, where the Court attempted to incorporate all three frameworks into its analysis—completing the loop back to *Associated General Contractors*—but was left unable to arrive at any substantive standard for proximate cause under the FHA.<sup>235</sup> The Court first imported the language from *Lexmark*, used there to frame a legislative intent analysis, that “[p]roximate-cause analysis is controlled by the nature of the statutory cause of action. The question it presents is whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits.”<sup>236</sup> The Court then, however, embraced a common law framework and stated that various common law formulations are applicable.<sup>237</sup> The Court meanwhile noted that the proximate cause standard the Eleventh Circuit had announced, foreseeability, “would risk ‘massive and complex damages litigation.’”<sup>238</sup> Despite the application of all three frameworks, the Court’s analysis led to no concrete definition of proximate cause under the FHA.<sup>239</sup>

#### IV. SCOPE OF LIABILITY FRAMEWORK

As documented in Parts II and III, the Court’s simultaneous endorsement of three inconsistent analytical frameworks to determine the meaning of proximate cause in statutory claims has given rise to a body of case law marked by inconsistency and

233. *Id.* (“[I]t is not error in a FELA case to refuse a [jury instruction] embracing stock proximate-cause terminology.”).

234. *Id.* at 702–03.

235. *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1306 (2017) (“The parties have asked us to draw the precise boundaries of proximate cause under the FHA and to determine on which side of the line the City’s financial injuries fall. We decline to do so.”).

236. *Id.* at 1305 (quoting *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 133 (2014)).

237. *Id.* at 1306 (“[P]roximate cause ‘generally bars suits for alleged harm that is “too remote” from the defendant’s unlawful conduct.’ . . . [P]roximate cause under the FHA requires ‘some direct relation between the injury asserted and the injurious conduct alleged.’” (first quoting *Lexmark*, 572 U.S. at 133; and then quoting *Holmes v. Sec. Inv’r Prot. Corp.*, 503 U.S. 258, 268 (1992))).

238. *Id.* (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 545 (1983)).

239. *Id.* (inviting the lower courts to “define, in the first instance, the contours of proximate cause under the FHA”).



indeterminacy.<sup>240</sup> Statutory proximate cause standards and outcomes are doctrinally unjustified, and the jumbled precedent leaves lower courts with inadequate guidance to determine the meaning of proximate cause in new statutory contexts. To settle the deep incoherence in statutory proximate cause doctrine, this part proposes that the Supreme Court and lower courts embrace a single, structured analytical framework to determine the meaning of proximate cause in statutory claims. Specifically, this part argues that courts should uniformly apply the “scope of liability framework,”<sup>241</sup> as articulated in the *Restatement (Third) of Torts*, to determine the meaning of proximate cause under a given statutory cause of action.

This part proceeds in four subsections. The first subsection describes the scope of liability framework as set forth in the *Restatement (Third) of Torts* and outlines the analysis it would require in a statutory context. The second subsection argues that the scope of liability framework appropriately anchors the determination of proximate cause in the statutory scheme. It argues that the scope of liability framework prevents the Court from engaging in improper judicial policymaking and thereby avoids the serious flaws of the public policy framework. The third subsection contends that the scope of liability framework is also superior to the common law framework because it is more likely to produce consistent and predictable proximate cause standards and outcomes. Finally, the fourth subsection explains why scope of liability is a more optimal framework than the Court’s existing legislative intent framework.

#### A. *The Scope of Liability Framework*

The *Restatement (Third) of Torts* wholly replaces the term proximate cause with the phrase “scope of liability.”<sup>242</sup> This definitional shift roots the concept of proximate cause in the notion that negligent conduct causes a series of harms, and only some of those harms fall within the scope of liability that the law is willing to recognize.<sup>243</sup> The framing has echoes of Judge Andrews’s dissent in *Palsgraf*—that proximate cause is essentially about how far the court decides to extend liability—but is accompanied by a more structured

240. While pure doctrinal determinacy in any area of law is likely illusory, and there may be strong reasons such a goal is undesirable, heightened doctrinal indeterminacy raises serious concerns of judicial illegitimacy. *See* Allen, *supra* note 19, at 125–29.

241. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 (AM. LAW INST. 2010).

242. *Id.*

243. *Id.* § 29 cmt. a.

analysis for making that determination.<sup>244</sup> Under a scope of liability framework, “[a]n actor’s liability is limited to those physical harms that result from the risks that made the actor’s conduct tortious.”<sup>245</sup> The reporters term this inquiry the “scope of the risk” test.<sup>246</sup> The *Restatement (Third) of Torts* explains the test:

When defendants move for a determination that plaintiff’s harm is beyond the scope of liability as a matter of law, courts must initially consider all of the range of harms risked by the defendant’s conduct that the jury *could* find as the basis for determining that conduct tortious. Then the court can compare the plaintiff’s harm with the range of harms risked by the defendant to determine whether a reasonable jury might find the former among the latter.<sup>247</sup>

Thus, the scope of liability in a tort claim is based on the scope of the risks underlying the determination of negligence.<sup>248</sup>

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

245. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29. Both prior Restatements stated that legal cause required the showing of two elements: (1) the actor’s conduct is a “substantial factor in bringing about the harm,” and (2) there is “no principle or rule of law which restricts the actor’s liability because of the manner in which the act or omission operates to bring about such invasion.” RESTATEMENT (SECOND) OF TORTS § 9 cmt. b (AM. LAW INST. 1965); accord RESTATEMENT OF TORTS: INTENTIONAL HARMS TO PERSONS, LAND, AND CHATTELS § 9 cmt. b (AM. LAW INST. 1934).

246. The test is also known as the “risk standard.” See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmt. d. The test is effectively the same as “the risk rule” coined by Robert Keeton in his classic book on proximate cause. ROBERT E. KEETON, *LEGAL CAUSE IN THE LAW OF TORTS* 9–10 (1963); see also Zipursky, *supra* note 19, at 1253 (summarizing section 29 of the *Restatement (Third) of Torts* and Keeton’s book).

247. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmt. d. Jane Stapleton observes that the “scope of the risks” inherently derives from the normative concerns that underlie the recognition of the actor’s conduct as tortious. See Jane Stapleton, *The Risk Architecture of the Restatement (Third) of Torts*, 44 WAKE FOREST L. REV. 1309, 1327 (2009) [hereinafter Stapleton, *Risk Architecture*] (“Only by an explicit link back to the complex normative reasons courts give (or should be giving) to explain the contours, the ‘normative envelope,’ of the relevant ‘special relationship’ giving rise to the duty will the *Restatement (Third)* user understand which are the risks that made the actor’s conduct tortious and therefore how to apply the perimeter scope rule.”).

248. Note that the *Restatement (Third) of Torts* proposes an even broader standard for the scope of liability in intentional and reckless torts. Section 33 of the Restatement, *Scope of Liability for Intentional and Reckless Tortfeasors*, states:

- (a) An actor who intentionally causes harm is subject to liability for that harm even if it was unlikely to occur.
- (b) 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

The quintessential example provided to illustrate the application of the scope of the risk test is that of a parent who gives a child a loaded gun, which the child then drops on the foot of the plaintiff, causing injury.<sup>249</sup> To determine whether this injury falls within the scope of liability, a court would identify the proscriptive rule—do not give a child a loaded gun—and ask what risks it was intended to prevent.<sup>250</sup> A court would answer that handing a child a loaded gun is tortious because of the risk that the child will shoot the gun and thereby injure or kill someone.<sup>251</sup> Thus, while one could establish that the parent was negligent in giving the child the gun, the harm caused by the child dropping the gun on the plaintiff's foot would not be actionable because it does not fall within the scope of the risk that made the conduct negligent.<sup>252</sup>

The *Restatement (Third) of Torts* explains the reasoning underlying this framework. The scope of liability framework “imposes limits on liability by reference to the reasons for holding an actor liable for tortious conduct in the first place.”<sup>253</sup> It goes on to state that “[t]he risk standard appeals to intuitive notions of fairness and proportionality by limiting liability to harms that result from risks created by the actor's wrongful conduct, but for no others.”<sup>254</sup> While the scope of liability framework overlaps in certain respects with an approach based on foreseeability, it ultimately provides a narrower and more focused inquiry: only those foreseeable injuries that formed the basis for declaring the conduct tortious are within the scope of

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only acting negligently. In general, the important factors in determining the scope of liability are the moral culpability of the actor, as reflected in the reasons for and intent in committing the tortious acts, the seriousness of harm intended and threatened by those acts, and the degree to which the actor's conduct deviated from appropriate care.

(c) Notwithstanding Subsections (a) and (b), an actor who intentionally or recklessly causes harm is not subject to liability for harm the risk of which was not increased by the actor's intentional or reckless conduct.

RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 33; *see also id.* § 33 cmt. a (“[T]he scope of liability for intentional and reckless tortfeasors should be broader than for negligent or strictly liable tortfeasors.”).

249. *See* Stapleton, *Risk Architecture*, *supra* note 247, at 1324.

250. *See, e.g., id.* (discussing that the father's wrongful conduct was the “loadedness of the gun,” which risked the child accidentally shooting someone, not dropping it on someone's toe).

251. *Id.*

252. *Id.*

253. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmt. e.

254. *Id.*

liability. Thus, in the gun example, although it may be foreseeable that the child would drop the gun, injuries caused from dropping the gun would never fall within the scope of liability because they are not among the risks the rule was enacted to prevent.

In the statutory context, courts applying the scope of liability framework would perform the scope of the risk test by asking what class of harms the legislature intended to address when it enacted the statutory prohibition at issue. Courts would seek to discern the purpose of the statutory prohibition and, more specifically, what types of harmful outcomes the prohibition was designed to prevent or minimize by employing the traditional tools of statutory interpretation. Thus, through textualist methodologies, courts would gain insight into the scope of the risks based on statutory provisions that, for example, indicate the types of injuries that the statute was intended to address.<sup>255</sup> Similarly, through intentionalist methodologies, courts would look to the legislative history to determine the harms the statutory prohibition was meant to prevent or minimize.<sup>256</sup> Like in common law tort claims, the outcome of the scope of the risk test would determine the scope of liability, i.e., the standard for proximate cause.

#### B. *Avoidance of Improper Judicial Legislation*

The scope of liability framework is the optimal framework for proximate cause analysis because it properly anchors the analysis in the statutory scheme. As Sandra Sperino has correctly observed in her discussions of statutory proximate cause, when the legislature enacts a statutory prohibition, it conceives of a web of rights and duties that form “interlocking liability limits.”<sup>257</sup> The scope of liability framework provides an elegant analytical tool for discerning a proximate cause standard that aligns with those limits. The

255. For example, a civil statute outlawing the sale of guns to minors might provide that its purpose is to prevent needless gun violence and that any individual who has been injured by a minor’s improper use of a gun may sue. Such provisions would indicate that the risks the statute is designed to prevent are gun violence by minors and resulting injury.

256. For example, in the fictitious civil statute described in note 255, *supra*, the legislative history may include statements by congressional sponsors describing the deaths and physical injuries resulting from shootings by minors. It may also include debates about whether allowing victims or their estates to sue will help reduce such deaths and injuries. Perhaps, however, it includes no mention whatsoever of the financial or emotional harms that are experienced by family members of the victims. The latter version of history would serve as a strong indication that the statute was *not* designed to address this particular risk of youth gun violence, i.e., the financial and emotional injury to the family members of victims, and thus, liability should not extend to those individuals.

257. Sperino, *Statutory Proximate Cause*, *supra* note 8, at 1200.

framework reflects the intuitive sensibility that, where the legislature has enacted a statute with the goal of minimizing or eliminating a particular harm, we can and should assume that the legislature intended for liability to extend where a defendant's violation of the statute in fact caused that harm to occur. In other words, in the absence of statutory text that supplies the standard for proximate cause, the best proxy for the legislature's intent regarding the "ripples of harm" that are recoverable under the statute are the ripples that Congress sought to address.<sup>258</sup>

Conversely, it is improper for the Court to apply independent policy analysis in determining the proper limit for recoverability against the backdrop of a statutory scheme. The Court's independent views about the difficulty in crafting damages rules or the need to promote deterrence have no proper role in determining a statute's proximate cause standard where the legislative intent regarding that standard is discernible.<sup>259</sup> To allow otherwise would violate core separation of powers principles.<sup>260</sup> If the statutory scheme requires courts to craft complicated rules to apportion damages, for example,

258. See *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1306 (2017) ("A violation of the FHA may, therefore, 'be expected to cause ripples of harm to flow' far beyond the defendant's misconduct." (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 534 (1983))).

259. The well-established principle of legislative supremacy provides that courts are subordinate to legislatures in all nonconstitutional areas of policymaking. See Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 281–82 (1989) ("It is a commonplace that, apart from constitutional issues, judges are subordinate to legislatures in the making of public policy. If this subordinate role means anything at all, it must somehow constrain judges who interpret statutes from implementing their own notions of public policy."). Although differing views about the meaning and significance of legislative supremacy lead to varying approaches to statutory interpretation, no theory of legislative supremacy supports the independent application of policy factors where the legislative intent regarding an open question of statutory interpretation is discernible. See Edward O. Correia, *A Legislative Conception of Legislative Supremacy*, 42 CASE W. RES. L. REV. 1129, 1141 (1992); Earl M. Maltz, *Rhetoric and Reality in the Theory of Statutory Interpretation: Underenforcement, Overenforcement, and the Problem of Legislative Supremacy*, 71 B.U. L. REV. 767, 780–81 (1991) (analyzing different statutory interpretation frameworks with regard to their relationship to legislative supremacy).

260. The rule of legislative supremacy, see *supra* note 259, derives from the constitutional separation of powers. Legislative supremacy constrains courts from imposing their own policy preferences on statutes, holding that Congress is authorized by the Constitution to act as the primary maker of laws and policy, and thus, where Congress has resolved a legal or policy question, courts are "obligated to respect the legislature's decision" so long as that decision is constitutional. Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 B.U. L. REV. 209, 241 (2015); see also Farber, *supra* note 259, at 292 ("When statutory language and legislative intent are unambiguous, courts may not take action to the contrary. In other words, when legislation clearly embodies a collective legislative understanding, the court must give way, even if its own view of public policy is quite different.").

it is likely the legislature's intent that courts do so.<sup>261</sup> The fact that the task may be difficult does not give courts permission to decline to allow such suits to go forward nor does it relieve them of their obligation.<sup>262</sup>

Justice O'Connor's concurrence in *Holmes* highlighted precisely this limitation on the judiciary's interpretative authority, citing recent Supreme Court precedent that held that where Congress enacts a statute providing a private right of action for damages, courts are bound to administer the statute regardless of whether they agree with its wisdom.<sup>263</sup> Judges cannot interpret damages provisions to be more limited than a statute provides because of the challenges involved in administration—such an interpretative reach by the judiciary would represent a serious encroachment on the legislature's power.<sup>264</sup> Similarly, a court's independent judgment regarding deterrence—the extent to which it is necessary to allow suits to go forward to deter prohibited conduct—has no proper role in setting limits on liability where the statute's structure and purpose already reflect those limits.<sup>265</sup> No theory of statutory interpretation supports an approach to the determination of proximate cause that so clearly flies in the face of separation of powers principles.<sup>266</sup>

Moreover, where the legislative intent surrounding the limitations on liability is ambiguous, courts do not gain authority to

261. Even the “weakest” notions of legislative supremacy involve judicial deference to the text and purpose of a statute. See William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1065 (1989) (“[I]f the text and legislative history support one interpretation, public values analysis cannot displace it. In many cases, the public values presumptions operate as ‘tiebreakers’ in the close cases, where there are good textual and legislative history arguments for different interpretations.”). Yet even when the case is not close, the doctrine of legislative supremacy does not permit courts to look beyond the statute in the first instance to determine statutory meaning. See Farber, *supra* note 259, at 284.

262. See *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 285 (1992) (O'Connor, J., concurring) (“[I]f Congress had legislated the elements of a private cause of action for damages, the duty of the Judicial Branch would be to administer the law which Congress enacted; the Judiciary may not circumscribe a right which Congress has conferred because of any disagreement it might have with Congress about the wisdom of creating so expansive a liability.” (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 748 (1975))).

263. *Id.*

264. See *supra* notes 259–60.

265. See *supra* notes 259–60.

266. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 353 (1990) (articulating a practical reasoning model of statutory interpretation premised on the “hierarchy of sources,” which shows the statutory text, specific and general legislative history, and legislative purpose as more authoritative than “current policy”).

abandon the statute entirely and set a standard based on what would be convenient to implement or on what they judge as good policy. Rather, separation of powers principles require courts to determine the standard for proximate cause that most closely aligns with the overall statutory scheme.<sup>267</sup> Policy concerns may be relevant, but they still must be rooted in the statute—the extent to which the legislature was concerned about deterrence or avoiding duplicative recovery, for example—rather than the judiciary’s independent views on those issues. The Court’s public policy framework ignores these constitutional concerns altogether and treats the proximate cause determination as if it is capable of being understood in a vacuum, when in fact, a statute’s legislative purpose provides relevant limitations on the extent of harm that is recoverable.<sup>268</sup>

Finally, it bears mentioning that concerns about speculation and the ability to ascertain the precise amount of damages attributable to the unlawful conduct need not be addressed by proximate cause because they are already accounted for in other judicial rules. As described in Part II, causation encompasses two separate elements: factual cause and proximate cause. The factual causation requirement already protects defendants from recovery for speculative claims.<sup>269</sup> To satisfy factual cause, the plaintiff must demonstrate that the injury would not have occurred *but for* the defendant’s conduct and, moreover, that the defendant’s conduct was a *substantial factor* in bringing about the injury.<sup>270</sup> Thus, to the extent a plaintiff’s claim is speculative because the plaintiff cannot establish that the injury is in fact attributable to the unlawful conduct rather than to some other intermediate cause, the plaintiff would not be able to satisfy factual causation.<sup>271</sup> Requiring proximate cause to provide that same

267. See *supra* notes 259–60.

268. See Sperino, *Statutory Proximate Cause*, *supra* note 8, at 1247 (“To date, courts have approached [proximate cause questions] casually and without recognizing that statutory proximate cause raises important concerns related to separation of powers and the interaction of the common law with statutes.”).

269. Proximate cause doctrine is heavily criticized for often mistakenly incorporating elements of factual causation. See Michael D. Green, *The Intersection of Factual Causation and Damages*, 55 DEPAUL L. REV. 671, 680–81 n.31 (2006); Sperino, *Statutory Proximate Cause*, *supra* note 8, at 1223; Stapleton, *Legal Cause*, *supra* note 19, at 967.

270. *Paroline v. United States*, 572 U.S. 434, 444 (2014).

271. See *Holmes v. Sec. Inv’r Prot. Corp.*, 503 U.S. 258, 269 (1992) (“[T]he less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff’s damages attributable to the violation, as distinct from other, independent factors.”); *id.* at 272–73 (“If the nonpurchasing customers were allowed to sue, the district court would first need to determine the extent to which their inability to collect from the broker-dealers was the result of the alleged conspiracy to manipulate, as opposed to, say, the broker-dealers’ poor business practices or their failures to anticipate developments in the financial markets.”);

protection is unnecessary and also blurs the important distinction between the two causation requirements.

Other safeguards against speculative claims are found in the rules of civil procedure. Chiefly, Federal Rule of Civil Procedure 12(b)(6) requires “[f]actual allegations [to] be enough to raise a right to relief above the speculative level on the assumption that all of the complaint’s allegations are true.”<sup>272</sup> To satisfy this standard, a complaint’s allegations must include statements of fact that entitle the plaintiff to relief, and those statements must not be merely “labels and conclusions.”<sup>273</sup> Rule 12(b)(6) is thus expressly crafted to provide relief (in the form of a dismissal) where the plaintiff’s allegations are speculative in nature; proximate cause need not serve the very same function.<sup>274</sup> And where borderline speculative allegations survive a challenge at the pleading stage, other safeguards exist at the level of proof: to prevail on a claim, the plaintiff must demonstrate facts that meet the “preponderance of the evidence” threshold for relief and must establish specific damages.<sup>275</sup>

The scope of liability framework properly anchors proximate cause analysis in the statutory scheme and, in doing so, restrains courts from engaging in the type of improper judicial legislation inherent in the public policy framework.<sup>276</sup> The scope of the risk test requires courts to discern the legislative goals underlying the statutory prohibition at issue, and the line that is drawn for proximate cause, i.e. the scope of liability, is then a function of the legislature’s goals. The test thus leaves little leeway for courts to deviate from the

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*see also* *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 460 (2006) (asserting that proximate causation is meant to prevent “intricate, uncertain inquiries”).

272. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007); *see also* FED. R. CIV. P. 12(b)(6).

273. *Twombly*, 550 U.S. at 545; *see also* FED. R. CIV. P. 12(b)(6).

274. In *Anza*, for example, the Court’s concern that the plaintiff merely asserted that the injury alleged (i.e., loss of sales) resulted from the defendant’s conduct (i.e., lowering of prices) without factual statements showing this to be true falls precisely within the set of concerns addressed by Rule 12(b)(6) and could have been dismissed under that standard without entangling the proximate cause standard. *See Anza*, 547 U.S. at 458–59.

275. *See id.* at 466 (Thomas, J., concurring) (citing RESTATEMENT (SECOND) OF TORTS § 912 (AM. LAW INST. 1977)) (“Proximate cause and certainty of damages, while both related to the plaintiff’s responsibility to prove that the amount of damages he seeks is fairly attributable to the defendant, are distinct requirements for recovery in tort.”).

276. Note that the arguments set forth here are meant only to apply to the determination of *statutory* proximate cause. When a court is determining the meaning of proximate cause under a given statute, it is engaging in statutory interpretation and, therefore, engaging in independent policy analysis would be improper. In contrast, when courts are setting the meaning of proximate cause in common law claims, independent policy judgments may well have a proper role in the analysis.



statutory framework, let alone to rewrite the statute based on their own views of public policy. Instead, the standard for proximate cause that emerges from this analysis is expressly linked to “the reasons the law has for imposing the obligation on the particular defendant in the first place” and is necessarily consistent with the overall statutory scheme.<sup>277</sup>

*C. Benefits of Scope of Liability Framework for Doctrinal Determinacy*

The scope of liability framework is also beneficial because it enhances doctrinal determinacy.<sup>278</sup> It does so by detaching statutory proximate cause analysis and outcomes from the traditional common law formulations. Application of common law standards engenders doctrinal indeterminacy for two principal reasons: there is no settled common law standard for proximate cause, and the available common law standards have ambiguous meanings.<sup>279</sup> By rooting the proximate cause analysis in the statute, the scope of liability avoids this indeterminacy.

First, as described in detail in Section II.A, the common law framework leads to doctrinal indeterminacy because there is no consensus on the standard for proximate cause in common law tort doctrine.<sup>280</sup> Common law formulations include, among others, directness; foreseeability; the immediate or nearest antecedent test; the efficient, producing cause test; the substantial factor test; and the probable, or natural and probable, consequence test.<sup>281</sup> The lack of a

277. Stapleton, *Legal Cause*, *supra* note 19, at 997.

278. This enhanced doctrinal determinacy does not come at the expense of judicial flexibility. The scope of the risk test provides a framework that guides judicial reasoning but does not dictate a particular outcome in any given factual scenario.

279. See Haley, *supra* note 19, at 148 (“[P]roximate cause, which never has been a precise legal concept, recently has become a dangerously weak doctrine.”).

280. See *supra* Section II.A.

281. See *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 701 (2011). Very recently, the Ninth Circuit Court of Appeals spelled out in express terms the absence of a uniform proximate cause standard:

Proximate cause is an infamously nebulous concept that the Court has explained is meant to serve as a generic label for “the judicial tools used to limit a person’s responsibility for the consequences of that person’s own acts.” *Holmes*, 503 U.S. at 268 . . . see also *Paroline v. United States*, . . . 134 S. Ct. 1710, 1719 (2014) (“The idea of proximate cause, as distinct from actual cause or cause in fact, defies easy summary.”); *United States v. Galan*, 804 F.3d 1287, 1290 (9th Cir. 2015) (“As the Court demonstrated, the phrase ‘proximate cause’ hides (or encompasses) interpretive problems of its own.”). We recognize that foreseeability is another of the ‘judicial tools’ in the proximate cause toolshed. See *Hemi Grp.*, 559 U.S. at 12 . . . .

settled common law standard means the Court cannot draw upon the common law as the source of meaning for proximate cause without doing so in a manner marked by arbitrariness. That is, because it is unsettled whether the common law test for proximate cause is foreseeability, directness, or something else, the Court cannot justify the importation of one or a combination of these standards as “the” common law standard on a purely doctrinal basis.<sup>282</sup> To the contrary, the wide range of standards available under the common law allows the Court, where it professes reliance on the “common law,” to simply pick and choose among the standards based on its preferences in any given statutory context. There is no independent doctrinal reason to explain why any particular standard should be applied rather than any other based on the common law. Thus, application of the common law framework is inherently arbitrary and facilitates inconsistency.<sup>283</sup>

Second, application of the common law does not help determine the meaning of whichever common law standard the Court has selected. As described in Section II.A, the meaning of common law proximate cause standards are both contested and notoriously flexible. It is disputed, for example, whether the directness standard restricts proximate cause to *only* those consequences which are direct consequences of the conduct and, thus, excludes indirect consequences that are foreseeable, or whether directness serves to expand proximate cause to encompass *both* foreseeable harms and harms that are unforeseeable but direct.<sup>284</sup> But even if the definitions

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Fields v. Twitter, Inc., 881 F.3d 739, 747 (9th Cir. 2018).

282. See, e.g., *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 12 (2010) (“The concepts of direct relationship and foreseeability are of course two of the ‘many shapes [proximate cause] took at common law . . . .’” (alteration in original) (quoting *Holmes v. Sec. Inv’r Prot. Corp.*, 503 U.S. 258, 268 (1992))).

283. For example, in *Hemi Group*, the Court declared that the proximate cause requirement under RICO “should be evaluated in light of its common-law foundations” and “thus requires ‘some direct relation between the injury asserted and the injurious conduct alleged.’ A link that is ‘too remote,’ ‘purely contingent,’ or ‘indirec[t]’ is insufficient.” *Id.* at 9 (alteration in original) (quoting *Holmes*, 503 U.S. at 271, 274). In *Staub*, however, the Court added another test to the common law standard: whether the intervening cause may be deemed a “superseding” cause of the harm. *Staub v. Proctor Hosp.*, 562 U.S. 411, 420 (2011).

284. Compare W. PAGE KEETON ET AL., *supra* note 64, § 42, at 273 (stating that under the directness theory of proximate causation, liability extends both to “all ‘direct’ (or ‘directly traceable’) consequences and those indirect consequences that are foreseeable”), and Stapleton, *Legal Cause*, *supra* note 19, at 996–97 (“The directness rule extends to all outcomes, even if not foreseeable, so long as they are the ‘direct’ result of the tortious conduct. . . . [T]he foreseeability rule generates a narrower scope of liability.”), with *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1306 (2017) (“We conclude that the Eleventh Circuit erred in holding that foreseeability is sufficient to establish proximate

were settled, “directness,” “foreseeability,” and other proximate cause formulations, such as “natural and foreseeable consequence,” have no settled meaning.<sup>285</sup> As scholarship, treatises, and courts frequently observe, these formulas are “empty metaphysical concepts,”<sup>286</sup> which are unable to direct courts’ analyses in any meaningful way.<sup>287</sup> Foreseeability “provides no definite guidance for decision” because “almost anything is foreseeable, given enough time and incentive to project possible consequences . . . .”<sup>288</sup> Directness, similarly, can expand or contract seemingly at a court’s will. Indeed, as the discussion in Section II.B demonstrates, the Supreme Court has at times interpreted “directness” as necessarily preclusive of multistep causal chains and at other times has found a multistep chain to be “direct.”<sup>289</sup> Thus, even once a common law standard is selected, that standard provides insufficient guidance to determine the substantive meaning of proximate cause.<sup>290</sup> The result, again, is arbitrariness and inconsistency.

The scope of liability framework avoids the problems of doctrinal indeterminacy inherent in the common law framework by divorcing proximate cause analysis from the muddled common law doctrine.<sup>291</sup> The scope of liability framework has no allegiance to these preexisting standards and instead determines the meaning of proximate cause based on the limitations contemplated by the legislature. This mode of analysis facilitates doctrinal determinacy. The determination of a statute’s scope of risks, while likely subject to debate, requires justification through the traditional tools of statutory

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cause under the FHA. . . . [F]oreseeability alone does not ensure the close connection that proximate cause requires. . . . Rather, proximate cause under the FHA requires ‘some direct relation between the injury asserted and the injurious conduct alleged.’” (quoting *Holmes*, 503 U.S. at 268)).

285. See *supra* text accompanying notes 90–92.

286. Kelley, *supra* note 19, at 98.

287. See *id.*; Sperino, *Statutory Proximate Cause*, *supra* note 8, at 1238 (noting that the lack of a uniform standard for proximate cause allows “courts [to] apply any meaning they see fit, whether the meaning comports with the underlying statute or not”); Stapleton, *Legal Cause*, *supra* note 19, at 969 (“[I]n disputes presented as concerning the nature of the consequence of which a complaint is made, the vacuity of the mere assertion of an outcome being ‘too remote’ or ‘not proximate’ is patent, especially in cases where the effect is instantaneous and spatially very near.”).

288. Kelley, *supra* note 19, at 92.

289. See *supra* notes 108–21 and accompanying text.

290. See Stapleton, *Legal Cause*, *supra* note 19, at 975 (emphasizing “[t]he inadequacy of causal [language] as a guide to attribution of responsibility in legal disputes”).

291. For an in-depth discussion of the term “doctrinal determinacy,” which broadly refers to the extent to which application of a legal doctrine produces predictable and internally consistent case outcomes, see generally Allen, *supra* note 19.

interpretation.<sup>292</sup> The scope of liability, i.e., the proximate cause standard, flows directly from this determination. The resulting standards are internally consistent because each reflects the outcome of this analysis and aligns consistently with the statutory scheme of which it is a part.

*D. Scope of Liability as a Framework for Doctrinal Coherence*

The scope of liability framework also provides a more doctrinally coherent and operationally practical structure as compared to the Court's existing legislative intent framework. The legislative intent framework, although anchored in the statutory purpose much like the scope of liability, contains little analytical structure and therefore fails to produce predictable and doctrinally consistent standards for proximate cause. In each of the three cases in which the Court has applied a legislative intent framework—*Department of Transportation*, *CSX Transportation*, and *Lexmark*—it has analyzed the statutory purpose from a different angle. In *Department of Transportation*, the Court looked to the “underlying policies” of the statute and the general purposes of the statutory provision at issue to determine the standard for proximate cause.<sup>293</sup> The Court asked whether recognizing proximate cause in the particular set of circumstances presented by the case would advance those purposes, and its answer to that question determined the proximate cause standard.<sup>294</sup> In *CSX Transportation*, however, the Court directly inquired into the legislature's intention regarding proximate causation.<sup>295</sup> The Court asked what degree of causation between the conduct and the harm Congress intended to be sufficient for recovery under the statute.<sup>296</sup> It analyzed this question by interpreting the statutory language regarding causation as well as the legislative history.<sup>297</sup> The Court then used the outcome of this analysis as the

292. Legislative intent is of course frequently contested and often elusive. However, the range of disagreement between competing interpretations is confined to disagreement regarding the meaning of legislative history. In the common law framework, the range of disagreement is potentially unbounded and eludes logical debate—it is simply unsettled whether the proper standard for proximate cause is foreseeability, directness, both, or something else entirely, and there are no clear principles underlying the disagreement. *See generally id.*

293. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004).

294. *Id.* at 768–69 (noting that the “legally relevant cause . . . is *not* the [agency's] action, but instead the actions of the President”).

295. *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 702–03 (2011).

296. *Id.* at 705.

297. *Id.* at 702–05.

basis for the proximate cause standard under the statute.<sup>298</sup> Yet in *Lexmark*, the Court looked neither to the broad legislative purpose nor to Congress's intended standard for proximate cause but instead to the types of injuries that Congress meant to be recoverable under the statute.<sup>299</sup> The Court determined the particular types of injuries for which Congress intended to provide recovery under the statute and then set a standard for proximate cause that reflected the chain(s) of causation necessary to link the conduct to those injuries.<sup>300</sup>

In sum, with the legislative intent framework, the Court arrives at a proximate cause standard based on the congressional purpose underlying the statute. However, what specifically the Court is looking to when it determines that purpose is inconsistent. The scope of liability framework provides structure to this inquiry by focusing the Court's legislative intent analysis on the "scope of the risks" the legislature was addressing when it enacted the statutory prohibitions at issue. This inquiry is the optimal one for three principal reasons.

First, it logically follows that, where Congress enacted a statutory prohibition with the goal of minimizing or eliminating a particular risk, it intended for plaintiffs to be able to recover when a violation of the statute in fact caused that risk to come to pass. Imagine, for example, a statute that prohibits parents with minor children from leaving guns in unlocked locations in their homes. The legislative history demonstrates that the statute was enacted to prevent deaths and injuries from youth gun violence, which, the legislature believed, were in part the result of minors having easy access to guns from their parents, which minors then shared or sold to others in their social networks (or used on their own). The statute includes only general causal language providing that persons injured by a violation of the statute may sue. It stands to reason that the legislature intended for the estate of a decedent to recover where the decedent's death resulted from a minor having access to an unlocked gun, which is a violation of the statute, and then sharing or selling that gun with others. That scope of the risks—deaths or injuries made possible by youth access to guns—is what the legislature intended to provide recovery for, and, thus, the standard for proximate cause under the statute should follow accordingly.

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298. *Id.* at 705.

299. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 133–34 (2014).

300. *Id.*

Second, the scope of liability framework is practically operational in a way that the Court's legislative intent framework, as applied in *CSX Transportation* in particular, is not. The *CSX Transportation* analysis relies on the availability of legislative history or statutory language indicating precisely what degree of causation is required under the statute to make out a claim. But such history is rarely available. In most of the statutes in which the Court has interpreted the meaning of proximate cause, the statutory language regarding causation is vague and ambiguous, providing only, for example, that persons whose injuries are "caused by" or "caused by reason of" a violation of the statute may sue.<sup>301</sup> This language lacks sufficient specificity to translate into a meaningful standard for proximate cause. Moreover, the legislative history is often silent on the degree of causation required to make out a claim under the statute. In *Holmes*, for example, the Court first attempted to determine the meaning of proximate cause under RICO by discerning the legislature's intended purpose behind the statutory language "'injured' by reason of" a violation of the statute.<sup>302</sup> The only insight the Court was able to glean from the legislative history was that the language in RICO was modeled after the language in the Clayton Act, and that language was borrowed from the Sherman Act.<sup>303</sup> Notwithstanding the analytical problems with importing that interpretation to RICO, the insight proved insufficient to determine the meaning of proximate cause under RICO because the common law standard was and is unsettled.<sup>304</sup> The Court thus turned to the public policy framework for the meaning of proximate cause.<sup>305</sup>

The Court's analysis in *Holmes* illustrates the shortcomings of the version of the legislative intent framework adopted in *CSX Transportation*: the framework depends on the existence of legislative history or statutory language that speaks directly to the causation question at issue, and statutes and their histories are often silent in this regard. The scope of liability framework, by contrast, relies on the existence of legislative history that is likely to be accessible,

301. See, e.g., *id.* at 122 (analyzing the statutory language "cause" or "likely to cause"); *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 757 (2004) (analyzing the statutory language "affecting"); *Holmes v. Sec. Inv'r. Prot. Corp.*, 503 U.S. 258, 265 (1992) (analyzing the statutory language "by reason of").

302. *Holmes*, 503 U.S. at 265 (quoting 18 U.S.C. § 1964(c) (2012)).

303. *Id.* at 267–68.

304. *Id.* at 268–70.

305. *Id.* at 272–74.

namely, the harmful outcomes that a particular statutory prohibition was intended to prevent or minimize.<sup>306</sup>

Third, the structure of the scope of liability framework ensures that the resulting proximate cause standards are properly tailored to comport with the statutory purpose. In this way, the scope of liability framework overcomes the problems in the Court's analysis in *Department of Transportation*. There, the Court determined the meaning of proximate cause under the statute by broadly asking whether deeming the conduct at issue a proximate cause would further the general purposes of the statutory prohibitions.<sup>307</sup> This inquiry is so broad that it risks creating overly inclusive proximate cause standards that do not comport with the true intentions of Congress. Statutes often have very broad general purposes such as to "end gun violence" or to "promote affordable housing," and it would be faulty to assume that Congress intended to allow liability to extend wherever doing so would advance these goals. The scope of liability framework appropriately narrows the inquiry by shifting courts' attention to the specific class of harms motivating the passage of the statutory provision at issue.

The scope of liability framework, as articulated in the *Restatement (Third) of Torts*, is thus the optimal framework to determine the meaning of proximate cause in statutory claims when compared with other commonly used frameworks. By grounding courts' analyses in the scope of the risks the legislature intended to prevent when it enacted the statute at issue, the framework avoids improper judicial policymaking, promotes doctrinal determinacy, and ensures adherence to the genuine legislative intent.

306. See William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041, 2042 (2006) (reviewing ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* (2006)) ("Federal judges will decide the meaning of statutory language in light of . . . the statute's legislative history, especially as it pertains to statutory purpose(s) and the compromises made . . ."); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 674 (1997) ("For more than a century, the Supreme Court has relied on the legislative history accompanying a statute to determine legislative 'intent' in cases of statutory ambiguity."). There are, of course, credible arguments that a statute's purpose can never be accurately determined because of the reality of the legislative process. See David A. Strauss, *The Plain Language Court*, 38 CARDOZO L. REV. 651, 655–56, 655 n.26 (2016) (noting that a general problem with arguments that invoke the purpose of a statute is that "no statute pursues a single purpose; there are always cross-cutting purposes"). See generally Gerald C. Mac Callum, Jr., *Legislative Intent*, 75 YALE L.J. 754 (1966) (outlining a variety of objections to the notion that legislative intent is accurately discoverable through statutory interpretation).

307. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768–70 (2004).

## V. APPLYING THE SCOPE OF LIABILITY FRAMEWORK TO THE FAIR HOUSING ACT

This part returns to *Bank of America* and applies the scope of liability framework to determine the meaning of proximate cause under the FHA. As discussed in Section IV.A, the analysis begins with an inquiry into the scope of the risks the statutory prohibitions are designed to prevent or minimize. The FHA broadly prohibits discrimination in housing on the basis of race, color, religion, sex, familial status, national origin, and disability.<sup>308</sup> These prohibitions are contained in three sections of the statute. Section 3604 prohibits discrimination in the sale or rental of housing, including any conduct that makes unavailable or creates less favorable terms or conditions for the sale or rental of housing.<sup>309</sup> Section 3605 prohibits discrimination in residential real estate-related transactions.<sup>310</sup> Specifically, it prohibits discrimination in mortgage lending and in the provision of other forms of financial assistance for the purchasing or maintenance of residential properties.<sup>311</sup> It further prohibits discrimination in residential property appraisals.<sup>312</sup> Section 3606 prohibits discrimination in the provision of brokerage services.<sup>313</sup>

To determine the risks motivating Congress's enactment of these prohibitions, this part provides an extensive analysis of the statute's

308. When Congress initially enacted the FHA in 1968, it prohibited discrimination on the basis of race, color, religion, and national origin. *See* Fair Housing Act of 1968, Pub. L. No. 90-284, § 804, 82 Stat. 73, 83 (codified as amended at 42 U.S.C. § 3604 (2012)). Sex was added as another protected characteristic in 1974. Housing and Community Development Act of Aug. 22, 1974, Pub. L. No. 93-383, sec. 808(b)(1), § 804, 88 Stat. 633, 729 (codified as amended at 42 U.S.C. § 3604 (2012)). In 1988, Congress amended the FHA to extend its protections to individuals with disabilities and to prohibit discrimination on the basis of family status. *See* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, sec. 6(b)(1), §§ 804, 806, 102 Stat. 1619, 1622 (1988) (codified at 42 U.S.C. §§ 3604, 3606 (2012)).

309. 42 U.S.C. § 3604 (2012). The Amendments Act, as codified, further prohibits discrimination in advertisements and in representations regarding the property and neighborhood. Fair Housing Act of 1968, Pub. L. No. 90-284, § 804(c), 82 Stat. 83 (codified as amended at 42 U.S.C. § 3604(c) (2012)). It also includes a prohibition against a refusal to permit reasonable accommodations for handicapped persons. Fair Housing Amendments Act of 1988, § 804, 102 Stat. at 1620–21.

310. 42 U.S.C. § 3605.

311. *Id.* § 3605(a)–(b)(1).

312. *Id.* § 3605(b)(2).

313. *Id.* § 3606 (“[I]t shall be unlawful to deny any person access to or membership or participation in any multiple-listing service, real estate brokers’ organization or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against him in the terms or conditions of such access, membership, or participation, on account of race, color, religion, sex, handicap, familial status, or national origin.”).



legislative history. The focus of this part is the legislative history because the statutory text itself contains few clues regarding the scope of the risks Congress intended to address. The introductory provision of the Act states that it is the policy of the FHA “to provide, within constitutional limitations, for fair housing throughout the United States.”<sup>314</sup> The Supreme Court has held that this language is “broad and inclusive” and thus should be given a “generous construction.”<sup>315</sup> However, the statutory text provides no indication of the specific risks the FHA is aimed to remedy.<sup>316</sup> Likewise, the statutory definition of “aggrieved person,” which delineates who has the right to sue, is broad but not precise. An “aggrieved person” is defined as “any person . . . who claims to have been injured by a discriminatory housing practice.”<sup>317</sup> The phrase “injured by” connotes loose restrictions on recovery but, again, fails to lend specific insight into what types of injuries Congress had in mind when it enacted the statute.<sup>318</sup>

The legislative history reveals that the FHA was enacted with ambitious social and economic aims—in the language of the scope of liability framework, the scope of the risks it was intended to prevent was wide. Generally speaking, the FHA was passed to address the impacts of housing discrimination. This sentiment is embodied in Housing and Urban Development (“HUD”) Secretary Robert Weaver’s statement to the Senate committee debating the bill that “[i]n order to understand fully the need for a national policy against discrimination in housing and the enactment of a comprehensive Federal fair housing law, it is well to look into the results of housing discrimination.”<sup>319</sup>

And, indeed, Congress did so.<sup>320</sup> The congressional debates and other legislative documents reflect that Congress was concerned about a web of consequences flowing from housing discrimination

314. *Id.* § 3601.

315. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209, 212 (1972).

316. *See id.* at 209–11.

317. 42 U.S.C. § 3602(i)(1) (2012).

318. *See CSX Transp., Inc. v. McBride*, 564 U.S. 685, 702–03 (2011).

319. *Fair Housing Act of 1967: Hearings on S. 1358, S. 2114, and S. 2280 Before the S. Subcomm. on Hous. & Urban Affairs of the Comm. on Banking and Currency*, 90th Cong. 35 (1967) [hereinafter “*Fair Housing Act Hearings*”] (statement of Robert C. Weaver, Secretary, Department of Housing and Urban Development).

320. *See, e.g.*, 114 CONG. REC. 3422 (1968) (discussing the physiological impact of racial discrimination in the housing market); 113 CONG. REC. 22,848 (1967) (describing the impact of discriminatory housing on access to education and job opportunities).

and that it expected the FHA to prevent or minimize these consequences in the future.

One strand of the web of consequences Congress recognized relates to the individual-level harms resulting from experiences of discrimination. The drafters of the FHA were acutely aware that minority populations facing discrimination in the housing market are denied economic opportunity—they are unable to purchase a home in a more prosperous neighborhood or to access resources that would allow them to improve their economic situation—and that this lack of access creates economic immobility.<sup>321</sup> The second strand of harms Congress intended to address relates to the impacts of discrimination experienced at a societal level. Statements in the legislative debates repeatedly emphasized that housing discrimination resulted in segregation, which fueled the growth of urban decay and slums. Congress understood that slums, in turn, cause a range of social problems and impose a financial burden on cities.<sup>322</sup> Congress saw the FHA as a solution to these ills.<sup>323</sup>

The individual-level harms are described in subsection (A). The societal harms are described in subsection (B) (residential segregation and urban decay), subsection (C) (social problems), and subsection (D) (financial burden). Subsection (E) summarizes the outcome of the scope of the risks test and describes the scope of liability standard that results.

*A. Scope of the Risks: Individual-Level Harms and the Lack of Economic Mobility*

The injustices faced by individuals who directly experienced discrimination were often the first reason cited for the passage of the FHA.<sup>324</sup> Witnesses and legislators described these injustices as both psychological and economic. Senator Walter Mondale, who was a cosponsor of the Senate bill that became the FHA, repeatedly

321. See *infra* notes 326–40 and accompanying text.

322. See, e.g., 113 CONG. REC. 22,848 (1967) (statement of Sen. Joseph Tydings) (explaining that discriminatory housing practices had a negative impact on education and job opportunities); see also *Fair Housing Act Hearings*, *supra* note 319, at 180 (prepared statement of Algernon D. Black, on behalf of the ACLU).

323. See, e.g., 114 CONG. REC. 3421 (1968) (statement of Sen. Walter F. Mondale) (“[F]air housing is one more step toward achieving equality in opportunity and education . . .”).

324. See *Fair Housing Act Hearings*, *supra* note 319, at 178 (statement of Sen. Walter F. Mondale, Member, Subcomm. on Hous. & Urban Affairs (quoting statement of Algernon D. Black, on behalf of the ACLU)); *id.* at 36 (statement of Robert M. Weaver, Secretary, Department of Housing & Urban Development).

discussed the emotional impact of housing discrimination. He described this impact as “the degradation and humiliation suffered by a man in the presence of his wife and children—when he is told that . . . he is just not good enough to live in a white neighborhood.”<sup>325</sup> During three-day hearings about the bill before the Subcommittee on Housing and Urban Affairs of the Senate Committee on Banking and Currency (“Committee”), he drew attention to other witnesses’ testimony that reflected this impact. Senator Mondale repeated for emphasis the statement of Algernon Black, speaking on behalf of the ACLU, that “[d]eeper than the material and physical deprivation is the humiliation and rejection and what this does to human being [sic].”<sup>326</sup> The executive director of the National Association for the Advancement of Colored People (“NAACP”), Roy Wilkins, likewise testified that “[o]ne of the burning frustrations Negro residents carry with them in city ghettos is the knowledge that even if they want to and have the means to do so, very often they cannot get out.”<sup>327</sup>

In addition to the psychological impacts, Congress was intensely focused on preventing the economic immobility that results from racial discrimination.<sup>328</sup> Indeed, economic mobility was the first objective Senator Mondale mentioned when he summarized the goals of the FHA on the eve of its passage.<sup>329</sup> “First,” he implored, “fair housing is one more step toward achieving equality in opportunity and education for the Negro.”<sup>330</sup> Senator Joseph Tydings likewise expressed this sentiment in his statement that housing discrimination “unjustly denies many Americans the freedom to gain access on equal terms with other Americans to good housing and good schools for their children, and proximity to good jobs. Such exclusion unjustly denies many Americans of an equal opportunity to better their

325. 114 CONG. REC. 3422 (1968) (statement of Sen. Walter F. Mondale).

326. *Fair Housing Act Hearings*, *supra* note 319, at 178 (statement of Sen. Walter F. Mondale, Member, Subcomm. on Hous. & Urban Affairs (quoting statement of Algernon D. Black, on behalf of the ACLU)); *see also id.* at 28 (statement of Ramsey Clark, Att’y Gen. of the United States) (testifying that fair housing was “psychologically most important”).

327. *Id.* at 98 (statement of Roy Wilkins, Executive Director, NAACP, and Chairman, Leadership Conference on Civil Rights); *see also id.* at 179 (statement of Algernon D. Black, on behalf of the ACLU) (depicting minority populations as experiencing frustration and rage from being trapped in a “cage” in urban ghettos).

328. *See, e.g., id.* at 28 (statement of Ramsey Clark, Att’y Gen. of the United States) (“[T]his law on the books, effectively enforced, can really provide opportunities in significant numbers and . . . it will make it much, much easier to achieve equality.”).

329. 114 CONG. REC. 3421 (1968) (statement of Sen. Walter F. Mondale).

330. *Id.*

lives.”<sup>331</sup> The congressional debates reflect Congress’s focus on three specific mechanisms by which it understood housing discrimination to paralyze economic mobility for nonwhite individuals: preventing moves closer to job opportunities, limiting opportunities for home ownership, and creating de facto segregation in schools and thus fewer educational opportunities.

First, Congress and the Committee repeatedly discussed the inability of African Americans to follow the movement of employment opportunities to the suburbs due to housing discrimination.<sup>332</sup> Data was cited at the Committee hearings showing that job opportunities were increasingly being located in suburban areas rather than in the core of cities.<sup>333</sup> Meanwhile, nonwhite populations were concentrated in metropolitan areas.<sup>334</sup> In Congress’s view, this spatial isolation was a direct product of housing discrimination and resulted in massive unemployment in the ghettos.<sup>335</sup> HUD Secretary Robert Weaver testified: “The high rate of unemployment in racial ghettos, particularly in the case of nonwhites, also demonstrates the evils resulting from housing discrimination. Housing discrimination deprives hundreds of thousands of nonwhites of employment opportunities in suburban communities which are

331. 113 CONG. REC. 22,848 (1967) (statement of Sen. Joseph Tydings).

332. *Id.* (statement of Sen. Hiram Fong) (“[T]he system of segregated housing disables our society. It often has led to the creation of deplorable slum conditions in which many of our citizens are too poorly educated, inadequately trained, and ill equipped to become productive members of a society . . .”); *see also Fair Housing Act Hearings*, *supra* note 319, at 36 (statement of Robert C. Weaver, Secretary, Department of Housing & Urban Development).

333. *Fair Housing Act Hearings*, *supra* note 319, at 36 (statement of Robert C. Weaver, Secretary, Department of Housing & Urban Development) (“Between 1960 and 1965 from one-half to two-thirds of all new factories, stores, and other mercantile buildings in all sections of the country, except the South, were located outside the central cities of metropolitan areas.”).

334. *Id.* (“[Eighty] percent of the nonwhite population in metropolitan areas in 1967 lives in central cities . . .”).

335. *See id.* at 46 (statement of Sen. Walter F. Mondale, Member, Subcomm. on Hous. & Urban Affairs); *id.* at 77 (statement of Frankie M. Freeman, Comm’r, United States Commission on Civil Rights); *id.* at 219 (statement of Edward Rutledge, Executive Director, National Committee Against Discrimination in Housing) (“These [U.S. Department of Labor] reports show that unemployment is so much worse in the slum ghettos than in the country as a whole.”); BUREAU OF LABOR STATISTICS, STANDARD METROPOLITAN STATISTICAL AREAS: NUMBER OF UNEMPLOYED AND UNEMPLOYMENT RATE, BY SEX, COLOR, AND AREA, MARCH 1966 (1966), *as reprinted in Fair Housing Act Hearings*, *supra* note 319, tbl.G; *Fair Housing Act Hearings*, *supra* note 319, at 305 (listing the “NCDH Bill of Particulars Submitted to the White House April 22, 1966”).

generally unavailable to them as residential areas.”<sup>336</sup> Similar testimony was reiterated throughout the Committee hearings.<sup>337</sup> Thus, it is clear from the hearings and congressional debates that the impact of housing discrimination on employment opportunities was a key motivation underlying the passage of the FHA.

Second, Congress understood discrimination in the housing market to hinder minorities’ economic prospects by making homeownership all but unavailable to them. Senator Vance Hartke testified regarding the lack of mortgage financing available to nonwhites, which acted as a “major deterrent” to their ability to obtain homeownership, particularly in the suburbs.<sup>338</sup> Other witnesses at the Committee hearings explained in detail the ways in which African Americans had long been shut out of homeownership opportunities. U.S. Attorney General Ramsey Clark opened the hearings by describing how, until 1947, the federal government encouraged and often required racially restrictive covenants in deeds where federal mortgage insurance or guarantees were sought.<sup>339</sup> Until 1948, he further explained, courts enforced private restrictive racial covenants.<sup>340</sup> Other witnesses testified that lending institutions

336. *Fair Housing Act Hearings*, *supra* note 319, at 36 (statement of Robert C. Weaver, Secretary, Department of Housing & Urban Development). Secretary Weaver went on to explain the necessity of fair housing for improvement of minorities’ employment prospects, stating that “[u]nless nonwhites are able to move into suburban communities by the elimination of housing discrimination . . . they are going to be deprived of many jobs, because they will be unable to live in the central city and work in the suburbs because of the high cost of transportation.” *Id.* at 36–37; *see also id.* at 219 (statement of Edward Rutledge, Executive Director, National Committee Against Discrimination in Housing) (“[N]ew employment in commerce, industry, construction, and services has tended to locate in suburban and outlying sections of metropolitan areas, where for largely racial reasons, Negroes have not been permitted to live.”); *id.* at 104 (statement of Roy Wilkins, Executive Director, NAACP, and Chairman, Leadership Conference on Civil Rights).

337. *See, e.g., id.* at 103 (statement of Roy Wilkins, Executive Director, NAACP, and Chairman, Leadership Conference on Civil Rights) (“The suburbs are often far removed from the residences of Negroes, who are unable to live near places of potential employment.”); *id.* at 239 (prepared statement of Edward Rutledge, Executive Director, National Committee Against Discrimination in Housing) (“We know of no statistics that reveal the relationship between housing segregation and racial disadvantage as clearly as those that relate to employment and unemployment in urban areas.”).

338. *Id.* at 328 (statement of Sen. Vance Hartke); *see also id.* at 38 (statement of Robert C. Weaver, Secretary, Department of Housing & Urban Development).

339. *Id.* at 6 (statement of Ramsey Clark, Att’y Gen. of the United States) (discussing the federal government’s failure to ensure equal protection prior to 1948 by encouraging racially motivated zoning and restrictive covenants).

340. *Id.* (statement of Robert C. Weaver, Secretary, Department of Housing & Urban Development); *see also id.* at 78 (statement of Frankie M. Freeman, Comm’r, United States Commission on Civil Rights) (“Until 1947, discrimination against Negroes was a condition of FHA assistance.”); *id.* at 128 (statement of Sen. Walter F. Mondale, Member,

refused to make loans to African Americans to purchase homes in white neighborhoods,<sup>341</sup> and senators noted that minorities were expressly left out of the post-World War II housing boom as a result of discriminatory policies.<sup>342</sup>

Third, the legislative history reflects Congress's intent that the FHA would address the impacts of housing discrimination on educational opportunities, which further hindered minorities' economic prospects. In urging for the passage of the FHA, Senator Hiram Fong repeatedly emphasized that the lack of fair housing maintains school segregation, preventing African Americans from attaining educational, and thus economic, opportunity.<sup>343</sup> The testimony of numerous witnesses at the Committee hearings echoed this view.<sup>344</sup> Reverend Robert Drinan, Dean of Boston College Law School, for example, testified that, if an African American "cannot purchase a home outside of his present neighborhood, then the guarantees that have been given to him for . . . equal opportunity for his children in education are often rendered impossible of attainment."<sup>345</sup> The effects of housing discrimination on educational opportunity and associated economic opportunity were of paramount

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Subcomm. on Hous. & Urban Affairs) ("[Y]esterday the U.S. Civil Rights Commission testified that until 1947 FHA required racial covenant[s] in the deeds of property where they were insuring the mortgage.").

341. See, e.g., *id.* at 181 (prepared statement of Algernon D. Black, on behalf of the ACLU).

342. 113 CONG. REC. 22,848 (1967) (statement of Sen. Hiram Fong).

343. *Id.*

344. *Fair Housing Act Hearings*, *supra* note 319, at 77, 79 (statement of Frankie M. Freeman, Comm'r, United States Commission on Civil Rights); *id.* at 119 (statement of Roy Wilkins, Executive Director, NAACP, and Chairman, Leadership Conference on Civil Rights); *id.* at 129 (statement of Reverend Robert F. Drinan, Dean, Boston College Law School); *id.* at 133 (statement of Jefferson Fordham, Dean, University of Pennsylvania Law School); *id.* at 187 (statement of Q.V. Williamson, President, National Association of Real Estate Broker's, Inc.); *id.* at 189 (statement of Leon Cox, Jr., Executive Director, National Association of Real Estate Broker's, Inc.); *id.* at 222 (statement of Edward Rutledge, Executive Director, National Committee Against Discrimination in Housing).

345. *Id.* at 129 (statement of Reverend Robert F. Drinan, Dean, Boston College Law School). Frankie M. Freeman, Commissioner of the United States Commission on Civil Rights, testified about a recent report published by the Commission, *Racial Isolation in the Public Schools*, which demonstrated a relationship between the confinement of minorities to urban ghettos and inferior educational opportunities. *Id.* at 79 (statement of Frankie M. Freeman, Comm'r, United States Commission on Civil Rights). She explained that for this reason the Commission's recommendations in this report included a federal fair housing law. *Id.* HUD Secretary Weaver also drew attention to this report, remarking that it "established conclusively the relationship between poor housing in racial ghettos and the lack of educational opportunities." *Id.* at 36 (statement of Robert C. Weaver, Secretary, Department of Housing & Urban Development).

importance to the legislature and were core motivations underlying the passage of the bill that became the FHA.<sup>346</sup>

This section demonstrates that the psychological and economic impacts on individuals who experienced discrimination were among the key “risks” the FHA’s prohibitions were intended to prevent. Congress believed that passage of the FHA would minimize or eliminate these effects to the extent that they were caused by housing discrimination.

*B. Scope of the Risks: Residential Segregation and Urban Decay*

Next, the legislative history reveals that the FHA was intended to address residential segregation and the urban slums resulting from such segregation. The FHA was enacted following President Kennedy’s issuance of an executive order prohibiting discrimination in federally funded housing, which listed the elimination of residential segregation as one of its stated goals.<sup>347</sup> Congress saw the FHA as a bolder and stronger version of the executive order that would do a better job of achieving its objectives.<sup>348</sup> Senator Edmund Muskie described the goal of residential integration underlying the FHA as “the heart of the matter.”<sup>349</sup> Senator Mondale remarked, “[T]he system of segregated housing disables our society.”<sup>350</sup> Testimony during the Committee hearings repeatedly emphasized that segregation was the product of discrimination, not individual choices or economics.<sup>351</sup> The FHA was described as a policy that would confront “the problem of residential segregation and its attendant evils.”<sup>352</sup> It would “stimulate Americans of all races and colors to

346. See, e.g., 114 CONG. REC. 3421 (1968) (statement of Sen. Walter F. Mondale) (describing fair housing as “one more step toward achieving equality in opportunity and education” for African Americans).

347. Exec. Order No. 11,063, 3 C.F.R. § 652 (1959–1963).

348. *Fair Housing Act Hearings*, *supra* note 319, at 20–21 (statements of Ramsey Clark, Att’y Gen. of the United States, and Sen. Walter F. Mondale, Member, Subcomm. on Hous. & Urban Affairs).

349. 113 CONG. REC. 22,847 (1967) (statement of Sen. Edmund Muskie).

350. *Id.* at 22,848 (statement of Sen. Hiram Fong).

351. *Fair Housing Act Hearings*, *supra* note 319, at 78 (statement of Frankie M. Freeman, Comm’r, United States Commission on Civil Rights) (“[H]ousing patterns have developed along the lines of rigid racial segregation. These patterns have not developed through the accumulation of independent choices by individual home seekers, nor can they be explained entirely by differentials in the income levels of whites and Negroes. To a large extent, housing patterns have been imposed upon home seekers—white and nonwhite—without regard to individual choice and without regard to ability to pay.”).

352. 113 CONG. REC. 37,038 (1967) (statement of Sen. Walter F. Mondale).

learn to live together”<sup>353</sup> and would reflect “the principle that we are going to live together and not separately.”<sup>354</sup>

The legislative debates and committee hearings reflect Congress’s understanding of the direct links between segregation and urban slums. In the concise and direct words of Senator Mondale, “the system of segregation . . . has led to the creation of deplorable slum conditions . . . .”<sup>355</sup> HUD Secretary Weaver devoted a portion of his lengthy testimony at the Committee hearings to the “results of housing discrimination.”<sup>356</sup> The first result he discussed was the emergence of “racial ghettos.”<sup>357</sup> He described how millions of African Americans who migrated from the South to the North were forced to live in circumscribed urban areas because of discrimination.<sup>358</sup> These areas inevitably turned into racial ghettos, where poverty, overcrowding, and poor housing conditions were rampant.<sup>359</sup> He explained the impossibility of eliminating urban poverty without enacting fair housing legislation: open housing is necessary to decrease densification, which is a prerequisite to “restor[ing] these areas so they will no longer be ghettos but they will be attractive places” to live.<sup>360</sup> The revitalization of America’s cities,

353. *Id.* at 22,847 (statement of Sen. Edmund Muskie).

354. *Id.* at 37,038 (statement of Sen. Walter F. Mondale). Pushing for cloture on the bill, Senator Mondale repeatedly underscored that the FHA would spur integration. 114 CONG. REC. 2692 (1968) (statement of Sen. Walter F. Mondale) (“Mr. President, the Senate has been involved for some days in a discussion of . . . the question of whether we will decide once and for all to prohibit deeply imbedded patterns of segregated living in America . . . .”). At congressional debates less than two months before the bill’s passage, he implored Congress that, “[i]f America is to escape apartheid we must begin now, and the best way for this Congress to start on the true road to integration is by enacting fair housing legislation.” *Id.* at 3422.

355. 113 CONG. REC. 22,848 (1967) (statement of Sen. Hiram Fong).

356. *Fair Housing Act Hearings*, *supra* note 319, at 35–37 (statement of Robert C. Weaver, Secretary, Department of Housing & Urban Development).

357. *Id.* at 40 (“There is, unfortunately, a great deal of assertion today that you either do something about the ghetto or you don’t do anything about it, that you either are concerned with open occupancy or you are concerned with fixing up the ghetto, and that these things are mutually inconsistent one with the other. Nothing could be further from the truth.”).

358. *Id.* at 35–36. Later testimony at the hearings included frequent reference to the fact that ghettos were deliberately created by discriminatory government policies. *See, e.g., id.* at 101 (statement of Roy Wilkins, Executive Director, NAACP, and Chairman, Leadership Conference on Civil Rights) (“It must be remembered that the northerners, the northern cities deliberately created the ghetto.”).

359. *Id.* at 36 (statement of Robert C. Weaver, Secretary, Department of Housing & Urban Development).

360. *Id.* at 40.



he repeatedly emphasized, depended on the enactment of fair housing legislation.<sup>361</sup>

The goal of eliminating urban decay was front and center in the congressional debates on the FHA.<sup>362</sup> The Act was passed on the heels of President Johnson's speech on "the crisis of the cities."<sup>363</sup> The word "crisis" was used over twenty-six times during the Committee hearings to describe the urban problems that the FHA intended to address.<sup>364</sup> The terms "slums" and "ghettos" were likewise invoked

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361. *Id.* at 37 ("And of central importance, the enactment of this bill would help surmount one of the basic barriers to the revitalization of our cities."); *id.* at 40 ("[Y]ou cannot even talk about revitalizing the areas of non-white concentration without envisioning an equal opportunity so that these people can move out into other places, as they will have to move if you are going to be successful in your attack on the ghetto.").

362. The following statement typifies the nature of the testimony given at the committee hearings:

The great urban crisis which confronts us calls for comprehensive programs of immense proportions. The focus of greatest need and concern is the slum or ghetto. The problems such areas present cannot be dealt with effectively in isolation. The extirpation of slum conditions in a given area will not meet the social need unless the intensity of use for residential purposes in the area is greatly reduced for the future and the people displaced can obtain good housing elsewhere. In short, a broad openhousing [sic] policy that is given vitality in practice is essential to the effective relief of slum conditions.

*Id.* at 133 (statement of Jefferson B. Fordham, Dean, University of Pennsylvania Law School). Testimony by Edward Rutledge serves as a further example. Mr. Rutledge excoriated that, "[i]f we look at our great cities, the most striking fact is that precisely because the total housing market is segregated, the ghetto has continued and will continue to expand the area of physical blight and human hopelessness in the city." *Id.* at 233 (prepared statement of Edward Rutledge, Executive Director, National Committee Against Discrimination in Housing).

363. 114 CONG. REC. 3953 (1968) (statement of Rep. Bill Barrett).

364. *Fair Housing Act Hearings*, *supra* note 319, at 4 (statement of Ramsey Clark, Att'y Gen. of the United States); *id.* at 37 (statement of Robert C. Weaver, Secretary, Department of Housing & Urban Development); *id.* at 76–77, 83, 85 (statements of Frankie M. Freeman, Comm'r, United States Commission on Civil Rights); *id.* at 98, 102, 108 (statements of Roy Wilkins, Executive Director, NAACP, and Chairman, Leadership Conference on Civil Rights); *id.* at 120 (statement of Sen. Walter F. Mondale, Member, Subcomm. on Hous. and Urban Affairs); *id.* at 133 (statement of Jefferson B. Fordham, Dean, University of Pennsylvania Law School); *id.* at 214, 219, 243 (statements and prepared statement of Edward Rutledge, Executive Director, National Committee Against Discrimination in Housing); Memorandum of Law on the Constitutionality of Federal Fair Housing Legislation from Edward Rutledge & Jack E. Wood, Jr. to Subcomm. on Constitutional Rights of the S. Judiciary Comm., in *Fair Housing Act Hearings*, *supra* note 319, at 252; NAT'L COMM. AGAINST DISCRIMINATION IN HOUS., HOW THE FEDERAL GOVERNMENT BUILDS GHETTOS (1967), reprinted in *Fair Housing Act Hearings*, *supra* note 319, at 284, 286, 312; *Fair Housing Act Hearings*, *supra* note 319, at 415 (statement of Kennon V. Rothchild, Past Chairman, Minnesota State Commission Against Discrimination); *id.* at 430, 432 (statements of James H. Harvey, American Friends Service Committee).

repeatedly. Indeed, each and every one of the forty-eight witnesses who spoke in favor of the FHA at the Committee hearings discussed the goal of eliminating urban slums.<sup>365</sup> In the words of HUD Secretary Weaver, “The rebuilding of our cities . . . cannot be successful unless we eliminate all forms of discrimination . . . .”<sup>366</sup> Following the Committee hearings, Representative Carl Albert described to Congress that the purpose of the FHA was “to eliminate the ghetto itself.”<sup>367</sup> While Congress was clear that it did not view the FHA as a “panacea” for urban decay, the history reveals that the drafters considered it a “necessary prerequisite”: “an indispensable part of th[e] total effort” towards the revitalization of America’s cities.<sup>368</sup>

Thus, Congress understood segregation and urban decay as risks imposed (and indeed, ones that had come to pass) by housing

365. See, e.g., *Fair Housing Act Hearings*, *supra* note 319, at 27 (statement of Ramsey Clark, Att’y Gen. of the United States); *id.* at 36–38 (statement of Robert C. Weaver, Secretary, Department of Housing & Urban Development); *id.* at 79 (statement of Frankie M. Freeman, Comm’r, U.S. Commission on Civil Rights); *id.* at 108 (statement of Roy Wilkins, Executive Director, NAACP, and Chairman, Leadership Conference on Civil Rights); *id.* at 127 (statement of Reverend Robert F. Drinan, Dean, Boston College Law School); *id.* at 133 (statement of Jefferson B. Fordham, Dean, University of Pennsylvania Law School); *id.* at 179 (prepared statement of Algernon D. Black, on behalf of the ACLU); *id.* at 207 (statement of Gerard A. Ferere, Professor of French and Spanish, St. Joseph’s College); *id.* at 238 (prepared statement of Edward Rutledge, Executive Director, National Committee Against Discrimination in Housing); *id.* at 348 (statement of John C. Williamson, Legislative Counsel, Realtors’ Washington Commission of National Association of Real Estate Boards); *id.* at 363 (statement of Rabbi Jacob Rudin, President, Synagogue Council of America); *id.* at 385 (statement of George Meany, President, AFL-CIO); *id.* at 398 (statement of Fred Kramer, Real Estate Panel, Chicago); *id.* at 497 (prepared statement of Whitney M. Young, Jr., Executive Director, National Urban League).

366. *Id.* at 38 (statement of Robert C. Weaver, Secretary, Department of Housing & Urban Development).

367. 113 CONG. REC. 24,084 (1967) (statement of Rep. Carl Albert). Senator Mondale likewise remarked on the eve of the bill’s passage that with fair housing “the rapid, block-by-block expansion of the ghetto will be slowed and replaced by truly integrated and balanced living patterns.” 114 CONG. REC. 3422 (1968) (statement of Sen. Walter F. Mondale). Congress was concerned about “ghetto living” in part due to the belief that it was inciting urban riots and giving fodder to black extremist groups. See *Fair Housing Act Hearings*, *supra* note 319, at 28 (statement of Sen. Walter F. Mondale, Member, Subcomm. on Hous. & Urban Affairs) (“[I]t seems to me that one of the biggest arguments that we give to the black racists is the existence of ghetto living.”).

368. *Fair Housing Act Hearings*, *supra* note 319, at 26–27 (statements of Sen. John Sparkman, Chairman, Subcomm. on Hous. & Urban Affairs; Ramsey Clark, Att’y Gen. of the United States; and Sen. Walter F. Mondale, Member, Subcomm. on Hous. & Urban Affairs); see also *id.* at 48 (statement of Robert C. Weaver, Secretary, Department of Housing & Urban Development) (“[W]ithout this proposal I don’t think the total effort [towards eliminating the ghettos] can be successful.”); *id.* at 107–08 (statement of Roy Wilkins, Executive Director, NAACP, and Chairman, Leadership Conference on Civil Rights).

discrimination. One of Congress's principal goals in enacting the FHA was to eliminate or minimize these risks.

*C. Scope of the Risks: Social Costs of Slums*

Congress well recognized that the web of consequences that flowed from housing discrimination did not end with segregation and the existence of urban slums. The legislative history shows that Congress was particularly concerned with the *social consequences* of urban decay, including "inferior public education, recreation, health, sanitation, and transportation services and facilities."<sup>369</sup> Senators repeatedly emphasized these effects during the congressional debates.<sup>370</sup>

Discussions about the social costs of slums often particularly emphasized overcrowding and poor housing conditions.<sup>371</sup> Senator Mondale described legalized discrimination in housing as "forc[ing] millions of Americans to live on top of one another in abject poverty in the ghettos and slums . . . ."<sup>372</sup> This argument was made repeatedly throughout the Committee hearings.<sup>373</sup> Poor housing quality and its

369. 113 CONG. REC. 22,848 (1967) (statement of Sen. Hiram Fong). The Department of Justice, in explaining the basis for constitutionality of the FHA, stated that in ghettos "the benefits of government are less available." U.S. DEP'T OF JUSTICE CONSTITUTIONALITY OF FEDERAL HOUSING LEGISLATION UNDER THE FOURTEENTH AMENDMENT AND THE COMMERCE CLAUSE [hereinafter *FEDERAL HOUSING LEGISLATION*], in *Fair Housing Act Hearings*, *supra* note 319, at 9. Citing data on racial isolation and urban poverty, Senator Fong described that ghettos have adverse effects on education and housing conditions. 113 CONG. REC. 22,848 (1967) (statement of Sen. Hiram Fong).

370. *Id.* (statement of Sen. Joseph Tydings) ("The presence of residential ghettos—in effect, restricted areas in which all members of a minority group are forced to reside no matter where they desire or can afford to live—brings gravely damaging social consequences to our country, particularly in our urban areas."). Senator Case articulated the causal chain: "unequal housing, resulting from discriminatory and closed housing policies, contributes to the intolerable conditions of life in many of this Nation's greatest urban areas." *Id.* at 22,844 (statement of Sen. Clifford Case). He then went on to specify that these conditions include "segregated overcrowding living conditions, inherently unequal schools, unemployment and underemployment, appalling mortality and health statistics." *Id.*

371. *See, e.g., Fair Housing Act Hearings*, *supra* note 319, at 78 (statement of Frankie Freeman, Comm'r, United States Commission on Civil Rights) (describing housing in the urban ghettos as "overcrowded, exorbitantly priced, and often unsound").

372. 113 CONG. REC. 22,845 (1967) (statement of Sen. Walter F. Mondale). Senator Fong likewise discussed how the lack of fair housing leads to significant overcrowding in urban centers, pointing out that in Harlem, density was 100 people per acre. *Id.* at 22,848 (statement of Sen. Hiram Fong).

373. *See, e.g., Fair Housing Act Hearings*, *supra* note 319, at 77 (statement of Frankie M. Freeman, Comm'r, United States Commission on Civil Rights) (testifying at length

spillover effects were similarly often discussed.<sup>374</sup> A 1959 Report of the United States Commission on Civil Rights, submitted into the Record of the Committee hearings, cited census data showing that “the housing of nonwhite families is consistently of poorer quality and more overcrowded than that of white households,” even though nonwhite families paid more for their homes in terms of prices or rent.<sup>375</sup> In Senator Mondale’s final summary of the goals underlying the legislation, he argued directly against whites’ “fears of integration” by pointing out the unfairness inherent in restricting minorities to “the oldest and least-desirable housing.”<sup>376</sup>

The history reflects that eliminating or minimizing these social costs was a primary goal of the FHA. As Whitney Young, Executive Director of the National Urban League, eloquently stated during the Committee hearings, “access to decent housing is the vortex around which . . . other vital rights resolve [sic] . . . . Ghetto housing isolates racial minorities from the public life of the community in which they live. It means inferior public services in health, education, transportation and sanitation.”<sup>377</sup> In one of the final congressional debates, Senator Hart implored Congress to pass the FHA to “reduce crime, . . . upgrade the Nation’s education level, . . . [and] reduce the welfare rolls . . . .”<sup>378</sup>

Thus, Congress considered the social costs of slums to be a key risk posed by housing discrimination. The FHA was intended to address this risk—the legislature expected that prohibiting discrimination would enable the dissolution of the slums, which would

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about how the “systemic denial of equal housing opportunity” to African Americans has caused overcrowding).

374. See 113 CONG. REC. 22,848 (1967) (statement of Sen. Hiram Fong) (“The housing conditions in which many of our Negro citizens are forced to live are generally of inferior quality . . .”).

375. DEP’T OF HOUS. & URBAN DEV., U.S. COMM’N ON CIVIL RIGHTS, SUMMARY OF STUDIES THAT PROVIDE QUANTITATIVE FIGURES WHICH INDICATE THAT THE HOUSING DOLLAR OF THE NONWHITE BUYS LESS THAN THE HOUSING DOLLAR OF A WHITE (1959), as reprinted in *Fair Housing Act Hearings*, *supra* note 319, at 42, 45.

376. 114 CONG. REC. 3421 (1968) (statement of Sen. Walter F. Mondale).

377. *Fair Housing Act Hearings*, *supra* note 319, at 497 (prepared statement of Whitney M. Young, Jr., Executive Director, National Urban League).

378. 113 CONG. REC. 22,846 (1967) (statement of Sen. Philip Hart). Responding to the question of whether the FHA would have any impact on jobs and education absent economic legislation, Q.V. Williamson, President of the National Association of Real Estate Brokers testified, “Education will not be straightened until we straighten housing. Jobs will not be straightened until we straighten housing.” *Fair Housing Act Hearings*, *supra* note 319, at 187 (statement of Q.V. Williamson, President, National Association of Real Estate Broker’s, Inc.).

thereby reduce or eliminate the negative social conditions they imposed.

*D. Scope of the Risks: External Economic Costs*

Finally, the legislative history reveals that Congress was acutely aware that the urban slums created by housing discrimination had negative financial impacts on cities. Witnesses at the Committee hearings testified expressly to the financial squeezing of cities brought about by racial discrimination. On one end, discrimination imposed a financial burden on cities by driving up municipal costs for health, education, welfare, and police.<sup>379</sup> Witnesses at the Committee hearings articulated the causal chain: discrimination creates slums, which in turn “breed many hazards such as depressed health conditions and lack of adequate health facilities, juvenile delinquency, soaring crime rates, fire losses, and other evils . . . . These conditions increase the cost of municipal services . . . .”<sup>380</sup> Slums, in short, were expensive for cities. As Algernon Black eloquently stated on behalf of the ACLU, “We damage people and then we have to pay a burden which the larger community must bear.”<sup>381</sup>

On the other end, Congress understood that discrimination negatively impacted city revenues by weakening the tax base of cities.<sup>382</sup> Committee witnesses and legislators discussed two distinct mechanisms by which discrimination diminished municipal tax revenues. First, legalized discrimination encouraged the mortgage industry to engage in unscrupulous practices such as blockbusting and panic selling.<sup>383</sup> These practices introduced volatility into the real estate market and drove down property values.<sup>384</sup> Witnesses testified

379. *Id.* at 180 (prepared statement of Algernon D. Black, on behalf of the ACLU) (“The money cost [of segregation] is high; the financial cost of extra services for health, education, welfare, and police. We damage people and then we have to pay a burden which the larger community must bear.”).

380. *Id.* at 105 (statement of Roy Wilkins, Executive Director, NAACP, and Chairman, Leadership Conference on Civil Rights).

381. *Id.* at 180 (prepared statement of Algernon D. Black, on behalf of the ACLU).

382. *Id.* at 105 (statement of Roy Wilkins, Executive Director, NAACP, and Chairman, Leadership Conference on Civil Rights) (“These conditions increase the cost of municipal services while at the same time decreasing the tax base from which the cost of the services is raised.”).

383. *Id.* at 21 (statement of Ramsey Clark, Att’y Gen. of the United States) (describing the practice of racial blockbusting).

384. Letter from William L. Taylor, Staff Director, U.S. Comm’n on Civil Rights Tech. Info. Ctr., to Senator Walter F. Mondale, *reprinted in Fair Housing Act Hearings, supra* note 319, at 86, 88 (noting that blockbusting creates a fear that property values in a given neighborhood will depreciate by an influx of minorities, which “become self-fulfilling

that fair housing laws, by contrast, had been shown to have a stabilizing effect on property values by eliminating these practices.<sup>385</sup> Second, the racialized ghettoization of cities weakened the tax base. Numerous statements in the Committee hearings described how, by bringing about urban decay, legalized discrimination resulted in weakened tax bases because property values decreased and wealthier residents fled to the suburbs.<sup>386</sup>

The financial situation of cities was described as untenable and demanding of government action.<sup>387</sup> Senator Hugh Scott bemoaned that discrimination in the housing market leads to social conditions that cause

the loss of property values which erode the property which so many people rise so strongly to protect. The rich, the well-favored, the middle-income group, all of those people who would like to see their property maintain or increase its value will have to stand by unless something constructive is done at the National, State, and local levels. It is said that people find their property values are decreasing.<sup>388</sup>

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prophecies” and that “[t]he fear produces panic-selling, which in turn results in the very depreciation in the housing market and chaos in the community that is feared”).

385. *Fair Housing Act Hearings*, *supra* note 319, at 404 (statement of Elliot N. Couden, Rep., Seattle Real Estate Board). The record of the Committee hearings also cited data showing that integration tended to increase property values. U.S. COMM’N ON CIVIL RIGHTS TECH. INFO. CTR., SELECTED BIBLIOGRAPHY ON PROPERTY VALUES AND RACE (1967), *as reprinted in Fair Housing Act Hearings*, *supra* note 319, at 88–89; *Fair Housing Act Hearings*, *supra* note 319, at 386 (statement of George Meany, President, AFL-CIO).

386. *See Fair Housing Act Hearings*, *supra* note 319, at 105 (statement of Roy Wilkins, Executive Director, NAACP, and Chairman, Leadership Conference on Civil Rights) (“The crowding and increased deterioration of the inner cities foster new slums and slum conditions . . . . These conditions . . . decreas[e] the tax base . . . .”); *id.* at 375 (statement of James W. Cook, President, Leadership Council for Metropolitan Open Communities, Chicago) (“Accommodating our Negro population by expanding the ghetto is also prohibitively expensive. It erodes the tax base for real property, and increases the cost of essential goods and services for the rest of us.”). A pamphlet by the National Committee Against Discrimination in Housing, introduced into the Committee Record, stated that in order to understand the evils of housing segregation, one must only “[w]itness the deterioration and decay of the nation’s cities, with their shrinking tax bases and expanding costs for essential services.” NAT’L COMM. AGAINST DISCRIMINATION IN HOUS., *supra* note 364, *as reprinted in Fair Housing Act Hearings*, *supra* note 319, at 286.

387. *Fair Housing Act Hearings*, *supra* note 319, at 181 (prepared statement of Algernon D. Black, on behalf of the ACLU) (“For what is to happen to the city which has been deserted by whites and whose government and future is thus handed over to the very people who have been deprived? The vast majority of the American people recognize that we cannot go on as we have in the past.”).

388. 113 CONG. REC. 22,846 (1967) (statement of Sen. Hugh Scott).

Attorney General Clark likewise testified to the financial strain segregation imposes on cities: “Difficulty in supplying the needs of the city in police protection and crime control, in education, employment, health, beauty, and recreation, and the many essential private and public services, is compounded many times over by segregation.”<sup>389</sup> Senators also invoked a study conducted by the Council of Economic Advisors, which estimated that the total economic cost of racial discrimination was \$27 billion.<sup>390</sup> In sum, “in the very cities where [social services] costs are greater the tax base in property and the ability to pay income taxes is undermined by the very ills brought by the discriminatory practices.”<sup>391</sup>

Thus, the economic costs of discrimination, particularly those borne by cities, were another key risk that Congress intended to address.

#### *E. Scope of Liability*

Under the scope of liability framework, the outcome of the scope of the risk test dictates the statute’s proximate cause standard. Specifically, liability is limited to the harms that fall within the scope of the risks that the statute was enacted to prevent or minimize. The application of the scope of the risk test reveals three key categories of risk from housing discrimination that motivated the passage of the FHA: individual psychological and economic harms, residential segregation, and urban decay, with its associated social and economic impacts. The legislative history indicates that Congress understood these harms as an interrelated web of consequences and recognized the all but inevitable results of discriminatory conduct in the housing market. Thus, under the scope of liability framework, proximate cause is satisfied where the harm caused by unlawful discrimination operates through direct effects on the housing market and falls within one or more of the three categories discussed in Sections V.B–D.

The Supreme Court was indeed correct that “[n]othing in the [FHA] suggests that Congress intended to provide a remedy wherever

389. *Fair Housing Act Hearings*, *supra* note 319, at 4 (statement of Ramsey Clark, Att’y Gen. of the United States). Attorney General Clark also noted that housing discrimination “restricts the number of new homes which are built and consequently reduces the amount of building materials and residential financing which moves across state lines.” FEDERAL HOUSING LEGISLATION, *supra* note 369, in *Fair Housing Act Hearings*, *supra* note 319, at 14.

390. 113 CONG. REC. 22,848 (1967) (statement of Sen. Hiram Fong).

391. *Fair Housing Act Hearings*, *supra* note 319, at 180 (prepared statement of Algernon D. Black, on behalf of the ACLU).

[the] ripples of harm travel.”<sup>392</sup> However, the legislative history offers clear insight on which “ripples of harm” Congress intended to be recoverable. Congress enacted the FHA with the goals of eliminating or minimizing the categories of injuries discussed above, at least to the extent those consequences are brought about by discrimination in the housing market. It is quite possible to imagine a different result of course. Had Congress been solely concerned with the unfairness of discrimination to minority individuals or the economic limitations individuals encountered when they faced unequal access to housing—in other words, had Congress’s concerns been limited to those described in Section V.A—the scope of liability would not extend nearly so far. But Congress had broad social and economic ambitions when it enacted the FHA. It understood discrimination to cause residential segregation and urban decay, in turn, socially and economically impacting urban communities. Congress passed the FHA to negate those effects. Thus, where conduct in violation of the FHA caused the exact outcomes that the drafters knew it to cause and intended to prevent, the scope of liability framework recognizes that liability should so extend. Such is the essence of the framework.

#### CONCLUSION

This Article responds to the question explicitly left open by the Supreme Court in *Bank of America*: what is the meaning of proximate cause under the FHA? It contextualizes this question within the Court’s growing body of statutory proximate cause doctrine. Over the past decade and a half, the Court has imported proximate cause requirements into statutes with increasing frequency. This Article shows that despite this trend, the Court has not yet developed clear principles to determine the meaning of proximate cause in a given statutory context. To the contrary, the doctrine the Court has created is rife with inconsistencies and lacks any degree of internal coherence. *Bank of America* both reflects and solidifies this incoherence.

This Article has leveraged these insights as a springboard to confront the question of how to determine the meaning of proximate cause in all statutory claims. It has systematically unpacked the doctrinal incoherence and has located its source in the Court’s shifting analytical frameworks. The Article has synthesized these

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392. *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1306 (2017) (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 534 (1983)).



frameworks into three categories: common law, public policy, and legislative intent. The Article has demonstrated that the Court's fluctuation among these three frameworks has allowed it to articulate conflicting proximate cause standards that are doctrinally unjustifiable.

To resolve this incoherence, the Article contends that the Court must adopt a consistent analytical framework to determine the meaning of proximate cause under statutory causes of action. The Article has proposed that the Court uniformly apply the scope of liability framework, as set forth in the *Restatement (Third) of Torts*. It argues that this framework properly anchors the proximate cause analysis in the statutory scheme, promotes doctrinal determinacy, and avoids improper judicial legislation. The last part of this Article then returned to the context of *Bank of America* and applied the proposed framework to the FHA. Through extensive legislative history analysis, the Article showed that proximate cause under the FHA is satisfied where a violation of the statute causes harm, through direct effects on the housing market, falling within any of three categories: individualized psychological and economic harms, residential segregation, and the social and economic costs of urban decay. The harms alleged by the City in *Bank of America* fall squarely within this third category, and thus proximate cause is satisfied.

