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Causation Actually ..... *J. Shahar Dillbary* 1

This Article debunks the consensus that in concerted action, concurrent causes, and alternative liability situations, the actual causation requirement is always missing. While courts and scholars insist that in these cases tort law holds liable parties who clearly did not cause the victim's harm, this Article offers a novel approach. Using a simple model and applying it to leading decisions, this Article shows that a party who did not *and* could not *even potentially injure the victim could nevertheless be a but-for reason for the harm. The Article also challenges claims that causation theories like concerted action, substantial factor and alternative liability are fair to the victim or that they are designed to deter actors from engaging in "antisocial" activities. In deviation from the prior literature, this Article reveals that these causation theories reduce the parties' incentives to take care and result in more, rather than fewer, accidents. This Article further shows that, despite lip service to the contrary, tort law promotes harmful activities that judges declare immoral, antisocial and illegal. This Article argues, however, that in many cases this result can be justified on efficiency grounds. The Article concludes that the but-for test should have a larger role in causation analysis and it provides a number of policy recommendations to courts and lawmakers.*

Privileging Professional Insider Trading ..... *Sarah Baumgartel* 71

This Article explores insider trading law's increasing focus on personal relationships, and the way in which the law has come to privilege professional over nonprofessional insider trading. The Article discusses how, in an effort to expand insider trading liability, the government has sought to impose legal duties of loyalty and confidentiality on a host of personal relationships not

otherwise subject to law—effectively basing civil and criminal penalties on "corruption" in purely personal relationships. At the same time, courts have adopted a business property rationale regarding the use of nonpublic information and declined to prevent companies from disclosing valuable nonpublic information to select market professionals, who may then lawfully trade. The current legal framework thus permits trading on tips by professional investors, while penalizing this same trading by others. This problem is demonstrated by the divergent outcomes in United States v. Newman *and* Salman v. United States. *After* Newman *and* Salman, *personal relationships are likely to be an increasing focus of enforcement. Because of the disparate treatment of trading on tips by professional versus nonprofessional traders, however, this focus does little to advance overall market fairness.*

Talking Textualism, Practicing Pragmatism:
Rethinking the Supreme Court's Approach to
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The Supreme Court's general approach to statutory interpretation is analytically incoherent. On the one hand, the Court has expressly endorsed "textualism": enforcing the plain meaning (i.e., ordinary usage) of a statute's words, and therefore refusing to consider non-textual evidence unless the language is unclear. On the other hand, the Court has implicitly applied "pragmatism"—reaching the best practical result after examining not only a statute's text but also Congress's intent (as revealed by legislative history), its overall purposes, precedent, and policy.

The two cases upholding the Affordable Care Act (ACA) illustrate this practice of purporting to follow textualism, but then finding seemingly clear words to be ambiguous and consulting a variety of sources to resolve the manufactured ambiguity. First, in King, *Justice Scalia made the unassailable textual argument that an ACA provision granting tax credits to those who purchase insurance on a Benefit Exchange established by "State" meant exactly what it said: one of America's fifty governments. A majority of Justices, however, asserted that "State" was unclear and could be read as also*

extending to the Federal Government. The Court adopted this broader interpretation based on its practical judgment that denying tax credits in the thirty-four States that had Federal Exchanges would cause millions of Americans to forego buying health insurance, which would frustrate the ACA's main purpose and potentially plunge insurance markets into chaos. This construction is defensible as an application of pragmatism, but not the textualist method the Court claimed to be employing.

Second, National Federation *concerned the ACA "penalty" for violating the individual mandate to purchase health insurance, which Congress had explicitly enacted under its Article I power to regulate interstate commerce—and not its taxing power. Four dissenting Justices applied textualism to conclude that Congress had imposed a "penalty," which has long had a single definition: "a monetary punishment for violating a regulatory law." Because the dissenters and Chief Justice Roberts agreed that Congress lacked power under the Commerce Clause to regulate inactivity (penalizing the failure to buy health insurance), the mandate should have been declared unconstitutional. Unexpectedly, however, Roberts joined his four liberal colleagues in maintaining that the term "penalty" was ambiguous and could possibly mean "tax"—a word that had always previously been defined as "an enforced contribution to support the government" and distinguished from a "penalty." This bizarre interpretation enabled the Court to reach its desired practical result of salvaging the mandate under Congress's constitutional power to tax.*

To compound the confusion, the Justices routinely invoke many specific "canons" of construction, which feature malleable standards that can easily be manipulated. For instance, in National Federation, *the Court cited the canon that statutes should be read, where reasonable, to avoid constitutional issues in order to rationalize its tortured interpretation of "penalty" as "tax."*

King *and* National Federation *are merely the most notable examples of a pervasive problem: unbridled discretion in construing statutes. Unfortunately, the Court has little practical incentive to change because (1) most statutes are of interest only to a small group, (2) Americans pay little attention to statutory interpretation,*

and (3) even unpopular individual rulings do not affect the public's overall high opinion of the Court. Nonetheless, respect for the rule of law and intellectual integrity should induce the Court to develop a more principled jurisprudence. The optimal solution would be for the Court to adopt and apply textualism as its basic interpretive approach, to clearly acknowledge when exceptional circumstances pragmatically persuade it to depart from that approach, and to deemphasize canons of construction.

NOTES

A Most Precious Right: Equal Protection, Voter Photo Identification, and the Battle Brewing in Texas ..... *Emily Vincent Cox* 235

On a Tuesday in November, millions of Americans show up and cast their votes, even in the face of cynicism, perceived futility, and disappointment with the politicians in Washington. It is the birthright of every citizen, and there is simply nothing more fundamentally American. The future of this right is now uncertain in the wake of the United States Supreme Court decisions Crawford *and* Shelby County. *This Note suggests finding certainty by re-framing the current test for the constitutionality of state voting restrictions, the* Anderson-Burdick *Balancing Test. This new imagining of the current test hinges on identifying the nature of the burden being placed on voters by the state restriction. Instead of a one-size-fits-all test, courts would choose between two standards—*Anderson *or* Burdick. *This Note explores this new iteration of the test through a case study of the interaction of several Texas state laws and policies that could lead to the disenfranchisement of thousands of United States citizens simply because they were born to undocumented immigrants.*

Cybersecurity on My Mind: Protecting Georgia Consumers from Data Breaches ..... *Maggie Lynn McMichael* 265

In a world where vast amounts of personal information are obtained and stored by countless organizations and businesses in the public and private sector, data breaches,

due to negligence or nefarious hacking, are a far too common occurrence. The results of a data breach can be serious and widespread, from public humiliation to identity theft and national security crises. In an effort to protect consumers from the potentially devastating effects of data breaches, the Federal Trade Commission has begun to take enforcement action against businesses whose data security practices are alleged to be unfair and deceptive. Theoretically, states can take similar actions under their "Little FTC Acts" or data breach notification laws.

This Note argues that Georgia's "Little FTC Act," the Fair Business Practices Act, and data breach notification law, the Georgia Personal Identity Protection Act, provide insufficient protection from data breaches for Georgia consumers and insufficient recourse for those harmed by breaches. This Note also proposes several changes in Georgia's statutory scheme that would incentivize organizations to implement stronger data security measures and provide better remedies for injured consumers.

Let My People Grow: Putting A Number on Strict Scrutiny in the Wake of *Holt v. Hobbs* ..... *Dana Anne Schwartzenfeld* 297

Beards have always played an important role in human society, especially in the religious context. One man's beard even got him in front of the United States Supreme Court. In Holt v. Hobbs, *the Court decided that a prisoner had a constitutional right to grow a one-half-inch beard for religious purposes. In making the decision, the Court made clear that the prisoner's religious interest far outweighed any security threat that such a short beard could pose to the prison. The Court declined to go any further, however, in clarifying the beard length at which the scales would begin to tip in favor of the prison's security interests. Is a one-inch-long beard permissible? What about two? This Note makes the case that this decision has left confusion among state legislatures, lower courts, and prison officials. It analyses possible solutions the Court could adopt, which include a case-by-case method, a categorical method, and a bright line rule method. It then argues that a bright line rule for*

permissible religious beard length should be adopted in order to avoid confusion among lower courts in the wake of this decision. It also examines the broader implications of drawing arbitrary lines to govern matters of fundamental rights that receive strict scrutiny analysis.

Poached Eggs: The Misclassification of Egg Donors as Independent Contractors and How Egg Donors Can Contribute to the Argument for A New Category of Worker—The Dependent Contractor ..... *Carol Louise Williamson* 327

As the growth in demand for egg donors is met with an increasing number of women willing to supply their eggs, changes need to be made to the way egg donors, and other similarly situated workers, are classified in the employment context. Most donor contracts are employer-created forms that designate the donors as independent contractors and thus spare the clinic the duty of providing employment benefits. Unlike other on-demand service providers, such as Uber-drivers, that have recently sought re-classification as employees, women who donate eggs are subject to physically invasive procedures and long-term health risks that particularly obviate the need for the protections granted employees. This Note begins by using the current tests available to employers in determining worker classification to show that even under the current framework, egg donors are employees. Further, this Note uses the unique platform of egg donors, women who provide an important short-term service at the cost of long-term health risks, to push for a change in the current classification system. Specifically, it suggests the creation of a new category—the dependent contractor—to accommodate the growing on-demand workforce while not crippling the business models that allow for the on-demand company's survival.

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