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USING TORT LAW TO UNDERSTAND THE CAUSATION PRONG OF STANDING

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Under current Supreme Court case law, a plaintiff does not have Article III standing to sue in federal court unless that plaintiff can demonstrate "causation." The term "causation" is ubiquitous within the law. Because of the frequency with which the term appears in various legal contexts, however, the conceptual analysis associated with that term can vary. Unfortunately, the Supreme Court has never clearly established the conceptual analysis necessary for making the causation determination within standing law. Consequently, there is confusion on this question.

This Article addresses that confusion by relying on causation terms and concepts fully developed within tort law. The term "causation" is associated with the "proximate cause" and "cause in fact" analyses within a standard negligence claim. In the early Supreme Court cases in which the causation prong of standing was introduced, the Court most often used cause in fact language in determining the causation prong of standing. Upon a close inspection of these early Supreme Court cases, however, it seems likely that the Court actually intended a proximate cause analysis. Moreover, a proximate cause analysis is more consistent with the "gatekeeping" function normally attributed to the standing requirement.

This Article argues that the causation prong of standing should be interpreted as being analogous to the proximate cause doctrine within negligence law. This interpretation would more closely align with the intuitions that originally prompted the development of the causation prong of standing. Moreover, a proximate cause interpretation would facilitate the development of a clear procedure for determining standing at the outset of litigation, thus fulfilling the "gatekeeping" function attributed to standing.

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INTRODUCTION

To satisfy the standing requirements deriving from the "cases" or "controversies" language of Article III of the U.S. Constitution,[1] a plaintiff must show (1) an injury in fact, which is (2) fairly traceable to the defendant's misconduct ("causation"), and which can be (3) redressed by a favorable decision of the court.[2] This articulation of the standing

1. *See* U.S. CONST. art. III, § 2, cl. 1.
2. *See* Hein v. Freedom From Religion Found., 551 U.S. 587, 597–98 (2007).

requirements deriving from Article III has been recited by the Supreme Court for nearly thirty years,[3] but these requirements can be traced to cases extending back even further.[4] This conceptualization has been the subject of extensive academic criticism from the moment the current formulation of standing was introduced to the most recent law review volumes.[5] The topic of standing has attracted the attention of, and frustrated, some of the nation's best legal academics.[6]

For the most part, the ubiquitous academic criticism of standing has focused primarily on the injury prong of the standing analysis.[7] This Article will depart from the thrust of most standing scholarship by focusing on the second prong: the "fairly traceable" or "causation" requirement. This prong has mostly been ignored, or treated as a secondary

3. *See* Allen v. Wright, 468 U.S. 737, 751 (1984) (listing the Article III standing requirements).

4. *See id.* (citing cases from the 1970s as precedent for the Article III standing requirements). In addition to Article III standing requirements, the Supreme Court has also identified several standing requirements that are "nonconstitutional prudential considerations." Franchise Tax Bd. of Cal. v. Alcan Aluminium Ltd., 493 U.S. 331, 331 (1990). The Court has been less precise in identifying prudential standing requirements, but the most commonly recognized are: (1) the requirement that "a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit," Bennett v. Spear, 520 U.S. 154, 162 (1997); (2) the requirement that a plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties," Warth v. Seldin, 422 U.S. 490, 499 (1975); and (3) a prohibition against "'generalized grievance[s]' shared in a substantially equal measure by all or a large class citizens," *id.* More recently, however, the Court has tended to articulate the prohibition against generalized grievances as deriving from Article III rather than prudential concerns. *See, e.g.*, *Hein*, 551 U.S. at 597–98 ("We have consistently held that [the interest of a federal taxpayer in seeing that Treasury funds are spent in accordance with the Constitution] is too generalized and attenuated to support Article III standing."); Lujan v. Defenders of Wildlife, 504 U.S. 555, 573–74 (1992) ("We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.").

5. *See, e.g.*, Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 467–68 (2008) (arguing that the current standing doctrine does not achieve the purposes attributed to the doctrine); Gene R. Nichol, Jr., *Rethinking Standing*, 72 CALIF. L. REV. 68, 68 (1984) ("In perhaps no other area of constitutional law has scholarly commentary been so uniformly critical [as in standing law].").

6. *See generally* Richard A. Epstein, *Standing and Spending—The Role of Legal* and *Equitable Principles*, 4 CHAP. L. REV. 1 (2001); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363 (1973); Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73 (2007); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, 'Injuries,' and Article III*, 91 MICH. L. REV. 163 (1992).

7. *See, e.g.*, Kimberly N. Brown, *What's Left Standing? FECA Citizen Suits and the Battle for Judicial Review*, 55 U. KAN. L. REV. 677, 719 (2007) (arguing that the injury prong of standing "remains central in statutory standing cases" but that causation and redressability are "another matter"); Scott Michelman, *Who Can Sue over Government Surveillance?*, 57 UCLA L. REV. 71, 76 (2009) ("[A]lthough the familiar standing test contains three constitutional prongs (injury-in-fact, causation, and redressability), the heart of the battle over standing to challenge government surveillance concerns who, if anyone, has suffered a judicially recognized injury-in-fact.").

consideration, in modern academic discussions on standing.[8] Partly because of academic disinterest in this topic, uncertainty remains as to the analysis required by the causation prong.[9] A major objective of this Article is to shed light on this issue.[10]

In order to accomplish this objective, I will utilize tort law. In particular, I will frequently reference the concepts of "cause in fact" and "proximate cause," both of which are elements of a standard negligence cause of action.[11] Modern tort law recognizes cause in fact and proximate cause as distinct concepts serving separate purposes.[12] This has not always been the case. The "decoupling" of cause in fact and proximate cause is a relatively recent phenomenon,[13] and one that continues in the most recent *Restatement (Third) of Torts*.[14]

A similar decoupling is needed for causation in the standing context. Lower federal courts routinely struggle to apply the causation prong of

8. Most academic commentary discussing the causation prong of standing is dated. *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 123 n.23 (6th ed. 2009) (listing "commentary on the Court's early development of the 'causation'" prong of standing). When the causation prong of standing is discussed, it is usually a secondary consideration to which relatively little attention is devoted. *See, e.g.*, Daniel A. Farber, *A Place-Based Theory of Standing*, 55 UCLA L. REV. 1505, 1544 (2008) (articulating a new theory of standing but devoting only one paragraph to the causation prong of standing).

9. *See* 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3531.5, at 295 (3d ed. 2008) (describing the "sea of uncertainty" associated with the causation prong of standing).

10. The Supreme Court's recent opinion in *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011), plainly demonstrates the need for a reconceptualization of the causation prong of standing. In *American Electric*, the Court was unable to muster even the most cursory analysis of the difficult causation questions implicated under current standing doctrine. These issues had been addressed below by the Second Circuit, *see* Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 345–47 (2009), had been extensively briefed to the Supreme Court, *see, e.g.*, Reply Brief for Petitioners at 5, *Am. Elec.*, 131 S. Ct. 2527 (No. 10-174), 2011 WL 1393804, at *5 (discussing standing and causation), and implicated the Court's power to hear the case, *see Am. Elec.*, 131 S. Ct. at 2535 (acknowledging that standing questions implicate the Court's power over the dispute). The Court punted on the question, however, stating—without analysis or explanation—that the Court was divided on this issue and that it was affirming the exercise of jurisdiction by "an equally divided Court." *See id.*

11. *See* AARON D. TWERSKI & JAMES A. HENDERSON, JR., TORTS: CASES AND MATERIALS 109–10 (2003) (listing cause in fact and proximate cause as elements of a Negligence claim). This Article will use the capitalized term "Negligence" to refer to the cause of action, as distinguished from the breach of duty element of that cause of action, which is sometimes confusingly referred to as the "negligence" element. *See infra* note 18.

12. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 cmt. a (2005) (explaining that cause in fact and proximate cause address "two quite distinct concepts" despite their common "causal terminology").

13. *See* Paul J. Zwier, *"Cause in Fact" in Tort Law—A Philosophical and Historical Examination*, 31 DEPAUL L. REV. 769, 774–75 (1982) (explaining that the decoupling of cause in fact and proximate cause is a twentieth century phenomenon).

14. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 cmt. a (explaining the original "conflation" of cause in fact and proximate cause and the efforts to decouple the concepts).

standing because of uncertainty as to which analysis is required.[15] The process of decoupling proximate cause from cause in fact within tort law has resulted in a more cohesive tort doctrine. Employing the same decoupling approach to causation within the standing doctrine can produce the same effect. In fact, it leads to a somewhat startling conclusion: while the *terminology* often used by the Supreme Court in discussing the causation prong of standing suggests a cause in fact analysis, the actual analysis employed by the Court under this element of standing is far less clear.

To untangle the Supreme Court's case law on this issue, this Article starts by considering the purposes or functions generally attributed to standing. Standing is often described as serving a "gatekeeper" function that is to operate at the "threshold" of a federal lawsuit.[16] The cause in fact language frequently employed by the Supreme Court, however, is flatly inconsistent with this conception of standing law. The cause in fact inquiry is fact intensive; it requires the decision maker to draw inferences from evidence. Having a cause in fact inquiry as part of the threshold standing analysis is akin to forcing a square peg into a round hole; it is a horrible fit. Not surprisingly, the Supreme Court has struggled mightily to develop a procedural approach to causation that recognizes the gatekeeper function of standing while also incorporating the cause in fact terminology found in its opinions. This failure to develop a cohesive procedure is a symptom of an underlying problem.

These procedural problems disappear, however, if the "fairly traceable" or "causation" prong of standing is interpreted as requiring a proximate cause analysis. Procedurally speaking, a proximate cause interpretation of standing is a great fit with the gatekeeper function attributed to standing law. A proximate cause analysis does not require a federal court to draw inferences from evidence at the outset of litigation; instead, it requires a court to ascertain the purposes behind the law on which the plaintiff relies in bringing her suit. This sort of analysis is deferential to other branches of government and is purely legal, as opposed to factual, in its scope. As such, it is a comfortable task for federal courts to perform and can be easily conducted at the threshold of litigation.

The superior "fit" of a proximate cause analysis within standing law makes it a superior interpretation of the fairly traceable prong of standing. Moreover, a close inspection of the early Supreme Court cases using cause in fact terminology suggests that the Supreme Court most likely intended, originally at least, a proximate cause analysis. Because of the failure to properly decouple the two forms of causation, proximate cause concepts were verbalized using cause in fact language. In subsequent Supreme Court

15. *See, e.g.*, Saunders v. White, 191 F. Supp. 2d 95, 101–06 (D.D.C. 2002) (discussing conflicting approaches by district courts in applying the causation prong of standing within the context of Equal Protection Clause claims).

16. *See infra* notes 146, 157–65 and accompanying text.

cases, the Court has continued to employ cause in fact language but has usually avoided engaging in a full-fledged cause in fact analysis.

As such, the Court should reformulate the causation prong of standing to clarify that standing requires a proximate cause, rather than a cause in fact, analysis. This interpretation of the causation prong of standing will solve the procedural problems created by the current cause in fact language used in the Court's opinions and will be a better tool for implementing the intuitions that originally prompted the Court to develop this branch of standing jurisprudence.

The organization of this Article is as follows: Part I addresses how cause in fact and proximate cause function as decoupled concepts within Negligence law. Part II demonstrates that the Supreme Court has mostly used a cause in fact vocabulary in explaining, and applying, the fairly traceable element of standing. Part III explores the tension between the fact-intensive cause in fact analysis and the gatekeeping function of standing, using the Supreme Court's failure to develop a comprehensible threshold procedure for analyzing the fairly traceable element as a conduit for examining the problem. Part IV illustrates how this tension is eliminated if a proximate cause interpretation is employed. Part V considers how a proximate cause interpretation would function within existing Supreme Court case law. The Conclusion of the Article briefly considers some of the manageable problems that would arise from a proximate cause interpretation of the causation prong of standing.

I. CAUSE IN FACT AND PROXIMATE CAUSE WITHIN TORT LAW

To gain a proper perspective on the current difficulties with the causation prong of standing, it is first necessary to have an appreciation as to how cause in fact and proximate cause operate as decoupled concepts within tort law, particularly within Negligence law. Tort law is the perfect springboard from which to delve into any discussion of causation. Although most law students have pondered the difficulties of cause and effect well before law school, for many, their first-year torts class is the first instance in which causation concepts are concretely defined and explored. Thus, for many lawyers, tort law has served as the formal introduction to the legal difficulties associated with causation, and therefore provides a convenient starting point for a discussion of standing causation.

Tort law is a nice springboard for another reason. Even though tort law serves an introductory function to causation, it also, unfortunately, serves to obfuscate the relevant concepts because of the terminology employed in a Negligence cause of action. A Negligence claim is usually understood as consisting of five elements[17]: (1) a legal duty; (2) breach of duty (or

17. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 6 cmt. b (2005). This modern conceptualization of a Negligence cause of action is the result of, and masks, numerous intellectual battles over the proper characterization of the tort. For a history of the struggles over the proper characterization of the Negligence cause of action, see generally William V. Dorsaneo III, *Judges, Juries, and Reviewing Courts*, 53 SMU L.

"negligence"[18]); (3) cause in fact;[19] (4) proximate cause; and (5) damages. The term "causation" is thus used in describing both the third and the fourth element of a Negligence claim. The legal analysis performed under elements three and four, however, is conceptually unrelated, despite sharing the term "causation."[20] As will be detailed below, this somewhat confusing terminology employed in torts has probably contributed to the contemporary confusion in understanding the causation prong of standing. Tort law, then, serves as both an introduction to the topic at hand and a source of some of the possible difficulties surrounding the causation requirement in standing analysis. If the topic under consideration is causation, tort law is the logical place to begin.

A. Cause in Fact

The cause in fact requirement in a Negligence claim is met if the plaintiff can show a link between the defendant's substandard or "negligent" behavior (element number two—"the breach") and the plaintiff's injury or damages (element number five).[21] This link is usually measured through the "but-for" test, which asks: "But for the defendant's negligent behavior, would the plaintiff's damages have occurred?"[22] If the plaintiff's damages

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REV. 1497, 1520–26 (2000); William Powers, Jr., *Judge and Jury in the Texas Supreme Court*, 75 TEX. L. REV. 1699, 1699–1704 (1997).

18. The different connotations associated with the term "negligence" are one of the many linguistic shortcomings in tort law. The word "negligence" is often used to refer to the *cause of action*, which consists of the five elements identified in the text. The term is also used to refer specifically to the second element of this cause of action (what I have labeled "breach of duty" in the text), which requires the plaintiff to show that the defendant acted below the level of care required, or "negligently." As will be argued below, the linguistic confusion surrounding the term "causation" is probably partly responsible for the Supreme Court's muddled standing jurisprudence. Thus, extreme attention will be given in this Article to linguistic precision. *Cf.* Leon Green, *The Study and Teaching of Tort Law*, 34 TEX. L. REV. 1, 19 (1955) ("The earlier the law student realizes the nature of the language he must utilize to do his study and develop his powers, the more quickly he should be on his way. For these terms must be brought under strict control, however figurative, spongy, or fictional they may seem. They will not respond to loose usage. Each serves some very definite function."). In this regard, the different uses of the term "negligence" will be avoided, when possible, by using different language to refer to the second element of the cause of action ("breach" or "substandard care"). When such efforts are more distracting than useful, however, the different meanings associated with the term "negligence" will be demarcated by capitalizing the first letter ("Negligence") when referring to the cause of action, and using the lower-case version ("negligence") when referring specifically to whether the defendant failed to exercise the care required.

19. Both the third and fourth element of a Negligence claim have been historically identified by terms other than the ones used in this Article. This confusion will be discussed in Part II.

20. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 cmt. a (2005).

21. *See id.* § 26 ("Tortious conduct must be a factual cause of harm for liability to be imposed. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct.").

22. *See id.* § 26 cmt. b ("The standard for factual causation in this Section is familiarly referred to as the 'but-for' test, as well as a *sine qua non* test. Both express the same concept: an act is a factual cause of an outcome if, in the absence of the act, the outcome

would have occurred even if the defendant had acted non-negligently, then the defendant is not the cause in fact of the plaintiff's damages and cannot be made liable through a Negligence claim. Consider a suit by a plaintiff for injuries sustained in an automobile accident with a defendant. The plaintiff argues that the defendant breached his duty to act reasonably because the defendant was speeding when he hit an ice patch and lost control of his vehicle (the plaintiff does not allege that any other conduct by the defendant breached the standard of care). If the jury believes that, even if the defendant had been going the speed limit, the accident (and the plaintiff's injuries) would have occurred anyway, the defendant is not liable for the plaintiff's injuries.

This type of causal connection is consistent with a tort system based on retributive compensation. One of the obvious objectives of tort law is to compensate those injured by the blameworthy behavior of others.[23] It is necessary, then, to establish a link between the defendant's blameworthy behavior and the plaintiff's injuries. A cause in fact analysis, using the but-for test, establishes this link.

There are a few characteristics of the cause in fact inquiry that are worth emphasizing at this point, even though they will be explored in more detail later, because they figure prominently in a proper understanding of the difficulties the Supreme Court has had in developing the fairly traceable requirement of standing. First, cause in fact is counterfactual. Determining whether cause in fact exists under the but-for test requires a guess or estimation as to what *would* have happened if the defendant had acted consistently with the law's requirements.[24] Thus, in a Negligence claim, the cause in fact inquiry requires a guess as to whether the plaintiff would still have been injured if the defendant had acted reasonably (in our example, by driving the speed limit rather than speeding), instead of unreasonably or "negligently." As part of this analysis, it is first necessary for the jury to determine how exactly the defendant should have acted under the circumstances he was facing.[25] In our example involving the speeding defendant, determining the exact conduct required of the defendant is relatively easy: the defendant would have complied with his legal obligation by driving no faster than the posted speed limit. But, as will be demonstrated later, this step in the analysis has sometimes proven difficult for the Supreme Court in the standing analysis, particularly for claims made

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would not have occurred."); *see also id.* § 26 reporters' note on cmt. b (documenting the widespread use of the "but-for" test for determining cause in fact).

23. *See* Steven D. Smith, *The Critics and the "Crisis": A Reassessment of Current Conceptions of Tort Law*, 72 CORNELL L. REV. 765, 768 (1987) (recognizing compensation as one of the primary objectives of tort law).

24. *See* DAVID W. ROBERTSON ET AL., CASES AND MATERIALS ON TORTS 122 (3d ed. 2004) ("[T]he 'but for' inquiry addresses a hypothetical situation: what *would have* happened in the absence of the defendant's wrongful conduct.").

25. *See* David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1770 (1997) (explaining that under the cause in fact analysis "the defendant's wrongful conduct is now 'corrected' to the minimal extent necessary to make it conform to the law's requirements").

under the Equal Protection Clause. After the conduct that the law required of the defendant is established, the cause in fact analysis requires a guess as to how events would have played out if the defendant had acted according to that required conduct.[26] Sometimes, this analysis can be rather easy in a tort claim. Consider injuries incurred after a defendant has run a red light and caused an accident in the intersection. The conduct that was required of the defendant was to stop at the red light. Common sense tells us that, if the defendant had stopped, the various injuries suffered by the plaintiff in the intersection accident would not have occurred. But in many cases, establishing a cause in fact link between the defendant's misconduct and the plaintiff's injuries will not be as simple. In these difficult cases, the analysis will involve the weighing of evidence, often including the persuasiveness of competing experts. Not surprisingly, the responsibility for answering the cause in fact question is assigned to the jury in a Negligence claim.[27] The plaintiff has the burden of proof on this question and must prove cause in fact by a preponderance of the evidence; that is, the plaintiff must prove that it is more likely than not that his injuries would not have occurred if the defendant had acted legally.[28] As a fact question (actually, a counterfactual question) to be answered by the jury, this conclusion is reached only at the end of trial, after all of the evidence has been received and all of the experts have testified.[29] A judge's legal training provides her with no special expertise or insight into performing the counterfactual inquiry required by cause in fact.

B. Proximate Cause

Although the fourth element in a Negligence cause of action shares the "causation" moniker with the third element, the two analyses share little in common on a conceptual level.[30] Proximate cause assumes that the defendant's illegal behavior was a cause in fact of the plaintiff's injuries.[31] Under a proximate cause analysis, the issue is whether the defendant should nevertheless be shielded from liability.[32] Proximate cause is a concession

26. *See id.* at 1771 (explaining this part of the cause in fact analysis).

27. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 28 cmt. c(1) (2005) (explaining that cause in fact "is a question of fact normally left to the jury, unless reasonable minds cannot differ").

28. *See id.* cmt. a.

29. *See* KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 105–07 (3d ed. 2007) (explaining the process by which the jury is expected to make the cause in fact determination).

30. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmt. b (2005) ("[P]roximate cause is only remotely related to factual causation."); ABRAHAM, *supra* note 29, at 125 ("What does [proximate cause] have to do with causation? Not much. . . . The determination that is made under the rubric of proximate cause has more to do with negligence than with causation.").

31. *See* ABRAHAM, *supra* note 29, at 125–26 (explaining that proximate cause operates after the other prerequisites to liability, including the cause in fact element, are met).

32. *See id.* at 124 ("[T]he doctrine of proximate cause operates as a limitation on the scope of the defendant's liability.").

that there are infinite consequences and harms resulting from every illegal act.[33] Rather than hold a negligent defendant liable for all of the consequences flowing from his unreasonable behavior, Negligence law chooses to limit the scope of his liability. One way in which this limiting function is achieved is through the proximate cause requirement.[34]

This limiting function of proximate cause in Negligence law has been performed through a variety of different tests. Most jurisdictions have now settled on either the "foreseeability" test or the "scope of the risk" test.[35] These tests essentially ask the same question: is the injury that occurred to the plaintiff one of the reasons why the defendant's conduct was determined to be illegal (unreasonable, negligent, or a breach) in the first place?[36]

Consider the following hypothetical: while driving home, I breach my duty to act reasonably by driving 15 miles per hour over the speed limit. Because of this negligent behavior, I am pulled over by a policeman and given a ticket. Because of the ticket, I sign up to take a Saturday defensive driving class a few weeks later in a remote part of town, which I would not otherwise visit on a Saturday. A few weeks later, while driving (in a safe and reasonable fashion) to the defensive driving class, the brakes on my car suddenly (and without warning) fail. Because of the brake failure, I am unable to navigate a turn and slam into a car parked on the side of the road. The owner of the damaged automobile brings a Negligence claim against me. The plaintiff concedes that I was driving carefully when the accident occurred, that it was not possible to control my car, and that I am not to blame for the brake failure, but argues that my breach was the decision to speed home from work several weeks earlier. My act of speeding several weeks before the accident was clearly a breach of my duty to act reasonably and to drive the speed limit. It also was a cause in fact of the plaintiff's damages: had I not been speeding, I would not have been handed a ticket, would not have been on my way to the defensive driving class in a remote part of town, and thus would not have hit the plaintiff's vehicle parked there.

Nevertheless, proximate cause does not exist for the plaintiff's claim. The damage which occurred to the plaintiff's automobile, and the manner in which it occurred, was not one of the reasons my breach was considered negligent in the first place—the plaintiff's injuries were not a foreseeable result of speeding weeks earlier. Speeding is negligent because the speed

33. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmt. a (2005) ("No serious question exists that some limit on the scope of liability for tortious conduct that causes harm is required.").

34. Thus, the *Restatement (Third) of Torts* attempts to clarify the limiting purposes served by proximate cause by using the label: "Scope of Liability (Proximate Cause)." *See id*. § 29.

35. *See* ABRAHAM, *supra* note 29, at 124 ("Most cases posing the issue of proximate cause can be resolved by the foreseeability test or by a closely related elaboration, the harm-within-the-risk test.").

36. *See* ROBERTSON ET AL., *supra* note 24, at 172 (describing this approach as "what courts actually do" in "a significant number of cases" despite employing various names for their tests).

can increase the frequency and severity of accidents. However, the risk that motorists will be involved in future accidents while driving to take care of their resulting speeding tickets is not one of the reasons that we consider speeding to be negligent behavior.

The above explanation of proximate cause is cursory. Any lawyer who can recall her first year torts class can attest to the subtleties that lie beneath the surface.[37] Some of these complexities are discussed later in this Article, but at this point, it is only necessary to recognize how cause in fact and proximate cause are decoupled within tort law, despite their common causation terminology.

II. THE TERMINOLOGY USED BY THE SUPREME COURT IN DISCUSSING THE CAUSATION PRONG OF STANDING

Considering the completely different analytical functions performed by cause in fact and proximate cause, one would presume that it would be easy to identify which of the two concepts is represented by the fairly traceable or causation requirement of Article III standing. Unfortunately, this is not the case. For the most part, the language used by the Court suggests a cause in fact interpretation of the fairly traceable prong. In this part, I sample some of the cases in which the Court is using clear cause in fact language to discuss the fairly traceable prong of standing. I also examine a set of cases involving "intervening causes," which appear to employ proximate cause language in discussing the fairly traceable prong of standing. Although I later look beyond the language employed by the Court in an attempt to identify the actual analysis guiding the Court's standing conclusions, this part only considers the words actually used by the Court.

Before proceeding to a discussion of the Supreme Court opinions concerning the causation prong of standing, it is perhaps helpful to briefly document the formidable challenges posed by the causation lexicon. As discussed above, tort law has successfully decoupled proximate cause and cause in fact as conceptual matters; tort law has been much less successful, however, in coalescing around an established vocabulary for the concepts involved. For instance, the idea that there must be a factual link between a defendant's wrongdoing and the plaintiff's injury (what this Article terms as "cause in fact") has been expressed using a variety of words or tests: "cause in fact," "actual causation,"[38] "factual causation,"[39] "the 'but-for' test," "the substantial factor test,"[40] and "the *sine qua non* test."[41] The

37. *See* ABRAHAM, *supra* note 29, at 127–28 (explaining the confusion and difficulties often encountered in this analysis).

38. *See* Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1813 (1985) (using the term "actual causation").

39. *See generally* ARNO C. BECHT & FRANK W. MILLER, THE TEST OF FACTUAL CAUSATION IN NEGLIGENCE AND STRICT LIABILITY CASES (1961) (using the term "factual causation").

40. The substantial factor test is an alternative test for finding a causal relationship between the plaintiff's injury and the defendant's misconduct. It is most appropriately used when no causal relationship exists under the but-for test, but a causal relationship seems

function performed by what I have termed "proximate cause" has also been expressed using a variety of terms, including "scope of liability"[42] and "legal cause."[43] There are a multitude of tests for determining whether proximate cause exists, with most jurisdictions having now settled on either the foreseeability test or the scope of the risk test.[44] Complicating matters even further is that often the same term has been used to refer to *both* the cause in fact and proximate cause concepts.[45] For instance, jury instructions in many states still do not clearly separate the distinct cause in fact and proximate cause analyses that the jury is expected to perform in a Negligence case.[46]

In this regard, the Supreme Court's selection of the term "fairly traceable" to describe the second prong of the modern standing analysis does little to minimize the potential confusion that can arise because of the convoluted tort terminology. Indeed, the Court would be hard-pressed to pick a term that could better obfuscate. The word "traceable" is mostly consistent with a cause in fact inquiry. It is defined as "able to be traced to."[47] A fundamental aspect of this definition is that it involves a connection *between* two things or ideas. As has already been discussed, cause in fact connects the defendant's inappropriate behavior with the plaintiff's injury.[48] The essence of the inquiry is whether the defendant's misconduct can be linked to the plaintiff's harm. The word "fairly," on the other hand, connotes a proximate cause inquiry. As previously discussed,[49] proximate cause serves to limit the defendant's liability for certain consequences, despite the defendant's behavior being a cause in fact of the plaintiff's harm: "No serious question exists that some limit on the scope of liability for tortious conduct that causes harm is required."[50] The answer to the proximate cause question has always been grounded in policy

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intuitively to exist. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 reporters' note on cmt. j (2005) ("[T]he substantial-factor test can be useful because it substitutes for the but-for test in a situation in which the but-for test fails to accomplish what the law demands.").

41. *See* ABRAHAM, *supra* note 29, at 103 (using the term "*sine qua non* test").

42. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 6 (using the term "scope of liability").

43. *See* Marshall v. Nugent, 222 F.2d 604, 610 (1st Cir. 1955) (suggesting that "legal cause" and "proximate cause" are synonymous terms).

44. *See supra* notes 35–36 and accompanying text.

45. The *Restatement (Second) of Torts* attempted to address both the cause in fact and proximate cause concepts under the umbrella term of "legal cause." *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM ch. 6 special note on proximate cause. Similarly, the substantial factor test has been used for determining proximate cause, in addition to its intended use as a test for cause in fact. *See id.* § 29 cmt. a.

46. *See id.* § 29 cmt. b ("Unfortunately, most standard jury instructions use the term 'proximate cause' and include within its instructions on both factual cause and scope of liability.").

47. *See WordNet*, PRINCETON UNIVERSITY, http://wordnetweb.princeton.edu/perl/webwn (search "traceable") (last visited Nov. 16, 2011).

48. *See supra* note 23 and accompanying text.

49. *See supra* notes 32–34 and accompanying text.

50. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmt. a.

judgments about *how much* liability for negligent behavior is appropriate.[51] One way to answer this policy-laden question is by considering what is "fair": "An important consideration in the decision to impose liability is fairness to the actor."[52] In this sense, then, the Court could not have picked a more ambivalent phrase than "fairly traceable" in terms of obscuring the two different types of analyses that are commonly associated with the term "causation."

Despite the challenges posed by the confusing terminology, a careful reading of the Court's opinions reveals that the Court has most often used language consistent with a cause in fact understanding, rather than a proximate cause understanding, of the fairly traceable prong of standing. This is particularly true in cases in which the Court has discussed the fairly traceable element with more than a cursory analysis.[53] Below, I examine some of these early Supreme Court cases in which cause in fact vocabulary is expressly used. In addition, I analyze a set of Supreme Court cases in which proximate cause language appears to be used, but which are consistent with the cause in fact vocabulary used by the Court in other cases.

A. Linda R.S. v. Richard D.

Although the term "fairly traceable" was never used in the *Linda R.S. v. Richard D.*[54] opinion, most commentators attribute this requirement of standing to that decision.[55] The case involved a suit brought by the mother of an illegitimate child against, among others, the state of Texas and a Dallas County District Attorney.[56] The baby's father had not been paying

51. At least, this is the modern, realist understanding of the proximate cause element. During the formalist era of American jurisprudence, the proximate cause analysis was sometimes portrayed as being a "scientific" inquiry. *See* William Powers, Jr., *Reputology*, 12 CARDOZO L. REV. 1941, 1951 (1991) (reviewing RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION (1990)) (describing the formalist view of proximate cause as "an outgrowth of the 'law-as-science' mindset of the late nineteenth century").

52. THOMAS C. GALLIGAN ET AL., TORT LAW: CASES, PERSPECTIVES, AND PROBLEMS 290 (4th ed. 2007). Of course, "fairness" considerations are not the only way in which a policy-laden issue can be approached. *See generally* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmt. e (discussing the extensive literature addressing the efficiency and administrative considerations in the proximate cause determination).

53. For an example of a case in which the fairly traceable requirement is resolved cursorily, see Meese v. Keene, 481 U.S. 465, 476 (1987) ("Because the alleged injury stems from the Department of Justice's enforcement of a statute that employs the term 'political propaganda,' we conclude that the risk of injury to appellee's reputation 'fairly can be traced' to the defendant's conduct." (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41 (1976))).

54. 410 U.S. 614 (1973).

55. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.3, at 76 (5th ed. 2007); 13A WRIGHT ET AL., *supra* note 9, § 3531.5, at 296 ("The current story of causation as an element of standing begins with Linda R.S. v. Richard D."); David A. Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 WIS. L. REV. 37, 45 ("[C]ausation was first expressly recognized as an article III requirement in the 1973 decision of *Linda R.S. v. Richard D.*").

56. *See* Linda R.S. v. Richard D., 335 F. Supp. 804, 805 (N.D. Tex. 1971).

child support.[57] Pursuant to a Texas state policy of not prosecuting fathers of illegitimate children for child support, Dallas County prosecutors had refused to prosecute the father.[58] The plaintiff argued that this policy violated the Equal Protection Clause of the U.S. Constitution.[59]

The Court, per Justice Marshall, affirmed the district court's dismissal of the case,[60] concluding that the plaintiff was not "entitled to invoke the judicial process."[61] The Court reasoned that there was only a "speculative" link between the plaintiff's injury of not receiving child support payments and the state of Texas's alleged Equal Protection violation in enforcing their child support regime only on behalf of legitimate children: "[I]f appellant were granted the requested relief, it would result only in the jailing of the child's father. The prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative."[62]

Justice Marshall is clearly using cause in fact language in *Linda R.S.* to support his conclusion that the plaintiff is without standing. Recall the formulation of the but-for test from Negligence law: "But for the unreasonable conduct of the defendant, would the plaintiff have been injured?"[63] Justice Marshall's language in *Linda R.S.* duplicates the but-for analysis from Negligence law: but for the defendant's failure to comply with the requirements of the Equal Protection Clause, would the plaintiff have received child support payments from the father?[64]

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57. *Linda R.S.*, 410 U.S. at 615.
58. *Id.*
59. *Id.* at 616.
60. *Id.* at 619.
61. *Id.* at 616.
62. *Id.* at 618.
63. *See supra* note 22 and accompanying text.
64. Actually, Justice Marshall's language is slightly different than the but-for cause in fact analysis found in tort law. Tort law looks at the relationship between the defendant's misconduct and the plaintiff's injury from a retrospective vantage point, while Justice Marshall's cause in fact analysis was framed from a prospective vantage point. Regardless, the analysis is the same in that it requires an examination of the relationship between the defendant's misconduct and the plaintiff's injury; whether it is from a prospective or retroactive perspective, it is still a cause in fact type of analysis. Indeed, one can rephrase Justice Marshall's analysis as retroactive without altering the meaning suggested by his language: "We believe that, if the father in this case had been prosecuted, the harm to the plaintiff (not collecting on child support payments) would likely have occurred anyway. The father probably would not have made child support payments from jail." So for present purposes, it is irrelevant that Justice Marshall's cause in fact language is framed prospectively, rather than retroactively (as in Negligence law).

Under modern standing doctrine, however, Justice Marshall's analysis should probably be categorized under the "redressability" prong of standing, rather than the causation or fairly traceable prong of standing. The redressability prong of standing has been understood to raise the same type of causal inquiry as the causation prong of standing analysis, except that redressability looks at the causal connection between the court's order (ordering the defendant to cease the illegal conduct) and the plaintiffs' requested relief. *See* CHEMERINSKY, supra note 55, at 75 (discussing causation and redressability as involving a similar analysis); *see also* FALLON ET AL., supra note 8, at 125 (stating that "inquiries into causation and redressability often overlap"). Nevertheless, despite the prospective language used by Justice Marshall, commentators continue to label *Linda R.S.* as a case decided under the causation prong of standing, *see, e.g.*, Logan, *supra* note 55, at 70–76 (discussing *Linda R.S.* as a causation case), and the Supreme Court has done the same, *see* Orr v. Orr, 440 U.S.

Justice Marshall says that the answer to this question is "speculative."[65] This language is cryptic. The cause in fact analysis is, of course, *by its nature* speculative.[66] Recall that a cause in fact inquiry first requires that the appropriate conduct by the defendant be identified. In a run-of-the-mill Negligence case, the appropriate behavior required by the defendant will often not be difficult to identify. For instance, if the defendant was negligent because he was speeding, the but-for test asks whether the plaintiff would have been injured had the defendant been driving the speed limit. Similarly, if the defendant was negligent for failing to stop at the stop sign, the but-for test asks whether the plaintiff would have been injured had the defendant stopped at the stop sign. In *Linda R.S.*, this cause in fact inquiry is slightly more difficult because there are two potential ways to "correct" the defendant's illegal behavior. The state defendants' alleged misconduct in *Linda R.S.* was in prosecuting the fathers of legitimate children, but not those of illegitimate children, for failing to make child support payments.[67] This alleged Equal Protection violation could be "corrected" by prosecuting all fathers, regardless of whether their children are legitimate or illegitimate, or by not prosecuting any fathers. Justice Marshall seemed to bypass this particular problem by assuming that Texas would remedy their Equal Protection violation by prosecuting all fathers.[68] This difficulty, however, does not appear to be the "speculative" problem with which Justice Marshall was concerned in *Linda R.S.*

Rather, the language of Justice Marshall's opinion indicates that the problem is in linking this hypothetical policy to the plaintiff's injury: "The prospect that prosecution will . . . result in payment of support can, at best, be termed only speculative."[69] Here, the term "speculative" does not really describe the type of analysis engaged in (recall that the cause in fact analysis is *always* speculative), but rather the probability that such a link between the policy and injury exists. Justice Marshall wrote: "[I]f appellant were granted the requested relief, it would result only in the jailing of the child's father."[70] A reasonable interpretation of Justice Marshall's language would suggest the following thought process:

> We are going to assume that the Equal Protection Clause prohibits a scheme in which Texas enforces child support obligations against the fathers of legitimate children but not of illegitimate children.[71] And we

268, 298 n.6 (1979) (discussing *Linda. R.S.* in the context of causation requirements of standing).

65. *Linda R.S.*, 410 U.S. at 618.

66. *See supra* notes 24–29 and accompanying text.

67. *Linda R.S.*, 410 U.S. at 616.

68. *Id.* at 618.

69. *See id.* (discussing the "jailing of the child's father").

70. *Id.* Justice Marshall's conclusion that prosecution and jailing of the father would not result in payment to the mother is, of course, "speculative" as well, although Justice Marshall apparently believes that his "speculation" is more probable than the speculation that the plaintiff's attorneys had urged the Court to adopt in the case.

71. The court decided this "merits" issue in a companion case. *See* Gomez v. Perez, 409 U.S. 535 (1973) (striking down the Texas policy as unconstitutional).

> are going to assume that Texas would correct this violation by enforcing child support obligations against all fathers, whether of legitimate or illegitimate children. Even if Texas had a policy of enforcing child support payments against illegitimate fathers, however, it seems doubtful that this policy would have produced actual payments to the plaintiff in this case. The child's father might have concluded that jail time was preferable to child support payments; or, the child's father might simply have had no money to make payments, so the threat of prosecution would not have prompted payments to the plaintiff in this case.

Although the language used by Justice Marshall in *Linda R.S.* would clearly suggest that Justice Marshall was engaging in the cause in fact analysis described above, I believe the reality is much more complicated. Later in the Article, I argue that the intuitions pushing Justice Marshall (and the rest of the Court) to a conclusion that the plaintiff lacked standing were actually of the proximate cause variety, but that the Court used cause in fact language to verbalize these intuitions.[72] In any event, focusing only on the language actually used by the Court in *Linda R.S*, there is no doubt the Court used cause in fact terminology.

B. Village of Arlington Heights v. Metropolitan Housing Development Corp.

The first Supreme Court opinion to specifically use the term "fairly traceable" as a standing requirement was *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[73] As in *Linda R.S.*, the Court used cause in fact language in describing the standing analysis.[74] In *Arlington Heights*, the Metropolitan Housing Development Corporation (Developer) planned to build low-income townhouses.[75] In conjunction with those plans, the Developer applied for the necessary rezoning of a 15-acre parcel of land from single-family use to multi-family use.[76] After the application was denied by the Village zoning authorities, suit was brought alleging that the denial was based on racially discriminatory motivations and was thus contradictory to the Fourteenth Amendment's Equal Protection Clause.[77] One of the plaintiffs was a black man who alleged that, because of the lack of low-income housing in the area, he had to commute to his job in Arlington Heights from a residence approximately twenty miles away.[78] The Court opined that this was a sufficient injury to justify standing, and that the injury was "fairly traceable" to the Board's decision,[79] which the Court assumed—at least at this stage of the analysis—was motivated by racial bias and, thus, in violation of the Equal Protection

72. *See infra* Part V.
73. 429 U.S. 252 (1977).
74. *See infra* notes 81–88 and accompanying text.
75. *Id.* at 254.
76. *Id.*
77. *Id.*
78. *Id.* at 264. This plaintiff was the basis of the Court's conclusion that standing existed in the case. *See id.* at 264 n.9.
79. *Id.*

Clause.[80] The Court conceded that the Developer would still have to "secure financing, qualify for federal subsidies, and carry though with construction"[81] if the rezoning was granted, but that there was a "'substantial probability'" that this would occur.[82] The Court concluded that all housing projections entail "similar uncertainties"[83] and that further inquiry would involve "undue speculation."[84]

Here again, the language used by the Court in applying the fairly traceable requirement is undoubtedly of the cause in fact variety. The Court's language suggests that a link between the plaintiff's injury (failure to find affordable housing in close proximity to his work) and the defendant's alleged unconstitutional behavior (a decision to deny a rezoning application based on discriminatory intent) is necessary, and that there was a "substantial probability" that this link existed.[85] Furthermore, as in *Linda R.S.*, the Court justified its standing conclusion with the use of the term "speculative."[86] In *Linda R.S.*, the plaintiff's argument—that a Texas policy consistent with the requirements of the Equal Protection Clause would have resulted in child support payments to her—was "speculative" and thus the basis for a conclusion that standing was lacking.[87] In *Arlington Heights*, however, it was the defendant's argument—that the plaintiff would have been injured regardless of the alleged unconstitutional behavior of the defendant—that Court regarded as "undue speculation."[88]

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80. *See id.* On the merits, the Court affirmed the trial court's decision that the Village's denial of the rezoning was not motivated by unconstitutional racial discrimination. *See id.* at 270–71.

81. *Id.* at 261.

82. *Id.* at 264 (quoting Warth v. Seldin, 422 U.S. 490, 504 (1975)). The Court assumed that the rezoning would be granted once unconstitutional racial discrimination was removed. *Id.* at 264. But as the Court's decision on the merits (that is, whether the Village in fact had based their denial on unconstitutional racial animus) reveals, this assumption was probably not appropriate. Even assuming that the Village's denial of the rezoning was based on unconstitutional racial animus, this does not mean that a rezoning application considered *without* racial animus would be approved. *Cf.* Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle, 429 U.S. 274, 283–86 (1977) (discussing how a government might have reached the same conclusion as the one allegedly motivated by an unconstitutional consideration even if it had considered only constitutionally permissible factors). Thus, although the Court is clearly engaging in a cause in fact analysis in this instance, the Court erred in failing to consider the possibility that the zoning application would have been denied even without unconstitutional racial discrimination.

83. *Arlington Heights*, 429 U.S. at 261.

84. *Id.*

85. *Id.* at 264. Within Negligence law, a plaintiff has to prove a cause in fact link between the defendant's misconduct and the plaintiff's injury by a "preponderance of the evidence," meaning simply that the causal relationship must be more likely than not. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 28 cmt. a (2005). It is not clear how a "substantial probability" requirement compares to the "preponderance of the evidence" standard.

86. *See Arlington Heights*, 429 U.S. at 261–62 ("[A] court is not required to engage in undue speculation as a predicate for finding that the plaintiff has the requisite personal stake in the controversy.").

87. Linda R.S. v. Richard D., 410 U.S. 614, 618 (1973).

88. *See Arlington Heights*, 429 U.S. at 261–62.

In both situations, however, the use of the term suggests a cause in fact inquiry.

C. Duke Power Co. v. Carolina Environmental Study Group, Inc.

The Supreme Court again employed cause in fact terminology in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*[89] In *Duke Power*, individuals residing near the location of two proposed private nuclear power plants brought suit as part of an effort to prevent the construction of the plants.[90] The plaintiffs claimed that the proposed nuclear power plant would have negative consequences for their residential life, including the decline of property values, the emission of radiation, the fear of radiation, and changes to area recreational waters.[91] One of the plaintiffs' legal strategies was to seek a declaration that the Price-Anderson Act, which limited the civil liability of private developers of nuclear energy in the event of an accident, was unconstitutional under the Fifth Amendment Due Process Clause.[92] The Court ultimately concluded that the plaintiffs had standing,[93] including the "difficult [causation] step in the standing inquiry."[94] The Court largely deferred to the District Court's conclusion that "a 'but for' causal connection between the Price-Anderson Act . . . 'and the construction of the nuclear plants'" had been established.[95] Duke Power argued that the power plants in question would have been built even without the Price-Anderson Act, either by private companies willing to assume the risk of nuclear power production without the Act's protection from civil liability or by government-financed projects.[96] The Court noted that the district court's finding that the power plants would not have been privately built, absent the Price-Anderson Act, was based on testimony given by private companies interested in nuclear power during the Congressional hearings on the Price-Anderson Act.[97] The Court rejected as "speculative" Duke Power's argument that, even without the Price-Anderson Act, a nuclear power plant would have been built in the plaintiffs' neighborhood.[98]

Once again, the cause in fact language is unmistakable. In fact, the *Duke Power* opinion's use of cause in fact language is perhaps the most blatant of the various standings cases in question, as the Court expressly relied on the but-for test to determine cause in fact.[99]

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89. 438 U.S. 59 (1978).
90. *Id.* at 67.
91. *Id.* at 72–73.
92. *Id.* at 67–68.
93. *Id.* at 81.
94. *Id.* at 74.
95. *Id.* (quoting Carolina Envtl. Study Grp., Inc. v. U.S. Atomic Energy Comm'n, 431 F. Supp. 203, 219 (W.D.N.C. 1977)).
96. *Id.* at 75.
97. *Id.* at 75–76.
98. *Id.* at 77–78.
99. *See id.* at 74.

D. Allen v. Wright

Cause in fact language was also famously used in *Allen v. Wright*[100] as part of the basis of the Court's conclusion that the plaintiffs in that case lacked standing.[101] In *Allen*, parents of black schoolchildren brought suit against the Secretary of the Treasury and the Commissioner of Internal Revenue, claiming that the defendants were neglecting to follow tax code provisions that deny tax-exempt status to racially discriminatory private schools.[102] The Court acknowledged that, to the extent that the plaintiffs' children were denied the benefit of a desegregated education, they had stated a cognizable injury, thus satisfying the first prong of the Article III standing analysis.[103] The Court concluded, however, that causation "between the challenged Government conduct and the asserted injury" was lacking.[104] The Court stated:

> The diminished ability of respondents' children to receive a desegregated education would be fairly traceable to unlawful IRS grants of tax exemptions only if there were enough racially discriminatory private schools receiving tax exemptions in respondents' communities for withdrawal of those exemptions to make an appreciable difference in public school integration. . . . [I]t is entirely speculative . . . whether withdrawal of a tax exemption from any particular school would lead the school to change its policies. . . . It is just as speculative whether any given parent of a child attending such a private school would decide to transfer the child to public school as a result of any changes in educational or financial policy made by the private school once it was threatened with loss of tax-exempt status. It is also pure speculation whether, in a particular community, a large enough number of the numerous relevant school officials and parents would reach decisions that collectively would have a significant impact on the racial composition of the public schools.[105]

Again, this is clearly cause in fact language. Even if the IRS has enforced the tax code in the manner the plaintiffs thought was legally required, the Court doubted a but-for causal link between the plaintiff's injury and the alleged illegal conduct.[106]

E. Proximate Cause Cases? Intervening or Superseding Causes

The discussion above demonstrates the frequent use of cause in fact language by the Court in applying the fairly traceable prong of standing. The Court has continued to employ the cause in fact language—established in these early cases—in recent cases such as *Massachusetts v. EPA*.[107]

100. 468 U.S. 737 (1984).
101. *See id.* at 758–59; *infra* notes 104–06 and accompanying text.
102. *Allen*, 468 U.S. at 739–40.
103. *Id.* at 756–57.
104. *Id.* at 759.
105. *Id.* at 758.
106. *Id.* at 758 & n.23.
107. 549 U.S. 497 (2007).

Some of these are discussed later in the Article. This section, however, addresses a few Supreme Court cases that appear to use proximate cause language, rather than cause in fact language, in discussing the causation prong of standing.[108] These cases involve, to borrow a tort phrase, "intervening" or "superseding" causes.[109] Upon close inspection, however, it becomes apparent that the language used by the Supreme Court in these cases is intended as cause in fact, rather than proximate cause, language.

Under Negligence law in most states, a defendant is allowed to argue that his or her liability is "cut off" by the subsequent conduct of other parties that occurred after the defendant's negligent conduct, but before the plaintiff sustained his injuries.[110] For example, in the famous case of *Watson v. Kentucky & Indiana Bridge & Railroad Co.*,[111] the plaintiff brought a Negligence claim against a railroad for injuries suffered in an explosion.[112] The railroad had negligently spilled gasoline, which subsequently exploded after a man tried to light a cigar in the area.[113] Although its negligence was clearly a cause in fact of the explosion (the man would not have been injured but-for the railroad's negligence in spilling the gasoline, in the absence of which there would have been no explosion), the railroad defended on the ground that its liability was cut off by the "intervening" conduct of the gentlemen who lit the cigar.[114] The Kentucky Supreme Court determined that the railroad's liability to the plaintiff was "superseded" only if the gentleman lighting the cigar had acted in a "wanton or malicious" manner, but not if he was merely negligent.[115]

While in a case like *Watson* the presence of an intervening human cause is a proximate cause issue, an intervening human cause can also influence a cause in fact analysis by making the "but-for" test more difficult to apply. Consider the tort case of *Britton v. Wooten*.[116] *Britton* involved a Negligence suit by a landlord against a tenant to recover damages after the leased premises were destroyed in a fire.[117] The landlord's claim was based

108. In one opinion, Justice Brennan even used the term "proximate cause" in discussing the fairly traceable prong of standing. *See* Blue Shield of Va. v. McCready, 457 U.S. 465, 477 (1982) ("In the absence of direct guidance from Congress, and faced with the claim that a particular injury is too remote from the alleged violation to warrant § 4 standing, the courts are thus forced to resort to an analysis no less elusive than that employed traditionally by courts at common law with respect to the matter of 'proximate cause.'").

109. *See* ABRAHAM, *supra* note 29, at 129–30.

110. There is some indication that states are moving away from this as an independent concept. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 34 cmt. a (2005) ("Were it not for the long history of intervening and superseding causes playing a significant role in limiting the scope of liability, this Section would not be necessary. However, to address the substantial body of law on this subject and to explain the bases for its declining importance, this Section is necessary. Subsequent Comments also identify the areas of substantial current agreement in the waning influence of superseding-cause jurisprudence and the areas that yet remain in flux.").

111. 126 S.W. 146 (Ky. Ct. App. 1910).

112. *Id.* at 147.

113. *Id.*

114. *Id.* at 150.

115. *Id.* at 150–51.

116. 817 S.W.2d 443 (Ky. 1991).

117. *Id.* at 444.

on the alleged negligence of the tenant in stacking flammable trash outside the leased premises, up to its combustible roof.[118] The record revealed that a third-party had intentionally lit the stored material and started the fire.[119]

The trial court granted summary judgment to the tenant defendant, on the ground that the arson served as a "superseding cause as a matter of law, thereby breaking the chain of causation."[120] The trial court's proximate cause conclusion was based on the *Watson* rule that an intentional superseding human cause relieves the original wrongdoer of Negligence liability.[121] In *Britton*, the Kentucky Supreme Court sided with "modern tort law" and rejected the tenant's superseding cause, proximate cause argument.[122] As such, the court reversed the trial court's entry of summary judgment in favor of the defendant tenant.[123] The remaining issue on remand was "whether the [landlord] can prove that the [tenant] caused or permitted trash to accumulate next to its building in a negligent manner which caused or contributed to the spread of the fire and the destruction of the [landlord's] building."[124] Here, the court is referencing potential cause in fact difficulties arising from the fact that the fire was a result of the intentional act of an arsonist.[125] Even if the landlord could prove that the defendant had, in fact, stacked rubbish alongside the building, and if the jury concluded that this conduct was negligent,[126] there was still a remaining issue as to whether the negligent behavior of the tenant was a cause in fact of the building's damage: but for the negligent stacking, would the fire damage to the building have occurred? The conduct of the arsonist, which was relevant to the tenant's attempted proximate cause argument, was also relevant to the cause in fact issue. Indeed, the cause in fact issue was *more* complex because of the existence of this intervening cause. Would the arsonist have engaged in the same criminal activity if his goal of burning down the building had not been made easier by the rubbish stacked outside the leased building? Even if an arsonist would have attempted to burn down the building without the rubbish located outside, would he have been successful? These questions, asked pursuant to the cause in fact analysis, were more difficult to answer because of the presence of the intervening arson. Recall, however, that the proximate cause issues arising from the intervening arson had already been disposed of by the appellate court.

Britton nicely demonstrates that the presence of a third party—an intervening or superseding cause—can be relevant to a cause in fact inquiry.

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118. *Id.*
119. *Id.*
120. *Id.* at 445.
121. *Id.* at 448–49.
122. *Id.* at 452.
123. *Id.*
124. *Id.* at 451–52.
125. *See id.* at 448.
126. It seems that if the tenant had engaged in this behavior, it would have been negligent per se because it violated Kentucky statutes addressing the disposal of waste. *See id.* at 444.

In this regard, *Britton* provides needed context for the string of cases in which the Supreme Court references an intervening or superseding cause while conducting an analysis under the fairly traceable prong of standing. A typical statement by the Court involving intervening causes can be found in *Bennett v. Spear*[127]: "[T]here [must] be a causal connection between the injury and the conduct complained of—the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court . . . ."[128] It is tempting to conclude that the reference to an independent third party is proximate cause language.[129] Careful consideration, however, reveals that this language is probably intended as an extension of the cause in fact language described in the previous section.

The Court's opinion in *Bennett* demonstrates that the Court's frequent references to third parties are consistent with its typical cause in fact language. *Bennett* involved a dispute over the Klamath Irrigation Project, which is operated by the Bureau of Reclamation (Bureau).[130] The Klamath Irrigation Project had been used by many irrigation farmers and ranchers as a source of water for decades.[131] In 1992, the Bureau notified the Fish and Wildlife Service (Service) that the Bureau's continued operation of the Klamath Irrigation Project might threaten two species of sucker fish that lived in the project waters and which had been listed as endangered by the Secretary of the Interior under the Endangered Species Act.[132] The Bureau was required to give the Service this notification under parameters established by the Endangered Species Act, which requires that all federal agencies consult with the Service if they believe that federal action might adversely affect a listed species.[133] After receiving this notification from the Bureau, the Service produced a Biological Opinion (as required by the Endangered Species Act) that recommended that the Bureau maintain minimum water levels in operating the Klamath Irrigation Project.[134] The Bureau indicated an intention to comply with the Biological Opinion, even though following the recommendations would impair the availability of water for some irrigation and rancher users.[135] By complying with the Biological Opinion, the Bureau shielded itself from the criminal and civil

127. 520 U.S. 154 (1997).

128. *Id.* at 167.

129. Some commentators have reached this conclusion. *See, e.g.*, Farber, *supra* note 8, at 1544 ("The common law analogue to the fairly traceable test is the proximate cause requirement in torts."). Litigants have also drawn the same conclusion. *See Bennett*, 520 U.S. at 168 ("'If petitioners have suffered injury,' the Government contends, 'the proximate cause of their harm is an (as yet unidentified) decision by the Bureau regarding the volume of water allocated to petitioners, not the biological opinion itself.'" (quoting the respondent's brief)).

130. *See Bennett*, 520 U.S. at 157.

131. *Id.* at 158–59.

132. *Id.* at 159.

133. *Id.* at 157–58.

134. *Id*. at 159.

135. *Id.* at 159–60.

liabilities imposed on federal agencies who "take" a species in violation of the Endangered Species Act.[136]

Suit was brought against the Service by the irrigation farmers and ranchers whose water supply would be depleted once the Bureau began following the Biological Opinion's recommendations.[137] The plaintiffs claimed that, in preparing the Biological Opinion, the Service had failed to comply with certain requirements of the Endangered Species Acts, including a consideration of the economic impact of their recommendation and using the "'best scientific and commercial data available.'"[138] The Service challenged the plaintiffs' standing to bring suit.[139] On the fairly traceable issue, the government argued that the harm to the plaintiffs—the decrease in the amount of water which would be available to them if the Klamath Irrigation Project was operated consistently with the Biological Opinion—was a result of the Bureau's decision and not the Service's allegedly illegal Biological Opinion: "'If [the plaintiffs] have suffered injury . . . the proximate cause of their harm is an (as yet unidentified) decision by the Bureau regarding the volume of water allocated to petitioners, not the biological opinion itself.'"[140] In other words, the Service was arguing that, between their illegal Biological Opinion and the harm to the plaintiffs, there was the intervening or superseding cause in the form of the Bureau's independent decision to follow the Opinion's recommendations, and that this intervening or superseding cause should preclude a finding that the plaintiffs' harm was fairly traceable to the misconduct of the Service.

The Court rejected the proximate cause argument of the Service because the plaintiffs had, in the Court's mind, satisfied the cause in fact analysis:

> [The Service's argument] wrongly equates injury "fairly traceable" to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation. While, as we have said, it does not suffice if the injury complained of is "th[e] result [of] the *independent* action of some third party not before the court," that does not exclude injury produced by determinative or coercive effect upon the action of someone else.[141]

Because the Bureau had operated the Klamath Irrigation Project in the same manner for almost a century before the Service's Biological Opinion, the Court determined that a cause in fact link existed between the plaintiffs'

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136. *Id.* at 169–70.
137. *Id.* at 159.
138. *Id.* at 176 (quoting Endangered Species Act of 1973 § 7, 16 U.S.C. § 1536 (1994)).
139. *Id.* at 160–61.
140. *Id.* at 168 (quoting the respondent's brief).
141. *Id.* at 168–69 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)) (internal quotation omitted). Although the Court usually uses cause in fact language in discussing the fairly traceable prong of standing, *Bennett* is one of the rare cases in which the Court is actually applying a cause in fact analysis. Later in this Article, I demonstrate that the Court has often eschewed a cause in fact analysis, despite using cause in fact terminology. *See infra* Part V.

injury and the defendant's misconduct. The Court believed that the Bureau would not have independently decided to restrict the water available to the plaintiffs,[142] and thus the erroneously prepared Biological Opinion was the but-for cause of this harm to the plaintiff.[143] In the suit against the Service, then, the conduct of the Bureau was relevant, not because the Court was interested in pursuing a proximate cause superseding cause analysis, but because a cause in fact analysis required an analysis of the Bureau's behavior.

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142. *Bennett*, 520 U.S. at 170–71.

143. The Court probably erred in conducting its cause in fact inquiry when it said that "it is not difficult to conclude . . . that [plaintiff's] injury is 'fairly traceable' to the Service's Biological Opinion." *Id.* The but-for test does not ask whether the plaintiff's injury would have occurred but-for the defendant's conduct, but whether it would have occurred but-for his *mis*conduct. *See* Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 598 (2007) ("'A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct . . . .'" (quoting Allen v. Wright, 468 U.S. 737, 751 (1984))); *Allen*, 468 U.S. at 757 (1984) (denying standing because "the injury alleged is not fairly traceable to the Government conduct respondents challenge as *unlawful*" (emphasis added)); Linda R.S. v. Richard D., 410 U.S. 614, 617–18 (1973) ("[A]ppellant has failed to allege a sufficient nexus between her injury and the government action which she attacks to justify judicial intervention."). *But see* Nike, Inc. v. Kasky, 539 U.S. 654, 667 (2003) (stating that the plaintiff's injury must be "'fairly traceable' to actions of the opposing party" (quoting *Bennett*, 520 U.S. at 162)). The concept is lucidly explained, in the tort law context, by Professor Abraham:

> There are many causes in fact—but-for causes—of any event. Being a cause in fact is not the same as what, in common parlance, would be called the "responsible" or the main cause of an occurrence. In an automobile collision case, if the defendant's parents had not met, if the defendant had not travelled to work on the day of the collision, if the defendant had not gone to college, bought a car, or run the red light, he would not have collided with the plaintiff. The key is whether one of these many but-for causes was negligent. If so, then the act or omission of the party responsible for this negligence is "a" cause in fact.

ABRAHAM, *supra* note 29, at 104.

The Court's mistake in *Bennett* was assuming that cause in fact had been demonstrated simply because the Service's Biological Opinion caused the Bureau's conduct. On this point, the evidence was overwhelming, considering that the Klamath Irrigation Project had been operated for decades and that the change in operation occurred directly after the Service's Biological Opinion. It is much more difficult, however, to determine whether the plaintiff's harm was related to the Service's *allegedly illegal conduct* in preparing the Biological Opinion. The claims asserted by the plaintiffs in *Bennett* rested on alleged statutory violations in preparing the Biological Opinion: the Service was clearly within their legal authority in drafting such an Opinion, but had allegedly failed to use the "'best scientific and commercial data available'" and had failed to consider the economic impact of their recommendation. *Bennett*, 520 U.S. at 176 (quoting Endangered Species Act of 1973 § 7, 16 U.S.C. § 1536 (1994)). Thus, the proper cause in fact inquiry in *Bennett* would have asked whether the harm would have occurred but for the procedural violations in preparing the Biological Opinion. In other words, if the Service had used the best scientific and commercial data available, and if it had considered the economic impact, would the Service have produced such a different Biological Opinion that the harm to the plaintiffs would not have occurred?

After the Supreme Court's opinion in *Bennett*, the U.S. District Court for the District of Oregon struck down the Service's Biological Opinion. *See* Bennett v. Spear, 5 F. Supp. 2d 882, 886–87 (D. Or. 1998). This ruling merely continued a long legal battle involving the Klamath Irrigation Project, of which *Bennett* is but a small part. For a fascinating account of this history, see HOLLY DOREMUS & A. DAN TARLOCK, WATER WAR IN THE KLAMATH BASIN (2008).

Similar to the tort context (as represented by the *Wooten* case), when a standing analysis requires an estimation of a third party's likely response to the hypothetical behavior of a party to the litigation (as in *Bennett*), the cause in fact analysis becomes more complex. As Justice Scalia stated in *Lujan v. Defenders of Wildlife*[144]:

> [When] [t]he existence of one or more of the essential elements of standing [such as causation] "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," . . . it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation . . . .[145]

This difficulty of considering the likely behavior of third parties under different scenarios arises pursuant to a cause in fact analysis. These intervening cause cases, then, are consistent with the cause in fact language used by the Court in other cases such as *Linda R.S.*, *Arlington Heights*, *Duke Power*, and *Allen*.

III. THE TENSION BETWEEN THE GATEKEEPER FUNCTION OF STANDING AND THE CAUSE IN FACT ANALYSIS

Part II considered various Supreme Court cases employing cause in fact language to decide the causation prong of standing. If this cause in fact language represents the true analysis being performed by the Court, however, problems arise. Standing is a "threshold" determination that serves a gatekeeper function: "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute . . . ."[146] Yet the fact-specific nature of the cause in fact inquiry makes it difficult to conduct this inquiry at the threshold of litigation, and thus it is irreconcilable with the gatekeeper function of standing. This inherent tension is evident in the Supreme Court's bewildering attempts to develop a procedure for deciding the fairly traceable prong of standing.

A. Standing as a Gatekeeper

In discussing the standing requirements derived from Article III of the Constitution, the Supreme Court has consistently stated that standing goes to the power of a federal court to resolve a dispute: "The case-or-controversy doctrines state fundamental limits on federal judicial power in our system of government."[147] Because standing requirements derived from Article III implicate the power of a federal court over a dispute, these

144. 504 U.S. 555 (1992).

145. *Id.* at 562 (quoting ASARCO Inc. v. Kadish, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.)).

146. Warth v. Seldin, 422 U.S. 490, 498 (1975).

147. *Allen*, 468 U.S. at 750 ("The Art. III doctrine that requires a litigant to have 'standing' to invoke the power of a federal court is perhaps the most important of these doctrines."); *see also Warth*, 422 U.S. at 498.

requirements are described as jurisdictional.[148] Accordingly, issues concerning standing can be raised at any point in the litigation, either by a litigant[149] or by a court sua sponte.[150] Congress is without power to confer on federal courts the ability to hear disputes which do not comport with the standing requirements derived from Article III.[151]

The placement or location of the *prudential* aspect of standing is a bit more uncertain.[152] The Court has also consistently stated that Congress can "override" prudential standing limitations.[153] Simply because Congress can abrogate prudential standing concerns does not necessarily mean, however, that the prudential standing rules are not jurisdictional or that they do not relate to the power of a federal court to address a dispute. Congress has the authority to determine the subject matter of cases that federal courts can hear, yet this inquiry is still considered to be jurisdictional and as addressing the power of the federal courts.[154] The Court has been somewhat ambiguous about whether prudential standing requirements are also jurisdictional, despite the fact that they can be trumped by Congress.[155] Not surprisingly, there is disagreement on this point in the federal circuit courts.[156]

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148. *See, e.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 109–10 (1998) ("Having found that none of the relief sought by respondent would likely remedy its alleged injury in fact, we must conclude that respondent lacks standing to maintain this suit, and that we and the lower courts lack jurisdiction to entertain it."); Lewis v. Casey, 518 U.S. 343, 349 n.1 (1996) (noting that standing is jurisdictional).

149. *See* Lewis, 518 U.S. at 349 n.1 (holding that standing is not subject to a waiver by a party litigant).

150. *See* Adarand Constructors, Inc. v. Mineta, 534 U.S. 103, 110 (2001) ("We are obliged to examine standing *sua sponte* where standing has erroneously been assumed below."); *see also* 13B WRIGHT ET AL., *supra* note 9, § 3531.15, at 311 n.13 (listing cases affirming this principle).

151. *See* Bennett v. Spear, 520 U.S. 154, 162 (1997).

152. *See supra* note 4 (discussing non-constitutional, prudential standing considerations).

153. *See Bennett*, 520 U.S. at 162 (stating that prudential standing doctrines "can be modified or abrogated by Congress"); *see also* Dep't of Commerce v. U.S. House of Reps., 525 U.S. 316, 328–29 (1999) (determining that Congress had defeated the zone of interest impediment by permitting any person to challenge the statistical approach used in the census). The conceptualization of "prudential" standing rules as something than can be modified or overridden by Congress is confusing. It is probably more conceptually accurate to state that Congress (or other governmental bodies that establish legal rights) determines the parameters of these "prudential" standing concerns in the first place.

154. *See* CHEMERINSKY, *supra* note 55, at 266 ("[A] federal court may adjudicate a case only if there is *both* constitutional and statutory authority for federal jurisdiction.").

155. *Compare* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 96–97 (1998) (distinguishing prudential standing from constitutional standing in holding that constitutional standing must be addressed before determining the merits question of whether a plaintiff has a cause of action under a federal statute, but that merits questions can be decided before prudential standing concerns such as the zone of interest requirement), *with* United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc., 517 U.S. 544, 551 (1996) ("[T]he prudential doctrine of standing has come to encompass 'several judicially self-imposed limits on the exercise of federal jurisdiction.'" (quoting Allen v. Wright, 468 U.S. 737, 751 (1984))), *and* Warth v. Seldin, 422 U.S. 490, 499 (1975) ("Apart from this minimum constitutional mandate, this Court has recognized other limits on the class of persons who may invoke the courts' decisional and remedial powers.").

156. *Compare* Gilda Indus. Inc. v. United States, 446 F.3d 1271, 1280 (Fed. Cir. 2006) (holding that the zone of interest test is not jurisdictional and is thus waived if not properly

The Court has consistently reiterated that standing is a determination that is separate from the merits of a dispute: "[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal."[157] Somewhat related to the idea that the standing question is distinct from the merits of a dispute is the concept that standing is a threshold determination, which the Supreme Court has often indicated.[158] There are two possible consequences of applying the term "threshold" to standing. One is to reiterate that the standing analysis is jurisdictional and that, unless standing is present, a court has no power to entertain the suit. As described above, this conception of standing as a threshold issue is clearly reflected in the Court's jurisprudence. Without standing (or at least without the standing requirements emanating from Article III), a federal court is without power over a dispute. As a threshold question, then, standing must be determined before proceeding to the merits, which are not related to the power of a court over a suit. This is the basis of the Court's holding in *Steel Co. v. Citizens for a Better Environment*,[159] in which the Court rejected "hypothetical jurisdiction" and held that Article III standing issues must be decided before addressing whether a particular statute provides the plaintiff with a cause of action.[160] The term "threshold" in this context thus serves to indicate the order in which issues must be decided in litigation.[161]

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asserted), *and* Laub v. U.S. Dep't of Interior, 342 F.3d 1080, 1087 n.6 (9th Cir. 2003) ("[B]ecause the zone of interest test is merely prudential rather than constitutional it is waivable, and Defendants have waived it by not raising it below."), *with* Animal Legal Def. Fund v. Espy, 23 F.3d 496, 506 (D.C. Cir. 1994) ("The zone of interests test is jurisdictional, so that it is our duty to consider the issue regardless of the defendants' failure to raise the issue in this court (as in this case) or in the trial court.").

157. *Warth*, 422 U.S. at 500; *see also Steel Co.*, 523 U.S. at 109–10 (concluding that if the plaintiff lacks standing, a "resolution of the merits . . . will have to await another day"); Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970) ("The 'legal interest' test goes to the merits. The question of standing is different.").

158. *See Steel Co.*, 523 U.S. at 102 ("Having reached the end of what seems like a long front walk, we finally arrive at the threshold jurisdictional question: whether respondent, the plaintiff below, has standing to sue."); Lujan v. Defenders of Wildlife, 504 U.S. 555, 569 (1992) (opinion of Scalia, J.) (stating that standing is a threshold inquiry); *Warth*, 422 U.S. at 498 ("In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit."); Linda R.S. v. Richard D., 410 U.S. 614, 616 (1973) (stating that whether the plaintiff "is entitled to invoke the judicial process [and whether] the facts alleged present the court with a 'case or controversy'" are threshold questions).

159. 523 U.S. 83.

160. *Id.* at 93–102.

161. In recent cases, the Court has taken up the "sequencing" issue involved in *Steel Co.*, which some commentators refer to as "jurisdictional resequencing." *See generally* Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1 (2001). In *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999), the Court determined that a case can be dismissed because of defects in personal jurisdiction before addressing a difficult question involving the Court's subject matter jurisdiction. *See id.* at 578. In *Sinochem International Co. v. Malaysia International Shipping Corp.*, 549 U.S. 422 (2007), the Court extended the *Ruhrgas* analysis to the threshold question of forum non conveniens, despite acknowledging that the discretionary doctrine of forum non conveniens was not jurisdictional and did not implicate the power of a court to adjudicate the dispute.

The other consequence of applying the term "threshold" to standing is to indicate that standing must be decided at the outset of litigation. This understanding of threshold is related to, but slightly different than, the understanding of threshold discussed in the preceding paragraph. The first understanding of threshold means only that jurisdictional issues such as standing must be decided *before* other issues in a lawsuit; this is primarily a doctrinal point. The second understanding of threshold addresses *when* in a lawsuit standing issues must be decided. The second understanding of threshold further implicates the question of how standing issues are decided, who decides them, and on what information they may be decided. This second understanding of the term "threshold" is a procedural point.

It seems relatively clear that, in describing standing as a threshold matter, the Court has intended both the doctrinal and procedural aspects associated with that word. The *Steel Co.* case directly addressed the doctrinal sequencing point. The procedural points have never been as firmly addressed, but nevertheless a general understanding seems to have emerged. First, on the question of who decides the issue, although never specifically addressed, it seems clear that standing is a legal question that must be determined by a court rather than a fact question to be determined by a jury.[162] Second, on the question of when to decide the issue, the general consensus seems to be that standing decisions are most usefully determined *early* in a lawsuit.[163] As Professors Wright and Miller have stated, it is desirable "to decide standing at the outset [of litigation], as a means of sorting out those suits that do not deserve to proceed toward trial on the merits."[164] Sometimes this concept is described as a gatekeeping function.[165] This conception of standing (including the fairly traceable

See id. at 429–30, 435–36. The *Sinochem* Court emphasized, in a unanimous opinion, that forum non conveniens could be the basis of a dismissal, even before addressing the difficult jurisdictional issues raised by the dispute, because forum non conveniens is a threshold issue clearly distinct from the merits of the case. *See id.* On the sequencing question, then, this trio of cases seems to clearly demarcate threshold inquiries from merits questions, with the former requiring resolution before the latter, but no particular order required for the resolution of the various threshold (even non-jurisdictional threshold) questions.

162. *See, e.g.*, 13B WRIGHT ET AL., *supra* note 9, § 3531.15, at 328 n.25 (listing cases holding that "[s]tanding is a question of law" and "regularly assum[ing] that there is no right to jury trial on the preliminary issue of standing" (citing Am. Postal Workers Union of L.A. v. U.S. Postal Service, 861 F.2d 211, 213 (9th Cir. 1988); Lewis v. Anderson, 615 F.2d 778, 784 (9th Cir. 1979))); Madeline Fleisher, *Judicial Decision Making Under the Microscope: Moving Beyond Politics Versus Precedent*, 60 RUTGERS L. REV. 919, 948–49 (2008) (discussing standing as an issue that is decided by a judge as a question of law); Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 EMORY L.J. 771, 777–78 (2003) (same).

163. 13B WRIGHT ET AL., *supra* note 9, §3531.15, at 308.

164. *Id.*; *see also* Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 650–51 (2005) ("Any doubts about subject-matter jurisdiction should be raised and resolved at the threshold of litigation; a federal court should not reach the merits of a claim unless and until it has satisfied itself that it is the proper forum and that it has the structural authority to resolve the legal and factual issues presented by the dispute between the present parties.").

165. *See, e.g.*, Kelsey McCowan Heilman, Comment, *The Rights of Others: Protection and Advocacy Organizations' Associational Standing to Sue*, 157 U. PA. L. REV. 237, 249

requirement) as a threshold issue to be determined at the outset of litigation seems intuitively correct: if the federal court lacks power over the case, this characteristic should be identified as quickly as possible.

B. The Fact-Intensive Nature of the Cause in Fact Inquiry

The notion that standing must be decided early in a lawsuit has proven problematic, particularly with regard to the causation requirement. In order to understand this difficulty, it is necessary to recall the nature of the cause in fact inquiry. In a Negligence case, cause in fact is treated as a fact question for the jury to determine at the end of trial, and only after considering all of the evidence presented by the litigants.[166] Indeed, cause in fact is treated as a jury question not just under Negligence law, but throughout all tort law.[167] Further, when cause in fact is relevant in a lawsuit outside the torts arena, it is also considered a question for the factfinder.[168]

As discussed in Part I, however, the jury is not resolving a "fact" question in the sense that they are determining what actually happened in the real world. For instance, when a jury acts as factfinder in a criminal case, the jury is determining whether the defendant committed the crimes he has been charged with.[169] There is a right and wrong answer to this question, because the defendant either did or did not act as the prosecutor alleges. These types of pure "what happened" fact questions also arise in tort law—for example, was the defendant speeding when the accident occurred? But cause in fact is *counter*factual. The jury is not asked to determine what actually happened; it is asked to determine what *would have* happened if the defendant had acted legally rather than illegally.

If cause in fact is not really a true "what happened" fact question, then why is it considered a question for the jury to resolve? In short, because juries are usually in as good, if not better, position than judges to make the cause in fact determination:

(2008) ("The standing doctrine, then, can be viewed as playing a gatekeeper function, admitting only true cases or controversies that will be vigorously litigated in a manner that presents the strongest arguments on each side, thus promoting the correct legal outcome.").

166. *See* ABRAHAM, *supra* note 29, at 105–07 (discussing how cause in fact is a question for the jury to be decided at the end of trial after hearing all of the evidence).

167. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 (2005) ("Tortious conduct must be a factual cause of harm for liability to be imposed."); *id.* § 28 cmt. a ("[T]he plaintiff has the burden of proof on factual causation, . . . which requires that the factfinder be persuaded from the evidence that factual causation more likely than not exists."); *id.* § 45 cmt. i (Tentative Draft No. 5, 2007) (explaining that factual causation is also required for recovery of emotional disturbance).

168. *See, e.g.*, Banks McDowell, *Causation in Contracts and Insurance*, 20 CONN. L. REV. 569, 584–85 (1988) (describing the jury's role in determining cause in fact within breach of contract claims).

169. *See* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 35–36 (2003) (discussing factfinding role of jury).

> [T]he jury must rely on its own experience and knowledge of the world to make its decision about what would have happened. Indeed, this "counterfactual" nature of the causation issue sometimes requires assuming that the jury has firm knowledge about the way the world works that none of us actually has.[170]

Sometimes the cause in fact analysis will involve an evaluation of expert witnesses and other trial evidence.[171] Other times, common sense and experience are the primary tools in determining cause in fact.[172] In either situation, the counterfactual determination is typically a task for a jury, and a judge is in no better position than a jury to address it. In any event, it is widely accepted that if the issue to be decided requires the evaluation and weighing of documentary evidence and testimonial witnesses, or the application of real-world experience and common sense, it is a question for the jury.[173]

Consider the tension created between the counterfactual nature of the cause in fact analysis and the notion that standing must be determined at the outset of litigation. Federal courts are asked to do a counterfactual analysis that they are not especially well equipped to perform; in other areas of the law, the counterfactual analysis is assigned to a jury. Moreover, the information on which a federal court will base this decision is not readily available at the outset of litigation. Recall that a jury determines cause in fact after having weighed all of the evidence presented at trial:

> From his understanding of, and experience with, the world, the trier of fact [is] required to make a judgment that certain effects follow certain antecedents. To ascertain whether a cause in fact existed, the trier of fact's 'judging capacity' need[s] to be furnished with enough evidentiary facts to enable him, based on his experience, to rationally connect the defendant's act with the plaintiff's injury . . . .[174]

If federal judges are to determine cause in fact as part of a threshold standing inquiry (to be ascertained at the outset of litigation), then judges must either: (1) make the cause in fact determination without the benefit of evidence that litigants can bring to bear on that question; or (2) require that this evidence be brought forward earlier in the litigation than normally required under the Federal Rules of Civil Procedure.

C. Creating a Procedure to Decide the Causation Prong of Standing

The tension created by the cause in fact language used by the Supreme Court in standing decisions and the threshold function of standing is evident in the Court's somewhat tortured efforts to develop a cohesive procedure

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170. ABRAHAM, *supra* note 29, at 105.

171. *See id.* at 106–07.

172. *Id.* at 105–06.

173. *See* United States v. Alexander, 526 F.2d 161, 168 (8th Cir. 1975) (stating that "weighing facts and considering the credibility of witnesses . . . ha[ve] been the hallmark of the jury tradition").

174. *See* Zwier, *supra* note 13, at 776 (quoting Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60, 61 (1956)).

for district court judges to use in resolving the cause in fact inquiry. Professors Wright and Miller have stated: "The procedural means for resolving standing issues are not as clearly defined as might be imagined."[175] The causation requirement is mostly responsible for this procedural confusion.

The Supreme Court has waffled between two different procedural approaches for determining the causation prong. Under the first approach, it is determined on the pleadings. Under the second, it is treated as a factual issue that would be decided at trial. Both of these procedural approaches are seriously flawed. A third approach exists—treating the issue as a "jurisdictional fact"—but it is only slightly superior to the other two.

1. As a Matter of Pleading

In early cases, the Court sometimes viewed the causation issue as something that could be resolved on the pleadings. In introducing the fairly traceable requirement in *Linda R.S.*, and in subsequently determining that this requirement had not been met, the Court indicated that the defect was in the plaintiff's pleadings: "[A]ppellant has failed to allege a sufficient nexus between her injury and the government action which she attacks to justify judicial intervention."[176]

Subsequent Court cases wrestling with the cause in fact inquiry also leave the impression that the issue can often be disposed of on the pleadings. Consider the Court's determination in *Simon v. Eastern Kentucky Welfare Rights Organization*[177] that the fairly traceable requirement had not been met.[178] In *Simon*, several indigents and organizations representing indigents brought suit against the Commissioner of Internal Revenue because of the IRS ruling allowing particular hospitals to be eligible for favorable tax treatment, even though those hospitals denied regular medical care to indigents.[179] The indigent plaintiffs argued that the ruling violated several federal statutes[180] and, further, that the plaintiffs were harmed by the ruling because fewer hospitals would offer free medical care to indigents after the allegedly illegal ruling.[181]

The Court determined that the fairly traceable element had not been met: "It is purely speculative whether the denials of service specified in the complaint fairly can be traced to [the allegedly illegal revenue ruling] or instead result from decisions made by the hospitals without regard to the tax

175. 13B WRIGHT ET AL., *supra* note 9, § 3531.15, at 301.

176. Linda R.S. v. Richard D., 410 U.S. 614, 617–18 (1973); *see also id.* at 616 ("The threshold question which must be answered is whether the appellant has 'alleged such a personal stake in the outcome of the controversy as to assure . . . concrete adverseness . . . .'" (quoting Baker v. Carr, 369 U.S. 186, 204 (1962))).

177. 426 U.S. 26 (1976).

178. *Id.* at 41–43.

179. *Id.* at 28.

180. *Id.*

181. *Id.* at 32–33.

implications."[182] The Court specifically noted that the fairly traceable element could be decided on a motion to dismiss: "[I]n this case the complaint is insufficient even to survive a motion to dismiss, for it fails to allege an injury that fairly can be traced to [the] challenged action."[183]

It is difficult to understand what additional pleadings the plaintiffs needed to include in *Simon* to survive the defendant's motion to dismiss. The plaintiffs had pled an injury; they had pled illegal conduct by the defendant; and they had pled that there was a causal link between the IRS's decision and their injury. How much more specifically can you plead a *counterfactual* occurrence—something that never happened in the real world? Granted, a plaintiff can always plead additional facts which, if true, would serve as *evidence* of the likely existence of the issue that is necessary for the plaintiff's case. Traditionally, at least, the pleading of evidence has not been necessary under the liberal "notice pleadings" approach of the Federal Rules of Civil Procedure, under which the plaintiff's complaint serves the purpose only of alerting the defendant to the factual basis of legal claims against him.[184] Historically, the pleadings have not been viewed as an opportunity to consider the likelihood that the facts alleged by the plaintiff are true.[185]

Of course, this traditional view of the complaint has been questioned recently. In *Bell Atlantic Corp. v. Twombly*,[186] *Ashcroft v. Iqbal*,[187] and *Dura Pharmaceuticals, Inc. v. Broudo*,[188] the Court has revisited the method for testing the sufficiency of a complaint under the Federal Rules of Civil Procedure.[189] The *Dura* case is particularly pertinent because it involved the causation requirement in securities fraud litigation, which requires a plaintiff to show that her economic loss has been caused by the defendant's material misrepresentation or omission.[190] In *Dura*, the plaintiffs alleged that they had purchased shares of Dura Pharmaceuticals stock in reliance upon the defendant's false representations and that, when the falsity of these statements became known, the price of Dura

182. *Id.* at 42–43.

183. *Id.* at 45 n.25.

184. *See* Erickson v. Pardus, 551 U.S. 89, 93 (2007) ("Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" (alteration in original) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)) (internal quotation omitted)); Conley v. Gibson, 355 U.S. 41, 47 (1957) (stating that the Federal Rules of Civil Procedure require only a statement "that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests"); *see also* Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 456–58 (1943) (explaining the limited purposes of pleadings).

185. *See generally* Luke Meier, *Why* Twombly *Is Good Law (but Poorly Drafted) and* Iqbal *Will Be Overturned*, 87 IND. L.J. (forthcoming 2012).

186. 550 U.S. 544 (2007).

187. 129 S. Ct. 1937 (2009).

188. 544 U.S. 336 (2005).

189. *See* Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 875 (2009) ("Many judges and academic commentators read the decision as overturning fifty years of generous notice pleading practice, and critics have attacked it as a sharp departure from the 'liberal ethos' of the Federal Rules . . . .").

190. *Dura*, 544 U.S. at 341–42.

Pharmaceutical shares dropped.[191] Despite these pleadings, which were quoted in the opinion, the Court determined that the plaintiffs' complaint failed to adequately allege economic loss caused by the defendant's misrepresentation.[192]

It is not clear what effect *Dura*, *Twombly*, and *Iqbal* might have on the appropriate procedure for determining standing.[193] As discussed more fully in the next section, by the time the *Twombly* and *Iqbal* cases were decided, the Supreme Court had mostly abandoned the view that the fairly traceable requirement can be determined solely on the basis of defects in the plaintiff's pleadings. In addition, the fairly traceable issue is fundamentally different than most issues pled by a plaintiff in federal court. This is because the fairly traceable issue is one that must be resolved by a court at the outset of the proceedings if standing is to continue to function in a gatekeeper capacity. In this sense, it is entirely "plausible"[194] that standing might be exempt from the new heightened pleading requirements, because the Court, as decision maker, will resolve any issues before the necessity of a full-blown discovery process and jury trial. In short, the court is already performing a gatekeeper function with regard to standing, so it is not necessary to manipulate pleading doctrine to perform this function.

2. As a Disputed Issue of Fact for the Jury

The effect of the recent Supreme Court cases involving heightened pleading standards on standing jurisprudence remains to be seen. But before these cases, the Court was clearly moving away from the notion that standing causation could be decided solely on the pleadings. For instance, in *Lujan*, the Court stated: "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for

191. *Id.* at 339.

192. It seems probable that the plaintiffs in *Dura* were proceeding under a different understanding of the legal requirements under federal securities laws. The plaintiffs appeared to believe that buying securities in reliance on defendant's misrepresentations, at a price that is artificially inflated because of those misrepresentations, constitutes actionable loss, which was the Ninth Circuit's position. *See* Broudo v. Dura Pharmaceuticals, Inc., 339 F.3d 933, 938 (9th Cir. 2003). The Supreme Court rejected this understanding, requiring instead that a plaintiff show that, after the defendant's misrepresentations were exposed, the value of the share price decreased. *See Dura*, 544 U.S. at 342–46. However, in the complaint in *Dura*, the plaintiffs had alleged that the defendants had falsely claimed that it expected FDA approval for a new medical device and that, after the FDA announced that it would not approve that device, Dura's stock price "temporarily fell but almost fully recovered within one week." *See id.* at 339. This pleading would seem to flatly contradict the Supreme Court's conclusion that the plaintiffs had failed to allege that "the defendant's misrepresentation . . . proximately caused the plaintiff's economic loss." *Id.* at 346. The plaintiffs might not have specifically labeled the stock price drop as evincing their loss, and it is probable that the plaintiffs were proceeding under a different theory, but the Court's conclusion on this point seems prickly.

193. *See* A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 6–7 (2009) (discussing the confusion on the appropriate standard to apply to a plaintiff's pleadings on a motion to dismiss).

194. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2007).

on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'"[195] Unfortunately, the manner in which the Court has described the post-pleadings procedures for resolving standing has also engendered confusion. Consider the Court's extensive discussion on the topic in *Lujan*:

> The party invoking federal jurisdiction bears the burden of establishing these elements. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation. . . . In response to a summary judgment motion, . . . the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be "supported adequately by the evidence adduced at trial."[196]

The Court properly outlines the procedures a trial court should use for fact questions that the jury will ultimately resolve after a full trial. If standing is to serve as a gatekeeper, however, this objective is defeated by delaying the ultimate determination on the causation prong of standing until a full-blown jury trial. While this approach would remedy the problem created by requiring a federal court to decide potentially complicated cause in fact questions solely on the pleadings, it undermines the notion that standing is a threshold determination that must be resolved at the outset of litigation. Moreover, it is not clear just who would be resolving this question. Justice Scalia's *Lujan* opinion could be read to indicate that a jury would resolve disputed issues of cause in fact about which reasonable minds could differ.[197] In other cases, the Supreme Court has also intimated that a jury would be asked to determine the cause in fact question.[198] Asking a jury to make determinations that affect the federal court's jurisdiction is problematic. Professor Mishkin stated long ago that the "power of the court to hear and decide a case could hardly be made to

195. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (alteration in original) (quoting Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 889 (1990)); *see also* Bennett v. Spear, 520 U.S. 154, 171 (1997) (describing the plaintiffs burden at the motion to dismiss stage as "relatively modest").

196. *Lujan*, 504 U.S. at 561 (citations omitted) (quoting FED. R. CIV. P. 56(e); Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 115 n.31 (1979)).

197. *See id.*

198. *See* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 64–66 (1987) ("If the defendant fails to make such a showing after the plaintiff offers evidence to support the allegation, the case proceeds to trial on the merits, where the plaintiff must prove the allegations in order to prevail. But the Constitution does not require that the plaintiff offer this proof as a threshold matter in order to invoke the District Court's jurisdiction."); *Gladstone, Realtors*, 441 U.S. at 115 n.31 ("Although standing generally is a matter dealt with at the earliest stages of litigation, usually on the pleadings, it sometimes remains to be seen whether the factual allegations of the complaint necessary for standing will be supported adequately by the evidence adduced at trial.").

depend upon the jury's verdict."[199] Regardless of whether a jury or judge would make this determination, however, the gatekeeper aspect of standing would be completely undermined if this determination was not made at the outset of litigation, but rather after the completion of a full trial.

3. As a "Jurisdictional Fact"

Resolving the fairly traceable prong under a cause in fact analysis at the pleading stage is difficult because of the fact-intensive nature of that inquiry, but waiting to resolve the issue until after a full trial undermines the gatekeeper aspect of standing. Thus, neither of the two procedural approaches suggested by the Supreme Court's case law is satisfactory for resolving a cause in fact analysis under the fairly traceable prong of standing. A third procedural approach is possible.

Occasionally, a disputed factual question arises in determining the threshold question of whether a court has subject matter jurisdiction over a claim.[200] For instance, factual questions may arise over the domicile of a party for purposes of determining whether there is diversity of citizenship. These disputed "jurisdictional facts"[201] need not be resolved by a jury, and instead can be resolved by the court after reviewing the evidence on the disputed point.[202] The Supreme Court has sanctioned this approach in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*,[203] in a case implicating the Court's admiralty jurisdiction[204]: "[A]ny litigation of a contested subject-matter jurisdictional fact issue occurs in comparatively summary procedure before a judge alone . . . ."[205] This summary

199. Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 166 (1953).

200. The federal appellate courts have coined the term "factual challenge" to refer to a motion brought under Federal Rule of Civil Procedure 12(b)(1) in which the movant challenges the factual underpinnings of the court's subject matter jurisdiction. *See* 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 12.30[4] & n.11 (3d ed. 2011) (listing cases distinguishing between "factual attacks" and "facial attacks").

201. *See* Stefania A. Di Trolio, Comment, *Undermining and Unintwining: The Right to a Jury Trial and Rule 12(b)(1)*, 33 SETON HALL L. REV. 1247, 1247 (2003) ("Jurisdictional facts are facts that are alleged and ultimately proven to establish subject matter jurisdiction in federal courts.").

202. *See id.* at 1248–49 (explaining that, except in unusual circumstances, jurisdictional facts are determined by the court rather than by the jury).

203. 513 U.S. 527 (1995).

204. Ironically, the Court's opinion spoke at length about the propriety of determining proximate cause under a statutory jurisdictional analysis when proximate cause was also a part of the merits dispute. *See id.* at 536–37. When a jurisdictional fact is the same as a fact that must be resolved as part of the plaintiff's cause of action, the procedure for a federal court to apply in resolving this fact is much more complicated and much less clear. *See* Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973, 980–84 (2006) (examining the two leading cases addressing the procedure a federal court should use when a jurisdictional fact overlaps with a fact that is necessary to the merits dispute); Di Trolio, *supra* note 201, at 1248 (discussing how federal courts should proceed when a jurisdictional fact is intertwined with the merits of the case).

205. *Grubart*, 513 U.S. at 537–38; *see also* U.S. Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72, 79 (1988) ("Nothing we have said puts in question the

procedure, however, can include "affidavits, documents, and even a limited evidentiary hearing to resolve disputed jurisdictional facts."[206]

In *Duke Power*, the Supreme Court reviewed an appeal from a district court that treated the fairly traceable element of standing as a jurisdictional fact to be resolved with the court acting as a factfinder.[207] In order to resolve the difficult cause in fact question presented in that case, the district court held a four-day hearing and took live testimony.[208] The Supreme Court also considered the relevance of a large volume of statistical information presented by the parties.[209] In affirming the cause in fact conclusions reached by the district court, the Supreme Court was extremely deferential to the district court's analysis,[210] even indicating that the Court reviewed the district court's cause in fact conclusions under the "clearly erroneous" standard.[211] The clearly erroneous standard of review is used by an appellate court for reviewing factual determinations made by a lower court.[212]

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inherent and legitimate authority of the court to issue process and other binding orders, including orders of discovery directed to nonparty witnesses, as necessary for the court to determine and rule upon its own jurisdiction, including jurisdiction over the subject matter."); Idleman, *supra* note 161, at 60–61 ("[A] court 'has the power to resolve any factual dispute regarding the existence of subject matter jurisdiction' and 'may hold an evidentiary hearing . . . necessary to evaluate its jurisdiction.'" (quoting Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445, 451 (6th Cir. 1998); Sierra Club v. Yeutter, 911 F.2d 1405, 1421 (10th Cir. 1990)) (second alteration in original)).

206. 2 MOORE ET AL., *supra* note 200, at § 12.30[4] & n.11. Some commentators have concluded that the burden of proof necessary to establish a "jurisdictional fact" is the same for "any factual element . . . of forum authority." Clermont, *supra* note 204, at 1020. *But see* 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1351, at 288–313 (3d ed. 2004) (discussing the procedures for determining a challenge to personal jurisdiction and stating that a federal court will "resolve all factual disputes" in favor of the nonmoving party, that the district court has "considerable procedural leeway in choosing a methodology for deciding" a 12(b)(2) motion, and that a court "may await the trial on the merits with the fact issues being left to the jury for determination if the district judge believes that is desirable").

207. Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 74 (1978) ("[T]he District Court concluded that 'there is a substantial likelihood that Duke would not be able to complete the construction and maintain the operation of the McGuire and Catawba Nuclear Plants but for the protection provided by the Price-Anderson Act." (quoting Carolina Envtl. Study Grp., Inc. v. U.S. Atomic Energy Comm'n, 431 F. Supp. 203, 220 (W.D.N.C. 1977))).

208. *U.S. Atomic Energy Comm'n*, 431 F. Supp. at 205 ("[A]t a hearing on the motion to dismiss, it appeared that full dress consideration was desired on the issues of standing and ripeness. Time was allotted, therefore, to develop evidence, and a hearing, four days in length, was conducted on September 27, 29 and 30 and October 1, 1976, on these subjects.").

209. *See id.* at 214 (listing and considering the statistical evidence submitted by the parties). In the opinion, the district court commented that "[t]he court is not a bookie." *Id.*

210. *See Duke Power*, 438 U.S. at 76 (stating that the evaluation of testimony "is the primary responsibility of the trial judge").

211. *See id.* at 77 ("Considering the documentary evidence and the testimony in the record, we cannot say we are left with 'the definite and firm conviction that' the finding by the trial court of a substantial likelihood that the McGuire and Catawba nuclear power plants would be neither completed nor operated absent the Price-Anderson Act is clearly erroneous; and, hence, we are bound to accept it." (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948))).

212. *See, e.g.*, Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982).

If a cause in fact inquiry is truly a proper component of the threshold jurisdictional standing inquiry, *Duke Power* represents the appropriate procedural approach for resolving the issue. This approach recognizes the fact-intensive nature of the cause in fact inquiry, but still allows this question to be determined at the outset of litigation (or at least before a full jury trial). In this sense, treating standing as a jurisdictional fact is superior to the two procedural approaches which have been suggested by the Supreme Court.

Treating the issue as a jurisdictional fact might be the best resolution of the tension between the gatekeeper aspect of standing and the fact-intensive nature of the cause in fact inquiry, but it also illustrates how difficult these concepts are to reconcile. Requiring a federal court to independently verify, as a threshold determination of the federal court's jurisdictional power, a causal relationship between the plaintiff's asserted injury and the alleged misconduct by the defendant will often prove to be cumbersome and tedious.

As detailed above, jurisdictional facts sometimes arise in the determination of other threshold inquiries, such as determining whether a court has subject matter jurisdiction. For the most part, these other threshold inquiries only *rarely* require the resolution of a jurisdictional fact by a federal court: "[T]he 'jurisdictional facts doctrine' is quite narrow, confined largely to party-based, as opposed to subject-matter-based, grants of federal jurisdiction."[213] Jurisdictional facts are rarely necessary under the Court's subject matter jurisprudence because the substantive doctrine for these other threshold areas has been shaped to permit a relatively straight-forward analysis at the outset of litigation. For instance, federal question jurisdiction under 28 U.S.C. § 1331 is analyzed according to the "well-pleaded" complaint rule, which scrutinizes the plaintiff's complaint to see if it raises a question of federal law.[214] Similarly, whether a federal court has diversity jurisdiction under § 1332 is analyzed pursuant to the "complete diversity" rule.[215] Although this approach can lead to factual disputes over which state is a party's domicile,[216] such factual disputes are rare.[217] A cause in fact analysis of the fairly traceable prong of standing, however, seems to frequently require a jurisdictional fact inquiry.

In conclusion, the fact-intensive nature of the cause in fact inquiry and the desire to make this determination at the outset of litigation are in tension. If a cause in fact analysis must be performed at the threshold of

213. *See* Wasserman, *supra* note 164, at 699.

214. *See, e.g.*, Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 830 (2002) ("The well-pleaded complaint rule has long governed whether a case 'arises under' federal law for purposes of § 1331.").

215. *See* CHEMERINSKY, *supra* note 55, at 302–03 (explaining the rule).

216. *See* Di Trolio, *supra* note 201, at 1247 (noting that disputes arise over parties' citizenship); *see also* 13E WRIGHT ET AL., *supra* note 9, § 3611, at 469 (indicating that one's citizenship is based on the state in which she is domiciled).

217. *See* 13E WRIGHT ET AL., *supra* note 9, § 3611, at 472 ("[I]n the majority of cases there is no dispute over where a party's true home is located.").

litigation, there is no obvious procedural mechanism to accomplish this purpose. The best approach is the one taken for other jurisdictional facts, but this procedure contemplates a cumbersome process at the outset of litigation and would presumably require that the parties be allowed discovery on this issue. This is tolerable in other threshold matters because disputes over the jurisdictional facts are uncommon, but they may arise with more frequency under a cause in fact analysis.

IV. PROXIMATE CAUSE AS A THRESHOLD DETERMINATION

Interpreting the fairly traceable prong of standing to require a proximate cause analysis would eliminate the procedural difficulties created by the cause in fact test. Whereas the nature of the cause in fact inquiry makes it difficult to analyze causation at the outset of litigation, the proximate cause inquiry is easily conducted at this stage, thus making it a better fit for standing's gatekeeper function.

This part will first determine what type of analysis would be conducted under a proximate cause understanding of the fairly traceable requirement. One can easily see, at least as an analytical matter, how a cause in fact analysis is incorporated directly from tort law. In tort law, cause in fact requires a but-for relationship between the plaintiff's injury and the defendant's misconduct. As every case raising the standing issue involves some injury to the plaintiff and some alleged wrongdoing by the defendant, it is not difficult to figure out how to transplant this analysis into standing law. To import proximate cause into standing, however, requires some clarification.[218]

Recall that proximate cause serves a limiting function within Negligence law.[219] Tort law has determined that defendants should not be liable for every injury that results from their unreasonable behavior, and thus only makes the defendant liable for those injuries for which his conduct was the proximate cause. Today, almost all states use either the foreseeability test or the scope of the risk test to achieve this objective. Both tests essentially ask the same question: is the plaintiff's injury one of the foreseeable consequences of the defendant's conduct that made his conduct unreasonable in the first place? Because of the ubiquity of the foreseeability and scope of the risk tests, they are generally considered synonymous with the term proximate cause.[220]

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218. *Cf.* Farber, *supra* note 8, at 1544 (arguing that proximate cause is "an intellectual quagmire" and that it should not be imported into an Article III standing analysis because it would allow a court to inject its belief about what is "fair or not fair").

219. *See supra* Part I.B.

220. Historically, other tests were used to perform the limiting objective of proximate cause. The most common was the "directness" test, which asked whether the plaintiff's injury has been "directly" caused by the defendant's misconduct. *See* JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS 104–05 (2010). This approach, however, proved to be of limited use as an analytical tool; whether an injury had been "directly" caused by the defendant's misconduct is not an analysis that can be defined with precision. *See id.* at 106. The modern test, by focusing on the foreseeability of the plaintiff's injury as a result of the defendant's conduct, requires an

It is this foreseeability analysis that I propose as a new interpretation of the fairly traceable prong of standing. In every case, a federal court would ask the following question: is the plaintiff's injury one of the harms that the law, which the defendant allegedly violated, was intended to address? Like proximate cause in the tort context, this would be a policy question, but *unlike* in the tort context, this would be a legal question to be answered by the court rather than by the jury.

To demonstrate why a proximate cause analysis within standing would not be a jury question as it is within Negligence law, it is necessary to fully understand how proximate cause functions within Negligence law and why it is a jury issue in that context. Negligence law is unique in that it gives to the jury a normative function.[221] In every Negligence case, the jury is asked to determine the reasonableness of the defendant's conduct. This normative role, which draws on a jury's collective values and requires the jury to weigh competing policy considerations, is different than the usual role of the jury as simply a factfinder.[222] In almost all other contexts, juries are called upon to determine disputed issues of fact rather than to give judgments about the appropriate outcome to a dispute.

Because of the unique normative role played by a jury in a Negligence suit, the jury is also given the task of determining proximate cause. As detailed above, the proximate cause analysis—under the foreseeability test—requires an understanding of the reasons that particular behavior is considered illegal. It asks whether the plaintiff's injury was among the risks that contributed to the decision that the defendant's behavior was unacceptable in the first place. In a Negligence suit, who better to answer

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analysis that can be defined and explained to a jury, and in this sense is a more useful analytical tool. *See id.* at 106–07 (stating that "[t]he use by modern courts of foreseeability . . . in many respects marks an improvement" and noting that these types of "formulations tend to frame the proximate cause requirement more elegantly and sharply"); *cf.* ROBERT E. KEETON, LEGAL CAUSE IN THE LAW OF TORTS 41–44 (1963) (arguing that courts applying the "directness" test really considered the foreseeability of the risk in drawing the distinction between "direct" and "indirect").

221. See Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 407, 424–25 (1999) ("The jury has a great deal of normative discretion in deciding what is reasonably prudent conduct.").

222. *See id.* at 424 (explaining that the jury's normative role in a Negligence claim is the exception rather than the rule). The only other situation in which a jury performs a similar normative function is when it exercises the somewhat controversial power of jury nullification, in which the jury disregards normative legal standards established by other bodies because of a disagreement with the values reflected in those norms. *See* Teresa L. Conaway et al., *Jury Nullification: A Selective, Annotated Bibliography*, 39 VAL. U. L. REV. 393, 393 (2004) ("Sometimes, however, juries look at the law and dislike what they see, at least with respect to the specific set of facts before them. When this happens, juries have been known to reach verdicts contrary to what logic dictates, which is known as "jury nullification."). Although the concept of jury nullification is usually associated with criminal trials, the concept does have potential application in civil proceedings as well, but receives even less academic support than criminal jury nullification. *See* Lars Noah, *Civil Jury Nullification*, 86 IOWA L. REV. 1601, 1658 (2001) ("Although a number of scholars praise aspects of unguided lay decisionmaking in this context, the case for civil jury nullification is much weaker than in the criminal arena.").

that question than the jury that makes that decision? Because the jury is the body in Negligence cases that establishes the normative requirements, they are in the best position to answer the proximate cause question.

In order to import a proximate cause analysis from Negligence law into the standing context, one must account for the jury's unique role as the normative body in Negligence law. Outside of Negligence law, normative legal standards are established by other bodies. Legislators, both state and federal, establish normative standards of behavior by statute. Administrative bodies, both state and federal, set normative standards through administrative rules and adjudications. State courts establish normative legal standards through the common law. To apply a proximate cause analysis in a case involving a statute or an administrative regulation requires an understanding of the reasons the issuing body created that law and the types of injuries that it intended to address. Obviously, the responsibility of applying a proximate cause analysis in this context would not fall to a jury. A jury is not equipped to determine whether the injury to the plaintiff was among the array of risks that, for example, Congress was concerned about when they established a normative standard through statute.

It is telling that even *within* Negligence law the proximate cause analysis is performed by the judge as a legal issue, rather than by the jury, when the normative standard of behavior is established by a body *other* than the jury. Consider a Negligence claim in which the plaintiff wishes to rely on a defendant's violation of a statute to prove substandard care. In most states, violating a statute constitutes "negligence per se," meaning that the question of whether the defendant breached the duty of care is no longer a jury issue, but a matter of law decided by the judge.[223] In order to rely on this principle, a plaintiff must show that the accident was the type of accident the legislature was attempting to address[224] and that the plaintiff was within the class of victims the legislature was attempting to protect.[225] To demonstrate, consider the case of *Potts v. Fidelity Fruit & Produce Co.*[226] In *Potts*, the plaintiff brought suit to recover for injuries resulting from a spider bite sustained while unloading bananas from a truck.[227] The plaintiff wished to establish that the defendant was negligent per se because the company had violated a Georgia statute regulating the shipment of foods.[228]

223. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 14 (2005) (articulating the negligence per se doctrine); *id.* § 14 reporters' note on cmt. c ("'Negligence per se' is the strong majority rule among American jurisdictions, which have accepted Justice Cardozo's famous holding in Martin v. Herzog, 126 N.E. 814 (N.Y. 1920)."). Even in states that follow this negligence per se rule, the violation of a statute can be excused under certain circumstances. *See id.* § 15 (listing situations in which the violation of a statute is excused and thus not automatically a breach of the duty of care).

224. *See id.* § 14 cmt. f ("Negligence per se applies only when the accident that injures the plaintiff is the type of accident that the statute seeks to avert.").

225. *See id.* § 14 cmt. g ("To invoke negligence per se, a party must show that the plaintiff was within the class of persons the legislature was endeavoring to protect.").

226. 301 S.E.2d 903 (Ga. Ct. App. 1983).

227. *Id.* at 904.

228. *Id.*

The court, rather than the jury, determined that the violation of the statute could not be the basis of a legal finding of negligence per se because the statute in question was "designed not to render the workplace a safe environment, but to prevent the sale and distribution of adulterated or misbranded foods to consumers."[229]

The court's analysis in *Potts* is a proximate cause analysis, just like the one in a typical Negligence case.[230] The only difference was that the normative standard on which the plaintiff relied was a statute created by the state legislature, rather than a jury's determination of the defendant's reasonableness. Because the normative standard had been established by a different body, the proximate cause analysis required the skill set of a judge, rather than a jury. In a negligence per se case, the proximate cause analysis requires an understanding of the reasons behind a statute's enactment. The *Restatement (Third) of Torts* offers this guidance on resolving the proximate cause issue in negligence per se cases: "In determining the purpose of the statute, the court can rely on the ordinary principles of statutory interpretation, including the language or text of the statutory provision, its location within the larger statutory scheme, the more general context of the statute, and indications of specific legislative intent."[231] In other words, the proximate cause analysis is a legal question better suited for the judge.

As the *Potts* case demonstrates, performing a proximate cause analysis outside the traditional context of Negligence law will almost always involve a legal inquiry into the purposes or motivations behind the law on which the plaintiff relies. This legal inquiry will be performed by a judge and will place the judge in the comfortable role of determining the intent of other political bodies. Accordingly, importing proximate cause into standing law would bring in a legal analysis. The ultimate answers would still turn on policy questions, but the policies would be provided by legislators and administrative bodies. The role of a federal court would simply be to ascertain this intent.

This type of proximate cause analysis could easily be performed by a federal court at the outset of litigation, making it much more consistent with the gatekeeper function that has been ascribed to standing. Indeed, this analysis could be based solely on the plaintiff's complaint. Particularly after *Twombly* and *Iqbal*, a plaintiff's complaint will be written with enough specificity that a court can determine whether the plaintiff's claimed injury was among the harms intended to be protected by the legal rule that the

229. *Id.*

230. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 14 cmt. f ("This statutory-purpose doctrine resembles the [proximate cause] doctrine that is applied in ordinary negligence cases . . . ."); ROBERTSON ET AL., *supra* note 24, at 171 ("The [proximate cause] element is the ordinary negligence law's analog to the threshold criteria for imposing liability (under the rubric of 'negligence per se') on the basis of defendant's violation of a penal statute.").

231. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 14 cmt. f.

defendant allegedly violated. Unlike the cause in fact interpretation of the fairly traceable prong of standing, no additional factual inquiry would be necessary. In this sense, then, a proximate cause interpretation is a better fit within standing law. Therefore, adopting this understanding of the fairly traceable prong would avoid the tension that arises from the current cause in fact understanding.

V. RECONCILING A PROXIMATE CAUSE APPROACH WITH THE SUPREME COURT'S CAUSE IN FACT LANGUAGE

A proximate cause interpretation is not necessarily inconsistent with the cause in fact language usually found in the Supreme Court's decisions. In reality, the cause in fact language used by the Court is largely misleading. In early cases after the introduction of the fairly traceable prong of standing, the Court would often use cause in fact language, but perform a proximate cause analysis. As the cause in fact language became more and more entrenched in the case law, the Court developed various techniques to avoid the difficult fact-intensive inquiry required by the cause in fact analysis. One of these techniques involved defining the plaintiff's injury in such a broad manner that cause in fact was obvious. Another technique was to simply gloss over the difficult questions posed by a cause in fact analysis; in one instance, the Court used the parties' arguments (or lack of arguments) as a mechanism to avoid a difficult standing analysis.[232] Because of this case law, reinterpreting the fairly traceable prong of standing as requiring a proximate cause analysis would not involve a dramatic departure from prior precedent, and would probably be more consistent with the original intuitions behind the Court's creation of this prong of standing.

A. Early Cases Based on Proximate Cause Motivations

In a 1987 opinion written while on the D.C. Circuit, Judge Bork wrote the following with regard to the causation prong of standing: "It seems clear that the Supreme Court's decisions about causation rest upon something more than mere estimates of probabilities."[233] In order for Judge Bork's statement to be accurate, the cause in fact language consistently used by the Court must be a façade. As explained earlier in this Article, the cause in fact inquiry requires a guess as to how events would have transpired if the defendant had acted legally rather than illegally.[234] This counterfactual inquiry, by its nature, requires "estimates of probabilities."

I believe Judge Bork's statement is accurate, at least with regard to the Supreme Court's early case law interpreting the causation prong of standing. In a series of opinions written after that prong's introduction, the cause in fact language used by the Court masked the proximate cause

232. *See* Massachusetts v. EPA, 549 U.S. 497, 523 (2007); *infra* notes 296–303 and accompanying text.

233. Haitian Refugee Ctr. v. Gracey, 809 F.2d 794, 803 (D.C. Cir. 1987).

234. *See supra* notes 21–26 and accompanying text.

analysis that it actually performed. Unfortunately, the Court's proximate cause intuitions—that the law relied upon by the plaintiff did not protect against the injuries suffered by the plaintiff—were expressed in cause in fact language.

This disconnect started in the opinion credited for creating the causation prong of standing, *Linda R.S.* Recall that in that case, the mother of an illegitimate child brought suit against the State of Texas and a Dallas County District Attorney for failing to prosecute the child's alleged father for failure to pay child support, pursuant to a Texas state policy of prosecuting only the fathers of legitimate children.[235] The mother claimed that this policy violated the Equal Protection Clause.[236] Justice Marshall concluded that the mother had no standing to bring the suit.[237] In explaining this conclusion, Justice Marshall used language indicating that a cause in fact link between the plaintiff's injury and the defendant's misconduct had not been established.[238] According to Justice Marshall, it was "speculative" that Texas's compliance with the Equal Protection Clause would have resulted in child support payments being made to the plaintiff mother.[239]

As detailed earlier in this Article, this language is clearly of the cause in fact variety.[240] Despite this language, Justice Marshall's conclusion that the plaintiff did not have standing was almost surely based on an understanding of the types of harms protected by the Equal Protection Clause. It is helpful here to consider the type of evidence that would have been relevant to a thorough cause in fact analysis in this case: information about the particular father, such as the father's testimony that he would prefer making child support payments rather than jail time, or vice versa; evidence indicating whether the alleged father, in previous situations, had chosen a monetary penalty over jail time; or even more generic evidence such as studies conducted about the effect prospective jail sentences have on fathers obligated to pay child support.[241] This circumstantial evidence could have helped the Court in performing a cause in fact analysis, but there is no mention of any of this type of evidence in the Court's opinion in *Linda R.S.*

Other Supreme Court opinions written around the time that the causation prong of standing was developed follow the same pattern as *Linda R.S.*: these opinions use cause in fact language to describe the Court's conclusion, but include no discussion of the type of evidence that would actually be relevant to a cause in fact inquiry. In *Simon*, the Court used cause in fact language to deny standing to several indigents in their suit

235. *See* Linda R.S. v. Richard D., 410 U.S. 614, 614–15 (1973).
236. *See id.* at 616.
237. *See id.* at 618–19.
238. *See id.* at 618; *supra* notes 62–70 and accompanying text.
239. *Linda R.S.*, 410 U.S. at 618.
240. *See supra* notes 62–70 and accompanying text.
241. For example of this type of study, see D.L. CHAMBERS, MAKING FATHERS PAY ch. 6 (1979).

against the Commissioner of Internal Revenue for the IRS's ruling making certain hospitals eligible for favorable tax treatment even though those hospitals denied regular medical care to indigents.[242] Despite the Court's use of this language, there is no reference to the types of evidence that would be needed to evaluate this cause in fact link.[243] In *Allen*, the Court carefully delineates the steps necessary to link the plaintiffs' harm to the defendant's alleged misconduct,[244] but instead of carefully considering the types of evidence that would be probative to the cause in fact analysis, the Court dismissed a possible connection as simply "speculative."[245] The Court's opinion in *Warth v. Seldin*[246] falls into the same category: cause in fact language is used, but the evidence that would control the cause in fact analysis is absent.[247]

In each of these cases, the cause in fact language is a façade. Rather than performing a cause in fact analysis, the Court's analysis is instead driven by an intuition about the types of harms protected by the legal rules on which the plaintiffs based their claims. In other words, the Court is performing a proximate cause analysis rather than a cause in fact analysis. In *Linda R.S.*, Justice Marshall's conclusion that the plaintiff is without standing is based on an implicit understanding about the types of harms against which the Equal Protection Clause protects. Indeed, at certain places in the *Linda R.S.* opinion, Justice Marshall comes close to articulating the true basis for the Court's conclusion. Justice Marshall notes that the Court had consistently denied standing in cases in which the plaintiff's suit is based on the decision whether to prosecute a third party and the plaintiff "is neither prosecuted or threatened with prosecution."[248] This statement is accurate, but not because those cases involved a failure to prove a cause in fact link between the plaintiff's injury and the defendant's alleged illegal conduct; it is accurate because the purpose of most laws is to address the parties being regulated and not to protect against harm to potential third parties. In this sense, then, *Linda R.S.* can be compared to the *Potts* case, where the statute on which the plaintiff relied was not intended to protect against workplace accidents but was instead designed to protect consumers in their consumption of food.[249] In *Linda R.S.*, the Equal Protection Clause did not protect against

242. *See* Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 28, 42–44 (1976); *supra* notes 177–83 and accompanying text.

243. For instance, testimony from hospital officials or statistical evidence about the percentage of hospitals who offer indigent care would have been highly relevant to determining whether the IRS rulings resulted in less medical treatment for indigents.

244. *See* Allen v. Wright, 468 U.S. 737, 758–59 (1984).

245. *Id.* at 758.

246. 422 U.S. 490 (1975).

247. *See id.* at 504–07. In *Warth*, low-income non-residents lacked standing to challenge a municipal zoning ordinance for effectively excluding low-cost housing because they could not show that such housing would exist "absent the respondents' restrictive zoning practices." *Id.* at 504. In reaching this conclusion, the Court noted that the record was "devoid" of information about whether current construction efforts would result in such housing, and that the plaintiffs' individual financial conditions "suggest[ed]" that the lack of housing was "the consequence of the economics of the area housing market." *Id.* at 506.

248. Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973).

249. *See* Potts v. Fidelity Fruit & Produce Co., 301 S.E.2d 903, 904 (Ga. Ct. App. 1983).

the injuries suffered by the plaintiff but was instead designed to protect against other types of harms. Likewise, the best understanding of cases like *Simon*, *Warth*, and *Allen* is that the Court is making a determination that the injuries claimed by the plaintiffs are not protected by the legal rule on which the plaintiffs rely.

If the actual analysis guiding the Court's decisions in cases like *Linda R.S.* and *Allen* is a proximate cause inquiry, why did the Court use cause in fact terminology? There are three potential explanations for this disconnect. The first is that the Court simply failed to decouple cause in fact from proximate cause. This error is easy to make. Consider a hypothetical involving a pedestrian who trips over a crack in a sidewalk and breaks her arm. Suppose that the pedestrian brings suit in federal court against the EPA for failing to enforce the Clean Air Act. Obviously, this suit should be removed from the federal docket at the first chance, but why? It is tempting to state that the suit should be dismissed because the EPA's failure to enforce the Clean Air Act did not *cause* the plaintiff's injury, but that reasoning is somewhat ambiguous because it fails to decouple proximate cause from cause in fact. A cause in fact link could conceivably be established between the plaintiff's injury and the EPA's violation. If the EPA's failure to enforce the Clean Air Act had contributed to global warming, and if global warming increases the occurrences of cracks in concrete due to increased exposure to heat, a plausible cause in fact link can be made between the defendant's alleged misconduct and the plaintiff's injury. But even if this link can be made, all would agree that the case is without merit and should be dismissed. The dispositive reason is that, regardless of whether enforcement of the Clean Air Act was a cause in fact of the plaintiff's broken arm, Congress did not intend the Clean Air Act to protect against this type of injury. The true impediment to our hypothetical plaintiff's suit is not an absence of cause in fact, but a failure to establish proximate cause. This hypothetical is similar to the situation confronting Justice Marshall when he was charged with writing the majority opinion in *Linda R.S.* The Court had concluded that the plaintiff was without standing, and it was Justice Marshall's responsibility to articulate the reasoning behind this conclusion. In writing the opinion, he used cause in fact terminology, similar to the tempting conclusion in our hypothetical that the EPA had not *caused* the plaintiff's injury. By failing to decouple proximate cause from cause in fact, the precise reasoning behind the conclusion is obscured.

The second reason that the Court might have initially used cause in fact language derives from confusion regarding the role of federal courts in determining whether the plaintiff has a constitutionally recognized injury. For decades, both the Supreme Court and commentators have wrestled with the question of whether the injury prong of standing limits Congress's ability—or presumably that of other political bodies that can create causes

of action—to broadly define an injury under a statute.[250] In *Lujan*, the Court seemed to resolve that federal courts have an independent duty to verify whether the plaintiff has a sufficient injury for Article III standing.[251] The Article III injury analysis is independent of Congressional intent.

Although Congress cannot create an Article III injury where none existed, it is an analytical mistake to assume that it is irrelevant whether Congress has created any injury at all. On various occasions, it seems as if the Supreme Court has made this analytical mistake. For example, in *Allen*, the plaintiffs put forward different theories as to how to frame their injury. Under the first framing, the injury existed solely because the IRS had enforced the tax code provisions inconsistently with the law's requirements.[252] The Court ultimately rejected this creative framing as not "judicially cognizable"[253] under the injury prong of standing. The Court neglected the question of whether the plaintiff's injury was one against which the statute was intended to protect because, regardless, the injury still was not sufficient to confer standing under Article III.

The plaintiffs' second framing in *Allen* was to characterize their injury as the deprivation of "an education in a racially integrated school."[254] The Court took pains to acknowledge that this injury was "judicially cognizable" under Article III and also "one of the most serious injuries recognized in our legal system."[255] In reaching this conclusion under the injury prong of standing, however, the Court never considered whether the statute was intended to address the plaintiffs' injury. Consequently, the Court fell into an analytical trap and the cause in fact analysis was used as an escape from this trap. The Court was able to skip the statutory question with regard to the first framing of the plaintiff's injury because, even if Congress did attempt to create a cause of action for those like the plaintiffs in *Allen*, such an injury would not be sufficient for standing. In evaluating the second proposed framing, the Court appeared to assume that no further analysis of Congress's intent was necessary because the injury was constitutionally cognizable, overlooking the possibility of a proximate cause analysis. Thus, to satisfy the Court's intuition that the plaintiffs' lacked standing, the shortcoming had to come to bear in other parts of the analysis. Using cause in fact language is a convenient escape in this situation because it can justify a "no standing" conclusion even if a sufficient injury exists under the Article III injury analysis.

This leads to the third explanation as to why the Court might have initially adopted, and continued to employ, cause in fact language in its opinions: a desire to completely divorce the causation inquiry from the merits of the case. As explained previously, the Court has often asserted

250. *See generally* Sunstein, *supra* note 6.

251. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 572–74, 576 (1992) (concluding that Congress's creation of a "procedural right" to sue is not sufficient to satisfy the injury prong of the standing inquiry).

252. *See* Allen v. Wright, 468 U.S. 737, 752–53 (1984).

253. *Id.* at 754.

254. *Id.* at 756.

255. *Id.*

this goal.[256] A proximate cause understanding of the fairly traceable requirement is, of course, completely incompatible with this objective because it requires an understanding of the purposes behind the law on which the plaintiff's suit relies. By using cause in fact language, the Court creates the impression that the Article III standing inquiry is completely divorced from an analysis of the substantive law that will control the case, i.e., the merits. Of course, using cause in fact language to create this impression is disingenuous when the Court is not really engaging in a cause in fact analysis. Moreover, as discussed below, a cause in fact inquiry does implicitly require an understanding of the merits of the suit. In any event, a proximate cause understanding is completely incompatible with the Court's traditional notion that the standing inquiry should be divorced from the merits and thus would explain why the Court would have chosen to employ cause in fact language.

B. The Supreme Court's Tactics in Avoiding a Cause in Fact Inquiry

Despite the disconnect between the cause in fact language employed by the Court and the proximate cause analysis actually used in early cases such as *Linda R.S.*, the Court has continued to employ cause in fact language when discussing the fairly traceable requirement. At some point, the cause in fact language appears to have taken on a life its own. Although it is difficult to discern with absolute confidence, more recent Supreme Court cases suggest that the Court has actually engaged in the cause in fact analysis suggested by the language in its opinions. The Court has usually managed, however, to dodge the difficulties that arise in conducting this fact-intensive analysis at the outset of litigation by employing various techniques that essentially emasculate the cause in fact analysis. Under one technique, the plaintiff's injury is defined so broadly that the cause in fact analysis becomes almost circular. Under another, the litigating parties are allowed to stipulate that a cause in fact relationship existed. Both approaches reflect a desire to avoid the fact-intensive nature of the cause in fact inquiry.

1. Avoiding Cause in Fact by Broadly Defining the Plaintiff's Injury

To understand the thrust of this section, consider the following truism: If a plaintiff's injury is defined broadly enough, a cause in fact relationship *always* exists in *every* lawsuit. This is accurate because in every lawsuit, a plaintiff alleges some conduct by the defendant that violates a legal rule. The plaintiff has a subjective belief that the defendant's conduct affects her in some way; otherwise, the suit would not have been brought. If the plaintiff's injury is defined as "*believing* that she is injured by defendant's conduct," a cause in fact relationship exists. Whether the defendant's conduct has caused the plaintiff physical or economic harm becomes

256. *See supra* note 149 and accompanying text.

irrelevant if the plaintiff's injury is broadly defined as believing that she has been affected in some way.

This hypothetical demonstrates an interesting trait of the cause in fact analysis: it is only as useful as the task it is asked to perform. Remember that cause in fact examines whether there is a link between two things. Obviously, this analysis depends upon the "things" that are to be examined for a causal relationship change. In this sense, then, it is helpful to think of cause in fact as an analytical machine. The machine is only as useful as the raw material inserted into the machine for analysis. When the cause in fact machine is asked to analyze the relationship between a plaintiff's injury and the defendant's misconduct, and the plaintiff's injury is defined as the belief that she was injured by the defendant's conduct, the work done by the machine is relatively useless. In this instance, the cause in fact machine has not failed; it is just that the raw material put into the machine was not appropriately defined so as to make the machine's performance useful.

In many cases, the Supreme Court has undermined the analytical usefulness of the cause in fact analysis in this way by broadly defining the plaintiff's injury. By manipulating the "input," the Supreme Court has often been able to influence the answer produced by the cause in fact "tool."

To demonstrate this concept, tort law is again helpful because it has more experience in dealing with this issue. Consider the famous "lost chance" Negligence cases, the most well-known of which is probably *Herskovits v. Group Health Co-op*.[257] In *Herskovits*, the estate of a man who died from lung cancer brought a wrongful death Negligence suit against a medical group for the defendants' failure to timely diagnose the lung cancer.[258] Had the defendants acted in accordance with the care the plaintiff alleged was required, the lung cancer would have been detected earlier.[259] Even with earlier detection of the cancer, however, the decedent was probably doomed: early detection only increased the decedent's chances of surviving the lung cancer to 39 percent.[260] Thus, more likely than not, the decedent would have died even if the defendant doctors had diagnosed the cancer at the time the plaintiff alleged the doctors were required to do so.[261] Under a traditional analysis using the preponderance of the evidence standard, and assuming that the injury for which the plaintiff was suing was the decedent's death, the plaintiff could not prove cause in fact. The *Herskovits* court, however, sanctioned an approach whereby the decedent's injury was defined not as the death of the plaintiff, but rather as the decreased *chances* of surviving the cancer.[262] By redefining the injury in this manner, proving cause in fact becomes a very straightforward process. If the decedent had a 39 percent chance of survival if he had received a timely diagnosis based on

257. 664 P.2d 474 (Wash. 1983); *see also* ROBERTSON ET AL., *supra* note 24, at 147 ("*Herskovits* became the leading case for the 'lost opportunity' doctrine.").

258. *See Herskovits*, 664 P.2d at 475.

259. *See id.*

260. *See id.*

261. *See id.*

262. *See id.* at 476–77.

appropriate medical conduct, but only a 25 percent chance of survival after the misdiagnosis, the defendant's improper conduct is a cause in fact of a 14 percent reduction in the plaintiff's overall chances of survival.[263]

With this tort background, one can better appreciate the many cases in which the Supreme Court seems to manipulate the definition of a plaintiff's injury in order to avoid a difficult cause in fact analysis, just as the court re-characterized the plaintiff's injury in *Herskovits*. This has most often occurred in the Court's Equal Protection jurisprudence, and probably most famously in the landmark case of *Regents of the University of California v. Bakke*.[264] In *Bakke*, a white male who had been denied admission to the School of Medicine at the University of California, Davis brought suit in California state court challenging the school's racial quota admissions program.[265] The California lower court determined that the admissions program violated the Equal Protection Clause of the Fourteenth Amendment,[266] but refused to issue an injunction requiring the plaintiff to be admitted to the medical school because the plaintiff "had not carried his burden of proving that he would have been admitted but for the constitutional and statutory violations."[267] The case was appealed to the California Supreme Court, which affirmed the lower court's determination that the medical school's admission policy violated the Equal Protection Clause, but ordered that Bakke be admitted.[268] This decision was appealed to the U.S. Supreme Court.[269]

At the Supreme Court, Bakke's standing to bring suit was challenged by amici, but not by the California State defendants.[270] Nevertheless, the Court properly acknowledged that it was necessary to verify standing, regardless of the arguments of the actual litigants in the case, because standing was an Article III jurisdictional requirement.[271] The Court faced a difficult cause in fact question in *Bakke*: if the injury to Bakke was his failure to gain admittance to the school, would Bakke have gained admission under an admissions program that complied with the requirements of the Equal Protection Clause? This first requires a determination of what an admissions program that complies with the Equal Protection Clause looks like. As *Bakke* and subsequent cases demonstrate,

263. *See id.* at 479.
264. 438 U.S. 265 (1978).
265. *See id*. at 269–70 (opinion of Powell, J.).
266. *See id*. at 270.
267. *Id.*
268. *See id.* at 270–71.
269. *See id.* at 281.
270. *See id.* at 280 n.14.
271. *See id.* Because Bakke's suit was originally filed in California state court, it was actually not necessary to establish Article III standing for the state court litigation. *See* ASARCO Inc. v. Kadish, 490 U.S. 605, 623–24 (1989). This issue was not resolved by the Supreme Court until after *Bakke*, and the Court has continued to treat *Bakke*'s standing analysis as relevant. *See* Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 665 n.4 (1993) (explaining that *Bakke*'s standing holding is not dictum, despite the Court's opinion in *ASARCO Inc.*).

a school has some flexibility in considering the race of an applicant in an effort to achieve a diverse student body.[272] Thus, it is not an easy task to predict whether Bakke would have been admitted under a constitutional admissions program because there are a multitude of different programs that would comply with the Equal Protection Clause: an admissions program that considers only empirical test results would clearly be constitutional; one that considers test results and scores students on the basis of interviews would also be constitutional; a similar program that also considers race as a factor in order to ensure a diverse student body would also be constitutional.[273] Bakke would presumably fare better under some of these admissions programs and more poorly under others; Bakke appeared to have relatively strong test scores, but he had applied late to the medical school one year and earned poor interview scores another year.[274]

In its standing inquiry, the Court sidestepped these difficult cause in fact issues by simply redefining the injury, much like the Washington Supreme Court had done in the *Herskovits* case:

> [E]ven if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing. The constitutional element of standing is plaintiff's demonstration of any injury to himself that is likely to be redressed by favorable decision of his claim. The trial court found such an injury, apart from failure to be admitted, in the University's decision not to permit Bakke to *compete* for all 100 places in the class, simply because of his race. Hence the constitutional requirements of Art. III were met.[275]

This practice of re-characterizing a plaintiff's injury so as to avoid a difficult cause in fact standing inquiry has been duplicated in many Equal Protection cases.[276] This practice was nicely summarized by Justice

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272. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 334–43 (2003) (upholding the University of Michigan Law School's affirmative action program designed to achieve a diverse student body).

273. *See id.*

274. *See Bakke*, 438 U.S. at 276–77 & n.7 (opinion of Powell, J.).

275. *Id.* at 280 n.14 (emphasis added) (citations omitted). Despite dodging the difficult cause in fact issue at the standing level, the Court still had to grapple with the same issue when it considered whether an order requiring Bakke to be admitted to the medical school was appropriate. Here, the Court shifted the burden of proof onto the school to prove that Bakke would not have been admitted under a constitutional admittance program, and held the school to its earlier stipulation that it could not meet this burden, despite the defendants' apparent change in litigation strategy on this issue at the Supreme Court level. *See id.* at 320 n.54 ("There is no occasion for remanding the case to permit [the medical school] to reconstruct what might have happened if it had been operating the type of program described as [constitutional in this opinion]. . . . No one can say how—or even if—petitioner would have operated its admissions process if it had known that legitimate alternatives were available. . . . In sum, a remand would result in fictitious recasting of past conduct." (citations omitted)). Although a plaintiff is usually saddled with the burden of proof in civil litigation, there is some support in tort law for shifting the burden of proof on the issue of cause in fact to the defendant. *See, e.g.*, Summers v. Tice, 199 P.2d 1, 4 (Cal. 1948) (shifting burden to defendants of disproving cause in fact when the defendants' negligence had deprived the plaintiff of proof on the cause in fact issue).

276. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) ("The [quota program] denies certain citizens the opportunity to compete for a fixed percentage of public

Thomas in *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*[277]:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.[278]

The Court has also used this technique to avoid difficult cause in fact inquiries outside the Equal Protection context. For instance, in *Watt v. Energy Action Educational Foundation*,[279] the State of California brought suit against the Secretary of the Interior claiming that the Secretary was required, pursuant to federal statute, to experiment with other methods of auctioning oil and gas leases for federally owned property on the outer continental shelf, besides the methods historically used by the Secretary.[280] California had a financial interest in the revenues generated by these government auctions because the federal government was required by statute to share the revenues from these leases with the states neighboring the corresponding areas of the continental shelf.[281] Whether the experimental bidding system would be applied to California's lease tracts and increase its shares was unclear, and the Secretary argued before the Supreme Court that this point defeated cause in fact.[282] The Court avoided this difficult inquiry, however, by simply re-characterizing the injury that California suffered; the injury to California was not the loss in revenues, but instead that the Secretary had "breached a statutory obligation to determine through experiment which bidding system works best."[283]

Broadly defining a plaintiff's injury is not necessary illegitimate. Cases like *Herkovits* and *Bakke* clearly show that redefining the injury in the cause in fact analysis has analytical usefulness so that conclusions regarding cause in fact comport with our intuitions regarding when recovery should

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contracts based solely upon their race."); Heckler v. Mathews, 465 U.S. 728, 739 (1984) ("[T]he right to equal treatment guaranteed by the Constitution is not co-extensive with any substantive rights to the benefits denied the party discriminated against."); *id.* at 740 n.9 ("Here . . . there can be no doubt about the direct causal relationship between the Government's alleged deprivation of appellee's right to equal protection and the personal injury appellee has suffered—denial of Social Security benefits solely on the basis of his gender."); Turner v. Fouche, 396 U.S. 346, 362 (1970) ("We may assume that the [plaintiffs] have no right to be appointed to the . . . board of education. But [they] do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications.").

277. 508 U.S. 656 (1993).
278. *Id.* at 666.
279. 454 U.S. 151 (1981).
280. *See id.* at 158.
281. *See id.* at 160–61.
282. *See id.* at 161.
283. *Id.*

be allowed. This technique, however, is a very slippery slope. If a plaintiff's injury is defined so broadly that the plaintiff's subjective belief that she was harmed by the defendant's behavior is sufficient, cause in fact ceases to have any analytical relevance. Thus, there must be normative limits as to how expansively the injury can be framed. In tort law, these normative controls exist in the form of an entrenched body of law that dictates what sorts of harms can be the basis of recovery in a tort suit and when the suit must be brought. *Herskovits* was an exception to the normal rule that a plaintiff's injury under Negligence law is defined in terms of bodily injury or death;[284] by defining the injury as the increased *chance* of avoiding death, rather than the actual death itself, the *Herskovits* court avoided a prohibitive cause in fact analysis. Indeed, even in a straightforward wrongful death case, normative controls are necessary in defining the plaintiff's injury. Unless an implicit time control is inserted into the framing of the injury in a wrongful death suit, the cause in fact test would *never* be met: "But for the defendant's negligent behavior, would the plaintiff have died?" The answer of course is, "Yes, eventually," because we are all destined to die at some point.[285] Therefore, in a wrongful death suit, the injury to the plaintiff is not *death*, but actually the amount and quality of *life* of which the defendant deprived the plaintiff by his negligence. This is reflected in the calculation of damages in a wrongful death claim.[286] Thus, in the tort law context, defining the injury for the cause in fact test works within established parameters.

These baseline rules are bedrock components of the entire torts system. Because the way that an injury is defined can be determinative of the cause in fact analysis, and further, because cause in fact is a core component of a torts system based on retribution, allowing exceptions to the fundamental rules regarding how tort injuries are framed (as occurred in *Herskovits*) can potentially undermine the entire thrust of American tort law. This is why the authors of the *Restatement (Third) of Torts* have cautioned against extending cases like *Herskovits* outside the specific context in which they

284. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 4 (2005) (defining "[p]hysical harm" as the "impairment of the human body . . . or of real property or tangible personal property").

285. *See* CHUCK PALAHNIUK, FIGHT CLUB 17 (1996) ("On a long enough time line, the survival rate for everyone will drop to zero.").

286. Here, again, Palahniuk is on point when describing Chloe, a character from his novel *Fight Club*, whose health is quickly deteriorating from a fatal disease: "[I]n that brainy brain-food philosophy way, we're all dying, but . . . [not] the way Chloe was dying." *Id.* at 37. For a more legal (but similarly sad) description of the damages currently available in wrongful death actions, see Andrew J. McClurg, *Dead Sorrow: A Story About Loss and a New Theory of Wrongful Death Damages*, 85 B.U. L. REV. 1, 1–6 (2005).

occurred, namely medical malpractice situations,[287] and why most courts have agreed with this warning.[288]

These normative limits to defining the plaintiff's injury must also exist within standing law for a cause in fact inquiry to have any teeth. An interesting issue arises, however, in considering potential sources for those limits. The most logical source is the substantive law relied on by the plaintiff as the basis of her suit. For instance, when Justice Thomas explained in *City of Jacksonville* why it was permissible to frame the plaintiff's injury as the loss of an opportunity to compete for government contracts without racial discrimination, Thomas focused on the basis of the plaintiff's suit—the Equal Protection Clause.[289] The irony here is that by examining the purposes of the substantive law relied on by the plaintiff in order to determine whether a broad framing of the plaintiff's injury is appropriate, the Court is engaging (in a roundabout fashion) in an inquiry very similar to the proximate cause analysis that asks (in a straightforward manner) whether the plaintiff's injury is one of the harms protected against by the substantive law relied on by the plaintiff. In tort law, these two inquiries are distinct: tort law generally establishes the normative limits on how the plaintiff's injury is to be framed; proximate cause performs the task of analyzing the reasons why the defendant's behavior was considered negligent in the first place. The proximate cause analysis is a "fact" question because the jury creates the substantive law regarding what constitutes reasonable behavior; the *Herskovits* question as to the appropriate framing of the plaintiff's injury is a pure legal question that requires a judge to consider the common law of torts. In the standing context, these inquiries are necessarily conflated: the substantive law that forms the basis of the plaintiff's suit must be the source for determining both the appropriate definition of the plaintiff's injury for a cause in fact analysis and whether this injury, properly framed, is one of the harms against which the law in question was intended to protect. Ironically, because the cause in fact analysis is useless without substantive limits on framing the plaintiff's injury, and because the most logical source for these limits is the substantive law relied on by the plaintiff, a cause in fact inquiry cannot exist without an inquiry that, like a proximate cause inquiry, requires an understanding of the purposes of that law.

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287. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 cmt. n ("Without limits, this reform is of potentially enormous scope, implicating a large swath of tortious conduct in which there is uncertainty about factual cause, including failures to warn, to provide rescue or safety equipment, and otherwise to take precautions to protect a person from a risk of harm that exists.").

288. *See, e.g.*, Simmons v. W. Covina Med. Clinic, 260 Cal. Rptr. 772, 776–78 (Cal. Ct. App. 1989) (refusing to recognize the *Herkovits* "lost chance" doctrine in a case for "wrongful birth" and "wrongful life").

289. The "injury in fact" in an Equal Protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. *See supra* notes 277–78 and accompanying text.

To demonstrate this point, consider again the case of *Linda R.S.* There, the Court used cause in fact language, but did not actually perform a cause in fact inquiry that evaluated the probability of successfully tracing the plaintiff's injury to Texas's alleged Equal Protection Clause violation.[290] Suppose, however, that the Court *had* actually engaged in the cause in fact analysis suggested by its opinion and had considered testimony and other evidence about the alleged father's likely response to a Texas policy of prosecuting all fathers who were delinquent in their child support payments. If the Court had engaged in this analysis and concluded that no cause in fact link had been established, the plaintiff might have argued that her injury should instead be framed the way the Court had done in *Bakke*.[291] If Linda R.S.'s injury was simply the *opportunity* to seek child support payments from the father of her illegitimate child under a Texas legal scheme consistent with the Equal Protection Clause, then a causal link exists between her injury and the defendants' Equal Protection Clause violation. Under this framing, the defendants were certainly a cause in fact of her injury because the injury and the legal violation are one and the same. As in *Herskovits* and *Bakke*, the cause in fact analysis becomes circular: the legal violation is essentially the injury itself, so by definition, the injury is caused by the legal violation.

To justify a conclusion that the plaintiff was without standing, it would have been necessary for the Court in *Linda R.S.* to articulate why the plaintiff's proposed broad framing of her injury was incorrect. This conclusion would most logically be based on an interpretation of the Equal Protection Clause: it is not appropriate to frame Linda R.S.'s injury as the lost opportunity to seek child support payments because the Equal Protection Clause was not intended to protect against harm to third-parties due to the inequitable administration of criminal laws. Notice the similarities between this analysis under the cause in fact inquiry and a proximate cause analysis. Under the cause in fact analysis, the Court must determine the purpose of the Equal Protection Clause to ascertain whether the plaintiff's framing of her injury is appropriate. Under a proximate cause analysis, the same analysis occurs but in a more straightforward manner; the Court simply asks whether the Equal Protection Clause protects against the injury complained of by the plaintiff. Both analyses require an examination of the substantive law's purpose or intent, and thus neither can be conducted without consideration of the merits of the plaintiff's suit.

Because of the similarities between these two analyses, it is difficult to discern whether the Court is actually committed to a cause in fact inquiry in those cases that use cause in fact language and yet define the plaintiff's injury so broadly that a rigorous cause in fact analysis is not needed. These

290. *See supra* notes 60–71 and accompanying text.

291. *See* Barry Matsumoto, *Weeping for Hecuba: Why Should We Weep for Strangers?*, 3 J. GENDER, RACE, & JUST. 677, 686 (2000) ("[O]ne can see that the critical choice which the Supreme Court made in [*Linda R.S.*] was not the application and interpretation of the causation and efficacy of relief requirements but rather the selection or characterization of her injury.").

cases are just as easily explained by a proximate cause understanding of the fairly traceable requirement; the conclusion that a broad definition of the plaintiff's injury is appropriate is consistent with a proximate cause conclusion that the plaintiff suffered an injury against which the substantive law was intended to protect. A cause in fact analysis is more easily identified in those cases in which a broad framing of the plaintiff's injury is rejected and standing is denied pursuant to a rigorous cause in fact analysis, but there are very few of these cases in the Supreme Court's jurisprudence. Outside of the early Supreme Court cases that established the fairly traceable requirement, it is exceedingly rare to find a case in which the Court has denied standing under that prong of standing. The number of cases in which the denial is based on a clear cause in fact analysis is even smaller. *Franklin v. Massachusetts*[292] and *Department of Commerce v. United States House of Representatives*[293] are two of these rare cases. Both involved the reapportionment process associated with the census,[294] and in both, the Court's use of a cause in fact analysis is clear from the language used and evidence cited in the opinions.[295] This rather small sampling of cases, however, is somewhat scant evidence in favor of a conclusion that the Court has been applying the cause in fact inquiry in suits where the plaintiff's injury is broadly defined.

Despite the persistent existence of cause in fact language in the Court's opinions, the most that can be said is that there is current confusion as to whether a cause in fact analysis is actually employed. The numerous cases in which the Court defines the plaintiff's injury so broadly that a cause in fact inquiry is analytically useless are just as consistent with a proximate cause interpretation of the fairly traceable prong of standing. At the least, the Court's penchant for broadly defining a plaintiff's injury indicates a desire to avoid a fact-intensive cause in fact analysis.

2. Using the Parties' Arguments to Avoid a Cause in Fact Inquiry

Another technique the Court has used to avoid a difficult cause in fact analysis is to allow the parties to stipulate that the fairly traceable requirement is met. This troubling technique was used in *Massachusetts v. EPA*.[296] In the case, the Commonwealth of Massachusetts brought suit against the EPA over the EPA's decision not to regulate certain greenhouse gas emissions from new motor vehicles.[297] Massachusetts claimed that the EPA erred in concluding that it did not have the power to regulate

292. 505 U.S. 788 (1992).
293. 525 U.S. 316 (1999).
294. *See id.* at 320; *Franklin*, 505 U.S. at 790.
295. *See Dep't of Commerce*, 525 U.S. at 330 (discussing specific evidence relevant to a cause in fact analysis under the standing inquiry); *Franklin*, 505 U.S. at 802 ("Appellees have shown that Massachusetts would have had an additional Representative if overseas employees had not been allocated at all.").
296. 549 U.S. 497 (2007).
297. *Id*. at 505.

greenhouse gas emissions of new motor vehicles.[298] Moreover, Massachusetts claimed that the EPA had no authority to refuse to regulate the greenhouse gas emissions.[299]

The Court found that Massachusetts had asserted an injury sufficient for Article III standing because Massachusetts was losing coastal lands to rising seas.[300] Turning to causation, the Court ducked some of the incredibly difficult cause in fact hurdles inherent in linking the EPA's alleged misconduct to the plaintiff's harm by accepting the EPA's stipulation. The Court noted that the "EPA does not dispute the existence of a causal connection between manmade greenhouse gas emissions and global warming."[301] If a cause in fact inquiry is truly part of an Article III jurisdictional analysis, however, the arguments or stipulations of the parties before the court were irrelevant, just as they were in *Bakke*.[302] The Court has an independent duty to verify that the Article III requirements are met.[303]

If Massachusetts's injury was the loss of coastal land due to rising seas, a cause in fact inquiry linking that injury to the EPA's alleged misconduct would require a causal connection between "manmade greenhouse gas emissions and global warming."[304] Obviously, global warming is one of the more contentious contemporary issues in American politics.[305] One understands why the Court desired to avoid the issue and thus eagerly grasped onto the stipulation made by the EPA. Indeed, the Court even tiptoed around the issue in its introductory paragraph of the opinion.[306] A cause in fact understanding of the fairly traceable requirement, however, would have forced the Court to make this determination at the threshold of this litigation as part of the Court's independent duty to verify jurisdiction over the case.

298. *Id.*
299. *Id.*
300. *Id.* at 520–23.
301. *Id.* at 523.
302. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 280 n.14 (1978).
303. *See* FW/PBS Inc. v. City of Dallas, 493 U.S. 215, 230–31 (1990) ("Although neither side raises the issue here, we are required to address the issue even if the courts below have not passed on it, and even if the parties fail to raise the issue before us. The federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.'" (quoting Allen v. Wright, 468 U.S. 737, 750 (1984)) (alteration in original) (citations omitted)).
304. *Massachusetts*, 549 U.S. at 523.
305. *See* Lee Dye, Opinion, *Global Warming and the Pollsters: Who's Right?*, ABC NEWS (June 16, 2010), http://abcnews.go.com/Technology/DyeHard/global-warming-polls-climate-change/story?id=10921583 ("On the surface, it appears that Americans are deeply divided over the issue [of global warming].").
306. *See Massachusetts*, 549 U.S. at 504–05 ("A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related.").

CONCLUSION

The Court's approach in the *Massachusetts* case clearly reflects a hesitancy to engage in a full-fledged cause in fact analysis as part of the threshold inquiry of standing. There is good reason for this tentativeness. As this Article has detailed, a cause in fact understanding of the fairly traceable prong of standing creates difficult procedural challenges. A proximate cause understanding of the fairly traceable requirement eliminates these difficulties. In addition, a proximate cause understanding is consistent with the original motivations that spurred the development of that prong of standing. At the very least, if the Court were to formulate a proximate cause understanding of this requirement, it would no longer be necessary for the Court to engage in some of the mental gymnastics discussed in Part V that seem obviously motivated by a desire to avoid the fact-intensive nature of the cause in fact test.

Adopting a proximate cause understanding would not eliminate the necessity of proving a cause and effect relationship in litigation. This analysis could simply be conducted as part of the merits of the case and would thus incorporate the normal procedures available in civil litigation for resolving contested factual questions. The case of *Texas v. Lesage*[307] is a prime example of this concept. In *Lesage*, after the plaintiff was denied admission to the University of Texas's Department of Education Ph.D. program, he brought an Equal Protection claim under § 1983 challenging the school's affirmative action admissions policy.[308] The case proceeded into discovery, at which point the school sought summary judgment based on the overwhelming evidence that the plaintiff would not have been admitted regardless of the affirmative action program.[309] The district court granted summary judgment, and the Supreme Court affirmed in a per curiam opinion.[310] The Court reasoned that, because the plaintiff had not established a but-for causal relationship between the plaintiff's denial of admission and the school's affirmative action program, he had not established a cognizable claim under § 1983.[311] There are obviously similarities between this case and *Bakke*, where the Court avoided a cause in fact inquiry as part of the threshold standing determination by broadly defining the plaintiff's injury.[312] But *Lesage* reiterates that failing to conduct a cause in fact analysis at the outset does not foreclose a cause in fact analysis as part of the underlying merits of the suit, where the issue can be resolved through the normal procedural tools available in federal civil litigation.

Although a proximate cause understanding of the fairly traceable prong of standing would resolve the problems discussed in this Article, two

307. 528 U.S. 18 (1999).
308. *Id.* at 19.
309. *Id.* at 19–20.
310. *Id.* at 20–21.
311. *Id.* at 21–22.
312. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 280 n.14 (1978).

potential issues arise. First, a proximate cause interpretation would be inconsistent with the idea that the standing analysis can be conducted as separate from the merits of the case. In reality, however, the current doctrine does not achieve this result. The cause in fact analysis itself can be considered part of the merits of the case, as *Lesage* demonstrates. Moreover, determining how to frame the plaintiff's injury for purposes of a cause in fact analysis requires an understanding of the purposes underlying the substantive law on which the plaintiff relies. In this sense, then, a proximate cause understanding of the fairly traceable prong of standing would simply make explicit what is currently implicit: that any interpretation of the fairly traceable prong of standing will require an examination of the merits of the dispute.

Second, a proximate cause understanding would essentially duplicate the analysis that the Court has sometimes conducted in statutory cases under the prudential "zone of interest" test.[313] The prudential zone of interest test is indistinguishable from the proximate cause analysis I have proposed in this Article. Some reconfiguring of standing doctrine would be needed to avoid repetitive and duplicate analyses, but this would be preferable to the current state of affairs, where it is not even clear what type of analysis is required by the fairly traceable prong of standing.

These issues aside, it is important to appreciate that a proximate cause understanding would serve a limited purpose within the broader objectives of standing law. If standing ultimately derives from separation of powers concerns,[314] a proximate cause understanding of the fairly traceable prong would further these objectives only in the sense that it would require a federal court to consider whether the body that created the substantive law relied on by the plaintiff (usually a state legislature or Congress) intended for the law to be used in the manner that the plaintiff seeks to use it. This analysis would be deferential to the political branches of government that establish substantive standards of conduct and in this sense is consistent with the overarching separation of powers objectives of standing law.

The proximate cause understanding could not, however, further *all* of the separation of powers concepts represented by standing law. While it would allow the judiciary to ensure that the substantive law produced by other branches of government was not being misused, it would not be an effective tool for determining whether these other branches exceeded the limits of Article III. Stated differently, while a proximate cause understanding would prevent the judiciary from independently exceeding the limits described in Article III, it would not be an effective check on the other branches. This function, however, can either be performed by the injury prong of standing or, as one commentator has recently suggested,

313. *See supra* note 4 (discussing the "zone of interest" test of non-constitutional prudential standing).

314. *See generally* Elliott, *supra* note 5 (arguing that the current doctrine does not further the separation of powers functions attributed to it).

conducted completely outside of standing doctrine.[315] Indeed, simply because standing doctrine serves separation of powers concerns does not mean that all separation of powers concepts need be crammed into this doctrine, which was originally devised to specifically address the plaintiff's ability to bring suit. In any event, these topics are beyond the scope of this Article. It is clear, though, that a proximate cause understanding of the fairly traceable prong of standing would be a good start toward a more cohesive and orderly standing doctrine.

315. *See generally* Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781 (2009) (suggesting that the separation of powers functions typically attributed to standing more naturally derive from Article II of the Constitution).