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The Causation Canon

Sandra F. Sperino[*]

ABSTRACT: It is rare to witness the birth of a canon of statutory interpretation. In the past decade, the Supreme Court created a new canon—the causation canon. When a statute uses any causal language, the Court will assume that Congress meant to require the plaintiff to establish "but-for" cause.

This Article is the first to name, recognize and discuss this new canon. The Article traces the birth of the canon, showing that the canon did not exist until 2013 and was not certain until 2020. Demonstrating how the Court constructed this new canon yields several new insights about statutory interpretation.

The Supreme Court claimed the new causation canon represents "ancient" and "long-held" principles of common law. The Supreme Court's claims about the causation canon are easily disprovable with only a cursory review of Supreme Court cases from the past forty years. This is not a case of a contested or difficult historic record.

In creating the causation canon, the Court did not simply apply the common law to statutes. Instead, it constructed its own new federal causation standard that is not consistent with any state's common law or even the Restatement of Torts. The Court significantly changed the common law and then magnified the significance of the change by imposing it as a default statutory interpretation canon that will apply across both civil and criminal federal statutes.

This new canon represents a significant change in the way the Supreme Court has used the common law, and it does not fit comfortably within claims made about textualism generally or substantive canons specifically. Creating a new federal common law of factual cause and imposing that newly created law as a default standard significantly raises the profile of this area of statutory interpretation and demands greater scholarly inquiry.

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INTRODUCTION

It is rare to witness the birth of a canon of statutory interpretation. In the past decade, the Supreme Court created a causation canon. When a statute uses any language that might relate to factual cause, the Court will assume that Congress meant to require the plaintiff to establish "but-for" cause.[1]

This Article is the first to recognize the canon. It demonstrates that no causation canon existed before 2013. Prior to 2013, the Supreme Court analyzed factual cause individually for each statute and did not assume that "but-for" cause was the required substantive standard or that the plaintiff was required to prove factual cause. This history demonstrates that the causation canon did not derive from an ancient lineage. Instead, the Supreme Court created it, and it did so recently.

The new causation canon is not consistent with the common law, despite the Court's claims to the contrary. The causation canon creates a stand-alone

1. *See* Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1014 (2020). I use the term "canon" with reservations. As shown throughout this Article, the causation canon is not consistent with history, the common law, or the tenets of textualism. In using the word "canon," I am not claiming that a canon should exist.

factual cause standard. In contrast, the common law uses a bundled approach. In many circumstances, the common law does require a plaintiff to establish "but-for" cause. However, the common law also recognizes that there are situations in which this standard does not work well. In those situations, the common law adapts by changing the substantive standard or the party required to prove it.[2]

By rejecting the common law's bundled approach to factual cause and imposing a stand-alone default standard, the Court has made a powerful substantive choice. The Court has then magnified this choice by imposing it as the default for factual cause in all federal statutes.

While it is important to recognize the factual cause canon and that it is inconsistent with tort law, the new canon represents a significant shift in the way the Supreme Court uses the common law in statutory interpretation. It applies the default canon to almost any words relating to causation, even though Congress chose to use different words in different statutes.[3] It has even applied the canon to a statute that contains no causal word, but rather words that the Court called "suggestive" of causation.[4] The default rule does not require the Court to examine whether the underlying statute or its concept of causation derives from the common law, and the default rule applies to both criminal and civil cases. The causation canon is inconsistent with many tenets of textualism, generally, and substantive canons, specifically.

This new use of power demands further scholarly attention. This Article charts some of the areas in which the causation canon upsets the current view of the intersection of the common law and statutes and calls for a cadre of scholars to focus on how courts are invoking specific common law doctrines in the statutory context.

Part I shows how the causation canon does not accurately reflect common law causation. Part II demonstrates that before 2013 the Supreme Court did not apply the causation canon. Part III focuses on the cases from 2013 to 2020 in which the Supreme Court announced the canon and magnified it. Part IV explores how the causation canon is in tension with core statutory interpretation principles and how the canon reveals significant gaps in the statutory interpretation literature related to use of the common law.

I. FACTUAL CAUSE

In the past decade, the Supreme Court created a new canon of construction —the causation canon. If a statute uses causal language, the Court will assume

2. *See, e.g.*, Paroline v. United States, 572 U.S. 434, 452–58 (2014); Bostic v. Ga.-Pac. Corp., 439 S.W.3d 332, 344 (Tex. 2014); Summers v. Tice, 199 P.2d 1, 3 (Cal. 1948).

3. *See, e.g.*, Burrage v. United States, 571 U.S. 204, 206 (2014) ("results from"); Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 348 (2013) ("because of").

4. *Comcast*, 140 S. Ct. at 1015.

that the plaintiff is required to establish "but-for" cause.[5] While the causation canon has primarily developed in the employment discrimination context, it has a potentially broad reach in the civil and criminal context.

Prior to 2013, no Supreme Court case invoked this canon. To date, no scholarly literature has identified or discussed this new canon.[6]

One striking feature of the causation canon is that it does not accurately capture tort causation. In tort law, factual cause is not described through one test. Rather, factual cause is a bundle of tests. Courts apply different factual cause tests depending on the context. In tort law, causation is often divided into two concepts: factual cause and proximate cause. This Part discusses the first of these concepts: factual cause.[7] Factual cause explores "the causal connection between the defendant's wrongful conduct and the plaintiff's injury."[8] The factual cause inquiry focuses on whether an actor's conduct both contributed to an outcome and is significant enough that legal responsibility is appropriate.

In tort law, factual cause typically involves two different questions: (1) which party is required to establish causation and (2) what substantive standard governs. It is common to assert that the primary or "dominant" standard for establishing causation in negligence cases is that the plaintiff must establish "but-for" cause.[9] If a judge asserts that the plaintiff is required to establish "but-for" cause, the judge is stating that the plaintiff is required to bear the burdens of production and persuasion. The judge is also asserting that the substantive standard that the plaintiff is required to meet is "but-for" cause. A condition is a "but-for" cause of a "result if and only if, but for the occurrence of the condition, the result would not have occurred."[10]

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5. *See id.* at 1014 (holding a plaintiff is required to establish "but-for" cause in Section 1981 cases). *But see* Babb v. Wilkie, 140 S. Ct. 1168, 1176 (2020) (holding that the text of the federal sector provision of the ADEA required a different result). The term "canon" itself is difficult to define. Anita S. Krishnakumar & Victoria F. Nourse, *The Canon Wars*, 97 TEX. L. REV. 163, 164, 181–90 (2018) (providing guiding principles for defining "canon" while recognizing there is no universal definition and asking whether "any interpretive principle articulated by the U.S. Supreme Court [is] a canon" or whether "canonical status require[s] something more in the way of historical pedigree, longevity, regularity of use, or some other measure").

6. *See* Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 901–08 (2017) (conducting an empirical study of substantive canons invoked by the Supreme Court from 2006 to 2012 and not identifying the causal canon).

7. There is a rich literature discussing factual cause. For an overview of the major ideas animating this area, see generally Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001 (1988) [hereinafter Wright, *Causation*].

8. David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1768 (1997) [hereinafter Robertson, *Common Sense*].

9. David W. Robertson, *Causation in the* Restatement (Third) of Torts*: Three Arguable Mistakes*, 44 WAKE FOREST L. REV. 1007, 1009 (2009) [hereinafter Robertson, *Causation in the Restatement (Third)*]; Wright, *Causation*, *supra* note 7, at 1021.

10. Wright, *Causation*, *supra* note 7, at 1021; *see also* Robertson, *Common Sense*, *supra* note 8, at 1769–71 (describing a multi-part test for using the "but-for" standard).

As discussed throughout this Part, tort law does not always require the plaintiff to establish factual cause.[11] Nor does it always apply "but-for" cause as the substantive standard. Tort law sometimes requires the defendant to carry some of the factual cause burden. It also relies on a bundle of factual cause standards. In other words, "but-for" cause is one of several standards the common law uses to analyze factual cause.

One of the central tenets of common law causation is that requiring the plaintiff to establish "but-for" cause is problematic in some circumstances.[12] As Richard Wright has stated: "Courts and legislatures have long recognized the need to avoid or to supplement the but-for test to reach instances of causation that it does not identify."[13]

One scenario in which requiring the plaintiff to establish "but-for" cause produces problematic results is a subset of cases called multiple, sufficient cause cases.[14] In a multiple, sufficient cause case, there are at least two different factual causes of an outcome, both of which could independently and fully cause the outcome. For example, imagine two different people shoot a third individual and each bullet pierced the third individual's heart at the same time. In this scenario, each shooter's action is sufficient to cause the entire injury to the victim.[15]

Using the "but-for" cause counterfactual inquiry will create a bizarre result in a multiple, sufficient cause case because it will absolve each wrongdoer of liability. In multiple, sufficient cause cases, courts can relax the standard for proving factual cause from "but-for" to a looser "substantial factor" standard.[16]

There are other scenarios in which requiring the plaintiff to establish "but-for" cause leads to potentially unjust outcomes. For example, the *Restatement (Second) of Torts* recognized that the dominant factual cause standard does not work in some scenarios when multiple actors act tortiously,

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11. Robertson, *Common Sense*, *supra* note 8, at 1775–76 (discussing ways in which courts modify the factual cause inquiry).

12. *See, e.g.*, Burrage v. United States, 571 U.S. 204, 214 (2014); *see also* Wright, *Causation*, *supra* note 7, at 1011 (discussing the issues that arise when more than one input could have caused an injury).

13. Wright, *Causation*, *supra* note 7, at 1022.

14. *Burrage*, 571 U.S. at 214; *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 27 (AM. L. INST. 2010) (noting that a different factual cause standard exists when multiple sufficient causes exist); *id.* § 27 Rep.'s Note (stating that there is nearly universal recognition that the "but-for" standard is inappropriate when multiple sufficient causes exist); RESTATEMENT (SECOND) OF TORTS § 432 (AM. L. INST. 1965) (describing the prior standard for factual cause when multiple sufficient causes exist); Mark Bartholomew & Patrick F. McArdle, *Causing Infringement*, 64 VAND. L. REV. 675, 722 (2011); Martin J. Katz, Gross *Disunity*, 114 PENN ST. L. REV. 857, 881 (2010).

15. This is different than the *Summers v. Tice* scenario, in which the evidence suggests that even though multiple people acted in a negligent manner, only one actor's breach resulted in actual harm because the shot from only one actor's gun touched the plaintiff. Summers v. Tice, 199 P.2d 1, 3 (Cal. 1948).

16. Robertson, *Causation in the Restatement (Third)*, *supra* note 9, at 1020.

only one harms the plaintiff, and there is uncertainty about which defendant harmed the plaintiff.[17]

This is the scenario presented in *Summers v. Tice*, in which two hunters negligently shot toward a third hunter, hitting the third hunter.[18] If the third hunter was only hit by a shot from one of the two negligently discharged weapons and the court required the plaintiff to establish "but-for" cause, the plaintiff would not be successful because the plaintiff would not be able to identify which of the two hunters negligently discharged the gun. In this instance, the court chose not to place the entire causal burden on the plaintiff, given the difficulty for the plaintiff to identify the correct shooter.[19] The court instead found that the two shooters would be jointly and severally liable for the plaintiff's harm unless one of the shooters could establish he was not the "but-for" cause of the plaintiff's harm.[20] In this scenario, the court did not require the plaintiff to carry the entire causal burden.

Courts also modify the factual cause inquiry in concerted activity cases.[21] In these cases, several people are engaged in a common activity, but only one person's conduct ends up directly causing the harm.[22] Drag racing is a good example of concerted activity. If two people are drag racing and one of the two cars spins out of control hitting an innocent plaintiff's car, tort law will often allow the plaintiff to recover from both of the people involved in the drag race even though only one person directly caused the harm.[23]

The *Restatement (Second) of Torts* and the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* resolve these problems with an organizational structure that requires the plaintiff to establish "but-for" cause in some scenarios, but also explicitly recognizes that the plaintiff should not be required to establish it in all cases.[24]

Despite the Supreme Court's recent creation of the causation canon, it too has recognized that the common law contains a bundle of factual cause

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17. RESTATEMENT (SECOND), *supra* note 14, § 433B(3). "But-for" cause is also problematic in other circumstances. RESTATEMENT (THIRD), *supra* note 14, § 27 cmts. f, i.

18. *Summers*, 199 P.2d at 3.

19. *Id.*

20. *Id.* at 3–4.

21. Robertson, *Causation in the Restatement (Third)*, *supra* note 9, at 1011–14 (discussing this option).

22. *See id.*

23. Juhl v. Airington, 936 S.W.2d 640, 644–45 (Tex. 1996) (collecting cases and secondary sources discussing concerted activity); *see also* Robertson, *Causation in the Restatement (Third)*, *supra* note 9, at 1011–14 (discussing other examples of concerted activity).

24. RESTATEMENT (THIRD), *supra* note 14, § 27 Rep.'s Note; *id.* § 27 (noting that a different factual cause standard exists when multiple sufficient causes exist). There is nearly universal recognition that the "but-for" standard is inappropriate when multiple sufficient causes exist. *Id.* § 27 Rep.'s Note; RESTATEMENT (SECOND), *supra* note 14, § 432.

standards and that the entire bundle serves as the backdrop against which Congress legislates.[25] In *Paroline v. United States*, the Court stated:

> [T]he availability of alternative causal standards where circumstances warrant is, no less than the but-for test itself as a default, part of the background legal tradition against which Congress has legislated. It would be unacceptable to adopt a causal standard so strict that it would undermine congressional intent where neither the plain text of the statute nor legal tradition demands such an approach.[26]

State tort law also recognizes that a plaintiff is not always required to establish "but-for" cause.[27] As the Supreme Court of Texas noted, "[w]hile but for causation is a core concept in tort law, it yields to the more general substantial factor causation in situations where proof of but for causation is not practically possible or such proof otherwise should not be required."[28]

Tort law's flexibility is not a hidden or obscure feature. Instead, the flexibility of the doctrine is covered in many torts classes during the first year of law school. Even a cursory review of Supreme Court cases from the past forty years reveals that the Court is aware that tort law provides for a bundle of factual cause standards.[29] In her concurring opinion in *Price Waterhouse v. Hopkins*, Justice O'Connor noted how, at times, the common law allows the burden of proof to shift to the defendant.[30] The Supreme Court has explicitly stated that the bundle of causation standards is the background tort law principle known to Congress.[31]

As this discussion illustrates, causation doctrine is contextual and intrinsically tied to underlying social goals.[32] In an influential essay about causation, Guido Calabresi discussed how tort law uses causation to "determine[] what injuries are worth avoiding," to decide which "people bear the burden of those injuries that do occur," and "to encourage or require the spreading of such burdens."[33]

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25. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 339 (2013).

26. Paroline v. United States, 572 U.S. 434, 458 (2014) (citation omitted).

27. *See, e.g.*, Bostic v. Ga.-Pac. Corp., 439 S.W.3d 332, 343–45 (Tex. 2014) (using a substantial factor test); Ford Motor Co. v. Boomer, 736 S.E.2d 724, 732 (Va. 2013) (discussing multiple sufficient causes); Doull v. Foster, 163 N.E.3d 976, 985–89 (Mass. 2021) (discussing differences between multiple sufficient causes and other circumstances involving multiple causes).

28. *Bostic*, 439 S.W.3d at 344.

29. *See, e.g.*, *Nassar*, 570 U.S. at 339.

30. Price Waterhouse v. Hopkins, 490 U.S. 228, 263–64 (1989) (O'Connor, J., concurring). There is a separate question about whether it makes sense to apply a tort standard to discrimination statutes. While this question is important, it is not the focus of this Article.

31. *Paroline*, 572 U.S. at 458.

32. Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 106 (1975); Wright, *Causation*, *supra* note 7, at 1004–10 (providing an overview of ways different legal theories intersect with causation doctrine).

33. Calabresi, *supra* note 32, at 70.

Scholars also have worried that overly rigid articulations of factual cause divorce the concept from what non-lawyers deem to be proper intuitions about causation. Professor Richard Wright has noted that "judges and juries, when not confined by incorrect tests or formulas, consistently have demonstrated an ability to make intuitively plausible factual causal determinations."[34] Professor James Macleod has shown that lay readers do not view factual cause inquiries through the "but-for" cause framework.[35]

Applying "but-for" cause as a stand-alone standard without the rest of the bundle is inconsistent with tort law because tort law recognizes that there are numerous situations in which "but-for" cause is problematic.[36] The common law rejects this approach, recognizing that causation must be flexible enough to address different factual scenarios, to balance competing goals, and to incorporate new ideas.[37]

II. THE NONEXISTENT CANON

The causation canon is not consistent with common law causation. This Part and the next Part will demonstrate how the Supreme Court constructed the canon over time. Importantly, no factual cause canon existed prior to 2013.[38] Instead, the Court treated each factual cause case as specific to the statute it was interpreting. No substantive canon provided a default principle.

In 1989, the Court viewed the factual cause inquiry as relating to two different principles: (1) the party required to prove factual cause and (2) the substantive standard for proving causation.[39] Over time, the Court began to merge these two ideas, assuming that the "but-for" cause standard also required

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34. Wright, *Causation*, *supra* note 7, at 1018–19 (advocating for "the Necessary Element of a Sufficient Set (NESS) test" in which "*a particular condition was a cause of (contributed to) a specific result if and only if it was a necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of the result*"). For articles exploring factual cause in the civil rights context, see generally Katie Eyer, *The But-For Theory of Anti-Discrimination Law*, 107 VA. L. REV. 1621 (2021) (discussing how framing discrimination law through causation rather than intent can help discrimination law respond to modern discrimination). *See also* Hillel J. Bavli, *Causation in Civil Rights Legislation*, 73 ALA. L. REV. 159, 177 (2021) (arguing that none of the causal tests used for civil rights legislation correctly articulates the appropriate causal inquiry); Hillel J. Bavli, *Cause and Effect in Antidiscrimination Law*, 106 IOWA L. REV. 483, 485 (2021) (noting the inadequacy of the "but-for" standard of causation); D. James Greiner, *Causal Inference in Civil Rights Litigation*, 122 HARV. L. REV. 533, 534–39 (2008) (discussing problems with using regression techniques in civil rights litigation).

35. James A. Macleod, *Ordinary Causation: A Study in Experimental Statutory Interpretation*, 94 IND. L.J. 957, 961–62 (2019).

36. *See supra* notes 12–17 and accompanying text.

37. Calabresi, *supra* note 32, at 107 (rejecting a rigid notion of causation because it "would mean that the ability to respond to changing goals and mixtures of goals, both analyzed and implicit, which characterizes common law adjudication and concepts, would be lost. No longer could new needs be introduced and old ones dropped without tearing the seamless web").

38. *See infra* Part III.

39. *See infra* Section II.A.

the plaintiff to bear the full burden of proof. This Part documents how this change happened.

At various times prior to 2013, the Court recognized that tort law does not always require the plaintiff to establish "but-for" cause and that there are good reasons for factual cause in the statutory context to include similar flexibility. In at least one case, the Court explicitly recognized that the common law factual cause standard included a bundle of possible factual cause standards and that when Congress created statutes against the backdrop of the common law, the backdrop included the entire bundle of factual cause standards.[40]

This history demonstrates that the causation canon does not represent a long-held belief about factual cause or a common understanding of the concept. Instead, it represents a choice by the Supreme Court to narrow the factual cause inquiry. Transforming this choice into a canon of construction increases the reach of the choice and enshrines it as a default principle to all federal criminal and civil statutes and across different factual contexts within individual statutes. The fact that the Supreme Court is hiding the recent vintage of its choice should raise red flags about whether the canon is doctrinally or theoretically sound.

A. *FACTUAL CAUSE IN 1989:* PRICE WATERHOUSE

In 1989, the Supreme Court determined the factual cause standard under Title VII in the case of *Price Waterhouse v. Hopkins*.[41] Three features of *Price Waterhouse* are important for understanding factual cause. First, the Court did not invoke a default canon of construction.[42] Second, the Court viewed the factual cause inquiry as involving two separate questions: (1) the party required to prove causation and (2) the substantive standard.[43] Finally, the Court understood tort law to encompass multiple factual cause standards.[44]

In *Price Waterhouse*, Plaintiff Ann Hopkins alleged that her employer violated Title VII when it did not promote her to partner because of her sex.[45] Numerous partners submitted comments on whether Hopkins should be voted into partnership.[46] Some partners praised her performance on large projects and some partners criticized her for being brusque with staff members.[47] "One partner described her as 'macho'; another suggested that she 'overcompensated for being a woman.'"[48] A few "partners criticized her

40. Paroline v. United States, 572 U.S. 434, 452–58 (2014).
41. Price Waterhouse v. Hopkins, 490 U.S. 228, 240–42 (1989).
42. *Id.*
43. *Id.* at 244–54.
44. *See id.*
45. *Id.* at 231–32.
46. *Id.* at 233.
47. *Id.* at 233–34.
48. *Id.* at 235 (citations omitted).

use of profanity"; however, one partner thought these partners mentioned profanity "only 'because it's a lady using foul language.'"[49] Another partner advised Hopkins that she "should 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'"[50]

The Supreme Court held that a plaintiff could prevail on a sex discrimination case if she can show that her sex was the motivating factor for an outcome.[51] The Court explicitly rejected a standard that required the plaintiff to establish "but-for" cause.[52]

To understand *Price Waterhouse* fully, it is important to know how the concurring opinions intersect with the plurality opinion. Writing for a plurality, Justice Brennan drafted an opinion that three other Justices joined.[53] Justices White and O'Connor each drafted separate concurring opinions.[54] Given this structure, it is easy to miss that six Supreme Court justices agreed with both the outcome of the case and with the framework for evaluating factual cause. Significant portions of the factual cause analysis in *Price Waterhouse* represent a majority of the Court.

Several features of *Price Waterhouse* are important. First, no Justice on the Court mentioned a default canon of construction related to factual cause. Importantly, even the dissenting Justices did not mention any such canon.

Instead, the Court viewed its task as a statutory specific one that required the Court to examine the language of the statute and its purpose. It framed the causal question as determining "the kind of conduct that violates [the] statute."[55] The Court examined the language in Title VII that prohibits an employer from taking an action "because of" a protected trait.[56] The Court explained that "these words . . . mean that gender must be irrelevant to employment decisions."[57]

The Supreme Court noted: "[A] person's gender may not be considered in making decisions that affect her. Indeed, Title VII even forbids employers to make gender an indirect stumbling block to employment opportunities."[58] The Court also noted that an employer is liable under Title VII when "[it] allows gender to affect its decisionmaking process."[59] It specifically stated that

49. *Id.* (citation omitted).
50. *Id.* (citation omitted).
51. *Id.* at 240–41.
52. *Id.*
53. *Id.* at 231.
54. *Id.* at 258 (White, J., concurring); *id.* at 261 (O'Connor, J., concurring).
55. *Id.* at 237 (plurality opinion).
56. *Id.* at 240; *see also* 42 U.S.C. § 2000e-2(a)(1)–(2) (2018) (using the term "because of").
57. *Price Waterhouse*, 490 U.S. at 240.
58. *Id.* at 242.
59. *Id.* at 248.

it was not limiting the ways that the plaintiff could prove her sex played a role in the employer's decision.[60]

Importantly for this Article, the Court stated that "[t]o construe the words 'because of' as colloquial shorthand for 'but-for causation' . . . is to misunderstand them."[61] In her concurring opinion, Justice O'Connor noted that the counterfactual required by the "but-for" cause standard sometimes required the factfinder to do "the impossible" because the counterfactual requires the factfinder to explore "a purely fanciful and unknowable state of affairs."[62] The plurality expressed skepticism that by using the "words 'because of,' Congress meant to obligate a plaintiff to identify the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges."[63]

When interpreting the causal standard, the plurality looked at the words "because of" but also considered other provisions of Title VII and the purposes of Title VII expressed through the statutory language and prior Supreme Court cases.[64]

Justice Kennedy wrote a dissenting opinion in which Chief Justice Rehnquist and Justice Scalia joined.[65] Even though the Justices believed that the words "because of" required the plaintiff to establish "but-for" cause, none of the Justices claimed that there was a canon of statutory construction that required the result.[66]

Second, the Court understood the factual cause inquiry to include two different concepts: the factual cause standard and the party required to prove it. The framework created by the Court required the plaintiff to establish a portion of the causal burden.[67] Once the plaintiff did this, the defendant could escape liability by proving an affirmative defense: that it would have made the same decision absent the protected trait.[68] The plurality reasoned that if the defendant failed to make this showing, the factfinder would ultimately be concluding that the protected trait was the "but-for" of the outcome.[69] This framework allocated causal burdens to both the plaintiff and the defendant.

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60. *Id.* at 251–52.

61. *Id.* at 240.

62. *Id.* at 264 (O'Connor, J., concurring) (quoting Wex S. Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60, 67 (1956)).

63. *Id.* at 241–42 (plurality opinion).

64. *Id.* at 239, 242–43. The plurality also discussed a framework developed in the constitutional law context. *Id.* at 249–50.

65. *Id.* at 279 (Kennedy, J., dissenting).

66. *Id.* at 282–84.

67. *Id.* at 246 (plurality opinion).

68. *Id.* at 250.

69. *Id.* at 249.

In their concurring opinions, Justice White and Justice O'Connor also agreed with a framework that would not require the plaintiff to establish "but-for" cause.[70] Justice White advocated borrowing the burden-shifting framework from another case and did not frame his opinion through the lens of tort law.[71]

For Justice O'Connor the words "because of" required the "but-for" standard of causation.[72] However, Justice O'Connor explicitly recognized that the "but-for" cause inquiry did not require the plaintiff to bear the entire causal burden.[73] According to Justice O'Connor, once the plaintiff showed that sex was a substantial factor in the partnership decision, the plaintiff had taken her evidence as far as she could and this would be sufficient to establish liability.[74] The employer could only escape liability by establishing that it would have made the same decision without considering the plaintiff's sex.[75]

Justice O'Connor believed that requiring the plaintiff to carry the full causal burden would limit the appropriate reach of Title VII. She noted that workplace "decisions are often made by collegial bodies on the basis of largely subjective criteria" and requiring a plaintiff to prove that a protected trait was a "definitive cause" would "be tantamount to declaring Title VII inapplicable to such decisions."[76]

Justice O'Connor argued that the purposes of Title VII would be disserved by a rule that required the plaintiff to carry the full burden of establishing "but-for" cause in all circumstances.[77] She recognized that an employer violates Title VII when it takes sex into account, even if sex is ultimately not the "but-for" cause of a specific outcome.[78] Justice O'Connor recognized that the purposes of Title VII would not be fulfilled by requiring the plaintiff to carry the entire factual cause burden.[79] She also understood that tort law sometimes allowed causal burdens to shift to the defendant in some circumstances.[80]

In *Price Waterhouse*, six Justices understood that factual cause involves two separate questions: the substantive standard and the party required to prove it. Significantly, "but-for" cause did not always require the plaintiff to carry the full causal burden. Even the dissent recognized that the Court was struggling

70. *Id.* at 259–60 (White, J., concurring); *id.* at 261–62 (O'Connor, J., concurring).

71. *Id.* at 258–60 (White, J., concurring).

72. *Id.* at 261–63 (O'Connor, J., concurring).

73. *Id.* at 262.

74. *Id.* at 276. Justice O'Connor suggested that the plaintiff needed to use direct evidence to get the benefit of the burden shift. *Id.*

75. *Id.* at 276–77.

76. *Id.* at 273.

77. *Id.* at 278.

78. *Id.* at 265.

79. *Id.* at 272–73, 278.

80. *Id.* at 262–64.

with two separate questions: the causal burden and the party required to prove it.[81]

Third, the Court viewed tort law as embracing multiple causation standards and did not view Title VII as being coterminous with tort law. Five Justices explicitly mentioned that tort law does not always require the plaintiff to establish "but-for" cause. The plurality recognized that "[b]ut-for caus[e] is a hypothetical construct."[82] The plurality specifically mentioned that requiring the plaintiff to prove "but-for" cause does not appropriately account for multiple, sufficient causes—cases in which two or more forces create an outcome and any one alone is sufficient to cause the complete result.[83] Justice O'Connor explicitly discussed how tort law does not require the plaintiff to carry the full causal burden in all multiple cause cases.[84]

The framework ultimately adopted by the Court did not even try to mimic tort law. Instead, the Court developed a tort-like framework with details specific to Title VII. The framework allowed a plaintiff to prevail by establishing a protected trait played a motivating factor in the outcome and the employer could escape liability by showing it would have made the same decision absent the protected trait.[85] Justice O'Connor extensively discussed why Title VII's goals supported the framework adopted by the Court.[86]

Even the dissent did not frame the causal inquiry through the lens of tort law. Instead, the dissent argued that the case should be resolved through the framework the Court created in *McDonnell Douglas*.[87] Importantly, no member of the Court claimed that a causation canon existed.

B. FACTUAL CAUSE IN THE AUGHTS: GROSS V. FBL FINANCIAL SERVICES

The story of statutory factual cause continued in 2009 with *Gross*, another discrimination case.[88] In *Gross*, the Court held a plaintiff is required to establish

81. *Id.* at 280–83 (Kennedy, J., dissenting).

82. *Id.* at 240 (plurality opinion).

83. *Id.* at 241.

84. *Id.* at 263–64 (O'Connor, J., concurring).

85. *Id.* at 241–48 (plurality opinion); *id.* at 259–60 (White, J., concurring); *id.* at 261–73 (O'Connor, J., concurring).

86. *Id.* at 264–70. In 1991, Congress amended Title VII in response to *Price Waterhouse*. 42 U.S.C. § 2000e-2(m). Congress affirmed that a plaintiff could prevail on a Title VII discrimination claim by establishing her protected trait was a motivating factor in the outcome. *Id.* However, Congress amended the affirmative defense created by the Court in *Price Waterhouse*. *Id.* § 2000e-5(g)(2). Congress made the affirmative defense more worker-friendly by making it a partial defense to damages, rather than a complete defense to liability. *Id.*

87. *Price Waterhouse*, 490 U.S. at 280, 286 (Kennedy, J., dissenting). In *McDonnell Douglas*, the Court created a three-part, burden-shifting framework for evaluating certain disparate treatment cases. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973).

88. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 167 (2009).

"but-for" cause to prevail on a claim under the Age Discrimination in Employment Act ("ADEA").[89]

Three aspects of *Gross* are important. First, the Supreme Court did not invoke a factual cause canon. Second, the Court largely considered the substantive standard and the party required to prove it as two separate issues. Third, the Court did not frame its inquiry through the lens of tort law.

In *Gross*, the Court did not claim that a factual cause canon existed or influenced the outcome.[90] If the causation canon existed in 2009, it would have played a central role in the analysis.

Instead, the Court framed its outcome as being specific to the ADEA.[91] The Court emphasized that "[w]hen conducting statutory interpretation, we 'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.'"[92] The Court relied heavily on the fact that Congress amended Title VII to incorporate *Price Waterhouse*'s motivating factor standard, but did not add the same language to the ADEA.[93] It read the lack of statutory amendment to be controlling.[94]

The Court next noted that determining the causal standard required the Court to examine the language of the ADEA and to determine its ordinary meaning.[95] It turned to the "because of" language in the ADEA and provided non-legal dictionary definitions of "because."[96] The Court then strangely asserted that the non-legal dictionary definitions supported the ideas that the party required to carry the causal burden was the plaintiff and that the substantive standard was "but-for" cause.[97] It is unclear how the Court derived these legal meanings from non-legal dictionaries.

Although the Court briefly conflated the legal standard and the party required to prove it, the Court later considered those issues to be separate.[98] The Court claimed that two prior ADEA cases required the plaintiff to carry the burden, even though neither cited case explicitly grappled with the issue.[99]

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89. *Id.* at 180.

90. Krishnakumar, *supra* note 6, at 901–08 (conducting an empirical study of substantive canons invoked by the Supreme Court from 2006 to 2012 and not identifying *Gross* as invoking a substantive canon).

91. *Gross*, 557 U.S. at 175–80.

92. *Id.* at 174 (quoting Fed. Express Corp. v. Holowecki, 552 U.S. 389, 393 (2008)).

93. *Id.*

94. *Id.* at 174–75. It is doubtful that Congress expressed its intent to require a "but-for" cause standard in the ADEA by failing to amend the statute to explicitly include the motivating factor standard because the Court in *Price Waterhouse* had interpreted the same "because of" language to incorporate the "motivating factor" standard.

95. *Id.* at 175.

96. *Id.* at 176.

97. *Id.*

98. *Id.* at 177.

99. *Id.* (first citing Ky. Ret. Sys. v. EEOC, 554 U.S. 135, 139–43, 148–50 (2008); and then citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141, 143 (2000)).

Interestingly, the Court then stated when "the statutory text 'is silent on the allocation of the burden of persuasion,'" the Court would "begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims."[100] *This was contrary to the Court's assumptions in* Price Waterhouse.[101] Even though there was a strong argument that *Price Waterhouse* was the prevailing precedent, the Court rejected it as such by claiming that the *Price Waterhouse* burden-shifting framework was difficult to apply and that "it is far from clear that the Court would have the same approach were it to consider the question today in the first instance."[102]

Finally, tort law played an extremely limited role in *Gross*. The Court did not ground its analysis in tort law. Instead, the Court claimed to undertake a textual analysis of the ADEA, with limited references to tort law.[103]

Justices Stevens, Breyer, Souter, and Ginsburg dissented, arguing, among other things, that "[t]he most natural reading of this statutory text prohibits adverse employment actions motivated in whole or in part by the age of the employee."[104] In a separate dissent, Justices Breyer, Souter, and Ginsburg argued "[t]he words 'because of' do not inherently require a showing of 'but-for' causation."[105] They contested whether "but-for" cause fit well in discrimination law because plaintiffs were often trying to show intent.[106] In contrast, torts cases often related to physical causes.[107] Justice Breyer worried that in the employment discrimination context, employers would often have more information than plaintiffs.[108]

Although the Court reached different outcomes in *Price Waterhouse* and *Gross*, the two cases are similar in ways that are important to the causation canon. Neither Court articulated that it was operating under a default principle that the plaintiff is required to establish "but-for" cause. Although they reached different outcomes, both cases purported to analyze a particular statute. The Court did not view the factual cause inquiry as a nearly uniform inquiry that reached across many statutes. Both Courts understood that the causal standard and the party required to prove it are separate concepts.

At the same time, a small part of the foundation of the new canon began to subtly emerge in *Gross*. The Court asserted that there is a default principle that the plaintiff must carry the burden of persuasion unless the statute states otherwise.[109]

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100. *Id.* (quoting Schaffer v. Weast, 546 U.S. 49, 56 (2005)).
101. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989).
102. *Gross*, 557 U.S. at 178–79.
103. *See id.* at 175–78.
104. *Id.* at 180 (Stevens, J., dissenting).
105. *Id.* at 190 (Breyer, J., dissenting).
106. *Id.* at 190–91.
107. *Id.* at 190.
108. *Id.* at 191.
109. *Id.* at 177 (majority opinion).

C. FACTUAL CAUSE IN OTHER CASES

In the period prior to 2013, Supreme Court cases outside the employment discrimination context followed the same factual cause features as the employment discrimination cases. There is no canon encouraging the Court to presume that the plaintiff must prove "but-for" cause. Indeed, as discussed below, the Court often used the motivating factor test and shifted part of the causal burden to the defendant.

In *NLRB v. Transportation Management Corp.*, the Court considered how factual cause should operate in cases alleging an employer wrongfully terminated an employee because of the employee's union activity.[110] To resolve this question, the Supreme Court did not invoke a causation canon. Instead, it deferred to the National Labor Relations Board's interpretation, which would find a violation if the employee's termination was "in any way motivated by [the] desire to frustrate union activity."[111] However, the "employer could escape the consequences of a violation by proving that without regard to the impermissible motivation, the employer would have taken the same action for wholly permissible reasons."[112]

In *Safeco Insurance Co. of America v. Burr*, the Court interpreted a provision of the Fair Credit Reporting Act that required notice when the "adverse action . . . [is] based in whole or in part on . . . [a] [credit] report."[113] The Court decided *Safeco* in 2007, just a few years before *Gross*, and the analysis in the two cases is similar.

In *Safeco*, the Court did not analyze the case using a default causation canon. Instead, it considered the meaning of the term "based on."[114] Without any citation, the Court noted, "[i]n common talk, the phrase 'based on' indicates a but-for causal relationship and thus a necessary logical condition."[115] The Court even recognized a possible alternate reading of this language and chose the "but-for" standard based on what the Court believed Congress was trying to accomplish through the Fair Credit Reporting Act provision.[116] Even though the Court relied heavily on tort law in other portions of the *Safeco* opinion, it did not explicitly rely on tort law in the factual cause analysis.[117]

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110. NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 394–95 (1983), *abrogated by* Dir., Off. of Workers' Comp. Programs, Dep't of Lab. v. Greenwich Collieries, 512 U.S. 267, 280–81 (1994).

111. *Id.* at 399.

112. *Id.*

113. Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 52 (2007) (fifth alteration in original) (quoting 15 U.S.C. § 1681m(a) (2018)).

114. *Id.* at 63.

115. *Id.*

116. *Id.* at 63–64.

117. *Id.* at 63–64, 68–70; *see also* Pac. Operators Offshore, LLP v. Valladolid, 565 U.S. 207, 221 (2012) (rejecting "but-for" cause). Other cases during this time focused on whether causal language required a showing of proximate cause. *See, e.g.*, Bridge v. Phx. Bond & Indem. Co., 553

The causal structure the Supreme Court applied in *Price Waterhouse* was borrowed from a case in which the Court considered whether a school district violated a teacher's First Amendment rights: *Mt. Healthy City Bd. of Ed. v. Doyle*.[118] In *Mt. Healthy*, the Supreme Court held that the teacher could prevail by showing his speech was a substantial factor in the employment decision but that the school district would prevail if it demonstrated it would have made the same decision without considering the teacher's constitutionally protected speech.[119] When the Court created tests for evaluating whether government actors violated the Constitution by engaging in racial discrimination or by violating the plaintiff's First Amendment rights, the Court did not assume that the plaintiff was required to establish "but-for" cause.[120]

These cases illustrate three key features of the Supreme Court's factual cause jurisprudence prior to 2013. There is no causation canon. The Court viewed factual cause as a statutory specific question. The Court also understood factual cause to embrace two separate questions: the causal standard and the party required to prove it. The Court did not view the common law as requiring one choice: that the plaintiff was required to establish "but-for" cause.

III. THE CANON

In 2013, the Supreme Court articulated the causation canon, although it was difficult to recognize it at the time. It was not until 2020 that the canon fully emerged. This Part traces the causation canon through the lens of three cases and then discusses other factual cause cases from 2013 through 2020.

Three features are important. First, the Court has created a default canon that is the starting point for factual cause analysis for all statutes. Under this new canon, the Court will presume that a statute requires a plaintiff to establish "but-for" cause, unless the statutory language shows that it does not "follow[] the general rule."[121] The canon requires the plaintiff to fully establish causation, and it sets the default standard as "but-for" cause.[122]

Second, the Court declared, without evidence, that this default position has a long pedigree. This is incorrect. Tort law does not view "but-for" cause as a stand-alone standard because it has long recognized that the "but-for" cause formulation does not work in certain instances.[123] Both the substantive

U.S. 639, 652–55 (2008); Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 457 (2006); Holmes v. Sec. Inv. Protection Corp., 503 U.S. 258, 266 (1992).

118. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285 (1977).

119. *Id.* at 285–87; *see also* Hunter v. Underwood, 471 U.S. 222, 228 (1985) (applying similar framework); Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 417 (1979) (same); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270–71, 270 n.21 (1977) (same).

120. *See Mt. Healthy*, 429 U.S. at 285–87.

121. Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1014 (2020).

122. *See id.*

123. *See supra* Part II.

standard for factual cause and the party required to prove it can change in tort law.[124] This flexibility disappears in the new causation canon.

Finally, the Court seems willing to apply the new default canon to any statute, even statutes that do not derive from the common law or use tort-like causation words. The canon applies in both civil and criminal cases. The Court is willing to apply the canon to different causal words and even to statutes that do not contain direct causal language.

A. UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER V. NASSAR

In 2013, the Court held that to prevail on a Title VII retaliation claim, a plaintiff must prove "but-for" cause.[125] The reasoning in *Nassar* is markedly different than *Price Waterhouse* and *Gross*, even though the Court decided *Nassar* only four years after *Gross*. The Court relied heavily on tort law and claimed that, in the usual course, tort law requires the plaintiff to prove "but-for" cause.[126]

In *Nassar*, the Court started with the uncontroversial statement that, generally, tort law requires proof of causation.[127] The Court then cited a couple of discrimination cases for this same idea.[128] The Court stated that "[i]n the usual course, this standard requires the plaintiff to show 'that the harm would not have occurred' in the absence of—that is, but for—the defendant's conduct."[129] Then, the Court articulated that this rule "is the background against which Congress legislated in enacting Title VII, and these are the default rules it is presumed to have incorporated, absent an indication to the contrary in the statute itself."[130]

One especially strange aspect of *Nassar* is that it is a significant departure from the cases that preceded it related to how strongly it states the default position. About a year before *Nassar*, the Supreme Court considered causation under a different statute and refused to adopt a "but-for" cause standard, without mentioning that this standard was the supposed default.[131]

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124. *See supra* notes 82–84 and accompanying text.

125. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013).

126. *See id.* at 346–47.

127. *Id.* at 346.

128. *Id.* In this paragraph, the Court is not claiming that either tort law or the cited cases demand a particular substantive standard or a particular party to prove that standard. Neither of the cited cases addressed the causation issue specifically. *See id.* ("In intentional-discrimination cases, 'liability depends on whether the protected trait' 'actually motivated the employer's decision' and 'had a determinative influence on the outcome[.]'" (quoting Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993))); *see also* City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978) ("[T]he simple test [is] whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'" (quoting *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1170 (1971))).

129. *Nassar*, 570 U.S. at 346–47.

130. *Id.* at 347.

131. *See* Pac. Operators Offshore, LLP v. Valladolid, 565 U.S. 207, 221–22 (2012).

Even within *Nassar*, the Court specifically noted that tort law does not always require proof of "but-for" cause.[132] This is important. In 2013, the Court still explicitly recognized tort law's flexibility, although it downplayed this flexibility. Even as the Court recognized that tort law does not require "but-for" cause in multiple, sufficient cause cases, this did not prevent the Court from stating the premise that it would later fully solidify as a canon of construction. As discussed in the next Section, this recognition of tort law's flexibility will become even less visible over time.

In *Nassar*, it is not clear how much work the default principle is performing or even whether it is dicta. The rest of the opinion focused on statutory specific questions, such as the language of Title VII's retaliation provision, the 1991 amendments to Title VII, and whether the 1991 amendments apply to the retaliation provision.[133] The Court never returned to the default principle in *Nassar*.

B. BURRAGE V. UNITED STATES

Seven months after *Nassar*, the Supreme Court addressed factual cause in the criminal law context in *Burrage v. United States*.[134] While the causation canon may be dicta in *Nassar*, it plays a greater role in *Burrage*. Notably, however, in *Burrage*, the Court still facially undertakes a statutory specific analysis, while also heavily relying on the new causation canon.

In *Burrage*, the Court interpreted a sentencing provision that required a twenty-year mandatory minimum sentence for any person who unlawfully distributed certain drugs "when 'death or serious bodily injury results from the use of such substance.'"[135] The Court considered whether the provision applied when a criminal defendant supplied a drug that contributed to another person's death if the drug was not the "but-for" cause of the death.[136]

Burrage is a criminal case.[137] The facts of *Burrage* provide a different context for thinking about how courts might use the causation canon.[138] A jury convicted Marcus Burrage on multiple counts, one of which asserted "that

132. *Nassar*, 570 U.S. at 347 (describing "the existence of an exception for cases where an injured party can prove the existence of multiple, independently sufficient factual causes, but observing that 'cases invoking the concept are rare'" (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 27 cmt. b (AM. L. INST. 2005))).

133. *Id.* at 347–57. The Court also relied on an odd fakers and floodgates argument. *Id.* at 358–59. The arguments the Court relied on can be critiqued on a number of substantive grounds. Fortunately, exploring these critiques is not necessary to understanding the factual cause canon. *See id.* at 363–86 (Ginsburg, J., dissenting).

134. *See generally* Burrage v. United States, 571 U.S. 204 (2014) (interpreting "results from" statutory language to require "but-for" causation).

135. *Id.* at 206 (quoting 21 U.S.C. § 841(a)(1), (b)(1)(A)–(C) (2012)).

136. *Id.* at 207.

137. *Id.* at 206.

138. *Id.* at 206–07.

[Mr.] Burrage unlawfully distributed heroin on April 14, 2010, and that 'death . . . resulted from the'" distribution of the heroin.[139] Mr. Burrage sold heroin, and Joshua Banka died after injecting it.[140] Evidence showed that Mr. Banka ingested marijuana, oxycodone, and heroin before his death.[141] A medical witness testified that, at the time of his death, Mr. Banka had multiple drugs in his system, "including heroin metabolites, codeine, alprazolam, clonazepam metabolites, and oxycodone."[142] Medical experts testified that heroin was a contributing factor in Mr. Banka's death, but could not testify as to whether Mr. Banka would have lived had he not injected the heroin.[143]

The Court considered the meaning of the words "results from" in the criminal statute.[144] After citing a dictionary, the Court concluded that the words "results from" were words of causality.[145] It then cited to *Nassar* for the proposition that "[i]n the usual course, this requires proof that the harm would not have occurred in the absence of—that is, but for—the defendant's conduct."[146] The Court also cited the Model Penal Code.[147] It later noted that the "but-for requirement is part of the common understanding of cause."[148]

It is worth noting that the sentencing provision used the words "results from,"[149] while the Title VII retaliation provision discussed in *Nassar* used the word "because."[150] Despite the textual difference, the Court noted that the same default principles applied.[151] The Court even indicated that the words "based on" would also yield the same result.[152]

Throughout *Burrage*, the Court asserted that the result it reached reflected tradition and the background norm against which Congress legislates.[153] Curiously, the Court does not reconcile this claim with federal cases it cited, most of which date to the early 2000s or later. If a rule reflected tradition, the citations should reflect a longer pedigree.

Burrage recognized the "undoubted reality" that tort law does not always use the "but-for" standard and that one of the most common scenarios in which

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139. *Id.* at 206–08 (quoting 21 U.S.C. § 841(b)(1)(C) (2012)).
140. *Id.* at 206.
141. *Id.* at 206–07.
142. *Id.* at 207.
143. *Id.*
144. *Id.* at 210.
145. *Id.* at 210–11.
146. *Id.* at 211 (internal quotation marks omitted) (quoting Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 346–47 (2013)).
147. *Id.*
148. *Id.*
149. *Id.* at 210.
150. *Nassar*, 570 U.S. at 348.
151. *Burrage*, 571 U.S. at 212.
152. *Id.* at 213.
153. *Id.* at 214.

this occurs is cases of multiple, sufficient cause cases.[154] Justice Scalia noted that the Court did not need to accept or reject the "special rule" adopted for multiple, sufficient cause cases because those facts were not present in *Burrage*.[155] No medical witness testified that the heroin alone would have caused Mr. Banka's death.

Justice Scalia also discussed the substantial or contributing factor standard and noted that several state courts had adopted the rule and that a torts treatise noted this standard had "found general acceptance."[156] Although *Burrage* recognized the diversity of tort law, this did not prevent the Court from claiming that it was applying the traditional principle.[157]

Justices Ginsburg and Sotomayor concurred in the judgment.[158] They rejected the Court's claims that there is a uniform causation analysis or that employment discrimination law fell within that standard.[159] Nonetheless, they agreed with the enunciated standard because the statute was ambiguous, and the rule of lenity would encourage the Court to adopt a causal standard that favored the criminal defendant.[160]

C. COMCAST V. NATIONAL ASSOCIATION OF AFRICAN AMERICAN-OWNED MEDIA

What may be dicta in *Nassar* emerges as a full statutory canon just seven years later in *Comcast v. National Association of African American-Owned Media*.[161] In *Comcast*, the Court considered the appropriate causal standard under 42 U.S.C. § 1981.[162] The Court held a plaintiff must establish "but-for" cause to prevail on a Section 1981 claim.[163] While the holding in *Comcast* mirrors the holdings in *Gross* and *Nassar*, the Court's articulated reasons for the holding are different.

At the beginning of the *Comcast* opinion, the Supreme Court declared, "[f]ew legal principles are better established than the rule requiring a plaintiff to establish causation."[164] The Court did not provide any citation for this sentence.[165] The Court continued, "[i]n the law of torts, this usually means a plaintiff must first plead and then prove that its injury would not have occurred

154. *Id.*

155. *Id.* at 215.

156. *Id.* (quoting W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 267 (5th ed. 1984)).

157. *Id.* at 214, 216.

158. *Id.* at 219 (Ginsburg, J., concurring).

159. *Id.*

160. *Id.*

161. *See* Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1013 (2020).

162. *Id.*

163. *Id.* at 1019.

164. *Id.* at 1013.

165. *Id.*

'but for' the defendant's unlawful conduct."[166] This sentence also contains no citation.[167]

After reciting the facts of the case, the Court continued to discuss the applicable law. The Court indicated, "It is 'textbook tort law' that a plaintiff seeking redress for a defendant's legal wrong typically must prove but-for causation."[168] Two things about this sentence are important. First, the Court purported to obtain this "textbook" tort law from *Nassar*, a 2013 case, and *Nassar*'s citation to a 1984 torts treatise.[169] If this principle was long-established, you would expect the Court to cite older cases or sources, especially when trying to apply this principle to a statute originally created during the Reconstruction era.

Second, the Court indicated that "typically" the plaintiff must prove "but-for" causation.[170] The word "typically" glosses over quite a bit of tort law. While it is correct to say that tort law often requires a plaintiff to establish "but-for" cause, there are many recognized instances when tort law does not apply a "but-for" standard or when tort law does not require the plaintiff to bear the burden of establishing factual cause.[171] The canon the Court created ignored this central feature of common law factual cause.

After describing "but-for" cause, the Court continued with an important sentence. "This ancient and simple 'but for' common law causation test, we have held, supplies the 'default' or 'background' rule against which Congress is normally presumed to have legislated when creating its own new causes of action."[172] Despite claiming the rule was "ancient" and a default rule, the only citation the Court provided is to *Nassar*, decided in 2013.[173] The Court did not explain whether this supposedly ancient and default rule existed at the time Congress enacted Section 1981 during the Reconstruction era.[174]

The Court then noted that this default principle applied to federal antidiscrimination law, citing to both *Gross* and *Nassar* for this proposition.[175] Recall from the prior Part that the Court decided *Gross* in 2009 and that *Gross* did not apply any default canon of construction.[176] Instead, *Gross* framed the case as specifically examining the causal standard under the ADEA.[177]

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166. *Id.*

167. *Id.*

168. *Id.* at 1014 (quoting Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 347 (2013)).

169. *Id.* (first citing *Nassar*, 570 U.S. at 347; and then citing W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 265 (5th ed. 1984)).

170. *Id.*

171. *See supra* Part I.

172. *Comcast*, 140 S. Ct. at 1014.

173. *Id.*

174. *Id.* at 1015.

175. *Id.* at 1014.

176. *See supra* Section II.B.

177. *See supra* notes 91–94 and accompanying text.

The Court then continued to determine whether anything in Section 1981 would lead the Court to conclude that Section 1981 should be excepted from the default rule the Supreme Court created.[178] The Court turned to the language of Section 1981.[179] Section 1981 provides: "[a]ll persons . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, [and] give evidence . . . as is enjoyed by white citizens . . . ."[180]

The text of Section 1981 does not contain any explicit causal language. The Court even recognized this problem. It noted, "[w]hile the statute's text does not expressly discuss causation, it is suggestive."[181] The Court applied its new statutory canon to a statute that does not contain any tort-like causal words. Instead, the Court reasoned as follows:

> The guarantee that each person is entitled to the "same right . . . as is enjoyed by white citizens" directs our attention to the counterfactual—what would have happened if the plaintiff had been white? This focus fits naturally with the ordinary rule that a plaintiff must prove but-for causation. If the defendant would have responded the same way to the plaintiff even if he had been white, an ordinary speaker of English would say that the plaintiff received the "same" legally protected right as a white person.[182]

These sentences are problematic. They assume that "but-for" cause is the normal standard and that the plaintiff is the party who has to prove that standard.[183]

The Court then examined the broader structure of the Civil Rights Act of 1866 for "clues."[184] None of this discussion supported the idea that Section 1981 required a plaintiff to establish "but-for" cause. Instead, this discussion merely supported the idea that some causal principle may be contained within the broader statute, but not the exact substantive standard or the party required to prove it.

The Court also reasoned that Section 1982 and Section 1981 should be interpreted in tandem because the two sections use similar language.[185] The Court noted it "has repeatedly held that a claim arises under § 1982 when a citizen is not allowed 'to acquire property . . . *because of* color.'"[186] While this statement is true, it does not support the Court's larger claim. The Court may

178. *Comcast*, 140 S. Ct. at 1014–15.

179. *Id.* at 1015.

180. 42 U.S.C. § 1981(a); Civil Rights Act of 1866, Pub. L. No. 39-26, 14 Stat. 27.

181. *Comcast*, 140 S. Ct. at 1015.

182. *Id.* (alteration in original) (quoting 42 U.S.C. § 1981).

183. *See id.*

184. *Id.*

185. *Id.* at 1016.

186. *Id.* at 1016–17 (alteration in original) (quoting Buchanan v. Warley, 245 U.S. 60, 78–79 (1917)) (first citing Jones v. Alfred H. Mayer Co., 392 U.S. 409, 419 (1968); and then citing Runyon v. McCrary, 427 U.S. 160, 170–71 (1976)).

have described Section 1982 as requiring causation, but it does not necessarily follow that the plaintiff is the party required to prove it or that the causal standard is "but-for."

Section 1981 does not contain tort-like factual cause language, and Congress originally enacted it at a time when factual cause jurisprudence was still being developed. Despite these issues, the Court was comfortable declaring a robust, default canon.

D. OTHER CASES

From 2013 to 2021, the Supreme Court marched toward the causation canon. During this period, the Supreme Court issued opinions in other cases that yield additional insights about the canon. In two Title VII discrimination cases, the Court reiterated the canon, even though the "but-for" standard does not apply to Title VII discrimination claims.[187] In another case, the Supreme Court completely ignored its new default rule.[188]

The Court decided *EEOC v. Abercrombie & Fitch Stores, Inc.* in 2015.[189] In two sentences the Court noted that "[t]he term 'because of' appears frequently in antidiscrimination laws. It typically imports, at a minimum, the traditional standard of but-for causation."[190] In the next sentence, the Court correctly indicated that despite using the term "because of," Title VII discrimination claims do not require the plaintiff to establish "but-for" cause.[191] In *Abercrombie*, the Court reiterated the canon, even though the statute it was interpreting did not require the plaintiff to establish "but-for" cause.[192]

In *Bostock v. Clayton County*, the Supreme Court held that Title VII sex discrimination encompassed discrimination because of sexual orientation and gender identity.[193] The majority's analysis relied heavily on "but-for" cause, even though "but-for" cause is not the standard used for Title VII discrimination claims.[194] Nonetheless, Justice Gorsuch cited *Nassar* and noted that the words "because of" refer to the "'simple' and 'traditional' standard of but-for causation."[195] Justice Gorsuch did not state that Congress legislated against the backdrop of a default principle. However, his analysis suggested that he started with the assumption that when Congress used the words "because

187. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1739–40 (2020); EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 772 (2015).

188. *See infra* notes 211–14 and accompanying text.

189. *Abercrombie*, 575 U.S. at 768.

190. *Id.* at 772.

191. *Id.* at 773.

192. *Id.* at 772–73.

193. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020).

194. *Id.* at 1739–48; 42 U.S.C. § 2000e-2(m).

195. *Bostock*, 140 S. Ct. at 1739 (citing Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 346, 360 (2013)).

of" it meant "but-for" and that if Congress did not intend this outcome, it needed to use different words.[196]

What is especially strange about both *Abercrombie* and *Bostock* is Congress explicitly rejected the idea that the words "because of" require "but-for" cause. As discussed throughout this Article, when the Supreme Court interpreted the words "because of" in Title VII in 1989, it did not interpret those words as meaning "but-for" cause.[197] In 1991, Congress confirmed that the words "because of" in Title VII's discrimination provisions do not mean "but-for" cause.[198] The Court's own precedent and the 1991 amendments to Title VII are a strong rebuke to the idea that Congress legislates against a background norm of "but-for" cause.

The causation canon is a default rule and by its terms will not dictate the outcome in all cases. In *Babb v. Wilkie*, the Supreme Court held the ADEA's federal sector provision, 29 U.S.C. § 633a(a), does not require the plaintiff to establish "but-for" cause.[199] Section 633a(a) provides that "personnel actions" affecting individuals aged forty and older "shall be made free from any discrimination based on age."[200] In *Babb*, the Supreme Court held that the ADEA's federal sector discrimination provision demands that personnel actions are not tainted by age discrimination.[201]

The Court reiterated the factual cause canon in *Babb*. The opinion noted "the traditional rule favoring but-for causation."[202] The Court found that the words of the statute demanded a different result.[203] However, *Babb* did not clarify when a statute's language overcomes the default or how a court should make that determination. It merely ascertained that the ADEA's public sector provision sufficiently overcame the default rule.

The Supreme Court decided *Paroline v. United States* in April of 2014, just a few months after *Burrage*.[204] *Paroline* provided a completely different account of factual cause than the other cases discussed in this Section. In *Paroline*, the Court addressed whether a person who possessed child pornography would be required to pay full restitution to the person pictured in the pornography when the possessor was one of many people who possessed the images.[205]

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196. *Id.* at 1739–40. Justice Gorsuch also softened the potential harshness of using a "but-for" cause standard by noting that the standard is "sweeping" and that there can be more than one "but-for" cause. *Id.* at 1739.

197. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 240–41 (1989).

198. 42 U.S.C. § 2000e-2(m).

199. Babb v. Wilkie, 140 S. Ct. 1168, 1171 (2020).

200. *See* 29 U.S.C. § 633a(a).

201. *See Babb*, 140 S. Ct. at 1171. However, the Court did create a remedies limit that requires a plaintiff to establish "but for" cause to obtain certain remedies. *Id.*

202. *Id.* at 1176. In dissent, Justice Thomas vigorously argued on behalf of the factual cause canon. *See id.* at 1179 (Thomas, J., dissenting).

203. *See id.* at 1171 (majority opinion).

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

205. *Id.* at 439–40.

The Court did not apply a "but-for" cause standard. It recognized that "but-for" cause would not work in this circumstance. The Court demoted the "but-for" cause standard from a default rule, stating it was "a familiar part of [the] legal tradition" in the United States.[206] The Court recognized that "but-for" cause could not be met under the circumstances of the case.[207] It then engaged in a lengthy discussion about other recognized factual cause standards.[208]

It recognized that different causal standards are necessary "to vindicate the law's purposes."[209] It then noted:

> [T]he availability of alternative causal standards where circumstances warrant is, no less than the but-for test itself as a default, part of the background legal tradition against which Congress has legislated. It would be unacceptable to adopt a causal standard so strict that it would undermine congressional intent where neither the plain text of the statute nor legal tradition demands such an approach.[210]

In *Paroline*, the Court crafted a unique factual cause standard.

The causation canon is also missing in *Husted v. A. Philip Randolph Institute*.[211] In that case, the Supreme Court interpreted a provision of the National Voter Registration Act that prohibits states from removing voters from voter rolls "by reason of [the] person's failure to vote."[212] The Court noted, "[w]hen a statutory provision includes an undefined causation requirement, we look to context to decide whether the statute demands only but-for cause as opposed to proximate cause or sole cause."[213] Based on its reading of other portions of the statute, the Court interpreted the causal language to require sole cause, a standard that is harder to establish than "but-for" cause.[214]

The cases discussed in this Section demonstrate a few additional features of the common law canon. In *Babb*, the Court recognized one instance in which the language Congress used overcame the default rule.[215] In *Paroline* and *Husted*, the Court seemed to ignore its default canon without explanation.

In contrast, the Supreme Court announced a robust causation canon in *Comcast*.[216] As shown in this Part, the Supreme Court has created a default

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206. *Id.* at 450.

207. *Id.*

208. *Id.* at 450–53.

209. *Id.* at 452.

210. *Id.* at 458 (citation omitted).

211. Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833, 1842–43 (2018).

212. *Id.* at 1842 (quoting 52 U.S.C. § 20507(b)(2) (2018)).

213. *Id.* This statement seems to conflate factual and legal cause questions. Additionally, the Court strangely noted that "[t]he phrase 'by reason of' denotes some form of causation." *Id.*

214. *See id.* at 1843–45.

215. Babb v. Wilkie, 140 S. Ct. 1168, 1175 (2020).

216. Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1014 (2020).

canon that is the starting point for factual cause analysis for federal statutes in many circumstances. The Court has repeatedly claimed this canon has an ancient pedigree, even though the Court never recognized that it existed prior to 2013. The Court is willing to apply the canon to civil and criminal statutes that use different causal language and even to statutes that do not explicitly contain causal language.

IV. QUESTIONS RAISED BY THE CANON

The Supreme Court recently created the causation canon, and the causation canon is not consistent with tort law. These facts raise serious questions about the legitimacy of the causation canon as a statutory interpretation device.

This Part explores how the canon is in tension with statutory interpretation methodology, especially textualism. One of the central precepts of textualism is words matter. To date, the Court has applied the causation canon to different words, and even to statutes that do not explicitly use causal language. Strangely, if the federal courts adopted the actual common law with its bundle of standards, this would also be in tension with an idea implied within textualism: that the courts should select one meaning for words within a statute.

The causation canon also points to a gap in the statutory interpretation literature. There is no agreement about where the common law fits within the taxonomy of statutory interpretation. And there has been no systematic attention paid to how the Supreme Court is importing the common law into statutes through canons and how much power federal courts have when doing so.

If a canon, like the causation canon, does not interpret a statute and does not reflect the common law, it appears the Supreme Court is creating a federal common law. That the Supreme Court is trying to do so through the guise of a statutory interpretation canon merits further attention.

A. STATUTORY INTERPRETATION GENERALLY

When a statute explicitly or implicitly invokes factual cause, a judge might use statutory interpretation principles to determine how the factual cause inquiry should proceed. This Section explores how the causation canon is in serious tension with core tenets of statutory interpretation, generally, and textualism, specifically.

When judges interpret statutes, they often invoke one or more interpretive methodologies, such as textualism,[217] intentionalism,[218] and purposivism,[219] among others.[220] At times, judges use these methodologies to express their views about the proper balance of power between the judiciary and the legislature.[221]

Judges often assert that one goal of statutory interpretation is to find the plain meaning of a statute.[222] This search typically begins with the text of the statute.[223]

One method of statutory interpretation—textualism—elevates the text of the statute as a primary source of statutory meaning.[224] There are varying forms of textualism, some of which eschew the use of legislative history as a valid source for statutory meaning.[225] To determine meaning, a textualist methodology often relies on the dictionary meaning of words, whether the words are terms of art, the grammatical structure of a statute, and how the words fit within the overall context of the statute.[226] Even within textualism there are debates about what meaning should govern when the language of

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217. For scholarly discussion of textualism, see generally John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287 (2010); Philip P. Frickey, *Faithful Interpretation*, 73 WASH. U. L.Q. 1085 (1995); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749 (1995); and William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

218. *See generally* T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988) (describing various statutory interpretation techniques). *See, e.g.*, John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 75 (2006) [hereinafter Manning, *Textualists from Purposivists*]; John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 422 (2005).

219. *See, e.g.*, Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 NW. U. L. REV. 269, 278–79 (2019) (characterizing the statutory interpretation debate as between textualists and purposivists); Manning, *Textualists from Purposivists*, *supra* note 218, at 75.

220. *See, e.g.*, William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987) (discussing dynamic statutory interpretation); William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 662–67 (1982) (discussing common-law interpretation).

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

222. *See, e.g.*, Yates v. United States, 574 U.S. 528, 537 (2015); Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 239 (2004).

223. *See Yates*, 574 U.S. at 537; *Household Credit*, 541 U.S. at 239.

224. Tara Leigh Grove, Comment, *Which Textualism?*, 134 HARV. L. REV. 265, 272 (2020). For critiques of textualism, see, for example, Abbe R. Gluck, *Justice Scalia's Unfinished Business in Statutory Interpretation: Where Textualism's Formalism Gave Up*, 92 NOTRE DAME L. REV. 2053, 2076 (2017); and Victoria Nourse, *Textualism 3.0: Statutory Interpretation After Justice Scalia*, 70 ALA. L. REV. 667, 668–69 (2019).

225. *See, e.g.*, Grove, *supra* note 224, at 266–68 (describing different strains of textualism); Eskridge, *supra* note 217, at 623 (discussing new textualism).

226. Manning, *supra* note 217, at 1309–10 n.101.

the statute appears to conflict with the accepted public meaning of that language at the time Congress enacted the statute.[227]

Intentionalism and purposivism recognize statutory text as a source of meaning. Intentionalist methodologies tend to value a broader array of sources to determine the meaning of a statute, including legislative history.[228] Critics of intentionalist methodologies point to the difficulties inherent in determining legislative intent.[229]

Purposivist interpretation often emphasizes the general purpose of the underlying statute as a source of meaning.[230] For example, a court might look to the broad, remedial purposes of a statutory regime to serve as a guide on whether to read a particular statutory provision broadly or narrowly.[231] The statute's purpose is sometimes stated within the statute itself or within its legislative history. At times, courts assign a purpose, or set of purposes, to a particular statute.[232]

Other theoretical and empirical accounts of statutory interpretation abound.[233] Fortunately, it is not necessary for the purposes of this Article to make any descriptive, evaluative, or normative claim about these competing theories and their respective metes and bounds. There is significant debate within the scholarly community about whether statutory interpretation can be neatly pressed into these categories.[234] Nor is it necessary to determine whether any particular account fully captures how statutory interpretation happens in

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227. *See generally* Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (demonstrating disagreement between majority and dissenting opinions about how to construe text of Title VII).

228. *See* Thomas W. Merrill, Essay, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 366–68 (1994); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 325–26 (1990).

229. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 16–25 (1994) (discussing difficulties with locating useful expressions of intent); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 362–63 (2005) (describing Justice Scalia's concern that legislators might "salt the Congressional Record with misleading statements that further their own special agendas" if courts find the entire legislature's intent in such isolated statements); *id.* (noting that textualists are not convinced legislative history provides an accurate picture of the legislature's intent).

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

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

232. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800–01 (1973) (discussing purposes of Title VII).

233. *See generally* Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking Is Better than Judicial Literalism*, 53 WASH. & LEE L. REV. 1231 (1996) (examining textualism from the environmental law perspective); *see also* Eskridge, *supra* note 217, at 630 (discussing imaginative reconstruction).

234. *See, e.g.*, Manning, *Textualists from Purposivists*, *supra* note 218, at 78 ("The distinction between textualism and purposivism is not . . . cut-and-dried."); Nelson, *supra* note 229, at 355–56 (discussing the acknowledgement by textualists of the relevance of purpose in statutory interpretation); William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541, 592–93 (1988) (commenting that a plain meaning analysis must take into account both the internal context of the statute as well as the external context).

practice.[235] Instead, this Section focuses on tensions created by the causation canon.

The causation canon is in tension with key aspects of textualism, intentionalism, and purposivism. This Section focuses on the tensions with textualism because the causation canon cases are drafted by Justices of the Supreme Court that espouse textualism. Justice Kennedy wrote the majority opinion in *Nassar*,[236] Justice Scalia penned the *Burrage* majority opinion,[237] and Justice Gorsuch wrote the *Comcast* majority opinion.[238]

One key idea in textualism is "words matter." Textualism calls for judges to read the words of a statute within the context of the broader statute.[239] Under the causation canon, words often do not matter.

When writing statutes, Congress has used many different words that might be interpreted as causal. For example, in the causation canon cases, the Court has stated that "because of"[240] falls within the canon, as do the words "results from"[241] and "based on."[242] The causation canon can apply even when a statute contains no words that traditionally signify common law cause.[243]

In other contexts, textualist judges will assume that when Congress uses different words it intends different meanings.[244] But, with the causation canon, courts assume that different words mean the same thing.[245] The causation canon suggests that in most circumstances, even though the statutory language is different, the outcome is the same.

The causation canon applies even when Congress chose not to use the words "but for" in the statute and even when Congress chose words that do not mimic common law words for expressing factual cause. It is not clear which words Congress can use to overcome the presumption, and before 2013 or

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235. Popkin describes the process of statutory construction as "moving back and forth between words and other indicia of meaning without preconceived notions about whether the words are clear." Popkin, *supra* note 234, at 594. William Eskridge and Philip Frickey similarly describe the process as "polycentric" and not "linear and purely deductive." Eskridge & Frickey, *supra* note 228, at 348. More recent empirical projects question whether statutory interpretation methodologies properly capture the understanding of Congress. For an example of one such project, see generally Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons* (pts. 1 & 2), 65 STAN. L. REV. 901 (2013) [hereinafter Gluck & Bressman, Part I], 66 STAN. L. REV. 725 (2014) [hereinafter Bressman & Gluck, Part II].

236. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 342 (2013).

237. Burrage v. United States, 571 U.S. 204, 206 (2014).

238. Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1013 (2020).

239. *See* Eskridge, *supra* note 217, at 626–30.

240. *Nassar*, 570 U.S. at 348–51.

241. *Burrage*, 571 U.S. at 214–16.

242. Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 63–64 (2007).

243. *Comcast*, 140 S. Ct. at 1014–15 (noting that the language of Section 1981 is "suggestive" of causation).

244. *See, e.g.*, Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2071–72 (2018).

245. *See supra* notes 240–43 and accompanying text.

perhaps arguably 2020, Congress would not have known to use specific words because no causation canon existed. The canon applies across civil and criminal statutes.

In statutes, words should be interpreted against the backdrop of the entire statute, not through isolated words.[246] Scholars have noted how textualists have often disregarded this maxim, isolating words to restrict the possible meanings that can be gleaned from statutory language.[247]

This isolationist methodology is especially problematic when applying the common law to statutes. Congress is not restricted to expressing factual cause through one or two words, but rather can express factual cause principles throughout the statute. Some statutes have multiple operative provisions, and many statutes contain definitional sections and express defenses or affirmative defenses that limit the reach of the statute.[248] The causation canon erases or diminishes the rest of the statutory regime by focusing on one or two words within the statute. It picks words like "because of" and "based on" and assumes they import "but-for" cause.[249] It applies this default before looking at the entire statute.

In this way, statutes are structurally different than the common law. Common law causes of action express their elements through a limited set of concepts. For example, the elements of a negligence claim are generally expressed through the concepts of breach, duty, causation, and damages.[250] Most statutes do not follow this structure.

Strangely, if the Court adopted the common law of factual cause, this would also challenge another, often unstated, assumption of textualism: that words only have one meaning within a given statutory provision. At common law, words can have multiple meanings, depending on the context. Factual cause doctrine is a good example of this phenomenon. When considering questions of factual cause, courts often change how they articulate factual cause, depending on the facts of the case before them.[251] The term "factual cause" at common law does not invoke one meaning. It invokes a bundle of possible meanings, dependent on the context of the underlying case.

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246. Yates v. United States, 574 U.S. 528, 537 (2015).

247. Victoria Nourse, *Picking and Choosing Text: Lessons for Statutory Interpretation from the Philosophy of Language*, 69 FLA. L. REV. 1409, 1411 (2017) (arguing that textualism often is isolationist); *see also* William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1721–22 (2021) (noting that some judges do not justify their choice of text); Nourse, *supra* note 224, at 668–70 (discussing the characteristics of textualism and explaining a new characteristic in the post-Scalia era).

248. *See, e.g.*, 42 U.S.C. §§ 2000e–2000e-17.

249. *See supra* notes 240–43 and accompanying text.

250. *See, e.g.*, Hirsch v. CSX Transp., Inc., 656 F.3d 359, 362 (6th Cir. 2011); Chickaway v. United States, No. 11-CV-00022, 2012 WL 2222848, at *1 (S.D. Miss. June 14, 2012) (noting the "familiar elements of any negligence claim").

251. *See supra* Part I.

The causation canon fundamentally changes the common law inquiry from a bundle of choices to a stand-alone standard. To the extent textualism, specifically, or statutory interpretation, generally, requires a court to find "one" meaning, it is inconsistent with some portions of the common law.

Additionally, the causation canon is in tension with intentionalism and purposivism to the extent that it abandons a statute-specific approach for a default standard. It strains credulity to believe that Congress intended to adopt one standard of factual cause across federal criminal and civil statutory law and that it did so by using different words. It also is strange to assume that Congress meant to apply a narrow version of common law factual cause to statutes that reject or substantially revise the common law and also to statutes that have broad, remedial purposes.

In fact, for Title VII, when the Supreme Court interpreted the words "because of" to mean "motivating factor," Congress affirmed that choice by later amending the statute to expressly include the standard.[252] For Title VII discrimination claims, Congress did not intend the words "because of" to mean "but-for" cause.

These issues are illustrated well through *Comcast* and *Nassar*. In *Comcast*, the Court applied the canon to a statute that does not contain any common law causal terms and that is a Reconstruction era statute that pre-dated tort law's emergence as a recognized area of law.[253] The Court applied the same assumption to Title VII's retaliation provision in *Nassar*, even though Congress enacted that provision decades later, the provision uses different words, and the provision is part of a larger statutory scheme that rejects large swaths of common law rules related to at-will employment.[254]

B. CANONS OF CONSTRUCTION

To evaluate the factual cause canon, it is helpful to determine how it fits within the current taxonomy of canons. As this Section demonstrates, the causation canon does not fall neatly within the goals commonly articulated for substantive canons.

Canons of construction are a set of background rules and presumptions that courts use, along with other tools, to interpret statutes.[255] These canons are often divided into categories, including textual canons and substantive canons.[256]

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252. 42 U.S.C. § 2000e-2(m).

253. Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1014–15 (2020).

254. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 351–60 (2013).

255. James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 7 (2005). It is worth noting that differences exist between interpretation and construction. *See* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 113 (2010) (discussing substantive canons as canons of construction).

256. *See, e.g.*, Krishnakumar, *supra* note 6, at 833. Textual canons are also called language canons. *Id.* Some scholars divide canons into different categories. *See* William N. Eskridge, Jr. &

Textual canons (also called semantic canons) are rules or presumptions about how to interpret text that are presumably drawn from general ideas about the meaning of language, syntax, grammar conventions, and how words intersect within the broader statutory context.[257] For example, the negative implication canon (*expressio unius est exclusio alterius*) provides that the expression of one thing implies the exclusion of other non-expressed things.[258] As another textual canon example, courts assume that "[t]he verb *to include* introduces examples, not an exhaustive list."[259]

In contrast, "substantive canons reflect judicially-based concerns, grounded in the courts' understanding of how to treat statutory text with reference to judicially perceived constitutional priorities, pre-enactment common law practices, or specific statutorily based policies."[260] One example of a substantive canon includes the rule of lenity, which allows courts to resolve ambiguous criminal statutes in favor of the defendant.[261]

At times, judges use a common law canon when interpreting statutes. The common law canon has been expressed in different ways. William Eskridge and Philip Frickey describe the canon as a "[p]resumption in favor of following common law usage where Congress has employed words or concepts with well settled common law traditions" and note that the canon requires court to "[f]ollow evolving common law unless inconsistent with statutory purposes."[262] Justice Scalia and Bryan Garner describe the canon differently. They call it the "Canon of Imputed Common-Law Meaning."[263] They define the canon as the "age-old principle . . . that words undefined in a statute are to be interpreted and applied according to their common-law meanings."[264] The canon does not apply "[i]f the context makes clear that a statute uses a common-law term with a different meaning."[265]

Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 97–108 (1994); Eskridge, *supra* note 217, at 664–66.

257. Gluck & Bressman, Part I, *supra* note 235, at 924–25; *see also* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1249–51 (2001) (arguing that textual canons should be understood differently when the underlying statute is a super-statute).

258. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107 (2012).

259. *Id.* at 132.

260. Brudney & Ditslear, *supra* note 255, at 13; *see also* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 595–96 (1992) ("[S]ubstantive canons are not policy neutral. They represent value choices by the Court.").

261. Gluck & Bressman, Part I, *supra* note 235, at 924.

262. Eskridge & Frickey, *supra* note 256, at 107.

263. SCALIA & GARNER, *supra* note 258, at 320.

264. *Id.*

265. *Id.* at 321.

It is not clear where the common law canon fits within this overall taxonomy of canons. Some scholars classify it as a substantive canon.[266] Scalia and Garner call it a stabilizing canon.[267] Some scholars place the use of the common law in its own category.[268] Some scholars place the common law within a category called extrinsic source or reference canons.[269] Justice Amy Coney Barrett has noted that "[t]extualists also read statutes against certain background assumptions that function much like substantive canons."[270]

The causation canon most likely belongs under the general heading of a common law canon. I am reluctant to place it under this heading because it does not actually reflect the common law; however, I set that reservation aside briefly. Unfortunately, it is not clear where the common law canons fit within the overall taxonomy of interpretive canons. Some might call the causation canon a substantive canon and others would place it in a different category.

The inability to fit the more general common law canon consistently within the taxonomy of statutory interpretation is theoretically problematic. When scholars are discussing certain categories of canons, it is not clear whether they intend to include the common law canon. For example, if a scholar is defending or critiquing substantive canons generally, it is unclear whether the common law canon belongs within the category of substantive canons. Where the common law canon fits within the larger taxonomy is important because courts and scholars often defend different types of canons using different arguments.

There is an immense scholarly literature examining canons of construction generally and substantive canons specifically.[271] Despite this literature, the canons remain undertheorized.[272]

Defenders of canons justify them on numerous grounds, four of which are particularly important to this discussion: conventional meaning, longevity,

266. *See* Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71, 82 (2018); James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 CALIF. L. REV. 1199, 1205 (2010).

267. SCALIA & GARNER, *supra* note 258, at 320.

268. Krishnakumar, *supra* note 6, at 850–51 (noting use of common law separate from substantive canons); *see also* Mendelson, *supra* note 266, at 99–105 (noting differences on how common law is coded in empirical work); James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L.J. 1231, 1249 (2009) (listing common law as one of the various sources relied on by courts).

269. *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 123 (2010).

270. *Id.*

271. For examples of some of this literature, see generally Krishnakumar, *supra* note 6; Mendelson, *supra* note 266; Gluck & Bressman, Part I, *supra* note 235; Barrett, *supra* note 269; and Brudney, *supra* note 266.

272. Gluck & Bressman, Part I, *supra* note 235, at 924–25.

predictability, and gap-filling.[273] Some scholars and jurists justify canons as simply reflecting the conventional meaning of a word or concept or a long-accepted meaning. Under the conventional meaning rationale, substantive canons serve as "background norms" and "are simply tools of faithful agency, which facilitate an interpretation of text as such text is conventionally understood."[274] Scalia and Garner extol canons as "presumptions about what an intelligently produced text conveys."[275]

Some accounts of substantive canons assume they are valid because they represent "a closed set of background assumptions justified by their sheer longevity."[276]

Some argue that substantive canons make the interpretive process "more predictable for both Congress and litigants."[277] "When canons are articulated in advance and consistently applied, they give Congress clear guidance about how to accomplish its legislative goals and the likely consequences of different statutory alternatives."[278] Scalia and Garner argue that canons promote clearer drafting.[279]

The canons may also serve a gap-filling function. They direct the Court when Congress has intentionally or unintentionally left a gap in a statute or when Congress has explicitly or implicitly delegated authority to the courts to fill in missing details.[280]

There is a significant literature criticizing whether substantive canons effectuate conventional meaning and whether they create predictable outcomes. This literature explicitly recognizes that statutory canons often do not represent legislative preferences and are often implemented to further judicial preferences.[281] Both inside the statutory interpretation scholarship and in other fields, legal scholars question whether legal texts

273. *See id.* at 925–30 (summarizing the literature); Barrett, *supra* note 269, at 176–77 (arguing that some substantive canons reflect constitutional concerns). The causation canon does not reflect constitutional concerns. Additionally, scholars have justified the substantive canons as an escape valve to avoid absurd results that might otherwise result from textualism. *But see* Krishnakumar, *supra* note 6, at 826–32 (contesting this idea). This rationale also does not apply to the causation canon.

274. Jonathan H. Choi, *The Substantive Canons of Tax Law*, 72 STAN. L. REV. 195, 231–32 (2020).

275. SCALIA & GARNER, *supra* note 258, at 51.

276. Barrett, *supra* note 269, at 111 (noting this justification although not advocating it).

277. Michael T. Morley, Essay, *The Disparate Impact Canon*, 166 U. PA. L. REV. ONLINE 249, 256 (2017); *see also* Eskridge & Frickey, *supra* note 256, at 67 (explaining that canons can serve a coordinating function to aid in predictability).

278. Morley, *supra* note 277, at 256. *But see* Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 577–78 (2002) (demonstrating that legislative drafting process is not fully consistent with court claims related to that process).

279. SCALIA & GARNER, *supra* note 258, at 51.

280. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 421 (1989).

281. Krishnakumar, *supra* note 6, at 880; Eskridge & Frickey, *supra* note 260, at 595–96.

can ever be interpreted divorced from other value judgments.[282] Then Professor, now Justice, Barrett has noted that "it is generally recognized that substantive canons advance policies independent of those expressed in the statute."[283]

Canons often do not lead to predictable outcomes. For some canons, there are counter-canons that suggest different outcomes depending on whether the court chooses to apply the canon or the counter-canon.[284]

Additionally, "[s]cholars have pointed out that substantive canons are countermajoritarian, subject to judicial invention and reinvention, and difficult for Congress to overcome."[285] Professor Krishnakumar has also questioned whether the conventional, scholarly account of substantive canons reflects how courts create and use the canons.[286]

As shown throughout this Article, the causation canon cannot be justified on grounds of conventional meaning or longevity. The causation canon did not exist until 2013.[287] In the 1980s and continuing into the aughts and teens, the Court did not use or recognize the causation canon, even though such a canon clearly would have been useful in resolving *Price Waterhouse* and *Gross*, among other cases.[288] Even in 2012, the Supreme Court decided a factual cause issue without reference to any canon and without adopting "but-for" cause.[289] The Court did not use the canon, because it simply did not exist.

Indeed, in case after case, the Supreme Court had previously treated the factual cause inquiry as a statutory specific inquiry.[290] For each statute, the Court considered which party had the burden of proving factual cause and what the substantive standard should be.[291] It often considered these questions to be separate from one another. Additionally, in multiple cases, the Supreme Court articulated a test that was not consistent with the common law.[292]

What is especially troublesome about the causation canon is the lengths the Supreme Court goes to hide its non-existent pedigree. Even a cursory review of Supreme Court cases from the past forty years reveals that the

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282. *See, e.g.*, Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867, 870–71 (2018); Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2244 (2017); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 207–09 (1993).

283. Barrett, *supra* note 269, at 110.

284. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950).

285. Krishnakumar, *supra* note 6, at 827–28.

286. *Id.* at 829.

287. *See supra* Part III.

288. *See supra* Part II.

289. *See* Pac. Operators Offshore, LLP v. Valladolid, 565 U.S. 207, 221–22 (2012).

290. *See supra* Part II.

291. *See supra* notes 67–81 and accompanying text.

292. *See Pac. Operators Offshore*, 565 U.S. at 221–22.

causation canon did not exist until recently.[293] Nonetheless, the Court in *Comcast* described its new canon as "ancient" and "'textbook tort law'" when it is neither of those things.[294]

The causation canon does not reflect the conventional meaning of factual cause within tort law. Tort law recognizes some circumstances in which the plaintiff is required to prove "but-for" cause and several instances in which either the plaintiff is not required to fully prove the causal standard and/or the standard is not "but-for" cause. Tort law retains flexibility to align the factual cause standard given the facts of the case and the demands of broader issues, like fairness.

More importantly, the causation canon raises significant questions about what conventional meaning Congress is trying to convey in statutes. Many statutes do not use tort-like causal language, such as "but-for" cause, factual cause, or even cause. Instead, statutes often use words such as "because of" or "results in." If Congress intended to invoke tort causation, it could use more specific words from tort law. It would be quite easy for Congress to include statutory language indicating that the plaintiff is required to establish "but-for" cause.

Nor does the causation canon represent ordinary meaning outside of the law. Professor James Macleod has shown that lay readers do not view factual cause inquiries through the "but-for" cause framework.[295]

The fact that the causation canon is not long-lived and does not represent conventional meaning makes the causation canon highly susceptible to the charge that the Supreme Court is hiding the preferences it is enacting by disguising them as a canon. Further, it is not correct to suggest that Congress was legislating against the backdrop of the causation canon, at least prior to 2013. No such canon existed.

It might be argued that the causation canon created predictability. It at least starts the conversation with a default principle. However, it is not clear when the Supreme Court will apply the canon and when it will choose not to do so. Additionally, there is robust precedent that does not apply the causation canon. Courts will have the complicated tasks of sorting out whether the factual cause canon or precedent applies in future cases.

Additionally, there is a canon of construction that a statute supersedes the common law when the statute is not consistent with the common law "and when a statute is designed as a revision of a whole body of law applicable to a given subject."[296] As most statutes supersede the common law in some respects, it is not always clear which canon should govern when interpreting statutes, the causation canon or this more general common law canon.

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293. *See supra* Part II.

294. Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1014 (2020).

295. Macleod, *supra* note 35, at 966–74.

296. Llewellyn, *supra* note 284, at 401.

There also is a canon directing courts to broadly construe remedial statutes.[297] At times, the common law yields a narrower version of a cause of action than the statutory text otherwise would allow. In these instances, it is not clear which interpretation should govern: the broader, remedial interpretation or the outcome suggested by the causation canon.

The causation canon also affects federal criminal law. In that context, it is not clear how courts should interpret a statute when the statutory language is not facially clear. Should the court resort to the common law or should the rule of lenity require that the court interpret the statute in a way that favors the criminal defendant? At times, these two canons will conflict.

The causation canon may serve a gap-filling function. It is highly unlikely that in many instances Congress contemplated precise legal causation language, except when specifically prompted to do so. If we were to go back in a time machine and ask Congress what it intended for causal language, it likely meant some looser causal inquiry that is more consistent with how non-lawyers think about causation. The judiciary may believe that the adjudication of legal claims requires a more exacting causal standard than that anticipated by Congress.

If this is the case, it raises significant questions related to the judiciary's role in factual cause. The judiciary would be adopting a factual cause standard based on its own need to adjudicate cases. The courts may be imposing litigation-based causation frames that are counter to the operation of the statute. Outside of litigation, a looser causal standard may better capture the intent of Congress and the broader goals of at least some statutes. Indeed, many civil statutes are not designed primarily for litigation. Instead, they are meant to guide primary behavior and most often operate outside the context of litigation.

The federal discrimination statutes operate in this way. Take Title VII as an example. Most of the effects of Title VII occur outside of litigation, as employers and workers implement its non-discrimination tenets. Although litigation plays only a small role in the overall function of Title VII, the courts only experience Title VII through litigation. It seems incongruent that when interpreting statutes such as these that Congress would choose litigation-specific constructs.

If the judiciary believes it needs to define causation in a more exacting way for litigation purposes, this raises significant questions about the power of the courts and about whether the courts are using the text of the statutes to derive statutory meaning.

Even if the courts believe they need a legal definition of factual cause, it is not clear why the default standard should be "but-for" cause. In the Title VII context, when Congress specifically considered the factual cause question,

297. *See, e.g.*, Tcherepnin v. Knight, 389 U.S. 332, 336 (1967).

it chose a motivating factor standard.[298] And, Congress could have easily used the words "but-for" cause, if it intended this standard. It also is unclear why the bundle of standards provided in the common law is not the more appropriate gap-filler. If Congress was legislating against the backdrop of the common law, the backdrop would have been the bundle, not the stand-alone "but-for" standard.

Additionally, for many statutes it is not even clear that common law factual cause should serve as the gap-filler. The causation canon ignores the changing relationship between statutes and the common law that has been noted for more than one-hundred years.[299] Many statutes expressly abrogate common law understandings of legal rights and obligations, generally. Some statutes radically upset traditional common law duties.[300] For modern statutes, it is no longer fair to assume that they are derived from the common law or that common law concepts should fill statutory gaps.

Even larger questions arise when Congress has given rule-making authority to a federal agency related to the statute. If a factual cause term exists in that statute, but the term is not clear, courts should determine whether an agency has spoken on the issue, at least in some circumstances. Under the *Chevron* doctrine, courts will defer to an agency's construction of a statute when the underlying statutory regime is silent or ambiguous regarding the particular question, when the agency's interpretation is permissible, and when Congress has granted authority to the agency to interpret the statute.[301] The causation canon is powerful to the extent that it makes the *Chevron* inquiry unnecessary as the court can simply indicate that the statutory language is clear in using a common law definition. In some circumstances, the causation canon represents a significant exercise of power by the judicial branch over the executive branch.

The factual cause canon cannot be justified based on longevity or conventional meaning. It is not clear whether the canon will lead to predictable results and whether it properly serves as a gap-filling device. These problems alone merit serious consideration whether the Court should continue to apply the causation canon or quietly abandon it. For scholars, important questions remain about whether and how the more general common law canon and the specific causation canon fit within the overall taxonomy of statutory interpretation.

C. *FEDERAL COMMON LAW*

The causation canon requires further scrutiny because it enshrines a federal common law through the vehicle of statutory interpretation. It represents

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298. 42 U.S.C. § 2000e-2(m).

299. Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 387 (1908).

300. *See, e.g.*, Family and Medical Leave Act, 29 U.S.C. § 2601 (2018); 42 U.S.C. § 2000e.

301. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984); Skidmore v. Swift & Co., 323 U.S. 134, 136–38 (1944); GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 5 (1982).

an extraordinary use of court power, and one that is highly suspect given the way the Court is willing to ignore its own precedent to claim the canon's pedigree. The causation canon calls into question how much power courts can properly claim when creating canons that purport to rely on specific common law principles.

While legal scholarship has explored the relationship between statutes and the common law generally,[302] using the common law within canons of constructions has received no sustained attention. There is a difference between using the common law as one potential source of statutory meaning and using the common law as a default canon of construction across statutes. There is also a difference between adopting the common law or modifying it for a specific statute and creating a new common law that is not consistent with the common law and then applying that new standard across statutes.

We need a map of the ways courts are invoking the common law when interpreting statutes.[303] The causation canon presents an especially compelling reason for this larger project. With the causation canon, the Court feels comfortable claiming to adopt the common law when tort law and the Court's own precedent demonstrate the Court is not adopting the common law. The Court is abandoning statutory-specific use of the common law and embracing a default standard. This default standard applies across civil and criminal law. The Court is creating a federal common law through a canon.[304]

I suspect that other uses of the common law are working in similar ways. It would be the work of a lifetime to interrogate all of the ways courts are invoking the common law in the context of statutes. I argue that a cadre of scholars should engage this question.

This project calls for a different way of thinking about the common law canon. The common law canon is not controversial in the abstract because, in some circumstances, it is appropriate to use the common law to interpret statutes. However, the common law canon is not a single, undifferentiated canon. There is not just one common law canon, but a host of common law canons, each with different levels of specificity and that operate in different ways.

All of the ways of using the common law do not operate on a similar footing, and some are likely to be more legitimate uses of power than others.

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302. *See, e.g.*, WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 45, 67 (1999); CALABRESI, *supra* note 301, at 5; Mark A. Geistfeld, *Tort Law in the Age of Statutes*, 99 IOWA L. REV. 957, 960 (2014); Jeffrey A. Pojanowski, *Private Law in the Gaps*, 82 FORDHAM L. REV. 1689, 1691 (2014); Caleb Nelson, *State and Federal Models of the Interaction Between Statutes and Unwritten Law*, 80 U. CHI. L. REV. 657, 750 (2013); Pound, *supra* note 299, at 383–84.

303. Professor Anita Krishnakumar's forthcoming paper appears to start this larger project. Anita Krishnakumar, *The Common Law as Statutory Backdrop*, 136 HARV. L. REV. (forthcoming 2023).

304. The Court has frequently textualized its own precedent. Lawrence M. Solan, *Precedent in Statutory Interpretation*, 94 N.C. L. REV. 1165, 1216 (2016). However, the causation canon is different because the Court is selecting a narrow portion of its precedent and textualizing it through a canon.

In some statutes, Congress explicitly or implicitly encouraged either the use of the common law generally, the use of specific common law concepts, or a common law methodology.[305]

The causation canon is a particularly robust common law canon because it purports to adopt a default rule across statutes, even those that use different words and even those that do not derive from the common law.

Fortunately, the causation canon is still in its infancy, which means that it is weak and subject to revision. It is a baby canon. Given the substantive and theoretical problems with the canon, the better course is to abandon the canon in its infancy.[306] The causation canon creates a new federal common law and applies that new common law under the guise of statutory interpretation.

However, abandoning the causation canon is not enough. The mechanism of enshrining a unique federal common law through a statutory canon merits serious attention. We need to understand how often this is happening and whether it fits within existing accounts of statutory interpretation theory and practice. While "[i]nterpretive approaches wax and wane [and] particular rules rise and recede,"[307] having a complete account of how specific common law doctrines intersect with statutory canons is a worthy project.

This descriptive project will allow scholars and judges to better understand the appropriate limits of common law "canonization," the process by which courts change specific common law doctrines into statutory canons.

CONCLUSION

In the past decade, the Supreme Court created a new canon—the causation canon. When a statute uses any causal language, the Court will assume that Congress meant to require the plaintiff to establish "but-for" cause.

The birth of a new canon is an important legal development. This new canon deserves particular attention because the Supreme Court claimed it represents "ancient" and "long-held" principles of common law, even though the canon did not exist before 2013. The canon does not represent the common law. Instead, the Court created its own new federal causation standard that is not consistent with any state's common law or even the *Restatement of Torts*. The Court significantly changed the common law and then magnified the significance of the change by imposing it as a default statutory interpretation canon that will apply across both civil and criminal federal statutes.

The timing of the factual cause canon is especially curious. The canon emerged when most statutes are no longer perceived as being extensions of the common law. The factual cause canon should be perceived as an exercise

305. *See* Hillel Y. Levin & Michael L. Wells, *Qualified Immunity and Statutory Interpretation: A Response to William Baude*, 9 CALIF. L. REV. ONLINE 40, 46–48 (2018).

306. *See generally* Aaron-Andrew P. Bruhl, *Communicating the Canons: How Lower Courts React When the Supreme Court Changes the Rules of Statutory Interpretation*, 100 MINN. L. REV. 481 (2015) (discussing qualities that affect whether trial and appellate courts adopt certain canons).

307. *Id.* at 494–95.

in judicial power, elevating judge-made law over statutory text. That avowed textualists are making this move, makes it even more interesting as this new canon is in tension with textualist claims about statutory interpretation and with claims about substantive canons, specifically.

At the same time, the canon reveals significant gaps in the legal scholarship related to the common law in the statutory interpretation context. The causation canon is still in its infancy. Given the significant substantive and theoretical problems it raises, it is worth considering whether the Court should abandon it.