Proximate Cause in Statutory Standing and the Genesis of Federal Common Law

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The federal courts have long struggled to articulate a set of coherent standards for who may assert rights under a federal statute. Apart from the constitutional limitations of the judicial power under Article III, courts have until recently addressed this question under a series of freestanding "prudential" rules governing standing to sue. The Supreme Court's 2014 decision in Lexmark International v. Static Control Components marked a sea change, holding that the federal courts may not decline to assert jurisdiction for prudential reasons and that standing to sue under a federal statute depends on whom Congress intended to authorize to sue. But Lexmark raised as many questions as it answered. In the same breath that it declared statutory standing a matter of congressional intent, the Court held that proximate cause—a creature of the common law of tort—generally defines the limits of federal statutory claims. Subsequent decisions applying this rule have extrapolated the Court's decisional law from narrow and specific settings to provide a new, trans-substantive limitation on standing to assert federal statutory rights.

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This Note traces the proximate cause element of statutory standing to decisions interpreting the Clayton Act and Racketeer Influenced and Corrupt Organizations Act—decisions that were inextricably bound to the legislative history and structure of those specific statutes—and concludes that application of these decisions to other federal statutes is both inconsistent with the reasoning in these decisions and contrary to the Court's stated purpose in Lexmark to effectuate congressional intent. Right or wrong, however, this new proximate cause requirement of statutory standing illustrates one process by which federal common law originates: the extrapolation of statutory precedents into trans-substantive rules. By exploring the origins and contours of this new proximate cause requirement, this Note attempts to provide guidance to practitioners asserting claims under federal statutes and to scholars seeking to understand the development of federal common law.

INTRODUCTION

A city sues a bank for discriminatory home lending practices under the Fair Housing Act. The Supreme Court concludes that the city's case meets the constitutional requirements for federal-court justiciability, that Congress intended the Fair Housing Act to protect plaintiffs like the city from the type of harms alleged, and that those harms alleged followed foreseeably from the bank's bad acts. But "something more" is required. In spite of controlling precedent that the Fair Housing Act extends standing to plaintiffs to the broadest extent constitutionally permissible,[1] and despite previous successes by municipalities on similar claims,[2] the city's claim fails without a showing of proximate cause. The contours of this proximate cause requirement, the Court

1. *See* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209 (1972).
2. *See* Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 92 (1979).

holds, are defined by the background principles of tort common to all federal statutory causes of action.

How did we get here?

The Court's decision in *Bank of America Corp. v. City of Miami*,[3] described above, raises a host of problems for the study and practice of federal statutory claims: the "tortification" of anti-discrimination law,[4] the role of plausibility pleading as a judicial gate-keeping mechanism, and public enforcement through private causes of action, to name a few. Most interestingly, it represents the culmination of the Court's project to reform its jurisprudence of standing, in which proximate cause has become a new trans-substantive[5] requirement for standing to sue under federal statutes.

The Court laid the groundwork for *Bank of America* in *Lexmark International, Inc. v. Static Control Components, Inc.*, where it held that its prior articulation of "prudential" limitations on standing as jurisdictional was misguided. Instead, courts should view the canon of prudential standing requirements as a question of whether a particular plaintiff is authorized to sue under a particular statute.[6] This question, the Court held, in turn depends on whether the statutory violation proximately caused the plaintiff's injuries.[7]

This Note will argue that the Supreme Court's reformulation of prudential and statutory standing in the 2010s accompanied the advent of proximate cause as a default rule of statutory standing for federal statutory causes of action. The development of this new proximate cause requirement illuminates one path for the creation of federal common law, a path in which the Court extrapolates trans-substantive rules from its prior construction of individual federal statutes. While the Court's pivot away from prudential standing in *Lexmark* has been the subject of wide discussion, no article has yet sought to make sense of the Court's new

3. 137 S. Ct. 1296 (2017).

4. *See generally* Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, U. ILL. L. REV. 1 (2013). Professor Sperino argues that judicial attempts to apply tort law principles to statutory discrimination claims are misguided, both because such statutes lack a basis in common-law tort and because they include other limitations on liability that displace any need for common-law limitations like proximate cause. Disparate impact claims in particular, in which the harms associated with a policy disadvantaging a particular group stem not from invidious discrimination but from a perpetuation of social imbalances, seem uniquely ill-suited to the incorporation of common-law tort requirements. *See id.* at 16. Nonetheless, the Court has frequently characterized discrimination claims as "tort-like" in nature. *See, e.g.*, Staub v. Proctor Hosp., 562 U.S. 411, 420 (2011) (Uniformed Services Employment and Reemployment Rights Act); Meyer v. Holley, 537 U.S. 280, 285 (2003) (Fair Housing Act).

5. By a trans-substantive requirement, I mean one that applies in essentially the same form regardless of the substantive content of the statute at issue.

6. Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 127–28 (2014). The doctrine of prudential standing, as understood before *Lexmark*, limited claims that do not fall outside of Article III's "case-or controversy" requirement for federal-court jurisdiction but that nonetheless strain judicial competence or exceed obvious statutory authorization. This doctrine will be discussed in more detail in the following Section.

7. *Id.* at 132.

proximate cause jurisprudence or how it fits into the broader picture of post-*Erie* federal common law.

Part I will introduce the basics of Article III and prudential standing with an eye to the minimal role causation played in those doctrines prior to *Lexmark*. Part II will explain the doctrinal foundations of the Court's new proximate cause jurisprudence in the construction of particular federal statutes. Part III will analyze the Court's new statutory standing regime established in *Lexmark*, including its presumption that federal statutory causes of action are inherently limited to plaintiffs whose injuries are proximately caused by a violation of the statute. Part IV will discuss the anatomy of this new proximate cause requirement and its implications for federal statutory claims. Part V will argue that the development of the new proximate cause requirement represents an as-yet-unstudied paradigm for the genesis of federal common law out of statutory precedents.

I.
CAUSATION IN ARTICLE III AND PRUDENTIAL STANDING

A. Standing in General

Article III, Section 2 of the United States Constitution limits the power of the federal courts to the adjudication of "cases" and "controversies."[8] The Supreme Court has construed the case-or-controversy requirement to impose several limits on what claims the federal courts may hear, termed together the doctrines of justiciability. The federal courts may not issue advisory opinions.[9] They may hear claims only once they are sufficiently developed to be capable of effective judicial resolution, but not past the point that a live controversy remains; that is, claims must be "ripe"[10] and must not be "moot."[11] The federal courts may not hear disputes so entwined with the operation of the political branches of government or the inner workings of state governments so as to present "political questions" outside the competence of the judiciary.[12] Most often a barrier to plaintiffs in federal court, and of singular importance for this Note, is that a federal court may reach the merits of a claim only if the parties have standing to sue.[13]

Standing under Article III requires that a plaintiff allege an injury in fact that is fairly traceable to the defendant's violation of law and is likely to be redressed by a favorable judgment.[14] Essentially, this requirement serves to

8. U.S. CONST. art. III, § 2.
9. *See* Muskrat v. United States, 219 U.S. 346, 354–55 (1911).
10. *See* Poe v. Ullman, 367 U.S. 497, 503–04 (1961).
11. *See* Honig v. Doe, 484 U.S. 305, 317–18 (1988).
12. *See* Nixon v. United States, 506 U.S. 224, 228 (1993).
13. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–60 (1992).
14. *See id.* at 560–61.

ensure that a plaintiff has a sufficient personal stake in the outcome of a suit to justify the invocation of federal judicial power.[15] A plaintiff alleges a judicially cognizable injury when the harm alleged is both concrete and particularized, and is imminent rather than merely speculative.[16] For standing under Article III, the injury must be sufficiently related to a defendant's unlawful conduct such that a judicial remedy will provide the plaintiff redress. Absent any of these requirements, courts would risk deciding disputes in which the parties lack any real interest, not only wasting judicial resources, but also potentially creating binding precedent based on suits where the parties had no incentive to litigate as vigorously as possible.

Although standing is easily phrased as a "who?" question—i.e., who has standing to sue?—the requirements of injury in fact, traceability, and redressability inextricably link the "who?" to a "what?". A claim is justiciable only where the relief sought will redress the injury the plaintiff has actually suffered. A plaintiff may, for example, have standing to bring a damages claim for a past wrong, but lack standing to seek injunctive relief if they are unlikely to suffer the same injury in the future.[17] An injury will also fail to give rise to a justiciable controversy where it has an insufficient nexus to the unlawful acts alleged.[18] Standing under Article III does not, therefore, inhere as an abstract matter in a plaintiff who has suffered a concrete and particularized injury, but rather describes a particular relationship between a plaintiff, a defendant, and an injury that allows effective adjudication by a federal court.

In addition to the constitutional requirements for justiciability under Article III, the pre-*Lexmark* Court implemented a number of "prudential" limitations on standing.[19] Characterizing these limitations as "closely related to Art. III concerns but essentially matters of judicial self-governance,"[20] the Court declined to exercise jurisdiction in cases that otherwise met constitutional standing requirements on the grounds that they presented issues in a manner not

15. *See* Warth v. Seldin, 422 U.S. 490, 498–99 (1975). Some members of the Court have also argued that more permissive standing rules pose a separation-of-powers problem by giving the federal courts power to oversee "the particular programs agencies establish to carry out their legal obligations." *See Lujan*, 504 U.S. at 568; *see also* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1550–51 (2016) (Thomas, J., concurring in the judgment) (arguing that Article III standing requires more from plaintiffs asserting public rights than from those asserting purely private rights).

16. *See Lujan*, 504 U.S. at 560.

17. *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983) (holding that a plaintiff asserting a claim for police brutality under 42 U.S.C. § 1983 lacked standing to seek injunctive relief against police chokehold policies "[a]bsent a sufficient likelihood that he will again be wronged in a similar way").

18. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 757–59 (1984).

19. In this Article, I attempt to follow the Supreme Court's contemporaneous nomenclature when discussing rules of standing not dictated by Article III's case-or-controversy requirement. When referring to these rules more generally across opinions that have characterized them alternatively as prudential or as dictated by statutory construction, I refer to them as the Court's extra-constitutional rules of standing.

20. *Warth*, 422 U.S. at 500.

amenable to effective judicial resolution.[21] The doctrine of prudential standing bars claims asserting "generalized grievances" or claims premised on the "legal rights or interests of third parties."[22] It also requires that a plaintiff's claim fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[23] Unlike the "irreducible constitutional minimum of standing"[24] under Article III—a limitation on federal judicial power that has often frustrated congressional attempts to confer standing on any interested citizen under statutes like the Endangered Species Act and Administrative Procedure Act—Congress may abrogate prudential standing requirements for statutory causes of action.[25] Essentially, prudential standing provided a mechanism by which the federal courts could decline to adjudicate claims beyond those clearly authorized by Congress or in circumstances where the courts doubted their own competence.

Prudential standing requirements, as articulated in the pre-*Lexmark* era, sat in an uneasy position between concerns of the constitutional allocation of power to the federal courts and concerns of the proper scope of particular federal claims. The zone-of-interests requirement illustrates this tension. Although the Court, in its early prudential standing jurisprudence, described these limitations as reflecting an extension of the policies embodied in Article III,[26] it would be difficult to justify the zone-of-interests requirement with reference only to the amenability of an injury to judicial remedy. Because prudential standing does not displace Article III requirements, a case must still present an injury fairly traceable to a defendant's unlawful conduct and redressable by the court. And while the rule against generalized grievances and the rule against third-party standing (the other prudential standing rules) weed out complaints by a plaintiff with only a minimal interest in the outcome of a dispute, the zone-of-interests requirement may bar claims by the only plaintiff to have suffered an injury. For example, in *Air Courier Conference of America v. American Postal Workers Union, AFL-CIO*,[27] the Court held that postal workers lacked prudential standing to challenge regulations allowing international remailing because they fell outside of the zone of interests of the Private Express Statutes. Even though the

21. *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

22. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 474 (1982).

23. *Id.* at 475 (quoting Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970)).

24. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

25. *See Warth*, 422 U.S. at 501; *see, e.g.*, Fed. Election Comm'n v. Akins, 524 U.S. 11, 19 (1998) (concluding that Congress intended in the Federal Election Campaign Act of 1971 to "cast the standing net broadly—beyond the common-law interests and substantive statutory rights upon which 'prudential' standing traditionally rested").

26. *See Warth*, 422 U.S. at 500; *Valley Forge*, 454 U.S. at 475; *see also* Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677, 692–93 (1990) (arguing that the boundary between Article III injury requirements and the prudential rules against generalized grievances and third-party claims are often murky).

27. 498 U.S. 517 (1991).

postal workers alleged an Article III injury (reduced employment opportunities) not shared by others, and such an injury could readily be redressed by finding the regulations unlawful, the Court held that the postal workers lacked standing because Congress had not designed the relevant statutes to protect their interests.[28] The zone-of-interests requirement of prudential standing is in this way at cross-purposes with the rule against generalized grievances.

The rule against third-party standing occupies somewhat of a middle ground. Like both the Article III injury-in-fact requirement and the rule against generalized grievances, it may prevent adjudication of disputes when the parties to the lawsuit are not those most interested in the outcome. But the question of whether a plaintiff asserts their own rights or the rights of another is intertwined with the merits question of who a particular statute authorizes to sue; that is, whether the plaintiff has a right of action at all. A plaintiff cannot be said merely to be asserting the legal rights of a third party if a statute gives the plaintiff their own right of action. While the rule against third-party standing therefore relates to the policy concerns of Article III justiciability, it nonetheless is adrift without reference to the particular legal right that the plaintiff seeks to assert.

In this sense, both the zone-of-interests requirement and the rule against third-party standing have a statutory[29] dimension, even when phrased in terms of judicial self-governance rather than statutory interpretation. This presents a serious tension with the view of standing as a jurisdictional question, one that haunted the Court until it reframed extra-constitutional limitations on standing in explicitly statutory terms in *Lexmark*.

Before *Lexmark*, whether viewed as a prudential-jurisdictional or statutory requirement, extra-constitutional limitations on standing included no general causation element. Causation, beyond the minimal requirement of Article III that an injury be fairly traceable to the conduct complained of, was a merits question for the finder of fact, controlled by the nature of the specific cause of action.

B. The "Fairly Traceable" Requirement of Article III Standing

The "fairly traceable" requirement of Article III standing was the sole causation element of standing in the pre-*Lexmark* era, outside of a few narrow statutory contexts that will be discussed in the next Part. This requirement is significantly weaker than the proximate cause element of a tort cause of action, essentially requiring only that the defendant's alleged unlawful conduct "make an appreciable difference"[30] with respect to the plaintiff's injury, so that a judicial remedy will meaningfully redress it. *Lexmark*'s new proximate cause requirement therefore represents a significant change in the causal relationship required to support standing for federal statutory causes of action. Both the

28. *Id.* at 524–25.

29. Or more broadly, a "substantive" dimension, since the rule against third-party standing applies with equal force to constitutional claims.

30. Allen v. Wright, 468 U.S. 737, 758 (1984).

relationship of the "fairly traceable" requirement to that of redressability and its application in various substantive areas demonstrate that it requires only the loosest degree of causation.

Considering how the "fairly traceable" requirement bears on a claim for injunctive relief illustrates that causation in Article III standing is conceptually the flipside of redressability. Federal judicial power extends only to disputes where a federal court can rectify the alleged injury with a favorable judgment; that is, where a defendant's conduct has factually caused the plaintiff's injury, so that stopping the unlawful conduct will prevent ongoing harm. And an injunction against a defendant redresses the plaintiff's injury in precisely those circumstances where the injury is fairly traceable to the defendant's conduct. Unlike proximate cause in tort law, which turns on whether it is reasonable to hold a defendant liable for harms they have factually caused, causation for Article III standing is only a question of whether a defendant's unlawful conduct has appreciably contributed to a plaintiff's injury. Indeed, the Court has specifically rejected arguments that a defendant's conduct must be the proximate cause of an injury for the "fairly traceable" requirement to be met.[31] Proximate cause is a merits question, whereas the causation requirement of Article III is the corollary of redressability—a question of the amenability of the suit to judicial resolution.[32]

The Court's decisions in a variety of substantive areas confirm the view that the "fairly traceable" component of Article III standing is satisfied by some degree of factual causation. For suits under the Federal Employers' Liability Act, the Court has held that proximate cause is not required for a plaintiff to prevail on their claim, much less to establish standing to sue.[33] A plaintiff must demonstrate only that the defendant's "negligence played a part—no matter how small—in bringing about the injury"[34] to recover, a rule of causation even more permissive than cause-in-fact requirements for negligence claims in many states.[35] Similarly, the Court's analysis of proximate cause as an element of statutory standing for specific statutory causes of action, discussed in the next Part, implies that common-law proximate-cause limitations on liability play no role in justiciability as a constitutional matter. A contrary view would require dismissal for lack of subject matter jurisdiction before reaching questions of statutory standing or success on the merits.[36]

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31. *See* Bennett v. Spear, 520 U.S. 154, 168–69 (1997).

32. *See* Bradford C. Mank, *Standing for Private Parties in Global Warming Cases: Traceable Standing Causation Does Not Require Proximate Causation*, 2012 MICH. ST. L. REV. 869, 923 (2012).

33. *See* CSX Transp., Inc. v. McBride, 564 U.S. 685, 705 (2011).

34. *Id.*

35. David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1768 (1997) ("The most widely accepted test for making [the cause-in-fact] inquiry is the but-for test."). Even more permissive standards for factual causation generally require that the defendant's conduct be at least a "substantial factor" in the plaintiff's injury. *See id.* at 1775–76.

36. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 93–98 (1998).

Requiring a showing of proximate causation to establish standing to sue under a federal statute therefore goes far beyond what is required by Article III. Where proximate cause is an essential element of the claim, this formulation locates the proximate cause element within the standing inquiry. But for causes of action that historically included no proximate cause element, it creates a new, substantive requirement for plaintiffs to succeed on federal statutory claims.

II.
CAUSATION IN FEDERAL STATUTORY CAUSES OF ACTION

Prior to *Lexmark*, the Court's forays into the proximate cause requirements of federal statutory causes of action were limited to specific statutory contexts and rested on specific statutory language. The first of these, in the Court's landmark decision in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*,[37] addressed the causation requirements for a claim for treble damages under § 4 of the Clayton Act.[38] The Court relied on language borrowed from the earlier Sherman Antitrust Act and the broader statutory context to conclude that such claims were limited by the common-law causation requirements in force when the Sherman Act was enacted.[39]

The plaintiff unions in *Associated General Contractors* alleged that the defendant multiemployer association coerced members and third parties to award contracts to non-union contractors in violation of § 4 of the Clayton Act.[40] The district court dismissed the antitrust claims and the Ninth Circuit reversed.[41] The Supreme Court reversed. By limiting claims to "[a]ny person who shall be injured in his business or property *by reason of* anything forbidden in the antitrust laws," the Court concluded that § 4 of the Clayton Act imposed a proximate causation requirement on claims under the act.[42]

Although practical concerns unquestionably guided the Court's decision,[43] the Court rested its analysis on the specific statutory language and the history of the Clayton Act. Specifically, the Clayton Act adopted its "by reason of" language directly from § 7 of the 1890 Sherman Antitrust Act, which courts had

37. 459 U.S. 519 (1983).

38. 15 U.S.C. § 15 (2012). In relevant part, § 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

39. *See Associated Gen. Contractors of Cal.*, 459 U.S. at 533–35.

40. *Id.* at 520–21.

41. *Id.* at 524.

42. *See id.* at 529–30 (emphasis added).

43. *See id.* at 541–45. The Court reasoned that the remoteness of the harm from the alleged violations and the possibility of other factors in causing the injury would make ascertaining damages impossible, and that there is a "strong interest . . . in keeping the scope of complex antitrust trials within judicially manageable limits." *Id.* at 543.

already construed as incorporating common-law limitations on liability.[44] The Court identified legislative history revealing that the Sherman Act was intended to bring within federal jurisdiction "the same [common-law] remedies . . . that have been applied in the several States to protect local interests."[45] By adopting the identical language of the Sherman Act in § 4 of the Clayton Act, Congress also adopted the "judicial gloss" courts had applied to this language, in light of the Sherman Act's common-law origins.[46]

The Court continued this trend of reading a proximate cause requirement into otherwise broad federal statutory causes of action based on particular statutory text and legislative history in *Holmes v. Securities Investor Protection Corp*.[47] In *Holmes*, the Court likewise held that the Racketeer Influenced and Corrupt Organizations (RICO) Act's civil damages provision[48] required proximate causation. Citing *Associated General Contractors*, the Court reasoned that by adopting nearly identical language to that of § 4 of the Clayton Act, Congress intended to allow civil recovery under RICO only subject to the same limitations and "judicial gloss" that courts had read into the Clayton Act and the Sherman Act before it.[49] A clear line runs from the Sherman Act—adopted in 1890 against the backdrop of general common law and designed to bring within federal auspices claims with state common-law origins—through *Associated General Contractors* and *Holmes*. In neither case did the proximate cause requirement emanate from federal common law *at the time each case was decided*. Rather, subsequent congressional enactments adopted the extra-textual limitations that attached to the Sherman Act based on its contemporaneous situation in the legal landscape and its congressional purpose.

Apart from RICO's use of the Clayton Act's language, structural similarities between the civil damages provisions in each statute likewise suggest that they be read with similar questions of scope in mind. Each statute lays out a lengthy and expansive list of legal wrongs and enforcement mechanisms, including criminal penalties.[50] Each then provides for treble damages in a civil action for any violation of the statute.[51] And in each case, the harms for which plaintiffs typically seek redress—as did the plaintiffs in *Associated General Contractors* and *Holmes*—involve market manipulations that cause widespread

44. *Id.* at 533–35.
45. *Id.* at 531 n.22 (quoting 21 CONG. REC. 2,456 (1890)).
46. *See id.* at 534.
47. 503 U.S. 258 (1992).
48. 18 U.S.C. § 1964(c) (2012). The provision provides in relevant part that "[a]ny person injured in his business or property *by reason of* a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." *Id.* (emphasis added).
49. *Holmes*, 503 U.S. at 267–68.
50. 15 U.S.C. §§ 1–14; 18 U.S.C. § 1962.
51. 15 U.S.C. § 15(a); 18 U.S.C. § 1964(c).

"ripples of harm"[52] that courts may struggle to attribute to particular bad acts.[53] Given that, in the Court's view, "Congress modeled § 1964(c) [the civil damages provision of the RICO Act] on the civil-action provision of the federal antitrust laws,"[54] the textual similarity of the two statutes provides only further evidence that Congress intended for the same longstanding limitations to apply in each.

Not all members of the *Holmes* Court, however, believed such analysis of the text, history, and structure of RICO was required to conclude that a plaintiff could not prevail absent a showing of proximate cause. Despite the ease with which the Court reached its conclusion in *Holmes* based on analysis of the particulars of the statute, Justice Scalia argued for the same result "not so much because RICO has language similar to that of the Clayton Act," but on a broader, more fundamental "practice of common-law courts."[55] Presaging his opinion for the Court in *Lexmark*, Justice Scalia concluded that *Holmes* presented a question of statutory standing. He then announced, without reference to authority, that "[o]ne of the usual elements of statutory standing is proximate causality."[56]

The significance of Justice Scalia's departure from the majority in *Holmes* cannot be overstated. Not only did he plant the seeds of *Lexmark*'s broader holding over twenty years later by reframing the zone-of-interests test as a statutory, rather than prudential, requirement. He also placed proximate cause within the statutory standing framework. And his is a species of proximate cause that derives not from congressional intent in creating a specific statutory cause of action, but from the common law—and not just the common law of the federal courts or of American courts, but "probably of all courts, under all legal systems."[57] His is a proximate cause of first principles. Fitting, then, that he did not cite precedent, but proverb.[58]

In the years between *Holmes* and *Lexmark*, the Court applied proximate cause in a variety of statutory contexts. Professor Sandra Sperino thoroughly catalogues these cases in her 2013 article *Statutory Proximate Cause*.[59] Many of the cases during this period involved the familiar setting of civil RICO or related

52. Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 534 (1983).

53. *See Holmes*, 503 U.S. at 269 (worrying that allowing recovery for indirect harms would make it difficult for courts "to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors").

54. *Id.* at 267.

55. *Id.* at 287 (Scalia, J., concurring in the judgment).

56. *Id.*

57. *Id.*

58. "'[F]or want of a nail, a kingdom was lost' is a commentary on fate, not the statement of a major cause of action against a blacksmith." *Id.* Justice Scalia offered no precedent in support of his view that statutory standing incorporates a proximate cause requirement. He attributed the principle embodied in his commentary on this adage to *Associated General Contractors*.

59. *See* Sandra F. Sperino, *Statutory Proximate Cause*, 88 NOTRE DAME L. REV. 1199, 1216 n.79 (2013).

securities-fraud causes of action.[60] Others dealt with judicially implied causes of action based in part on federal statutory prohibitions, notably securities fraud actions bearing close similarity to RICO securities actions.[61] Some cases related to federal jurisdiction-conferring statutes that by their own terms provided for adjudication of common-law claims and did not create new statutory rights.[62] A separate line of cases, illustrated by *Staub v. Proctor Hospital*,[63] imputed a proximate cause requirement to some federal statutory causes of action on the theory that they sounded essentially in tort. While straying closer to a general proximate cause element for federal statutory causes of action, these cases still relied—if only nominally—on the specific history of particular federal statutes—namely, that the statutes structurally resembled tort causes of action and that Congress therefore intended them to incorporate common-law tort limitations on liability.[64] Justice Scalia's view that every federal statutory cause of action requires proximate cause absent a congressional command to the contrary lay dormant until *Lexmark*.

III.
THE COURT'S PIVOT ON STATUTORY STANDING AND THE NEW PROXIMATE CAUSE

Lexmark resolved the great tension between the "prudential" and "statutory" dimensions of the Court's extra-constitutional standing doctrines[65] by clarifying that the zone-of-interests test was a question not of prudence or judicial self-governance, but of statutory interpretation.[66] The Court abrogated

60. *See, e.g.*, Hemi Group, LLC v. City of New York, 559 U.S. 1 (2010); Anza v. Ideal Steel Supply Corp., 547 U.S. 451 (2006).

61. *See, e.g.*, Dura Pharm., Inc. v. Broudo, 544 U.S. 336 (2005). *Dura* addressed proximate causation in a judicially implied securities fraud action. While courts have implied such actions in part based on federal statutes, they are not federal statutory claims per se. The common-law origins of such claims, as well as the lack of congressional directive as to who may bring suit under the relevant statutes, may explain the Court's reference to common-law principles in defining standing for these implied rights of action. "Judicially implied private securities fraud actions resemble in many (but not all) respects common-law deceit and misrepresentation actions." *Id.* at 343.

62. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004). *Sosa* discussed the relationship between proximate cause and the "foreign country" exception to the waiver of sovereign immunity in the Federal Tort Claims Act (FTCA), concluding that the exception barred recovery for injuries suffered in a foreign country. Common-law proximate causation, in the Court's view, did not define the contours of the FTCA's jurisdictional grant. *Id.* at 703–04. Where jurisdiction lies based on federal statutory law, the actual causes of action under the FTCA are based on state law and employ state-law rules of decision. *See* 28 U.S.C. § 1346(b) (2012). Claims under the Alien Tort Statute, as discussed in *Sosa*, similarly rest on the common law (the law of nations)—the statute is "simply . . . a jurisdictional grant" that "clearly does not create a statutory cause of action." *Sosa*, 542 U.S. at 713.

63. 562 U.S. 411 (2011). Justice Scalia, writing for the Court, stated with minimal discussion that the Uniformed Services Employment and Reemployment Rights Act "incorporates the traditional tort-law concept of proximate cause." *Id.* at 420.

64. *See id.*

65. *See supra* Part I.

66. Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014). Although the Court did not explicitly decide the fate of the other extra-constitutional rules of standing, Justice Scalia

its prior holdings that characterized extra-constitutional standing rules as "judicially self-imposed limits on the exercise of federal jurisdiction."[67] Instead, once a court ascertains that a suit meets Article III justiciability requirements, the remaining question of standing is whether the plaintiff "falls within the class of plaintiffs whom Congress has authorized to sue" under the relevant statute based on "traditional principles of statutory interpretation."[68]

For those frustrated by the Court's squirrelly doctrine of prudential standing, *Lexmark* came as a breath of fresh air. It settled that extra-constitutional limitations on standing were a non-jurisdictional merits question, obviating the need for courts to decide whether to address the zone-of-interests test before Article III concerns in the interest of constitutional avoidance.[69] Furthermore, *Lexmark* brought the Court's extra-constitutional standing doctrine into alignment with what many scholars argued the Court should have been doing all along: determining standing not based on free-floating doctrine, but "by reference to the particular right at issue."[70] Given the fraught history and internal

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intimated strongly that they must fit under either the Article III or statutory standing rubrics. The rule against generalized grievances, traditionally viewed as a prudential limitation on standing, was properly a matter of Article III's case-or-controversy requirement. The rule against third-party standing, he noted, often had a statutory dimension. *Id.* at 127 n.3. Given the Court's statement that "it cannot limit a cause of action that Congress has created merely because 'prudence' dictates," it is unlikely that the rule against third-party standing survives for federal statutory claims except where it implicates Article III concerns or suggests that a statute does not confer a cause of action on a particular plaintiff. *See id.* at 128.

67. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004); Allen v. Wright, 468 U.S. 737, 751 (1984).

68. *Lexmark*, 572 U.S. at 128.

69. This difficulty was on display in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), which rejected the practice of "hypothetical jurisdiction" in which courts assumed jurisdiction to dispense with cases more easily resolved on the merits. Justice Stevens, concurring in the judgment, argued that the Court could address standing under the Emergency Planning and Community Right-To-Know Act of 1986 as a jurisdictional matter before reaching the question of Article III justiciability, pointing to a prior opinion of Justice Scalia characterizing the zone-of-interests test as jurisdictional. *See id.* at 117 (Stevens, J., concurring in the judgment) (citing Bennett v. Spear, 520 U.S. 154, 164 (1997)). When viewing each as a jurisdictional question, constitutional avoidance would counsel against resolving Article III questions before those of prudential standing. *Cf.* Kremens v. Bartley, 431 U.S. 119, 134 & n.15 (1977) (deciding case on prudential mootness grounds rather than reaching merits of constitutional claim). *Lexmark* therefore relieved courts of the difficult task of determining which questions about whether a plaintiff has stated a claim fall within the jurisdictional issue of prudential standing as opposed to the merits issue of statutory construction.

70. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 250 (1988). Professor (now Judge) Fletcher argued that the Article III case-or-controversy requirement too should impose no barrier to recovery where Congress has authorized a right of action and a plaintiff asserts a good-faith stake in the outcome of the litigation. *Lexmark* essentially endorsed this view with respect to extra-constitutional rules of standing. *See* Ernest A. Young, *Prudential Standing after* Lexmark International, Inc. v. Static Control Components, Inc., 10 DUKE J. CONST. L. & PUB. POL'Y 149, 152–53 (2014) ("[O]ne may fairly read *Lexmark* as adopting Fletcher's analysis for purposes of prudential standing. The thrust of Justice Scalia's opinion, after all, is to replace general judge-made notions of prudence with a substantive inquiry into the intent of particular statutory provisions."). The Court has sharply rejected it, however, with respect to Article III standing. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

tension of the Court's prudential standing doctrine, it is unsurprising that the *Lexmark* Court was unanimous in its decision reframing this doctrine in the familiar terms of statutory interpretation.

The truly remarkable aspect of *Lexmark*'s holding is its statement that courts should "generally presume that a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violation of the statute,"[71] and its articulation of this proximate cause requirement within the rubric of statutory standing.[72] Each is worthy of discussion.

First, the general presumption of a proximate cause requirement inherent in any federal statutory cause of action marks a radical departure from the Court's approach in cases such as *Associated General Contractors* and *Holmes*.[73] Rather than looking to the history of a statute and its specific language, courts under *Lexmark* need only determine that Congress has not explicitly displaced this common-law rule in order to impute a proximate cause requirement to a federal statutory cause of action. While Justice Scalia buttressed this conclusion with reference to the "variety of contexts" in which the Court construed federal statutes to require proximate cause—citing *Associated General Contractors*, *Holmes*, and *Dura Pharmaceuticals*—the conclusion that *all* federal statutory causes of action include this requirement is wholly inconsistent with the Court's pre-*Lexmark* statute-specific approach in these cases. *Associated General Contractors* and *Holmes* labored greatly to trace the history of the specific language in Clayton Act and RICO to its common-law origins in order to ascertain whether Congress intended to require proximate cause.[74] Unlike cases addressing statutes where Congress expressly defined the elements of a statutory claim, *Dura Pharmaceuticals* concerned a judicially implied cause of action. Even there, the Court was careful to note the asserted right's common-law origins in requiring proximate cause in that particular context.[75]

Second, the formulation of proximate cause as a default rule of statutory standing is especially curious in light of the Court's pronouncement that statutory standing asks whether Congress authorized the plaintiff to sue under the applicable statute.[76] If statutory standing boils down to the question of whom Congress intended to authorize to sue, a proximate cause element of statutory

71. *Lexmark*, 572 U.S. at 132.

72. *See id.* at 128–31. While the Court largely eschewed the phrase "statutory standing," proximate cause is listed along with the zone-of-interests test as a question of the plaintiff's "right to sue" under the applicable statute.

73. *See supra* Part II. Prior to *Lexmark*, lower courts also applied this more probing statute-specific approach when determining in the first instance whether statutory causes of action included a proximate cause requirement. *See, e.g.*, Rothstein v. UBS AG, 708 F.3d 82, 95 (2d Cir. 2013) (concluding that claims under § 2333 of the Anti-Terrorism Act required a showing of proximate cause because Congress used the same "by reason of" language that had "commonly been interpreted to require proximate cause for the prior 100 years").

74. *See supra* Part II.

75. *See* discussion in note 61, *supra*.

76. *See Lexmark*, 572 U.S. at 127–29.

standing can be justified only by locating it within congressional intent. The Court indeed made a brief overture to a theory of congressional intent, assuming that Congress "is familiar with the common-law rule [requiring proximate cause] and does not mean to displace it *sub silentio*."[77] But the assumption that Congress intended to burden each federal statutory cause of action with all the baggage of the common law (and whose common law?)[78] when the Court stated this new presumption for the first time in *Lexmark* defies both logic and the Court's prior jurisprudence on causation in federal statutory claims. The tension between the congressional-intent framework of statutory standing and the development of proximate cause as a trans-substantive rule that cuts across all federal statutory causes of action will be discussed further in Part IV below.

The origin of *Lexmark* in Justice Scalia's jurisprudence is unmistakable. It marks the culmination of a project encompassing both Justice Scalia's separate opinion in *Holmes* and his opinion for the Court in *Steel Co.*, which aimed to sharply delineate Article III justiciability from the question of the bounds of particular statutory causes of action, with no room for a prudential middle ground where legislative intent and the Court's judicial self-governance comingle. This new approach, however, does not fully banish extra-constitutional judicially created limits on congressionally created causes of action. Instead, the common law creeps into federal statutory law. Even where Congress has acted to protect the interests of a class of plaintiffs through legislation, certain "venerable principle[s]" of judicial practice continue to frustrate Congress's aims and preclude relief.[79]

The "venerable principle" of proximate cause was on prime display in *Bank of America Corp. v. City of Miami*, where the Court held that the City of Miami's Fair Housing Act claims satisfied the zone-of-interests prong of statutory standing but might nonetheless fail under proximate cause. The City alleged that Bank of America and Wells Fargo had engaged in discriminatory home lending practices prohibited by the FHA resulting in a disproportionate number of foreclosures, which reduced property tax revenues and raised the cost for the City to provide municipal services.[80] Citing *Lexmark*, and without reference to any FHA-specific precedent, the district court held that statutory standing under the FHA included a proximate cause requirement, and that the City had failed to adequately plead it.[81] On appeal, the Eleventh Circuit reversed, holding that the appropriate standard for proximate cause under the FHA was foreseeability, and that the City had met it.[82] The Supreme Court, with Justice Breyer writing for the Court, agreed with the Eleventh Circuit's conclusion that the City was within

77. *See id.* at 132.
78. *See* discussion in the text surrounding note 58, *supra*.
79. *See Lexmark*, 572 U.S. at 132.
80. Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1300–01 (2017).
81. City of Miami v. Bank of Am. Corp., No. 13–24506–CIV, 2014 WL 3362348, at *5 (S.D. Fla. 2014).
82. City of Miami v. Bank of Am. Corp., 800 F.3d 1262, 1282 (11th Cir. 2015).

the zone of interests sought to be protected by the FHA, but vacated the lower court's proximate cause holding.[83] The Court held that, under the FHA, proximate cause required "some direct relation between the injury asserted and the injurious conduct alleged" and that mere foreseeability was insufficient.[84] It remanded the case to the Eleventh Circuit to determine the contours of proximate cause under the FHA in the first instance.[85]

Bank of America followed a much different course than the Court's pre-*Lexmark* cases on standing under the FHA, with the new proximate cause rule producing precisely the opposite result. In *Gladstone, Realtors v. Village of Bellwood*,[86] the Court held that a city alleging similar injuries to those alleged by the City of Miami in *Bank of America* had statutory standing under the FHA. The Court relied on its prior holding in *Trafficante v. Metropolitan Life Insurance Co.*[87] that Congress intended the FHA to confer standing under the statute to the limits of Article III. Standing therefore extended not only to individual plaintiffs, but also to the Village of Bellwood, which alleged economic losses as a result of racial steering.[88] While *Gladstone* did not discuss proximate cause—as Neal Katyal (representing Bank of America) pointed out in oral argument, proximate cause was neither briefed nor argued in *Gladstone*[89]—the omission itself is telling. The Court viewed *Trafficante* as controlling on the question of standing under the FHA. It recognized that "Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules.'"[90] In the FHA, Congress had done so.[91] The Village therefore could proceed with its claim, provided it met Article III justiciability requirements (the Court concluded that it had). Proximate cause was nowhere to be found in the Court's statutory standing analysis.[92]

Arguably, *Trafficante* and *Gladstone* dealt only with the zone-of-interests prong of statutory standing, and left room for other extra-constitutional

83. *Bank of Am.*, 137 S. Ct. at 1301.

84. *Id.* at 1306 (quoting Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258, 268 (1992)).

85. *Id.*

86. 441 U.S. 91 (1979).

87. 409 U.S. 205 (1972).

88. *See Gladstone*, 441 U.S. at 98.

89. Transcript of Oral Argument, *Bank of Am. Corp.*, 137 S. Ct. 1296 (2017) (No. 15-1111).

90. *Gladstone*, 441 U.S. at 100 (quoting Warth v. Seldin, 422 U.S. 490, 501 (1975)).

91. *See id.* at 101–02 (1979) (explaining that standing under § 812 of the FHA should not be read more restrictively than § 810); *see also Trafficante*, 409 U.S. at 208 (holding that Congress intended to expand standing under § 810 of the FHA to the fullest extent permitted by Art. III).

92. While the Court decided *Gladstone* during the period when it viewed extra-constitutional limitations on standing as prudential, it addressed standing under the FHA in primarily statutory terms. *See Gladstone*, 441 U.S. at 93 ("This case presents both statutory and constitutional questions concerning standing to sue under Title VIII."); *see also id.* at 105–07 (discussing legislative history in determining FHA standing).

limitations on standing, which might include proximate cause.[93] The Court in *Bank of America* indeed relied on *Gladstone* to conclude that economic injuries alleged by the City of Miami fell within the zone of interests of the FHA, while neglecting *Gladstone* entirely in its proximate cause analysis.[94] But several factors counsel against concluding that the *Gladstone* Court intended to resolve only a narrow question of the zone of interests. First, the zone-of-interests test was relegated to a single mention in a footnote in *Gladstone* as the Court recited its prudential standing rules.[95] Second, the Court met squarely the question of "whom Congress has authorized to sue," the broader question in *Lexmark* encompassing both the zone-of-interests and proximate cause requirements.[96] Even *Lexmark* justified its proximate cause holding with Congress's presumed intent not to disturb common-law doctrines,[97] a presumption explicitly negated when Congress seeks to confer standing under a statute to the broadest extent permissible under the Constitution. If the Court in *Trafficante* and *Gladstone* meant what it said about congressional intent, these cases foreclose the possibility that Congress meant for proximate cause to limit standing under the FHA.

At a minimum, *Bank of America* broke new ground by locating the requirement of proximate cause under the FHA within the question of standing. It seems, moreover, to represent a substantive change in the law, imposing a new barrier for plaintiffs who have been factually injured by a violation of the FHA. Under *Lexmark*, all plaintiffs pursuing claims under statutes that do not explicitly reject a proximate cause requirement face this obstacle at the pleadings stage.

IV.
THE ANATOMY OF THE NEW PROXIMATE CAUSE

If proximate cause is now a default requirement of statutory standing, what precisely does this requirement look like? Part III discussed the development of this new requirement in *Lexmark* and its application in *Bank of America* to potentially foreclose claims of a sort that would have survived statutory standing requirements under the Court's pre-*Lexmark* jurisprudence. But while *Bank of America* held that foreseeability was not sufficient for proximate cause under the FHA, it left for the Eleventh Circuit the task of formulating an appropriate standard. In the Court's *Lexmark* formulation, the precise nature of the proximate

93. Purely prudential rules of standing with no mooring in "traditional tools of statutory interpretation" would not survive *Lexmark*. *See* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 127 (2014).

94. *See Bank of Am. Corp.*, 137 S. Ct. at 1304–05.

95. *See Gladstone*, 441 U.S. at 100 & n.6.

96. *See Lexmark*, 572 U.S. at 128, 137.

97. *See id.* at 132–33.

cause requirement of statutory standing is, at least formally, a statute-by-statute inquiry.[98]

Despite the statute-by-statute analysis ostensibly mandated by *Lexmark*, the Court in *Bank of America* essentially called for application of the same principles of directness it had pronounced in *Associated General Contractors*.[99] The Court rejected the Eleventh Circuit's reading of Supreme Court precedent (that the FHA must be given "a generous construction") as requiring departure from the more restrictive standard in the Clayton Act and RICO cases.[100] *Lexmark* stood for the proposition, the Court concluded, that "proximate cause generally bars suits for alleged harm that is 'too remote' from the defendant's unlawful conduct," regardless of the statutory particulars.[101] "[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.'"[102]

The Court's directness formulation of proximate cause departs from contemporary tort law practice in the state courts. As the Eleventh Circuit noted, "[p]rofessional usage almost always reduces proximate cause issues to the question of foreseeability."[103] Modern doctrine—apart from, apparently, that of the Supreme Court—has long rejected the antiquated "direct causation" approach to proximate cause exemplified in such opinions as *Atlantic Coast Line Railroad Co. v. Daniels*[104] and Judge Andrews's dissent in *Palsgraf v. Long Island Railroad Co.*[105] Proximate cause under the in-progress Restatement (Third) of Torts asks whether the alleged harm falls within the risk that made the defendant's conduct tortious; the risk is "evaluated by reference to the foreseeable (if indefinite) probability of harm of a foreseeable severity."[106] This standard is not dissimilar to the zone-of-interests test, which asks whether the plaintiff asserts an interest that Congress intended to protect. While the Restatement thus formulates its standard in terms other than foreseeability, it nonetheless disclaims "an amorphous direct-consequences" test.[107] The Restatement notes: "Many jurisdictions employ a 'foreseeability' test for

98. *See id.* at 133 ("Proximate cause analysis is controlled by the nature of the statutory cause of action.").

99. *See Bank of Am.*, 137 S. Ct. at 1306 (citing Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 534 (1983)) (rejecting FHA proximate cause standard that would follow the "ripples of harm . . . far beyond the defendant's misconduct").

100. *See* City of Miami v. Bank of Am. Corp., 800 F.3d 1262, 1281 (11th Cir. 2015) (citing Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209 (1972)).

101. *Bank of Am.*, 137 S. Ct. at 1306 (internal quotation marks omitted).

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

103. *City of Miami*, 800 F.3d at 1282 (quoting DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 199, at 686 (2d ed. 2011)).

104. *See* 70 S.E. 203, 205–06 (Ga. Ct. App. 1911).

105. *See* 162 N.E. 99 (N.Y. 1928) (Andrews, J., dissenting).

106. Restatement (Third) of Torts § 29, cmt. d (AM. LAW INST. 1998).

107. *Id.* § 29, cmt. e.

proximate cause, and in negligence actions such a rule is essentially consistent with the standard set forth in this Section."[108] The Court in *Bank of America* eschewed these developments in the general practice of tort law, instead adopting a standard derived from the *Associated General Contractors* line of cases, which specifically incorporated proximate cause requirements attendant to the 1890 Sherman Act.[109]

The Court's formulation of a general proximate cause requirement in *Bank of America* departed not only from prevailing tort law among the states, but also its own precedent locating the "direct causation" approach within the particular statutory context of the Clayton Act and civil RICO. Just seven years earlier, the Court noted that both "[t]he concepts of direct relationship and foreseeability are of course two of the 'many shapes [proximate cause] took at common law.'"[110] While "in the RICO context, the focus is on the directness of the relationship between the conduct and the harm,"[111] the Court had never before suggested that "directness," by itself, circumscribes those federal statutory causes of action with no textual connection to the Sherman Act.

It also bears noting that proximate cause in the common law historically had only limited applicability to intentional torts, as opposed to negligence. Application of this requirement to federal statutory causes of action therefore provides a layer of protection not available to intentional tortfeasors at common law. Both normative judgments about the moral culpability of intentional wrongdoers and practical concerns about the likelihood of unfairly assigning liability for arbitrary results of intentional tortious conduct have relegated proximate cause to a minor role in intentional tort claims.[112] Justice Thomas, who joined the majority opinion in *Holmes*, made essentially this point in his opinion in *Anza v. Ideal Steel Supply Corporation*: proximate cause as required for standing under RICO should not "permit[] a defendant to evade liability for harms that are not only foreseeable, but the *intended* consequences of the defendant's unlawful behavior."[113] But as the Court noted in *Hemi Group*, this

108. *Id.* § 29, cmt. j.

109. *See* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 125–26 (2014). Other precedent relied upon for the proximate cause standard stated in *Lexmark* is similarly antiquated. Framing the discussion, Justice Scalia cited *Waters v. Merchants' Louisville Ins. Co.*, 9 L.Ed. 691 (1837). *See Lexmark*, 572 U.S. at 131–33. *Associated General Contractors* and *Holmes* themselves relied on *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918), a case only tenuously related to proximate cause that rejected future collateral source payments as a damages offset. *See, e.g.*, Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258, 271 (1992).

110. Hemi Grp., LLC v. City of N.Y., 559 U.S. 1, 12 (2010) (quoting *Holmes*, 503 U.S. at 268). *Hemi Group* likewise applies the direct causation standard, while acknowledging that proximate cause may refer to foreseeability in other contexts.

111. *Id.*

112. *See* Sperino, *supra* note 4, at 10 (discussing reasons why the law of intentional torts generally rejects limitations based on proximate cause).

113. *See* Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 470 (2006) (Thomas, J., concurring in part and dissenting in part).

view "did not carry the day."[114] Instead, and contrary to the prevailing view that intentional tortfeasors bear liability for a broader range of harms than those who are merely negligent,[115] the proximate cause element of statutory standing requires some measure of directness no matter the nature of the unlawful conduct at issue. The Court has thus gone further here than has traditional tort law in shielding intentional wrongdoers from liability for the factual consequences of their wrongs.

Furthermore, that all federal statutory claims for damages sound in tort and require limitations on liability imported from common-law negligence is far from an incontrovertible position. Professor Sperino notes that Title VII discrimination claims already incorporate a variety of statute-specific limitations on liability that obviate the need for a freestanding proximate cause requirement, including special evidentiary standards and factual cause requirements.[116] Statutory proscriptions of particular, intentional conduct within the scope of a particular type of relationship—such as severe or pervasive harassment in the workplace—do not present the same concerns of unbounded and unfair liability as do common-law claims for a breach of a general duty of care.

Lower courts, however, have read *Bank of America* for all it is worth, mechanically applying its "directness" approach to proximate cause in other statutory contexts, almost all of which involve knowing or intentional wrongdoing. Taking to heart the Court's admonition in *Bank of America*, the Eleventh Circuit recently held that foreseeability was insufficient to establish proximate cause under the Commodities Exchange Act.[117] The "common-law principles" in the Court's RICO and Clayton Act cases controlled, rather than any analysis of the Commodities Exchange Act itself.[118] The Ninth Circuit similarly rejected a foreseeability standard for claims under the Anti-Terrorism Act, as previously suggested by the Second Circuit, in favor of the "direct relationship" test articulated in *Associated General Contractors* and *Holmes*.[119]

The proximate cause element of statutory standing therefore appears to have little "statutory" about it apart from the application of the directness standard from *Associated General Contractors* to the particular facts of a statutory cause of action. It is controlled essentially by 1890s tort law refracted through the lens of the Court's Clayton Act and RICO cases, with a healthy dose of Justice Scalia's "venerable principles." The nature of the statutory cause of

114. *Hemi Grp.*, 559 U.S. at 12.

115. *See* Sperino, *supra* note 4, at 10.

116. *Id.* at 11–21.

117. *See* U.S. Commodity Futures v. S. Trust Metals, Inc., 894 F.3d 1313, 1329–30 (11th Cir. 2018).

118. *See id.*

119. *See* Fields v. Twitter, Inc., 881 F.3d 739, 747–48 (9th Cir. 2018). Although *Fields* noted that the Anti-Terrorism Act, 18 U.S.C. § 2333(a), used the same "by reason of" language as in RICO and the Clayton Act, the court concluded that *Lexmark* generally precluded claims for harm "beyond the first step in the causal chain" from a defendant's bad act. *See id.* at 745.

action at issue may determine how direct a harm must be to have a "sufficiently close connection to the conduct the statute prohibits," but the question is now always one of directness.[120] Plaintiffs should expect to need to surmount this requirement whenever asserting claims for injuries removed from a defendant's unlawful conduct, even where the injuries are foreseeable and the Court has previously construed the statute's zone of interests broadly.

V.
THE NEW PROXIMATE CAUSE AND FEDERAL COMMON LAW

This Part will argue that the new proximate cause element of statutory standing is a creature of decidedly federal common law, as opposed to general law or statutory interpretation. It will then explore the development of the doctrine as an illustration of how trans-substantive federal common law can emerge from the construction of individual federal statutes.

The primary sources of law in the United States are legislative enactments and judge-made law. Although courts have at times referred to principles of natural law or of international norms as the basis for certain principles of American jurisprudence,[121] these more remote origins of the rules of decision at play in state and federal courts invariably find effect through the decisions of judges, binding on the courts and future litigants through principles of preclusion, adherence to precedent, and stare decisis. Judge-made law operates not only where the legislature is silent, as in the case of common-law torts, but also where courts fill in gaps in statutory language or infer an implied cause of action from a constitutional or statutory provision.

Together, the body of judge-made law is consolidated under the umbrella of "the common law," but the common law is far from homogenous. It includes the local law fashioned by judges of the state courts, federal common law, and general common law which encompasses state and federal rules of decision.[122] State common law controls when courts apply state-law rules of decision, whether in state court, in a federal court sitting in diversity,[123] or under particular federal statutes mandating state-law rules of decision.[124] Federal common law similarly governs, where applicable, in both state and federal courts when the

120. *See* Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1305 (2017) (quoting Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 133 (2014)).

121. *See, e.g.*, Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 139 (1810).

122. *See* Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 503–05 (2006). In contrast to the judge-made law articulated by some identifiable sovereign, *see S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting), general common law, at least as understood before *Erie*, "was not attached to any particular sovereign; rather, it existed by common practice and consent among a number of sovereigns." William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1517 (1984).

123. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938).

124. *See, e.g.*, 28 U.S.C. § 1346(b)(1) (2012).

plaintiff asserts a right under federal law.[125] Because the federal government's law-making powers are limited under the Constitution, federal common law, as opposed to statutory law, ordinarily provides the rule of decision only where federal courts have recognized an implied cause of action based on a specific federal statute or constitutional provision.[126] Federal courts often incorporate or apply general common law where a statute or constitutional provision provides for federal jurisdiction but declines to specify the applicable rules of decision.[127] General common law, sharply limited by the Court's landmark decision in *Erie Railroad Co. v. Tompkins*,[128] is not binding on the state courts and provides no independent basis for federal-court jurisdiction.[129]

But Justice Brandeis's proclamation in *Erie* that "[t]here is no federal general common law"[130] has proven somewhat of an overstatement. Certainly, *Erie* clarified that the federal courts must respect state-court opinions where the state law provides the rule of decision, even in areas such as commercial law that were previously viewed as within the province of general, as opposed to local, law.[131] This includes both when federal courts sit in diversity and when the Supreme Court reviews state court decisions.[132] Furthermore, state courts under *Erie* need not respect federal-court decisions on general law, even as persuasive authority, when deciding nonfederal questions. General law, however, has continuing vitality in a variety of federal-law contexts.[133]

Professor Caleb Nelson highlights several areas in which federal courts rely on general law to provide for common-law rules of decision or to fill in gaps in legislative enactments.[134] In some areas where statutory or constitutional provisions provide for federal jurisdiction but do not provide the rules of decision, general law controls. Claims concerning contracts to which the United States is a party, for example, are governed by something like a general law of contract, determined with reference to the standard principles of contract law at

125. State courts must adjudicate federal claims as they would parallel state-law claims. *See* Testa v. Katt, 330 U.S. 386, 392 (1947). Under the "Reverse *Erie*" doctrine, state courts presumptively may apply their own procedural rules when adjudicating federal claims, but not where doing so would abridge a substantive federal right. *See* Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 361 (1952).

126. *See, e.g.*, Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) (recognizing implied cause of action against federal officers for constitutional violations); J.I. Case Co. v. Borak, 377 U.S. 426 (1964) (recognizing implied cause of action for damages for securities fraud under procedural statutory provision).

127. *See* Nelson, *supra* note 122, at 507–18 (discussing suits in admiralty and contract claims against the United States).

128. 304 U.S. 64.

129. *See* Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 632–33 (1874).

130. 304 U.S. at 78.

131. *See id.*

132. *See* Herb v. Pitcairn, 324 U.S. 117, 125–26 (1945); *Erie*, 304 U.S. at 78.

133. *See* Nelson, *supra* note 122, at 504–05.

134. *See id.*at 507–18.

play in the states.[135] Maritime law in the federal courts likewise draws on the general law of seafaring nations.[136]

Despite the relatively broad view Professor Nelson takes of the role of general common law in federal law, a distinction remains between federal common law as such and general common law as applied by the federal courts. Where federal courts recognize an implied cause of action from a statute or constitutional provision, for example, the cause of action is a creature solely of federal law, and not of general law. Rather than referring to the prevailing law among the states or among nations, the federal courts in these contexts look primarily to policy and legislative purpose in shaping the rules of decision.[137] Similarly, when judicially crafted rights or defenses rest on the structure of the American federal system, they derive from a federal and decidedly not general common law.[138] These species of common law are markedly different from the general law based on "the core principles of the common law of contract that are in force in most states"[139] that is applied by the federal courts in cases concerning contractual obligations of the United States.

The distinction between federal common law and general common law has an important implication for the development of federal rules of decision—while federal common law as such develops only by federal judicial decisions, the general law continuously evolves as a product of prevailing legal norms. In *Sosa v. Alvarez-Machain*, for example, the Court held that claims under the jurisdiction-conferring Alien Tort Statute "must be gauged against the current state of international law" with reference to the "customs and usages of civilized nations."[140] Similarly, general-law principles of commercial law as applied by

135. *See id.* at 510.

136. *See id.* at 514–16.

137. *See, e.g.*, Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 70–71 (2001) (discussing policy reasons for declining to extend implied cause of action under *Bivens* in light of the deterrence purpose of such actions).

138. State sovereign immunity recognized in the Eleventh Amendment—whether viewed as deriving from the Amendment's text, federal common law, or structural requirements of the Constitution—provides an example of judge-made law that is distinctly federal and not general, shaped by the particular nature of American federalism. Absolute immunity for certain federal officers, to the extent not specifically mandated by the text of the Constitution, enjoys a similar position.

139. United States v. Nat'l Steel Corp., 75 F.3d 1146, 1150 (7th Cir. 1996) (Posner, J.). The law of government contracts may also include non-general law dimensions mandated by the character of the federal system. *See id.*

140. 542 U.S. 692, 733 (2004). The *Sosa* Court considered whether to recognize a cause of action to enforce the international-law prohibition against arbitrary arrest and detention. It concluded that the federal courts should recognize causes of action under the ATS only where the international-law norm at issue has sufficiently "definite content" and "acceptance among civilized nations." *Id.* at 732. Whether such a cause of action is best understood as one of federal common law or of general law applied by the federal courts, it requires looking beyond federal law to customary international-law, in its current state, as it evolves beyond the confines of the federal courts. *Compare* Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561–62 (1984) ("Unlike federal common law, customary international law is not made and developed by the federal courts independently and in the exercise of their own law-making judgment. In a real sense federal courts *find* international law rather than make it, as was not true when courts were applying the 'common law,' and as is clearly not the case

federal courts include those embodied in the Uniform Commercial Code and Restatements of the Law.[141] Stare decisis, and even adherence to binding precedent, appears to apply with significantly less force in matters of general law than of federal common law ancillary to particular statutory or constitutional rights.[142] This is logically consistent. The general law exists outside of the federal judicial system that applies it.

Lexmark's proximate cause requirement may be something of *tertium quid*, but it appears much closer to federal common law than to general law in its foundations and application. Justice Scalia posited the general rule in *Lexmark* as "a well-established principle of [the common] law"; [143] indeed, a general-law view of the proximate cause requirement is consistent with his reference in *Holmes* to the practice "probably of all courts, under all legal systems."[144] Little conceptual difficulty emanates from the determination that Congress intends the backdrop of general common law to fill in gaps in its enactments. Two factors, however, weigh against this interpretation. The *Lexmark* Court's reliance on highly statute-specific jurisprudence and its placement of proximate cause within the statutory standing inquiry both suggest that the new proximate cause doctrine assesses legislative purpose in a manner largely inconsistent with simple application of prevailing general-law principles. Furthermore, the character of this requirement and its incongruence with prevailing state law suggest that it is primarily a creature of federal decisional law rather than an evolving general tort law.

Proximate cause as an element of statutory standing is in its own terms statutory. *Associated General Contractors* and *Holmes*, on which the *Lexmark* Court principally relied,[145] investigated the nature of the causation requirement in the Clayton Act and civil RICO claims with regard to those statutes and with an eye to legislative purpose, not to the prevailing general common law.[146]

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when federal judges make federal common law pursuant to constitutional or legislative delegation."), *with Sosa*, 542 U.S. at 746 (Scalia, J., concurring in part and in the judgment) ("Because today's federal common law is not our Framers' general common law, the question presented by the suggestion of discretionary authority to enforce the law of nations is not whether to extend old-school general-common-law adjudication. Rather, it is whether to create new federal common law."). The Court also held—at least before *Erie*—that international law may be directly operative in the federal courts in appropriate circumstances. *See* The Paquete Habana, 175 U.S. 677, 700 (1900).

141. *See* Nelson, *supra* note 122, at 510.

142. *Cf.* United States v. Reliable Transfer Co., Inc., 421 U.S. 397, 403–05 (1975) (rejecting "divided damages rule" in admiralty based in part because "the United States is now virtually alone among the world's major maritime nations in" applying it, and noting that some lower courts had "simply ignored the rule" as it became outmoded).

143. Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 132–33 (2014).

144. Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 252, 287 (1992) (Scalia, J., concurring in the judgment).

145. *Lexmark*, 572 U.S. at 132–33. The Court also cited *Dura Pharmaceuticals*, which concerned a judicially created cause of action for securities fraud with similar common-law origins to the claims in *Associated General Contractors* and *Holmes*. *See* discussion in note 61, *supra*.

146. *See supra* Part II.

Specifically, in *Associated General Contractors*, the Court concluded that Congress intended (as evinced by its choice of identical language) to incorporate the common-law "judicial gloss" that courts had applied to the Sherman Act in 1890.[147] This judicial gloss included a freestanding "directness" requirement, which the Court referred to in the same breath as requirements such as privity of contract that have not survived developments in the general law of contracts in any recognizable form.[148] Legislative purpose in light of the statutes' use of language from the Sherman Act, rather than contemporary norms of the body of state and federal law, controlled the outcome in those cases. The statutes incorporated a particular body of common law from a particular point in time rather than calling for the application of an evolving general law. Likewise, the Court in *Lexmark* held that "[p]roximate-cause analysis is controlled by the nature of the statutory cause of action."[149]

The Court's application of *Lexmark* to the Fair Housing Act in *Bank of America*, however, reflected the same fixed-in-time principle of directness that the Court credited to the judicial gloss of the 1890 Sherman Act. In rejecting foreseeability as the guiding light of proximate cause, the Court generalized its statute-specific analysis from *Associated General Contractors* and *Holmes* to provide a rule totally out-of-step with prevailing norms in the state courts.[150] The Court in *Bank of America* undertook no inquiry into prevailing law in the states or the consensus of learned treatises.

Contrast this with the Court's approach in cases based on general law. In the admiralty case of *Exxon Co. v. Sofec*, for example, the Court took notice of the near-unanimity of state-law authority, as well as the view of commentators, in concluding that the general maritime law accommodated the doctrine of superseding cause within the framework of comparative negligence.[151] The proximate cause element of statutory standing, however, resists interpretation as a creature of general law paradoxically because of both its flexibility and its inflexibility—it is statute-specific in its origins, but it is so tethered to the Court's decisional law as to defy accommodation of both contrary congressional purpose and developing general common law.

This is the unique pedigree of the proximate cause element of statutory standing among the species of federal common law. Rather than emerging from general law or from whole cloth (as in the case of judicially created causes of action), it is an extrapolation from the construction of individual federal statutes. The Court built this foundation in *Associated General Contractors* and *Holmes*, in an era when the proposition that every federal statutory cause of action would

147. Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 532–34 (1983).

148. *See id.* at 532–33.

149. *Lexmark*, 572 U.S. at 133.

150. *See supra* Part IV.

151. Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 837–38 (1996).

include such a default requirement would have been nearly unthinkable.[152] *Lexmark* generalized this rule, in part buttressed by the common-law origins of unfair competition law. But it retained at least a nominal role for the "nature of the statutory cause of action" in shaping the contours of the proximate-cause requirement.[153] By *Bank of America*, hardly a pretense of a statute-specific inquiry remained—the Court held that even a statute in which Congress sought to extend statutory standing to the outer bounds of Article III contained a proximate cause element with substantially the same directness requirement articulated in *Associated General Contractors*. The scaffolding has fallen away, and a freestanding, trans-substantive proximate cause requirement remains.

CONCLUSION

This Note explored the Court's curious imposition of a new proximate cause default requirement for statutory standing, which accompanied its shift from a prudential to statutory framework for extra-constitutional standing in its 2014 decision in *Lexmark*. This little-discussed aspect of *Lexmark* represents a substantial change for plaintiffs pursuing federal statutory causes of action. Already, the Court has rejected under this new requirement Fair Housing Act claims that in all likelihood would have survived the prudential standing analysis of the pre-*Lexmark* Court. Even more curious than the anatomy of this new requirement, which hews to antiquated "direct causation" approaches to proximate cause long rejected by states and scholars, are the requirement's origins—it appears to emerge as a creature of federal common law out of the Court's prior constructions of a handful of statutes with a peculiar history in common-law tort claims. The judicial gloss of the 1890 Sherman Act, incubated in the decisional law of the Clayton Act and Racketeer Influenced and Corrupt Organizations Act, has now taken on a life of its own. Congress should be aware that absent explicit direction to the contrary, the private causes of action created by its legislation will be constrained by this new proximate cause requirement. And plaintiffs pursuing a wide variety of federal statutory claims should take a hard look at the Clayton Act and RICO standing if they wish their claims to survive motions to dismiss. As much as *Lexmark* did to tidy up the law of standing, significant uncertainty remains as this new proximate cause requirement filters beyond the Lanham Act and Fair Housing Act to other areas of federal statutory law.

152. No Justice suggested a course to the outcome in *Associated General Contractors* that did not run through the language of the statute. Even by 1992 when the Court decided *Holmes*, Justice Scalia was alone in his advocacy of a default proximate cause requirement. *See* Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258 (1992); *Associated Gen. Contractors of Cal.*, 459 U.S. at 519.

153. *Lexmark*, 572 U.S. at 133.