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ABOUT THE SEVENTH CIRCUIT REVIEW

Purpose

The SEVENTH CIRCUIT REVIEW is a semiannual, online journal dedicated to the analysis of recent opinions published by the United States Court of Appeals for the Seventh Circuit. The SEVENTH CIRCUIT REVIEW seeks to keep the legal community abreast of developments and trends within the Seventh Circuit and their impact on contemporary jurisprudence. The articles appearing within the SEVENTH CIRCUIT REVIEW are written and edited by Chicago-Kent College of Law students enrolled in the SEVENTH CIRCUIT REVIEW Honors Seminar.

The SEVENTH CIRCUIT REVIEW Honors Seminar

In this seminar, students author, edit, and publish the SEVENTH CIRCUIT REVIEW. The REVIEW is entirely student written and edited. During each semester, students identify cases recently decided by the Seventh Circuit to be included in the REVIEW, prepare initial drafts of case comments or case notes based on in-depth analysis of the identified cases and background research, edit these drafts, prepare final, publishable articles, integrate the individual articles into the online journal, and "defend" their case analysis at a semester-end roundtable. Each seminar student is an editor of the REVIEW and responsible for extensive editing of other articles. Substantial assistance is provided by the seminar teaching assistant, who acts as the executive editor.
The areas of case law that will be covered in each journal issue will vary, depending on those areas of law represented in the court's recently published opinions, and may include:

- Americans with Disabilities Act
- antitrust
- bankruptcy
- civil procedure
- civil rights
- constitutional law
- copyright
- corporations
- criminal law and procedure
- environmental
- ERISA
- employment law
- evidence
- immigration
- insurance
- products liability
- public welfare
- securities

This is an honors seminar. To enroll, students must meet one of the following criteria: (1) cumulative GPA in previous legal writing courses of 3.5 and class rank at the time of registration within top 50% of class, (2) recommendation of Legal Writing 1 and 2 professor and/or Legal Writing 4 professor, (3) Law Review membership, (4) Moot Court Honor Society membership, or (5) approval of the course instructor.
THE MONOPOLY GAME:
HAS THE SEVENTH CIRCUIT GIVEN PATENT
HOLDERS A GET OUT OF JAIL FREE CARD?

Erin Conway*


INTRODUCTION

It is not uncommon for a court to find itself at the crossroads of two conflicting, yet equally controlling laws.1 In instances such as this, how does a court determine which set of laws should dictate the outcome of the case? The intersection of the patent and antitrust laws, while not a new conflict, has recently attracted a significant amount of

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1 Even just within the realm of intellectual property, there are a plethora of conflicts. For example, in Oliveira v. Frito-Lay, Inc., the Second Circuit grappled with whether Astrud Giberto could enjoin Frito-Lay under the trademark laws from using her signature song, “The Girl From Ipanema,” in one of its commercials. 251 F.3d 56 (2d Cir. 2001). The court held that because songs are traditionally protected under the copyright laws, this created a conflict with her present action. While neither set of laws discussed what to do in such a situation, the court looked to the underlying purpose of each Act. The court noted that copyrights can only be granted for a limited amount of time, and once that time expires, the work goes into the public domain. Because trademarks offer perpetual rights, it would go directly against this principle of the Copyright Act to give Giberto trademark protection.
attention. This conflict arose from the traditional view that intellectual property rights regimes, which seek to stimulate innovation by granting limited monopolies, and the antitrust laws, which seek to protect competition by eliminating monopolies, were inherently contradictory. Today, however, most commentators view the antitrust and intellectual property laws as complementary, both seeking to protect consumers, yet, admittedly by taking different paths.

Unfortunately unifying patent policy with antitrust principles in order to effectuate this mantra has been difficult, in major part, because neither the Patent Act, nor the Sherman Act sets distinct boundaries or defines in any meaningful way how these two bodies of law are to be reconciled. What’s more, when faced with alleged antitrust violations by holders of intellectual property rights, the approaches taken by the various Federal Circuit courts run the gamut.

In a case of first impression in the United States Court of Appeals for the Seventh Circuit, Schor v. Abbot Laboratories revealed this inherent tension between the antitrust and patent laws. There, the court was charged with determining what, if any, liability a patent holder is subject to under the antitrust laws. Specifically, the court asked whether a patent holder may be liable for using its patent to exclude others from, or to affect competition in, more than one relevant market. In the end, the approach taken by the Seventh Circuit harms the ultimate beneficiary of both sets of laws—the consumer—by severely curtailing the antitrust laws at the hands of the patent laws.

Part I of this Comment outlines the basic principles underlying both the patent and the antitrust laws and describes the inherent tension between them. Part II discusses relevant cases in the antitrust-

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3 Id.
4 Id.
5 The notable exceptions are §§ 271(c) and (d) of the Patent Act. 35 U.S.C. § 271(c), (d) (2002).
6 See discussion in Part II, infra.
7 Schor v. Abbott Labs (“Abbott II”), 457 F. 3d 608 (7th Cir. 2006).
intellectual property conflict, including a recent Supreme Court case, *Eastman Kodak, Co. v. Image Technical Services, Inc.*[^8] and interpretations of the Court’s holding by the First, Ninth and Federal Circuits. These cases will shed light on the path that the Seventh Circuit should have taken. Part III delves into the facts of *Schor v. Abbott Labs*, a case that specifically dealt with the scope of intellectual property rights in light of an alleged antitrust violation. Lastly, Part IV contends that by following the lead of the Federal Circuit in rejecting the Ninth Circuit’s approach, the Seventh Circuit severely undercut competition by elevating the patent laws over the antitrust laws. Part IV further contends that the Seventh Circuit should have followed the approach of the Ninth Circuit, which properly addresses the policy concerns underlying each set of laws by raising a rebuttable presumption that a patent holder has a valid business justification in exercising its statutory-granted proprietary rights.

I. INTRODUCTION TO THE PATENT AND ANTITRUST LAWS AND THE TENSION THAT EXISTS BETWEEN THEM

A. Underlying Principles of the Antitrust Laws

In their simplest form, antitrust laws are intended to ensure that markets remain competitive. This is desirable in that freely operating competitive markets result in the most efficient allocation of a nation’s resources and bring consumers the widest variety of choices, the highest quality goods and services, and the lowest possible prices.[^9] While the traditional rationale underlying antitrust laws had both social and economic justifications, more recently, the promotion of consumer welfare has become the sole guiding principle.[^10]

To effectuate this goal of protecting consumer welfare, the antitrust laws proscribe certain types of anticompetitive conduct. Not

[^10]: Balto & Wolman, *supra* note 2, at 398.
all conduct that hurts competitors is anticompetitive or a violation of the antitrust laws.\textsuperscript{11} Thus, the main focus of the antitrust inquiry is to determine whether the conduct under scrutiny is likely to harm consumers, for example by raising prices or restricting production of goods or services.\textsuperscript{12} Two of the main statutory provisions defining conduct that is unlawful under the antitrust laws are §§ 1 and 2 of the Sherman Antitrust Act.\textsuperscript{13} Generally, § 1 of the Sherman Act proscribes agreements among competitors that interfere with the ability of firms to enter markets, introduce new products or price their products.\textsuperscript{14} On the other hand, § 2, which will be the main focus of this Comment, has the prohibition of monopolization as its prime concern.\textsuperscript{15}

In \textit{United States v. Grinnell Corp.},\textsuperscript{16} the Supreme Court of the United States defined monopolization under § 2 of the Sherman Act as having two main elements: (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic


\textsuperscript{12} Balto & Wolman, \textit{supra} note 2, at 403.

\textsuperscript{13} 15 U.S.C. §§ 1, 2 (2000). This Comment will mainly focus on the Sherman Act, in particular § 2, but § 7 of the Clayton Act (proscribing stock and asset acquisitions), § 3 of the Clayton Act (prohibiting certain forms of tying and exclusive dealing) and § 5 of the Federal Trade Commission Act (prohibiting unfair methods of competition) also come into play in the intellectual property context.

\textsuperscript{14} Section 1 of the Sherman Act provides: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”

\textsuperscript{15} Section 2 of the Sherman Act provides: “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishment, in the discretion of the court.”

accident. The language of §2 makes it clear that a monopoly itself is not illegal. Rather, the offense of monopolization contemplates some sort of anticompetitive or exclusionary conduct. Thus, the limitations of §2 take into account that it cannot merely forbid all monopolies, such as those that result from natural economic conditions, vigorous competition on the merits, or technological innovation, but only those that were acquired or maintained by means other than normal competition.

The first element of a § 2 monopolization claim requires a court to define the relevant antitrust market. Without a definition of the relevant market, “there is no way to measure a defendant's ability to lessen or destroy competition.” Yet, because defining the relevant market requires “a factual inquiry into the ‘commercial realities’ faced by consumers” it is not an easy undertaking. In defining the relevant market, the courts have examined whether consumers using one product will easily shift to another product, should, for example, the price of the product they are using increase or the price of other comparable products decrease.

Once the court has established the parameters within which the alleged monopolist’s power can be evaluated, it must determine what

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17 15 U.S.C. § 2; Grinnell, 384 U.S. at 570-71. A claim of attempted monopoly under § 2 requires: (a) the intent to monopolize a relevant market, (b) predatory conduct in pursuit of that end, (c) a dangerous probability of success, and (d) causal “antitrust” injury. Transamerica Computer Co. v. IBM Corp., 698 F.2d 1377, 1382 (9th Cir. 1983).

18 HOVENKAMP, supra note 9, at 10-2, 10-3.

19 Essentially, this means that the court must determine what subset of all of the goods or services the defendant is in competition with and in what geographic area. A relevant market can be as small as a single brand of a product or service. Eastman Kodak Co. v. Image Technical Servs., Inc. ("Kodak I"), 504 U.S. 451, 481-82 (1992).

20 Photovest Corp. v. Fotomat Corp., 606 F.2d 704 (7th Cir. 1979), cert. denied 445 U.S. 917 (1980) (stating a definition of relevant market is essential to assessing the alleged offender’s power over competition).

21 Kodak I, 504 U.S. at 482 (quoting Grinnell, 384 U.S. at 572).
share of that market is controlled by the alleged offender.22 In calculating a firm’s market share, in order to determine whether it has monopoly power, the court must determine what percentage of the total output in the market is sold by the defendant.23 One indicia of monopoly power includes a firm’s “power to control prices or exclude competition.”24 Notably, the Supreme Court held in Illinois Tool Works, Inc. v. Independent Ink, Inc. that a patent does not necessarily confer monopoly power in the relevant market.25

The acquisition or maintenance of monopoly power in itself is not necessarily an actionable offense under the Sherman Act.26 Therefore,

22 Because of the importance of the definition of relevant markets to the outcome of a monopolization or attempt to monopolize case, the plaintiff in such cases will inevitably attempt to establish the narrowest market definitions possible, while the defendant will attempt to establish the broadest possible market definitions. See, e.g., Int’l Boxing Club of N.Y., Inc. v. United States, 358 U.S. 242 (1959) (defendants argued that the relevant market was all professional boxing events, while the plaintiff successfully argued that the relevant market should be limited to championship boxing matches).

23 HOVENKAMP, supra note 9, at 10-16.

24 Grinnell, 384 U.S. at 571. As further explanation:

A pure monopoly exists when the defendant is the only seller in the market, and it is impossible for anyone to enter the market in competition with it. But a defendant may be guilty of monopolization even if it does not have a 100 percent market share, so long as it has sufficient control over the market that it can increase price and reduce output without being constrained by competition.

HOVENKAMP, supra note 9, at 10-6. “Courts generally require a 65% market share to establish a prima facie case of market power under § 1 of the Act.” Image Technical Servs., Inc. v. Eastman Kodak Co. ("Kodak II"), 125 F.3d 1195, 1206 (9th Cir. 1997) (citing American Tobacco Co. v. United States, 328 U.S. 781, 797 (1946)). Thus, something more is required to establish monopoly power.


26 For example, the Supreme Court in Grinnell noted that power gained “from growth or development as a consequence of a superior product, business acumen, or historic accident” is not the type of conduct the Sherman Act aims to prohibit. 384 U.S. at 570-71. Thus, as one can see, this is why exercising one’s rights under the government sanctioned, legal monopoly of the patent grant alone does not violate the Act.
the requirements of a § 2 monopolization claim are designed to “strike a balance by prohibiting only monopolies acquired or maintained by anticompetitive means.”

The second element of a §2 claim relates requires some showing of anticompetitive conduct, which can include the use of monopoly power “to foreclose competition, to gain a competitive advantage, or to destroy a competitor.” Generally, if a firm’s conduct is part of a willful scheme to acquire or maintain monopoly power by means other than competition on the merits, it has violated § 2. To assess whether the conduct of an intellectual property holder is anticompetitive, it is typically necessary to perform a rigorous economic analysis of the likely competitive effects of that conduct.

One of the most controversial theories of anticompetitive conduct involves claims that a monopolist in one market is attempting to “leverage” its monopoly into another market. To establish a § 2 Sherman Act violation based on monopoly leveraging, a plaintiff must prove that the monopolist: “(1) possesses monopoly power in the primary market; (2) gained or attempted to gain a monopoly power in a second relevant market; and (3) willfully acquired the monopoly power by some exclusionary conduct and not through efficiency and innovation.” Most often, monopoly leveraging cases involve tying claims, or some other exclusionary conduct. At issue in Abbott was

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27 1 HERBERT HOVENKAMP, MARK D. JANIS & MARK A. LEMLEY, IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW 10-3 (2002).
29 Kodak I, 504 U.S. at 483.
31 “A tying arrangement is ‘an arrangement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.’” Kodak I, 504 U.S. at 461 (quoting N. Pac. R. Co. v. United States, 356 U.S. 1, 5-6 (1958)).
32 Tying can also be an exclusionary practice in itself and can lead to § 2 liability.
whether a theory of monopoly leveraging that did not involve one of the typical exclusionary practices—such as tying—could violate the antitrust laws.\textsuperscript{33}

Unfortunately, the application of most theories of antitrust liability is particularly difficult when the alleged monopolist also has a legal monopoly in one or more of the relevant markets through some statutory-granted intellectual property right. For example, the thought of punishing a patent holder—who has a statutory right to exclude others from using its patented product—for refusing to license a patent or refusing to deal with its competitors seems counterintuitive. If one purpose of the antitrust laws is to encourage competition and innovation, then it seems as though a firm that has achieved monopoly status because of the demand for its patented good and has merely attempted to reap the benefits of such success, should not be punished for doing so. As Judge Learned Hand once declared, “[t]he successful competitor, having been urged to compete, must not be turned upon when he wins.”\textsuperscript{34} Yet the Supreme Court has made it clear that a patentee’s right to exclude is not absolute.\textsuperscript{35} In light of this principle, the courts have been hard pressed to specify under what set of circumstances and for what reasons a patent holder will violate the antitrust laws.

\textit{B. Underlying Principles of the Patent Laws}

Patents, along with copyrights, trademarks and trade secrets are a form of legal protection for intellectual property. In very simplistic terms, a patent is a time-limited property right granted by the United States federal government.\textsuperscript{36} The subject matter of a patent may

\begin{itemize}
\item \textsuperscript{33} Schor v. Abbott Labs ("Abbott II"), 457 F.3d 608, 610 (7th Cir. 2006).
\item \textsuperscript{34} United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2d Cir. 1945).
\item \textsuperscript{35} See Kodak I, 504 U.S. at 483 n.32 (citing Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602-05 (1985)).
\item \textsuperscript{36} The United States Constitution gives Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and
\end{itemize}
include any “process, machine, manufacture, or composition of matter.” However, only such inventions that are novel, useful, and nonobvious are worthy of a patent. The patent grant allows its holder to prevent others from making, using, selling, or offering to sell his or her patented invention, or importing it into the United States during the term of the patent—twenty years from the date the patent application was filed. Thus, in the sense that a patent allows its holder to prevent others from competing in the market for the patented good, a patent is essentially a government sanctioned monopoly.

Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8.


Id. §§ 101-102.

Id. § 101.

Id. § 103. An invention is obvious if it constitutes merely a trivial advancement over the state of the art.

Id. § 154(a)(1) & (2) (2000); see also id. § 271(a) (“Except as otherwise provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.”). The term of the patent begins on the date that the patent issues and ends 20 years from the date that the patent application was filed in the United States. Id. § 154(a)(2). Notably, a patent does not convey any positive or affirmative right to make, use, sell, offer to sell, or import an invention; a patent is a negative property right.

Id. § 154(a)(2). While the patent term technically lasts for twenty years, the enforceable life of a patent does not begin until the date the patent is issued. JANICE M. MULLER, AN INTRODUCTION TO PATENT LAW 17 (2003). Thus, the time elapsed between filing and issuance of the patent—the pendency period—is subtracted from the enforceable life of the patent. Id. In the U.S., the pendency period usually lasts about 2 years, so in reality, the enforceable patent term is more like eighteen years. Id.

MULLER, supra note 42, at 18 (citing Jamesbury Corp. v. Litton Indus. Prod., Inc., 756 F.2d 1556, 1559 (Fed. Cir. 1985)). Others argue that patents are more akin to “time-limited government conveyances of potential monopoly power, which can be put to ‘good’ or ‘bad’ uses from a societal standpoint.” MULLER, supra note 42, at 18 (citing Giles S. Rich, Are Letters Patent Grants of Monopoly?, 15 W. NEW ENGLAND L. REV. 239, 251 (1993)).
In exchange for this right to exclude, the inventor must fully disclose the invention to the public in sufficient detail and clarity. As compared to the utility, novelty and nonobviousness requirements which draw out the “technical merits of the claimed invention,” the disclosure requirements of the Patent Act pertain to the “informative quality of the patent application.” Thus, the Act requires that this disclosure be “enabling,” such that when read, others will be able to make and use the invention (once the patent expires), without undue experimentation. This puts the public in a position to almost immediately begin competing with the patent holder once the term of protection expires. In addition, the inventor must disclose the “best mode,” known to him or her, of practicing the invention. This requirement seeks to prevent the inventor from disclosing an inferior means of carrying out the invention, while concealing preferred embodiments from the public.

Yet, without the protections afforded by the patent laws, inventors would have little incentive to invest in research and development, let alone to publicize their resulting inventions for fear that someone may pirate their work. Another option, aside from the patent laws, is for the inventor to keep his invention as a trade secret. Unlike patents, trade secrets have no time limits. However, with trade secrets, the inventor can only protect from free-riding what he can keep secret. For example, the Coca-Cola Company holds the recipe for Coke as a trade secret by maintaining strict confidentiality and non-compete policies within the company. Yet, for technologies that can be easily reverse engineered (the process of discovering the technological principles of a device or system usually with the

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The specification shall contain a written description of the invention and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or which it is most nearly connected to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.

45 MULLER, supra note 42, at 65.


47 Id.

48 See MULLER, supra note 42, at 76.

49 Another option, aside from the patent laws, is for the inventor to keep his invention as a trade secret. Unlike patents, trade secrets have no time limits.
development of new technologies is that “the cost of creation [] can be very high, but the cost of copying it is often trivial.” 50 In theory, because copying is so easy and inexpensive, without the protections offered by the patent grant, free-riders and copyists would make it difficult if not impossible for inventors to recoup their initial investments. 51 As some scholars argue, without patent protection, invention and technical innovation would be uneconomical and would come to a halt. 52 The patent grant allows inventors to recoup their sunk research and development costs by charging monopoly prices. 53 To would-be inventors, the lure of obtaining a government-sanctioned monopoly on a commercially profitable invention induces research, development, and, ultimately, progress in the form of new technology. 54 By providing time-limited right to exclude others, the patent laws make inventing an attractive endeavor.

intention to construct a new device or program that does the same thing), trade secret is not a desirable form of protection. In the United States and many other countries, even if an artifact or process is protected by trade secrets, reverse-engineering the artifact or process is often lawful as long as it is obtained legitimately. The patent laws, on the other hand, allow the patent holder to bring his invention to the public without the fear that a copyist may simply reproduce the patented technology through reverse engineering. See Muller, supra note 42, at 67. 50 Id. at 6. 51 Mark A. Lemley, The Economics of Improvement in Intellectual Property Law, 75 Tex. L. Rev. 989, 994 (April 1997) (“In a private market economy, individuals will not invest in invention or creation unless the expected return from doing so exceeds the cost of doing so—that is, unless they can reasonably expect to make a profit from the endeavor”). “The ability of free-riders to appropriate the benefits of a new technology serves as a deterrent to those considering an investment in developing or investing in such technologies.” Id. 52 Id.; see also Muller, supra note 42, at 7 (“When adequate incentives for innovation do not exist, the result is underproduction of new inventions. . . . Absent a mechanism to exclude ‘free riders,’ i.e., people who enjoy the benefit of the good without paying for it, [new inventions] will be underproduced.”). 53 Christopher R. Leslie, The Anticompetitive Effects of Unenforced Invalid Patents, 91 Minn. L. Rev. 101, 151-52 (The benefits [of a patent] include potential monopoly profits for the life of the patent.”). 54 See Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 480 (1974).
While it is clear that the immediate effect of the patent laws is to secure a fair return for the inventor’s labor, the ultimate aim is, by this incentive, to benefit the public. The patent laws promote consumer welfare in the long term by encouraging investment in the creation and development of new technology. By fostering faster introduction of inventions through its incentives, the patent laws also increase competition. Additionally, as noted above, the patent laws essentially strike a bargain with the inventor—protection, in the form of a government-sanctioned right to exclude in the market of the invention, in exchange for public disclosure of the invention. So, not only does the public reap the benefits of technological progress, but also they benefit from the knowledge that the patentee gained in developing such technology. Thus, like the antitrust laws, the laws relating to intellectual property are aimed, in significant part, at fostering economic development.

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55 Thus, the patent laws are not aimed at benefiting the inventor. The patent laws merely use the lure of obtaining monopoly profits on a patented invention to entice inventors to invest in developing new technologies, and thus, benefit the public. This is also true for the Copyright Laws. See Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) (“The primary objective of a copyright is not to reward the labor of authors, but ‘[t]o promote the Progress of Science and useful Arts.’”) (brackets in original) (quoting U.S. CONST. art. I. § 8, cl. 8).

56 Image Technical Servs., Inc. v. Eastman Kodak Co. ("Kodak II"), 125 F.3d 1195, 1215 (9th Cir. 1997).

57 Economists have offered three other principle rationales for the existence of intellectual property rights: (1) Broader dissemination of innovations: The patent grant is essentially a bargain with the Patent Office. The patent holder receives the right to exclude others in the market of the invention in exchange for public disclosure; (2) Greater commercialization of inventions: intellectual property rights encourage licensing; and (3) Minimizing duplicative research. Balto & Wolman, supra note 2, at 405-07.
C. The Tension

Intellectual property rights enjoy greater importance today than ever before and play a large role in fostering technological growth. Yet, on the other hand, the antitrust laws are hailed as “represent[ing] a fundamental national economic policy.” Thus, it is of no surprise that courts are increasingly faced with questions of the proper breadth and enforceability of the patent grant in light of the antitrust laws. Confounding these questions is the fact that the patent and antitrust laws were traditionally viewed as directly contradictory—one granting monopolies and the other prohibiting them. Yet today, most feel that the supposed tension is merely illusory. In theory, the underlying purposes of the two bodies of law are largely the same: to promote the public good and to benefit consumer welfare. However, in practice, there is still considerable tension between the two bodies of law and many of the relevant cases addressing the intersection of intellectual


60 While most of the cases impacting the antitrust laws have arisen in the context of the patent laws, the other areas of intellectual property rights—copyright, trademark and trade secrets—are equally in tension with the antitrust laws. This comment will focus exclusively on the intersection between the patent and the antitrust laws.

61 Atari Games Corp. v. Nintendo of America, Inc., 897 F.2d 1572, 1576 (Fed. Cir. 1990) (both laws herald themselves as “encouraging innovation, industry, and competition”) (citing Locite Corp. v. Unltraseal Ltd., 781 F.2d 861, 876-77 (Fed. Cir. 1985)).
property and antitrust have not effectuated this supposed goal.\textsuperscript{62} Schor \textit{v. Abbott Labs} is such a case.

Despite their common goal, defining a boundary between the objectives of antitrust and those of intellectual property protection has been notoriously difficult, if not impossible.\textsuperscript{63} In major part, this is because both statutory provisions are silent on the issue and there is little to no Supreme Court jurisprudence resolving the conflict. Furthermore, while these bodies of law both strive to promote competition, they take very different paths to effectuate this goal.

In order for both the patent and antitrust laws to achieve their mutual goal of encouraging innovation while keeping anticompetitive behavior in product markets to a minimum, the two laws must be held in equilibrium. When one set of laws is elevated over the other, competition is stifled and the public is harmed. Yet, applying antitrust and patent principles in a non-discriminatory manner is particularly difficult because of the issues discussed above. This is especially true in a day when inventors make significant investments to protect their intellectual property and want to be able to take full advantage of that investment.

While many of the principles underlying the patent laws have seemingly dictated the struggle to reconcile thus far, some concessions have been made for antitrust considerations. For example, as a general rule, a patent holder is not required to license the protected technology and has no duty to cooperate with competitors.\textsuperscript{64} However, this right is not unqualified; “it exists only if there are legitimate competitive

\textsuperscript{62} Image Technical Servs., Inc. v. Eastman Kodak Co. ("Kodak II"), 125 F.3d 1195, 1217 (9th Cir. 1997) (“At the border of intellectual property monopolies and antitrust markets lies a field of dissonance yet to be harmonized by statute or the Supreme Court.”).

\textsuperscript{63} “[T]here is no easy delineation between a patent holder’s permissible exercise of its rights under patent law, which grants a government sanctioned monopoly and expressly allows the patentee to engage in exclusionary conduct, and anticompetitive behavior that violates antitrust law, which proscribes exclusionary conduct when coupled with monopoly power,” Schor \textit{v. Abbott Labs} ("Abbott I"), 378 F. Supp. 2d 850, 855-56 (N.D. Ill. 2005).

reasons for the refusal.”65 Section 2 of the Sherman Act may prohibit a firm from unilaterally refusing to license their intellectual property rights or deal with competitors where such a refusal would allow the firm to obtain or maintain monopoly power by excluding competition in a way that does not benefit consumers. Furthermore, a patent holder may violate the Sherman Act by exercising its right to exclude beyond the scope of the patent grant in an attempt to curtail competition in a secondary market.66

The antitrust theory of monopoly leveraging, while not new, has not been adequately clarified by the courts with respect to the actions of a patent, or other intellectual property right holder. Some circuit courts have, on varying levels, attempted to further develop monopoly leveraging as an antitrust cause of action against intellectual property holders. While monopoly leveraging in the context of intellectual property has not been directly addressed by the Supreme Court, at least four circuit courts67 have interpreted the Court’s holding in *Eastman Kodak Co. v. Image Technical, Inc.* ("Kodak I") as having varying ramifications on the outcome of this issue. All of these decisions offer insight into the path that the Seventh Circuit should have taken in deciding *Abbott II* and are discussed below.

65 Image Technical Servs., Inc. v. Eastman Kodak Co. ("Kodak I"), 504 U.S. 451, 483 n.32 (1992); see also Aspen Skiing, 472 U.S. at 600-01 (“The absence of a duty to transact business with another firm is, in some respects, merely the counterpart of the independent businessman's cherished right to select his customers and his associates. The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified.”).

66 As the Supreme Court in *Ethyl Gasoline Corp. v. United States* noted: [The patentee] may grant licenses to make, use or vend, restricted in point of space or time, or with any other restriction upon the exercise of the granted privilege, save only that by attaching a condition to his license he may not enlarge his monopoly and thus acquire some other which the statute and the patent together did not give. 309 U.S. 436, 456 (1940).

67 The First, Ninth, Federal and Seventh Circuits have all cited to *Kodak I* in deciding similar issues. The courts come down on different sides as to whether the Supreme Court’s holding actually dictates whether a patent holder may be liable under a theory of monopoly leveraging.
II. SEMINAL CASES IN THE INTELLECTUAL PROPERTY AND ANTITRUST CONFLICT

A. Berkey Photo, Inc. v. Eastman Kodak Co.

In 1979, the United States Court of Appeals for the Second Circuit touched on the theory of monopoly leveraging in *Berkey Photo, Inc. v. Eastman Kodak Co.* At issue in *Berkey Photo* was Kodak’s conduct in the photography and photofinishing industry, in which it competes along with several other firms, including Berkey Photo. The relationship between the two firms was complex in that Kodak was Berkey Photo’s competitor in some markets and it supplier in others, such as those for film and photofinishing equipment and supplies. Berkey Photo claimed that Kodak had violated § 2 of the Sherman Act by willfully acquiring and maintaining monopolies in the film, color print paper, and camera markets and that this conduct “caused it to lose sales in the camera and photofinishing markets and to pay excessive prices to Kodak for film, color print paper, and photofinishing equipment.”

The Second Circuit took care to define what conduct, exercised in conjunction with monopoly power, would bring about a § 2 violation. The court reiterated that the Sherman Act does not condemn one “who merely by superior skill and intelligence . . . [acquired monopoly power] because nobody could do it as well,” but rather one who wields that monopoly to prevent or impede competition. Thus, Kodak could not be held liable for merely acquiring monopoly power because it had a superior product, but only if it exercised that power in an anticompetitive manner. Conversely, the court held that in light of an improper acquisition or maintenance of monopoly power, a firm could

68 603 F.2d 263 (2d Cir. 1979).
69 Id. at 267.
70 Id.
71 Id. at 267-68.
72 Id. at 274 (“[A] firm with a legitimately achieved monopoly may not wield the resulting power to tighten its hold on the market.”).
not escape liability by arguing that it had not used that power to extract improper benefits. As the court explained, both innocent and intentional acquisition and maintenance of a monopoly “coupled with the purpose or intent to exercise that power” in a manner that excludes or prevents competition violates § 2.

Attempting to show that Kodak’s conduct was exclusionary in nature as required by § 2, Berkey Photo moved forward, essentially, under a theory of monopoly leveraging. Berkey Photo contended that Kodak had “illicitly gained an advantage in [the markets for photofinishing equipment and services] by leveraging its power over film and cameras.” Agreeing with Berkey Photo, the court explicitly recognized that “a firm may not employ its market position as a lever to create or attempt to create a monopoly in another market.”

The Second Circuit found its conclusion to be “an inexorable interpretation of the antitrust laws.” Even when legitimately obtained, monopolies are contrary to our notions of fair competition and must be strictly constrained. Such monopoly power is only tolerated out of considerations of fairness towards the innocent monopolist and insofar as necessary to preserve proper economic incentives. Accordingly, the court found no reason to allow for the exercise of monopoly power to the detriment of competition, even if such power was wielded over a secondary market. Such behavior

73 Id. (“Unlawfully acquired power remains anathema even when kept dormant.”).
74 Id. Thus, it is no defense for a firm who wields their monopoly power in an anticompetitive manner to argue that they innocently acquired such power—such as through a patent, or as the result of a superior product. Likewise, it is no defense for an intentional monopolist to argue that it did not exercise that power in a destructive manner. Id. at 274-75.
75 Id. at 275.
76 Berkey Photo, 603 F.2d at 275 (emphasis added) (citing Griffith, 334 U.S. at 107).
77 Berkey Photo, 603 F.2d at 275.
78 Id.
79 Id. (“There is no reason to allow the exercise of such power to the detriment of competition, in either the controlled market or any other.”).
does not become “more palatable” simply by arguing that “competition in the leveraged market may not be destroyed but merely distorted.” The court found support for this theory of monopoly leveraging in United States v. Griffith in which the Supreme Court held that the defendant had illegally used its monopoly power “to beget monopoly.”

Yet, according to the court, Griffith stood for more than just the recognition of monopoly leveraging as an antitrust cause of action. Griffith’s “rationale swept more broadly . . . for it admonished that ‘the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, was unlawful.’” The court recognized the theory of monopoly leveraging as linked to the prohibition against tying arrangements. To find liability for the tying arrangement, the Supreme Court did not require that “the market for the tied product be monopolized,” but, rather, that the monopolist’s conduct had merely foreclosed a “substantial amount of competition.” Thus, the court concluded that “the use of monopoly power attained in one market to gain a competitive advantage in another was a violation of [Section] 2, even if [the alleged monopolist did not] attempt to monopolize the second market.”

Berkey Photo, one of the “largest and most significant antitrust suits” of its time, stands for the proposition that a monopolist is liable under § 2 of the Sherman Act on a theory of monopoly leveraging if it used “its monopoly power in one market to gain a competitive advantage in another, albeit without an attempt to

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80 Id.
81 Id. (quoting United States v. Griffith, 334 U.S.100 , at 108 (1948)).
82 Berkey Photo, 603 F.2d at 275 (quoting Griffith, 334 U.S. at 107).
83 Berkey Photo, 603 F.2d at 275.
84 Id. at 276 (quoting Times Picayune Publ’g Co. v. United States, 354 U.S. 594, 608-09 (1953)).
85 Berkey Photo, 603 F.2d at 276.
86 Id. at 267.
monopolize the second market. The court’s holding is most notable in that it does not require that the monopolist utilize its monopoly in one market in an attempt to monopolize a secondary market; it only requires an attempt to gain a “competitive advantage” in the secondary market. While not specifically addressing intellectual property, it stresses that even those who acquire monopoly power through legitimate means—such as a patent—may be liable for leveraging that power into a secondary market. Thus, the court’s holding bears on the antitrust-patent tension.

B. Eastman Kodak Co. v. Image Technical Services, Inc.

More than two decades after the Berkey Photo decision, the Supreme Court of the United States squared off against the conflicting antitrust and patent laws in Eastman Kodak Co. v. Image Technical Services, Inc. (“Kodak I”). Bringing claims under both § 1 and § 2 of the Sherman Act, the plaintiffs, independent service organizations (ISOs), sought recovery from Eastman Kodak (“Kodak”) for its policies limiting the availability to ISOs of replacement parts for its equipment. Kodak manufactures and sells high volume photocopiers and micrographic equipment. Additionally, Kodak sells annual or multi-year service contracts to its customers for the sale and installment of replacement parts for its equipment. However, as Kodak’s parts are not interchangeable with other manufacturers’ products, Kodak does not compete with the other manufacturers in the service market; Kodak competes only with ISOs. In the early 1980s, the ISOs would purchase some parts on a limited basis from Kodak,

87 Id. at 275.
89 Id. at 455.
90 Id. at 456.
91 Id. at 457.
92 Id.
but most parts came directly from the original equipment manufacturers that produced parts that Kodak did not produce itself.93

After some time, consumers actually came to prefer the services of the ISOs and Kodak suffered a loss in service business.94 In response, Kodak stopped selling its photocopier parts to ISOs and shortly thereafter adopted the same policy for its micrographic parts.95 Kodak also allegedly entered into contractual agreements with its original equipment manufacturers to prevent them from selling parts to ISOs.96 These policies made it more difficult for ISOs to sell service for Kodak machines, and many were forced out of business, while others lost substantial revenue.97 Under a theory of monopoly leveraging, the ISOs claimed that Kodak violated § 2 of the Act by using its monopoly over Kodak photocopier and micrographic parts to attempt to create and actually create a second monopoly over the service markets.98

With respect to the first element of the § 2 claim, the Court easily concluded that Kodak held monopoly power in the service and parts markets.99 Because there were no readily available substitutes for Kodak’s parts and service, it had the power to control prices or exclude competition and, thus, had monopoly power.100 In evaluating whether the ISOs had satisfied the second element of the § 2 claim, the Court analyzed whether Kodak’s policies were impermissibly based on a scheme of willful acquisition or maintenance of monopoly power.101 The Court concluded that Kodak took exclusionary action to maintain

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93 Id.
94 Id.
95 Id. at 458.
96 Id.
97 Id.
98 Id. at 459.
99 Id. at 481.
100 Id.
its parts monopoly in an attempt to strengthen its monopoly share of the service market.\textsuperscript{102} Finding this conduct to be anticompetitive, the Court held that “[l]iability turn[ed] on whether ‘valid business reasons’ [could] explain Kodak’s actions.”\textsuperscript{103} According to the Court, while “a firm can refuse to deal with its competitors, . . . such a right is not absolute.”\textsuperscript{104} If a firm’s actions are exclusionary under the Sherman Act, to avoid liability, it must have “legitimate competitive reasons” for conducting itself in such a manner.\textsuperscript{105}

In one of the most notable passages in the opinion,\textsuperscript{106} at least as it refers to the antitrust-IP conflict, the Court stated that “power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if ‘a seller exploits his dominant position in one market to expand his empire into the next.’”\textsuperscript{107} Because it is found in the Court’s analysis of the ISO’s § 1 tying claim, the applicability of this language to the actions of a patent holder in the context of a § 2 violation is heavily disputed and has had various implications in lower court decisions.\textsuperscript{108} At the very least, this

\textsuperscript{102} Kodak I, 504 U.S. at 483.
\textsuperscript{103} Id. (quoting Aspen Skiing, 472 U.S. at 605).
\textsuperscript{104} Kodak I, 504 U.S. at 483 n.32 (citing Aspen Skiing, 472 U.S. at 602-05).
\textsuperscript{105} Kodak I, 504 U.S. at 483 n.32. Kodak contended that its actions were justified because it was: (1) maintaining its commitment to provide quality service; (2) controlling inventory costs; and (3) preventing ISOs from free-riding on its capital investment in equipment, parts and service. Id. at 483. As this case was on appeal from the Ninth Circuit’s denial of summary judgment, the Court did not decide on the merits whether these were valid business justifications. The Court merely held that Kodak’s asserted business justifications were insufficient to prove that Kodak is “entitled to a judgment as a matter of law” on the § 2 claim. Id. at 485-86 (quoting Fed. R. Civ. P. 56(c)).
\textsuperscript{106} Curiously, the most frequently discussed passage in the Kodak I opinion is actually found in a footnote.
\textsuperscript{107} Kodak I, 504 U.S. at 479 n.29 (quoting Times-Picayune Publ’g Co. v. United States, 345 U.S. 594, 611 (1953)).
\textsuperscript{108} Many attack applying this language to a § 2 violation because of the fact that it was placed in the Court’s discussion of Kodak’s alleged § 1 violation. Additionally, others take note that Kodak did not actually seem to present its patents in defense of the antitrust claims.
passage can be interpreted to support the antitrust theory of monopoly leveraging.\textsuperscript{109} While, on the whole, there is little discussion of Kodak’s intellectual property rights, some read the Court’s holding as further standing for the proposition that patent rights do not immunize a patent holder from antitrust violations based on monopoly leveraging, and that a patent holder may be liable under the monopoly leveraging theory for using its monopoly over a patented product to affect a secondary market.\textsuperscript{110}

C. Data General Corp. v. Grumman Systems

The First Circuit was the first circuit court to interpret the Supreme Court’s opinion in \textit{Kodak I} as it related to a § 2 monopolization claim. In \textit{Data General Corp. v. Grumman}\textsuperscript{111} the plaintiff, designed and manufactured computers and also offered a line of products and services for the maintenance and repair of its computers.\textsuperscript{112} From 1976 until sometime in the mid-1980’s, Data General affirmatively encouraged competition in the service market for its computers,\textsuperscript{113} by providing access to several necessary service tools to “third party maintainers” (“TPMs”), including Grumman.\textsuperscript{114}

\textsuperscript{109} \textit{“Even assuming . . . that all manufacturers possess some inherent market power in the parts market, it is not clear why that should immunize them from the antitrust laws in another market.”} \textit{Kodak I}, 504 U.S. at 479 n.29.

\textsuperscript{110} See id.

\textsuperscript{111} 36 F.3d 1147 (1st Cir. 1994).

\textsuperscript{112} \textit{Data General}, 36 F.3d at 1152.

\textsuperscript{113} \textit{Id.} at 1154.

\textsuperscript{114} \textit{Id.} For example:
[Data General (DG)] sold or licensed diagnostics directly to TPMs, and allowed TPMs to use diagnostics sold or licensed to DG equipment owners. DG did not restrict access by TPMs to spare parts manufactured by DG or other manufacturers. DG allowed (or at least tolerated) requests by TPMs for DG’s repair depot to fix malfunctioning circuit boards, the heart of a computer’s central processing unit (“CPU”). DG sold at least some schematics and other documentation to TPMs. DG also sold TPMs engineering change order kits. And finally, DG training classes were open to
One of these service tools included the MV/Advanced Diagnostic Executive System ("ADEX"), a sophisticated computer program developed by Data General to diagnose problems in its MV computers.\textsuperscript{115} In the mid-1980's, Data General, in an attempt to maximize revenues from its service business, began to refuse to provide many service tools, including the ADEX software, directly to TPMs.\textsuperscript{116} However, Grumman found various ways to “skirt” Data General’s ADEX restrictions.\textsuperscript{117}

In 1988, Data General filed suit against Grumman in the United States District Court for the District of Massachusetts claiming that Grumman had infringed its ADEX copyrights.\textsuperscript{118} Grumman asserted that Data General’s actions constituted an illegal tying under § 1 and monopolization under § 2 of the Sherman Act.\textsuperscript{119} In response to Data General’s motions for partial summary judgment, the district court rejected Grumman’s affirmative defenses and counterclaims.\textsuperscript{120} Grumman appealed.

Most relevant to this Comment is Grumman’s claim under § 2 of the Sherman Act that Data General willfully maintained its monopoly in the aftermarket for service of Data General’s computers.\textsuperscript{121} Grumman asserted that Data General’s unilateral refusal to license TPM field engineers. Grumman suggests that DG’s liberal policies were beneficial to DG because increased capacity (and perhaps competition) in the service aftermarket would be a selling point for DG equipment.

\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Id. at 1155. Data General also claimed that Grumman had misappropriated trade secrets embodied in the APEX software. Id. A jury agreed, awarding DG $27,417,000 in damages (excluding prejudgment interest and attorney’s fees). Id.
\textsuperscript{119} Grumman counterclaimed and asserted affirmative defenses that Data General “could not maintain its infringement action because [Data General] had used its ADEX copyrights to violate §§ 1 and 2 of the Sherman Antitrust Act.” Id. at 1156. This Comment will only discuss the First Circuit’s response to the § 2 counterclaim.
\textsuperscript{120} Id. at 1155.
\textsuperscript{121} Id. at 1181.
ADEX and other service tools to TPMs constituted exclusionary conduct within the meaning of § 2. The First Circuit set out to determine “whether a unilateral refusal to license a copyrighted work might ever deserve to be condemned as exclusionary.”

From the start, the court rested its analysis on whether or not the actions of Data General actually harmed the competitive process, as opposed to simply harming competitors. The court noted that conduct which “obstructs the achievement of competition’s basic goals—lower prices, better products, and more efficient production methods” harms the competitive process. “In contrast, exclusionary conduct does not include behavior which poses no unreasonable threat to consumer welfare but is merely a manifestation of healthy competition, an absence of competition, or a natural monopoly.”

Thus, said the court, if a monopolist’s refusal to deal harms the competitive process, it “may constitute prima facie evidence of exclusionary conduct in the context of a § 2 claim.”

Drawing on the Supreme Court’s decision in *Kodak II*, the court stated that a monopolist may rebut the presumption of exclusionary conduct by establishing a valid business justification for its conduct. Keeping in line with the underlying principles of the antitrust laws, the court noted that valid business justifications include those that relate

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122 *Id.* at 1182.
123 *Id.* While *Data General* discusses the reach of antitrust liability in light of the copyright laws, the First Circuit’s holding is also applicable to the antitrust-patent intersection.
124 *Id.*
125 *Id.*
126 *Id.* (citing *Grinnell*, 384 U.S. at 570-71).
127 *Data General*, 36 F.3d at 1183.
128 *Id.* (citing *Kodak* v. Image Technical Servs., Inc. (“*Kodak I*”), 504 U.S. 451, 483 n.32 (1992) (suggesting that a monopolist may rebut an inference of exclusionary conduct by establishing “legitimate competitive reasons for the refusal”); citing *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608 (1985) (suggesting that sufficient evidence of harm to consumers and competitors triggers further inquiry as to whether the monopolist has “persuade[d] the jury that its [harmful] conduct was justified by [a] normal business purpose”).
directly or indirectly to the enhancement of consumer welfare, such as pursuing efficiency and quality control.\textsuperscript{129} Again, the court’s overall analysis turned on the overall effect on the competitive process: evidence of harm to the competitive process raised a presumption that a monopolist’s unilateral refusal to deal was exclusionary, and evidence of countervailing benefits to the competitive process, in the form of a valid business justification, was necessary to rebut that presumption.\textsuperscript{130}

Notably, the court refused to adopt Data General’s proposal that a unilateral refusal to license a copyright can never constitute exclusionary conduct.\textsuperscript{131} According to the court, such an irrebuttable presumption would be tantamount to conceding that unilateral refusals to license a copyright always have a net positive effect on the competitive process, or that as a policy preference, intellectual property rights should categorically take precedence over the antitrust laws.\textsuperscript{132} Furthermore, while noting that the Sherman Act does not explicitly exempt asserting one’s intellectual property rights from antitrust scrutiny, the court warned that the Supreme Court disfavors creating implied exceptions to the antitrust laws.\textsuperscript{133} However, the court noted that, remarkably, in the patent context, many courts have either treated the patent laws as creating an implied limited exception to the antitrust laws, or have specifically held that the unilateral refusal to license a patent is exempt from antitrust liability.\textsuperscript{134}

According to the court, this “patent exception” came into existence for two reasons. First, as a policy presumption, it was

\textsuperscript{129} Data General, 36 F.3d at 1183. The court contrasted that the desire of a monopolist to maintain a monopoly market share or thwart the entry of competitors would not be a valid business justification. \textit{Id.}

\textsuperscript{130} \textit{Id.}

\textsuperscript{131} \textit{Id.} at 1184.

\textsuperscript{132} \textit{Id.}

\textsuperscript{133} \textit{Id.} at 1185 (citing Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 421 (1986) (“[E]xceptions from the antitrust laws are strictly construed and strongly disfavored.”)).

\textsuperscript{134} Data General, 36 F.3d at 1186.
“largely a means of resolving conflicting rights and responsibilities.”
While somewhat circular, this presumption rested on the argument that
because patents are essentially a government sanctioned monopoly,
giving the patent holder the exclusive right to prevent others from
practicing the invention, there could be no adverse effect on
competition. Additionally, the court noted that the “exception” was
“grounded in an empirical assumption that exposing patent activity to
wider antitrust scrutiny would weaken the incentives underlying the
patent system, thereby depriving consumers of beneficial products.”

Rather than fall in line with the patent exception, the court found
it more appropriate to choose an approach which both complemented
the underlying purposes of the Copyright Act and addressed the
“realities of the market.” In turning to the Copyright Act, the court
found it safe to assume that “Congress itself made an empirical
assumption that allowing copyright holders to collect license fees and
exclude others from using their works creates a system of incentives
that promotes consumer welfare in the long term by encouraging
investment in the creation of desirable artistic and functional works of
expression.” Finding it inappropriate to require an antitrust
defendant to prove the validity of this assumption in every refusal to
deal case, the court noted, however, that the Copyright Act does not
purport to immunize copyright holders from liability under the
Sherman Act. The Copyright Act’s silence on this issue “is
particularly acute in cases where a monopolist harms consumers in the
monopolized market by refusing to license a copyrighted work to
competitors.”

135 Id.
136 Id.
137 Id.
138 Id. at 1187.
139 Id. at 1184.
140 Id. at 1186-87.
141 Id. at 1187.
142 Id. The court does note that Congress has not been silent on the relationship
between antitrust and the patent laws. In 1988, Congress amended the patent laws to
In resolving the conflict, the court recognized the importance of “preserving the economic incentives fueled by the Copyright Act,”143 but also sought a resolution which would uphold the policies embodied in both the Copyright and Sherman Acts—“to improve the welfare of consumers in our free market system.”144 Ultimately, the court held that “the desire of an author to be the exclusive user of its original work is a presumptively legitimate business justification for the author’s refusal to license to competitors.”145 Additionally, the court made it clear that this is a rebuttable presumption, “for there may be rare cases in which imposing antitrust liability is unlikely to frustrate the objectives of the Copyright Act.”146 The court suggests three arguments that may be successful in rebutting the presumption of a valid business justification: (1) the monopolist “refuses to cooperate with a competitor in circumstances where some cooperation is indispensable to effective competition;”147 (2) the copyright was acquired in an unlawful manner;148 or (3) the monopolist knowingly developed its “proprietary position” to maintain a monopoly in a secondary market.149

The First Circuit’s holding is important in that it refuses to fall in line with the theory that intellectual property rights holders are exempt from antitrust liability. Instead, the court continually refers back to the provide that “[n]o patent owner otherwise entitled to relief for infringement . . . of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of [the patent owner’s] refusal to license or use any rights to the patent.” 35 U.S.C. § 271(d) (1988). The court correctly notes that § 271(d) prevents an accused infringer from bringing a patent misuse defense when the patent owner has unilaterally refused a license, but its contention that § 271(d) “may even herald the prohibition of all antitrust claims and counterclaims premised on a refusal to license a patent” is not so well grounded. I will discuss this in further detail below.

143 Data General, 36 F.3d at 1187.
144 Id.
145 Id. at 1182.
146 Id. at 1187 n.64.
147 Id. at 1188 (quoting Olympia Equip. Leasing Co. v. W. Union Telegraph Co., 797 F.2d 370, 379 (7th Cir. 1986)).
148 Data General, 36 F.3d at 1188.
149 Id.
heart of the antitrust laws—consumer protection—and recognizes that some actions of an IPR holder may harm competition beyond what we are willing to justify as a necessary incentive to innovate. Additionally, the court follows the lead of the Supreme Court by allowing alleged monopolists to justify their exclusionary conduct by presenting valid business reasons for such conduct. Furthermore, the First Circuit took painstaking care to address and reconcile the interests of both the patent and antitrust laws. Recognizing their common goal, the court presented approach that gave deference to the choice of the intellectual property right holder to exercise its statutory right to exclude, but also protected the considerations of the antitrust laws by allowing the antitrust plaintiff to rebut that such a choice has a valid business justification.

D. Image Technical Services, Inc. v. Eastman Kodak Co.

In Image Technical Services, Inc. v. Eastman Kodak Co., ("Kodak II") plaintiffs, a group of independent service organizations (ISOs) brought claims under §§ 1 and 2 of the Sherman Act after Kodak refused to sell replacement parts, many of which were patented, to the ISOs, who serviced and repaired Kodak photocopier equipment along with Kodak itself. With respect to the § 2 claim, the ISOs proceeded on a theory of monopoly leveraging that Kodak used its monopoly in the parts market, to monopolize or attempt to monopolize the sale of service for its machines. On remand from the Supreme Court, the case proceeded to trial in the district court and a unanimous jury awarded $71.8 million in damages to the ISOs on their § 2 monopolization claim.

On appeal, the United States Court of Appeals for the Ninth Circuit discussed the subject of a § 2 monopoly leveraging claim.
Interpreting the Supreme Court’s holding in *Kodak I* as generally endorsing the antitrust theory of monopoly leveraging, the court in *Kodak II* required that, in order to succeed on a theory of monopoly leveraging, the antitrust defendant must have used its monopoly in one market to monopolize or attempt to monopolize the downstream market. Notably, the court reiterated its rejection of the Second Circuit’s *Berkey Photo* standard which only attached liability to the use of monopoly power “to gain a competitive advantage” in a downstream market as too “loose.”

While recognizing that monopoly leveraging could be an available theory of liability, the court grappled with the issue of what conduct displayed by a patent holder, could be considered anticompetitive. The court reiterated that the second element of a § 2 monopoly claim—the conduct element—requires that the alleged monopolist exhibit some exclusionary conduct, and not merely competition on the merits. As a general rule, the court considered exclusionary conduct to include any conduct that “unnecessarily excludes or handicaps competitors in order to maintain a monopoly” or conduct that “extends natural

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155 *Id.* at 1208.
156 *Id.* at 1209. In *Kodak II*, Kodak was attacking the district court’s monopoly conduct jury instructions, specifically Instruction No. 29, which stated in relevant part:

[A] company with monopoly power in a relevant market has no general duty to cooperate with its business rivals and may refuse to deal with them or with their customers if valid business reasons exist for such refusal. It is unlawful, however, for a monopolist to engage in conduct, including refusal to deal, that unnecessarily excludes or handicaps competitors in order to maintain a monopoly.

*Id.* at 1208-09. The court declared that “§ 2 of the Sherman Act prohibits a monopolist from refusing to deal in order to create or maintain a monopoly absent a legitimate business justification.” *Id.* at 1209.
157 *Id.* at 1209 (citing Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 546. (9th Cir. 1991)).
158 “‘Willful acquisition’ or ‘maintenance of monopoly power’ involves ‘exclusionary conduct,’ not power gained ‘from growth or development as a consequence of a superior product, business acumen, or historic accident.’” *Kodak II*, 125 F.3d at 1208 (quoting *Grinnell*, 384 U.S. at 570-71).
monopolies into separate markets.”159 Drawing on the Supreme Court’s notorious footnote 29 in *Kodak I*, the court held that a patent holder may be liable under the monopoly leveraging theory by “exploit[ing] [its] dominant position to enhance a monopoly in another market.”160 However, as the court notes, *Kodak I* did not specifically address whether a unilateral refusal to deal in a patented product was exclusionary conduct.161 In fact, no other court had imposed antitrust liability for a unilateral refusal to sell or license a patent and most courts did not view such conduct as exclusionary.162 But the court reiterated that patent rights do not immunize a patent holder from antitrust liability.163 Patent holders do not have the right to exclude others from the market if the patent was unlawfully acquired, nor can they “attempt to extend a lawful monopoly beyond the grant of a patent.”164

Contrary to Kodak’s assertions, the court did not turn a blind eye to the serious impact its decision could potentially have on the value of intellectual property rights. The court recognized that making the actions of a patent holder susceptible to antitrust violations could deter would-be inventors from taking part in the development of new technologies.165 This risk strikes to the core of “the fundamental and complimentary purposes of both the intellectual property and antitrust

159 *Kodak II*, 125, F.3d at 1208, 1216.
160 *Id.* at 1216.
161 *Id.*
162 *Id.*
163 *Id.* at 1215-16.
164 *Id.* at 1216.
165 *Id.* at 1218. The court reasoned that:
Particularly where treble damages are possible, such claims [based on unilateral refusals to deal] will detract from the advantages lawfully granted to the holders of patents or copyrights by subjecting them to the cost and risk of lawsuits based upon the effect, on an arguably separate market, of their refusal to sell or license. The cost of such suits will reduce a patent holder’s ‘incentive . . . to risk the often enormous costs in terms of time, research, and development.”

*Id.* (quoting Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 480 (1974)).
laws, which aim to ‘encourag[e] innovation, industry and competition.” While ultimately deciding to extend liability for unilateral refusals to deal in patented products, the court felt that its approach must “account for the procompetitive effects and statutory rights extended by the intellectual property rights.”

Relying on *Kodak I* and *Aspen Skiing*, the court held that §2 of the Sherman Act “prohibits a monopolist from refusing to deal in order to create or maintain a monopoly absent a legitimate business justification.” Thus, “[w]hen a legitimate business justification supports a monopolist’s exclusionary conduct, that conduct does not violate §2 of the Sherman Act.” Citing to *Data General*, the court noted that this presumption could be rebutted by presenting evidence that the alleged monopolist had unlawfully acquired the intellectual property rights in question. Additionally, “[a] plaintiff may rebut an asserted business justification by demonstrating either that the justification does not legitimately promote competition or that the justification is pretextual.” Following the lead of the First Circuit in *Data General*, the court held that a patentee’s desire to exclude others from its patented technology is a presumptively valid business justification. According to the court, such a presumption would help

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166 *Kodak II*, 125 F.3d at 1218 (quoting Atari Games Corp. v. Nintendo of America, Inc., 897 F.2d 1572, 1576 (Fed. Cir. 1990)).
167 *Kodak II*, 125, F.3d at 1218.
168 *Id.* at 1209 (emphasis added); see also *Image Technical Servs., Inc. v. Eastman Kodak Co.* (“*Kodak I*”), 594 U.S. 451, 483 n.32 (1992) (“It is true that as a general matter a firm can refuse to deal with its competitors. But such a right is not absolute; it exists only if there are legitimate competitive reasons for the refusal.”).
169 *Kodak II*, 125 F.3d at 1212.
170 *Id.* at 1219 (citing *Data General v. Grumman*, 36 F.3d 1147, 1188 (1st Cir. 1994)).
171 *Id.* at 1212 (citing *Kodak I*, 504 U.S. at 483). Pretext is defined as “[a] false or weak reason or motive advanced to hide the actual or strong reason or motive.” *BLACK’S LAW DICTIONARY* (8th ed. 2004).
172 *Kodak II*, 125 F.3d at 1218.
the fact finder in equally applying the principles of both the antitrust and patent laws. 173

E. In re Independent Service Organizations Antitrust Litigation

In In re Independent Service Organizations Antitrust Litigation ("Xerox"), 174 the Federal Circuit was presented with facts strikingly similar to those presented to the Ninth Circuit in Kodak II. Xerox manufactured, sold, and serviced high-volume copiers. 175 After Xerox implemented a policy of not selling replacement parts and other copyrighted materials to ISOs unless they were also end-users of the copiers, ISO competitors in the photocopier service market sued Xerox for antitrust violations under the Sherman Act. 176 The plaintiffs claimed that Xerox used its monopoly over patented parts unique to its photocopiers to effectively eliminate ISOs from the service aftermarket. 177

Turning to the antitrust-IP conflict, it was clear from the start that the Federal Circuit was biased towards intellectual property rights. While tipping its hat to the mantra that the proprietary right of a patent does not insulate its holder from antitrust liability 178 and recognizing that a patentee’s right to exclude is not boundless, 179 the court made it clear that “the antitrust laws do not negate the patentee’s right to exclude others from patent property.” 180 Ultimately, the court held that a patent holder is only subject to liability under the Sherman Act in
cases of “illegal tying, fraud in the Patent and Trademark Office, or sham litigation [to enforce the patent].”\textsuperscript{181} Where these circumstances are not present, a patent holder can enforce its right to exclude “exempt from the antitrust laws.”\textsuperscript{182} The court’s strong language overwhelmingly communicated its preference for the patent laws.

Furthermore, the court severely limited the application of the Supreme Court’s holding in \textit{Kodak I} by asserting that the language in footnote 29 stood for nothing more than the “undisputed premise that the patent holder cannot use his statutory right to refuse to sell patented parts to gain a monopoly in a market \textit{beyond the scope of the patent}.”\textsuperscript{183} The court hung its hat on this principle and declared that so long as the patentee operates within the scope of the statutory patent grant, it has the unqualified right to refuse to sell or license its patented product. \textit{Kodak I} did nothing to limit this freedom whatsoever.\textsuperscript{184} In essence, according to the Federal Circuit, a patent holder’s right to exclude extends to any relevant market that involves the use, manufacture, or sale of the invention.\textsuperscript{185} Going even further, the court held that a patent holder does not violate the Sherman Act by unilaterally refusing to license or sell a patented item, even if the refusal to deal impacts competition in more than one market.\textsuperscript{186}

The court also expressly rejected the rebuttable presumption approach taken by the Ninth Circuit in \textit{Kodak II}. Akin to its disregard for the subjective motivation of a patentee in bringing suit to enforce its proprietary rights, the court held that a patent holder’s subjective

\textsuperscript{181} \textit{Xerox}, 203 F.3d at 1327-28. Aside from illegal tying, the court also attaches liability in patent infringement suits where: (1) “the asserted patent was obtained through knowing and willful fraud;” or (2) “the infringement suit was a mere sham to cover what is actually no more than an attempt to interfere directly with the business relationships of a competitor.” \textit{Id.} at 1326.

\textsuperscript{182} \textit{Id.} (emphasis added).

\textsuperscript{183} \textit{Id.} at 1327.

\textsuperscript{184} \textit{Id.}

\textsuperscript{185} \textit{Id.} at 1326-27.

\textsuperscript{186} \textit{Id.} at 1327 (“[W]e have expressly held that, absent exceptional circumstances, a patent may confer the right to exclude competition altogether in more than one antitrust market”)

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intent in refusing to deal in the patented product are irrelevant to antitrust law.\textsuperscript{187} The court refused to “inquire into [a patentee’s] subjective motivation for exerting his statutory rights, even though his refusal to sell or license his patented invention may have an anticompetitive effect.”\textsuperscript{188} Essentially, the court’s approach entails first asking the threshold question of whether the patentee’s refusal to sell its patented product exceeds the scope of the patent grant.\textsuperscript{189} If the answer is no, then the court’s analysis ends and it will not inquire into the patent holder’s subjective intent for participating in such conduct.\textsuperscript{190}

While all of the above cases do not necessarily discuss the antitrust-IP conflict, their holdings all have significant impact on the subject. The Seventh Circuit addressed many of these cases in \textit{Schor v. Abbott Labs}, but except for a nod in the Federal Circuit’s direction, disagreed with or decided to disregard the holdings and reasoning of these cases. The presentation of \textit{Schor v. Abbott Labs} and following discussion will shed light on why the court’s choice to do so was incorrect.

\section*{III. \textit{Schor v. Abbott Laboratories}}

\subsection*{A. Facts and the District Court’s Opinion}

Abbot Laboratories (“Abbott”) is an Illinois-based pharmaceutical company engaged in the business of developing, manufacturing and distributing a wide variety of drugs within the United States and worldwide.\textsuperscript{191} Among its portfolio of marketed drugs are several for

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{187} \textit{Id.}
\item \textsuperscript{188} \textit{Id.} at 1327-28.
\item \textsuperscript{189} \textit{Id.} at 1328.
\item \textsuperscript{190} \textit{Id.}
\item \textsuperscript{191} \textit{Schor v. Abbott Labs. (“Abbott I”), 378 F. Supp. 2d 850, 852 (N.D. Ill. 2005).}
\end{enumerate}
\end{footnotesize}
the treatment of HIV and AIDS. One such drug, ritonavir, is a protease inhibitor (PI) that slows the progression of the disease by preventing cells that have been infected with HIV from producing new copies of the virus. Ritonavir, sold under the brand name Norvir, was originally marketed as a stand-alone drug, but caused severe side effects when used alone in high doses. Abbott found, however, that Norvir had powerful effects when used in conjunction with other protease inhibitors. By blocking an enzyme in the liver that normally metabolizes away PIs, Norvir causes combined PIs to last longer in the bloodstream, thus boosting their overall effectiveness. This “boosting” effect allows HIV and AIDS patients to take lower doses of these other PIs, and less frequently. Abbott offers its own ritonavir boosted combination drug under the brand name Kaletra.

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193 Protease inhibitors (“PIs”) are just one class of anti-HIV drugs. Others include nucleoside/nucleotide reverse transcriptase inhibitors (NRTIs); non-nucleoside reverse transcriptase inhibitors (NNRTIs); entry inhibitors, which include fusion inhibitors; integrase inhibitors; maturation inhibitors; and cellular inhibitors. See Aidsmeds.com, http://www.aidsmeds.com (last visited Dec. 4, 2006).


196 At least seven other protease inhibitors not manufactured by Abbott Labs are now commonly boosted by Norvir: Agenerase, Crizivan, Fortovase, Invirase, Lexiva, Reyataz, and Viracept. Id.; see also Aidsmeds.com, Protease Inhibitors (PIs), http://www.aidsmeds.com/PIs.htm (last visited Dec. 4, 2006).

197 Abbott II, 457 F.3d at 610.

198 Id.

199 Id.
Along with potentially lowering the cost of effective treatment and reducing the number of doses a patient must take daily, Norvir is also effective in combating drug resistance. Drug resistance—reduction in the ability of a drug, or combination of drugs, to block HIV reproduction in the body—is a huge problem affecting HIV/AIDS patients.201 In general, it is important for those suffering from HIV/AIDS to have a variety of effective PIs, or other drugs, available to them if they become resistant to a particular drug or drug cocktail and need to alter their treatment regimen.202 Resistance to a drug often occurs when the drug is not effective at preventing the virus from reproducing inside the body. If the virus continues to reproduce during treatment, it can alter itself—or "mutate"—to avoid the drugs.203 Norvir helps to keep viral replication and, thus, mutation to a minimum by keeping the concentration of the boosted protease inhibitor in the bloodstream high. Norvir-boosted PIs are therefore able to remain effective treatments for longer periods of time.204

Abbott holds a patent on ritonavir205 and, thus, controls 100% of the Norvir market.206 Abbott also holds a patent covering ritonavir taken in combination with other protease inhibitors.207 In 2003, Kaletra, Abbott’s own boosted PI, began to lose its market share and defendant responded by raising the price of Norvir by more than four-

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201 Abbott I, 378 F. Supp. 2d at 852.
202 Id.
204 Abbott I, 378 F. Supp. 2d at 852.
hundred percent. However, Abbott did not raise the price of ritonavir as incorporated in Kaletra. As a result, Kaletra costs substantially less than boosting another PI with Norvir.

Plaintiff Gary Schor, who purchased Norvir for his personal use, brought a class action in the District Court for the Northern District of Illinois against defendant Abbott, alleging violation of § 2 of the Sherman Act. Specifically, Schor alleged under a theory of monopoly leveraging that Abbott violated §2 of the Sherman Act by abusing its legal monopoly over Norvir to unfairly injure competition in the market for Norvir-boosted PIs. According to Schor, Abbott’s “anticompetitive pricing scheme [was] designed to exclude competition for Kaletra,” which competes in the boosted PI market. However, Schor did not allege that Abbott participated in any of the typical exclusionary practices such as tie-in sales, a price-squeeze, exclusive dealing and selective refusal to deal, or predatory pricing.

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209 *Id.*
210 *Id.* This statement does not mean to suggest that other drug companies in the business of developing and manufacturing HIV/AIDS drugs actually sell a drug cocktail combining their protease inhibitor with Norvir in a pre-packaged, or chemically combined form similar to Kaletra. These practices would constitute infringement under Abbott’s ‘036 patent. This only means that an HIV/AIDS patient wishing to take a Norvir-boosted drug cocktail, he can either purchase Kaletra, or pay substantially more to purchase Norvir alone along with another protease inhibitor.
211 *Id.*
213 *Id.*
214 *Id.* at 853.
215 *Id.* at 855.
216 *Abbott II*, 457 F.2d at 610.
Such a claim of “free-standing” monopoly leveraging had never been brought before the Seventh Circuit. More importantly, the Seventh Circuit had never addressed “whether the Sherman Act limits a patentee’s right to exclude others from more than one relevant market” under a theory of monopoly leveraging. Seeming to understand the weight of the case before it, the district court not only took note of the “sparse case law regarding if or how the monopoly leveraging theory applies to conduct by a [patent holder],” but also that the little existing case law did not relate to a price increase by the patent holder. Thus, looking for guidance, the court analogized the price increase at issue to refusal to deal cases with because, “if a patentee has the right to refuse to sell its product altogether, it has the right to raise the price.” Above all, the court reiterated that in order to violate the Sherman Act, the alleged monopolist’s conduct must harm competition in the relevant market.

Turning specifically to the issue of whether a patent holder may be liable under a theory of monopoly leveraging for unilaterally increasing the price of its patented product, the court addressed the split between the Ninth Circuit and Federal Circuits. The district court ultimately sided with the Federal Circuit’s “sounder” approach and

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217 *Id.* at 611. Curiously, the Seventh Circuit felt it appropriate to analogize Abbott’s price increase conduct to the refusal to deal conduct present in *Xerox* and *Kodak II* when discussing relevant approaches to dealing with a monopoly leveraging claim, yet refrained from doing so when it characterized Schor’s monopoly leveraging claim as “free standing.” Wouldn’t it have been similarly appropriate for the court to analogize a price increase to a refusal to deal in determining whether Abbott participated in any of the “normal exclusionary practices”?


219 *Id.* at 856. In fact, as you can see from the cases discussed above, most either dealt with a refusal to deal/license in the patented product or a tie-in sales.

220 *Id.* (citing Zenith Labs., Inc. v. Carter-Wallace, Inc., 530 F.2d 508, 513 n.9 (3d Cir. 1976) (“[A] patentee is privileged to withhold [its invention] from sale at any price, or to offer it for sale at any price he wishes, low or high.”)).


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held that, “subject to narrow limitations . . ., a patentee’s exercise of its
statutorily-granted market power does not constitute a Sherman Act
violation, even if such conduct affects a second market.”222
Conversely, the court interpreted the Kodak II as limiting a patent
holder’s right to exclude others to a single market.223 As with the
Federal Circuit, the court felt that so long as the secondary market was
encompassed by the patent claims, the patent holder’s right to exclude
was not curtailed by the antitrust laws in that market.224

The court also noted that, as distinguished from Xerox and Kodak
II, Abbott’s patents cover Norvir’s use in the stand-alone market, as
well as in the Norvir-boosted PI market.225 While not unsympathetic to
the plaintiff’s concerns, the court feared it would run afoul of the aims
of the antitrust and patent laws to encourage innovation and
competition by imposing liability on a manufacturer that raised the
price on patented products wholly within its patent grant.226 According
to the court, the Federal Circuit’s approach “[kept] with the case law
and the statutory language suggesting that a court must consider the
scope of the patent grant when determining whether an antitrust
violation has occurred.”227 Holding that the defendant had not
exceeded the scope of its patents, the court granted Abbott’s motion to
dismiss.228 Schor appealed.

B. The Seventh Circuit’s Opinion

On appeal, the Seventh Circuit affirmed the District Court and
held that Abbott did not violate the Sherman Act by discriminately
raising the price of ritonavir in Norvir. The court read the district
court’s opinion as holding that a monopoly leveraging claim cannot

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222 Abb I, 378 F. Supp. 2d at 858.
223 Id. at 857.
224 Id.
225 Id. at 859.
226 Id. at 858.
227 Id.
228 Id. at 860.
stand absent some additional exclusionary conduct on the part of the alleged monopolist. Noting that Schor had not alleged any of the typical exclusionary practices, Judge Easterbrook, writing for the majority, set out to determine whether such a “free standing” theory of monopoly leveraging, could give rise to liability under the antitrust laws.

According to the court, there could be no liability under a theory of monopoly leveraging unless the antitrust defendant, having a monopoly in the primary market, could, through some “clever combination of prices,” make a monopoly profit for itself by inducing one or more of its competitors to withdraw from the secondary market. The court seemed to embrace the idea that unless the alleged monopolist’s conduct produced such consequences—the ability to reap monopoly profits by excluding others from the secondary market—it was not exclusionary as required by the antitrust laws. Judge Easterbrook opined that Abbott’s pricing scheme could bring about no such harm. He explained that “a monopolist can take its monopoly profit just once” either by charging monopoly prices in the primary market and allowing competition in the downstream markets, or by reducing the price in the primary market and inducing customers to buy more of the good. But an effort to do both “makes [the monopolist] worse off and is self-deterring”—attempting to quash

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229 *Abbott II*, 457 F.3d at 610. Curiously, the district court does not seem to say anything to this effect.

230 *Id.* at 610-11. The court concluded that Abbott’s conduct could not be considered a tie-in, a refusal to deal, price discrimination, a price-squeeze, nor an example of predatory pricing. This conclusion is questionable, to say the least.

231 *Id.* at 611. This Comment will only focus on the court’s ultimate decision on how to determine whether a patent holder can be subject to liability on a theory of monopoly leveraging. Discussion of the court’s strange reservations on the theory of monopoly leveraging, which has deep roots in antitrust jurisprudence, is saved for a later time.

232 *Id.* The court believes that this practice does not harm consumers because the alleged monopolist could not increase its profits. Yet, why would Abbot adopt these practices in the first place?

233 *Id.* at 611-12.
the competition in such a way is simply not economical. Thus, because a monopolist could not technically increase profits through such a discriminatory pricing scheme by making it unprofitable for others to compete in the market, it simply should not be prohibited by the antitrust laws.

As further support that Abbott’s conduct was not exclusionary, the court noted that Abbott’s competitors had not taken their drugs off the market and, thus, consumers were not harmed. Abbott’s rivals were continuing to profitably sell their competing products, so there was no prospect that Abbott was going to monopolize the market of Norvir-boosted PI’s. Unless Abbott’s unilateral conduct “create[d] a dangerous probability of success in monopolizing [the secondary market]” its conduct was not unlawful under the Sherman Act. On this point, the court condemned the approach taken by the Ninth Circuit in *Kodak II* and parts of the Second Circuit’s approach in *Berkey Photo*. The court reasoned that “[t]he ninth circuit did not give any reason for thinking that a monopolist’s acquisition of market power in a complementary product injures consumers.” In the court’s opinion, the *Kodak II* standard, which conditioned success on a monopoly leveraging claim on a mere showing that the antitrust defendant had “[used] its monopoly in one market to monopolize or

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234 *Id.* at 612.
235 *Id.*
236 *Id.* at 613. “None of Abbott’s rivals contends that, at Kaletra’s going price, it is unable to sell its own protease inhibitor profitably.” *Id.* at 610.
237 *Id.* at 613. This also relates back to the court’s discussion of why monopoly leveraging should not be a theory of antitrust liability. According to Judge Easterbrook, Abbott could have either a monopoly in the Norvir market or in the Kaletra market, not both. But, curiously, earlier in the opinion, the court cast serious doubt on whether Abbott actually held a monopoly in the Norvir market. And other courts have suggested that it is not necessary to succeed on a theory of monopoly leveraging that the antitrust defendant have a monopoly in the primary market.
238 *Id.*
239 *Id.*
240 *Id.*
attempt to monopolize [a] downstream market," was
“undisciplined.” Instead, the court opted to side with the Federal
Circuit in saying that the Ninth Circuit “just got it wrong.”

Furthermore, the court rejected the Ninth Circuit’s interpretation
of Kodak I as a “misunderstanding” of the Supreme Court’s holding. According to Judge Easterbrook, the Ninth Circuit erroneously read
Kodak I as forbidding firms with market power from dealing in
complementary products. Interpreted correctly, Judge Easterbrook
claimed, Kodak I stood for the proposal that firms with market power
are forbidden to deal in complementary products only “in ways that
take advantage of customers’ sunk costs.” In Kodak I, because
Kodak initially allowed the ISOs to service its photocopiers, but then
switched to a closed-service model, it “had the potential to raise the
total cost of copier-plus-service above the competitive level” and
above the price it charged if it had done its own repair work from the
outset. Because such a switch that would exploit customers’ sunk
costs was not possible, the court concluded that Schor could only be
successful if it were to generalize Kodak I as promulgating “a rule
against selling products that complement those in which the defendant
has market power.”

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241 Image Technical Servs., Inc. v. Eastman Kodak Co. (“Kodak II”), 125 F.3d
1195, 1209 (9th Cir. 1997).
242 Abbott II, 457 F.3d at 613 (citing In re Indep. Serv. Orgs. Antitrust Litig.
(“Xerox”), 203 F.3d 1322, 1327 (Fed. Cir. 2000)). The court stated that:
It would be possible to cabin [Kodak II] by observing that, despite
the opinion’s language, the case arose from a refusal to deal, so it
occupies one of the traditional antitrust categories rather than a
claim of “naked” monopoly leveraging of the sort that Schor
attempts to pursue. But we think it better to join the Federal Circuit
in saying that [Kodak II] just got it wrong.
Abbott II, 457 F.3d at 613.
243 Id. at 614.
244 Id. at 613-14.
245 Id. at 614.
246 Id.
247 Id.
On the whole, the court cabined its decision on the theory that Abbott’s disparate pricing of ritonavir did not harm consumers. Abbott’s conduct did not force other competitors in the Norvir-boosted PIs out of the market and it was not exploiting consumers’ sunk costs. In fact, the court noted that consumers technically benefited from the relatively low price for ritonavir in Kaletra and, because the antitrust laws “condemn high prices, not low ones, . . . it would be wholly inappropriate to oblige Abbott to raise its price for Kaletra.” A patent holder “is entitled to charge whatever the traffic will bear” and is not required “to cooperate with rivals by selling them products [at prices] that would help the rivals to compete.” Even though this case seemingly presented perfect conditions for the court to analyze a patent holder’s potential liability under the antitrust laws, this was one of the only references that the court made to the antitrust-IP conflict.

IV. WHY THE SEVENTH CIRCUIT “JUST GOT IT WRONG” AND HOW IT COULD HAVE DONE RIGHT

A. Where the Seventh Circuit Went Wrong

The Seventh Circuit’s holding in Abbott II essentially dodges the patent-antitrust conflict by failing to discuss, let alone attempting to reconcile their respective considerations. Almost no formal discussion is made of the elements of a § 2 monopolization claim, let alone as

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248 The court seems to frame its arguments on the idea that Schor was complaining about the “relatively low” price of ritonavir in Kaletra, when in reality, Schor was complaining about Abbott’s 500% increase in the price of ritonavir in Norvir. According to Schor’s complaint, the price of Kaletra never fluctuated. Thus, it is the fact that Abbott drastically increased the price of Norvir—a component in many other combination drug treatments—that was harming consumers.

249 Id. at 613. Again, it is not the low price of ritonavir in Kaletra that Schor complains of, but rather the high price of ritonavir in Norvir. Schor is arguing that the Abbott should be obliged to lower the price of Norvir.

250 Id. at 610.
they apply to patent holders.\textsuperscript{251} \textit{Abbott II}, a case that should have laid the groundwork for similar cases to come, leaves much to want as far as guiding how antitrust plaintiffs should proceed under a theory of monopoly leveraging against patent holder-monopolists. While outright rejecting the Ninth Circuit’s approach on at least one ground, the court does not clearly advocate for that of the Federal Circuit. Nor does the court present why the reasoning of the Federal Circuit is superior to that of the Ninth. After \textit{Abbott II}, it is not entirely clear what conduct on the part of a patent holder is actionable, especially under the monopoly leveraging theory.

Furthermore, contrary to what he stated upfront, Judge Easterbrook presented his opinion in terms of whether Abbott’s unilateral price increase was an exclusionary practice, and not in terms of whether a “naked” theory of monopoly leveraging could be successful under the Sherman Act. The court ultimately found that because Abbott’s conduct was not forcing other competitors from the market, it was not harming consumers and thus was not exclusionary and did not violate the antitrust laws. While determining whether an alleged monopolist’s conduct is exclusionary is one of the main steps to finding liability under the Sherman Act, the court nevertheless missed its chance to set out a clear standard for the potential liability of a patent holder under a theory of monopoly leveraging.\textsuperscript{252} The court seemed to just ignore one of the major issues presented to it.

\textsuperscript{251} While the court assumed, as the complaint was dismissed for failure to state a claim, that Abbott had market power, thus addressing the first element of a § 2 monopolization claim, the court fails to clearly assess the second element—whether Abbott’s conduct was exclusionary or anticompetitive. \textit{Id.} at 610-11.

\textsuperscript{252} Also curious is the fact that the court spent the majority of the opinion attempting to show that Abbott’s conduct was not exclusionary rather than realize, as the district court did, that a unilateral price increase is akin to a unilateral refusal to deal. Refusing to sell a product is the same as selling it at an infinite price; because no one can afford to pay an infinite amount, it is essentially the same as refusing to sell the product altogether. Thus, a refusal to deal is merely a subset of a unilateral price increase. Additionally, the court’s conclusion that Abbott’s conduct does not fall into any of the mentioned traditional exclusionary practices is questionable. It is not such a stretch to see how Abbott’s price increase is akin to the price-squeeze claim in \textit{United States v. Aluminum Co. of America}, 148 F.2d 416, 436-38 (2d Cir.).
What’s more, the court misinterpreted not only the Ninth Circuit’s holding in *Kodak II*, but also the Supreme Court’s holding in *Kodak I*. The court interpreted the Ninth Circuit’s *Kodak II* decision as completely limiting a patent holder’s right to exclude others to a single market.253 This interpretation is too broad. The Ninth Circuit held that a patent holder *may* violate the Sherman Act by using its patents to monopolize or attempt to monopolize a secondary market.254 Aside from such anticompetitive conduct, the patent holder is free to use the patented product as it wishes, in any market. The court interpreted the *Kodak I* holding as standing for the proposition that a monopolist can’t deal in complementary products in a way that takes advantage of customers’ sunk costs.255 This interpretation is too narrow. The Supreme Court clearly states that under § 2 of the Sherman Act, a firm cannot wield its monopoly power “as part of a scheme of willful acquisition or maintenance of monopoly power” in a secondary market.256

Overall, the few statements that the court did make concerning the relationship between the antitrust and patent laws tend to resolve the conflict in favor of the latter.257 Much like the Federal Circuit, the Seventh Circuit sends a message that patentees essentially have free reign in any of the markets encircled within its patent grants.258

1945), where the defendant violated the Sherman Act by selling processed aluminum sheets (i.e. Kaletra) for less than the price it charged for the raw aluminum required to make them (i.e. Norvir).

253 *Abbott II*, 457 F.3d at 613-14.

254 Image Technical Servs., Inc. v. Eastman Kodak Co. (*Kodak II*), 125 F.3d 1195, 1209 (9th Cir. 1997).

255 *Abbott II*, 457 F.3d at 614.


257 *Abbott II*, 457 F.3d at 614 (“It would make little sense to use the antitrust laws to condemn Abbott for a strategy . . . that the patents entitle Abbott to pursue if it chooses.”) (emphasis added); *id.* at 610 (“[A] patent holder is entitled to charge whatever the traffic will bear.”) (emphasis added).

258 *Id.* at 614 (“Recall that [Abbott’s] patents cover not only ritonavir administered by itself but also ritonavir administered in combination with another
Additionally, the Seventh Circuit chose to take the side of the Federal Circuit in rejecting the Ninth Circuit’s approach. Whether or not this can necessarily be interpreted as a direct adoption of the Federal Circuit’s approach, it can be inferred that if the Seventh Circuit had clearly advocated for a particular approach, it would have been one that gave great deference to the patent laws. Yet, as it will become clear in the following discussion, elevating one set of laws above the other is improper and can have detrimental effects on competition. Because it best harmonizes the patent and antitrust laws, the Seventh Circuit should have adopted the approach taken by the First and Ninth Circuits.

B. Harmonizing the Patent and Antitrust Laws

Historically, the public has held a particular distain for monopolies. Like many other Americans at the time, Thomas Jefferson, the author of the 1793 Patent Act and an inventor himself, had an “instinctive aversion to monopolies,” initially including those given under the patent grant.259 While clearly recognizing the social and economic rationale of the patent system, Jefferson did not feel that the exclusive rights of the patent grant should be freely given. He insisted that in order to deserve the “embarrassment of an exclusive patent,” technologies must meet very high standards.260 Only protease inhibitor. Abbott therefore could take control of the market in combination treatments until the patents expire.” (emphasis added).

259 *Graham v. John Deere*, 383 U.S. 1, 7-8 (1966) (“From France, he wrote to Madison (July 1788) urging a Bill of Rights provision restricting monopoly, and as against the argument that limited monopoly might serve to incite ‘ingenuity,’ he argued forcefully that ‘the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression,’ V Writings of Thomas Jefferson, at 47 (Ford ed., 1895)

260 *John Deere*, 383 U.S. at 11. In *John Deere*, the Court stated: The grant of an exclusive right to an invention was the creation of society—at odds with the inherent free nature of disclosed ideas—and was not to be freely given. Only inventions and discoveries which furthered human knowledge, and were new and useful, justified the special inducement of a limited private monopoly.
inventions and discoveries which furthered human knowledge, and were new and useful, outweighed the restrictive effect of the limited patent monopoly. Thus, Jefferson was very much aware of and concerned with the anticompetitive nature of the patent grant.

In a day when the United States Patent and Trademark Office (the “PTO”) receives over 390,000 patent applications and grants upwards of 140,000 patents per year, it is hard to believe that every patent undergoes such a high level of scrutiny as Jefferson would have liked. In fact, many believe that it has almost become too easy to get

Jefferson did not believe in granting patents for small details, obvious improvements, or frivolous devices. His writings evidence his insistence upon a high level of patentability.

_Id._ at 9.

261 _Id._ at 11.

262 USPTO ELECTRONIC INFORMATION PRODUCTS DIVISION, NUMBER OF UTILITY PATENT APPLICATIONS FILED IN THE UNITED STATES, BY COUNTRY OF ORIGIN CALENDAR YEAR 1965 TO PRESENT, http://www.uspto.gov/go/taf/appl_yr.pdf. The United States grants three types of patents: utility, design and plant. JANICE M. MUELLER, AN INTRODUCTION TO PATENT LAW 196 (2003). Utility patents, the most common type of issued U.S. patents, are what most people commonly think of when they think of a patent—a patent for an invention. _Id._ A design patent, in contrast, protects the “new, original and ornamental design for an article of manufacture,” 35 U.S.C. § 171, i.e. the aesthetic “look” of a particular item. A plant patent is available for those who: [Invent] or discover[] and asexually reproduce[] any distinct and new variety of plant, including cultivated sports, mutants, hybrids, and newly found seedlings, other than a tuber propagated plant or a plant found in an uncultivated state. 35 U.S.C. § 161 (2002). The number quoted in the text is for utility patent applications alone filed in the U.S. in 2005.


264 “Over the last 10 years, the number of patent applications filed annually with USPTO has increased 91 percent from about 185,000 in 1994 to over 350,000 in 2004.” US GOV’T ACCOUNTABILITY OFFICE REPORT TO CONG. COMM. ON INTELL. PROP., USPTO HAS MADE PROGRESS IN HIRING EXAMINERS, BUT CHALLENGES TO RETENTION REMAIN 1, http://www.gao.gov/new.items/d05720.pdf.
If this is so, then why should we place intellectual property rights on such a pedestal? While it is clear that we have become an intellectual property-based society, why should we give patent

265 “[R]ecent increases in both the complexity and volume of patent applications have . . . raised concerns among intellectual property organizations, patent holders, and others about the quality of the patents that are issued.” US GOV’T ACCOUNTABILITY OFFICE REPORT TO CONG. COMM. ON INTELL. PROP., USPTO HAS MADE PROGRESS IN HIRING EXAMINERS, BUT CHALLENGES TO RETENTION REMAIN 1, http://www.gao.gov/new.items/d05720.pdf (last visited, Dec. 5, 2006). In response to waning standards for obviousness, which Thomas Jefferson viewed as the important threshold for patentability, one patent scholar noted:

The PTO is now run like a business, and popular view is that PTO’s incentive structure and need for funds are such that it more or less sells patents for the price of filing and maintenance fees. Even if this view were off the mark, the sheer increase in filings—tripling in the last 20 years—must have lead to an even greater “move them through” mentality. In a vicious circle, lowering the bar increases filings, and increasing filings further lowers the bar. The populace has gotten wind of the situation, and the widespread perception now is that obtaining a patent has become too easy.


266 At the turn of the twentieth century, the Dow Jones Industrial Average, which many consider the symbol of American wealth and prosperity, was comprised of Amalgamated Copper, American Sugar, Tennessee Coal & Iron, U.S. Rubber, and U.S. Steel, among others. DOW JONES INDUSTRIAL AVERAGE HISTORY 3, http://djindexes.com/mdsidx/downloads/DJIA_Hist_Comp.pdf (last visited Dec. 2, 2006) (“Dow Jones”). As one columnist noted: “The Dow Jones industrial average has always been the great financial symbol of U.S. business and manufacturing. The Dow was American business; if the business of America was business, then the companies that made up the Dow Jones industrial average were what American business was all about.” Bob Greene, A Mouse Replaces Men of Steel, CHI. TRIB., May 20, 1991, at 1C; see also J. Thomas McCarthy, Intellectual Property—America’s Overlooked Export, 20 U. DAYTON L. REV. 809, 809-10 (1995) (discussing Greene’s observation). In 1991, the Walt Disney Corporation replaced U.S. Steel on the Dow Jones Index. DOW JONES, at 13. The face of American business had changed:

[T]he heart of U.S. Steel was property—those huge mills spewing sparks, belching smoke and turning out rolled steel twenty-four
holders the right to violate the antitrust laws when patents are becoming less and less meaningful, in a substantive sense? The clear answer is that we should not.

Neither the Patent Act, nor the Sherman Act speaks on how to resolve any conflicts between the two sets of laws. Strangely, this silence has led to many courts implicitly giving more weight to the patent laws, often exculpating patent holders from antitrust liability.267 Yet nothing in the Patent Act says that patent holders are immune to antitrust liability, and the Supreme Court supports this principle. Even more troubling, the Supreme Court has stated that “exemptions from the [Sherman Act] are strictly construed and strongly disfavored.”268 Then how is this tension to be resolved? The Supreme Court in Watt v. Alaska269 stated that when faced with such a conflict of laws, a court must attempt to resolve the conflict. Thus, the main concern of any court presented with the antitrust-IP conflict should be to find an approach that upholds the primary concern of both laws—consumer welfare. This is what the Seventh Circuit should have held as its ultimate goal. As the following discussion will show, the Federal Circuit completely disregarded this principle, while the First and Ninth Circuits succeeded in finding a common ground.

hours a day. But what is the property that is at the heart of a company like Disney? It is a new kind of property. We call it intellectual property.


268 Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409, 421 (1986); see also Silver v. NYSE, 373 U.S. 341, 357 (1963 (“It is a cardinal principle of construction that repeals [of the antitrust laws] by implication are not favored.”) (quoting United States v. Borden Co., 308 U.S. 188, 198 (1939))).

C. The Federal Circuit’s Approach Does Not Give Equal Weight to the Antitrust and Patent Laws

In attempting to maintain the sanctity of the patent grant, the Federal Circuit completely disregarded the considerations of the antitrust laws. Read broadly, the Federal Circuit’s holding in Xerox stands for the proposition that (absent evidence of fraud, sham litigation, or illegal tying) no antitrust claim may be asserted on a firm’s unilateral refusal to sell or license intellectual property. The court misinterpreted Supreme Court precedent and the text of the Patent Act and attempted to set intellectual property holders apart from holders of all other forms of property. Furthermore, the court is implicitly founded on questionable assumptions regarding the incentives behind the patent grant.

The court incorrectly interprets Supreme Court precedent as only holding patent holders liable under the antitrust laws for unlawfully extending monopoly power outside of the patent grant. The Federal Circuit hung its hat on the theory that if the patentee’s actions can be construed as falling within the patent grant, the antitrust inquiry ends. Essentially, the court holds that if a patent holder uses monopoly power in one market to have an anticompetitive effect in a secondary market, such conduct will not violate the antitrust laws so long as the patent grant can be construed to also cover the secondary market. Furthermore, the court refuses to address whether the patent holder, and alleged monopolist had a valid business justification for refusing to sell or license its patented product.

This theory of antitrust liability is completely at odds with recent Supreme Court antitrust jurisprudence. The Supreme Court in Kodak I expressly indicated that a patent holder could be liable for leveraging

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270 Xerox, 203 F.3d at 1327.
271 Id.
272 Id. at 1328.
273 Id. at 1327.
274 Id.
its power in one market to gain a competitive advantage in another.\footnote{Eastman Kodak Co. v. Image Technical Servs., Inc. ("Kodak I"), 504 U.S. 451, 479 n.29 (1992).} In making this declaration, the Court did not condition its application to the context of a §1 tying violation as suggested by the Federal Circuit. Furthermore, while the court is correct in noting that a patent holder cannot extend its monopoly beyond the bounds of the patent grant,\footnote{Xerox, 203 F.3d at 1327.} the language used by the Supreme Court extends beyond this limited view.

Furthermore, implicit in the Federal Circuit’s rejection of Kodak II and its refusal to assess a patent holder’s “subjective motivation for refusing to sell or license its patented products” lay a rejection of Supreme Court precedent allowing an antitrust plaintiff to rebut evidence of the alleged monopolist’s valid business reasons.\footnote{Kodak I, 504 U.S. 483 ("[The right to refuse to deal with competitors] exists only if there are legitimate competitive reasons for the refusal.") (citing Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602-605 (1985)).} Because the Patent Act does not condition a patentee’s right to exclude on having a particular motive for doing so, the Federal Circuit refuses to apply Supreme Court precedent, even if the patentee’s actions have an anticompetitive effect.\footnote{Xerox, 203 F.3d at 1327.} However, there is no reason to believe that this rule should not similarly apply to patent monopolists and the Supreme Court did not so restrict the rule.

In addition, the court reads § 271(d) of the Patent Act as support for a finding of antitrust liability.\footnote{Id. at 1326.} However, on its face, the language of this section does not purport to address antitrust liability, but rather patent misuse.\footnote{Section 271(d) states in relevant part: No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following: . . . (3) sought to enforce his patent rights against infringement or contributory infringement; (4) refused to license or use any rights}
alleged patent infringement or contributory infringement that renders the patent unenforceable.281 A patent holder is deemed to have misused the patent if she attempted to extend the power of the patent grant beyond the boundaries defined by the patent claims.282 Moreover, as some scholars have pointed out, the legislative history of the 1988 amendment of the Patent Act, which added § 271(d), “makes plain that it was originally conceived not as an antitrust exception for patent holders, but rather as an effort to address certain judicial precedents that Congress thought subjected intellectual property owners to harsher treatment than that afforded to owners of other forms of property.”283

Thus, this legislative history of the Patent Act reflects a clear Congressional intent to treat intellectual property the same as other forms of property for antitrust purposes.284 Yet, the Federal Circuit attempts to justify this exact opposite conclusion by also pointing to § 154 of the Patent Act, which grants to patentees the statutory right to

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281 See B. Braun Med., Inc. v. Abbott Labs., 124 F.3d 1419, 1427 (Fed. Cir. 1997) (describing patent misuse doctrine as an equitable doctrine that allows patent infringers to show patentee’s inequitable conduct has rendered the patent unenforceable).

282 See Mallinckrodt, Inc. v. Medipart, Inc. 976 F.2d 700, 708 (Fed. Cir. 1992) (determining patent misuse by whether conduct falls within scope of patent grant).


284 Id. (“A review of the Congressional record discussing the 1988 amendment and subsequent related bills reveals a consistent Congressional intent to create a ‘level playing field’ under the antitrust laws for all forms of property—not to provide special treatment, or an antitrust immunity, for patent and copyright holders.”).
The court essentially concludes that the patentee’s right to exclude under this section is unfettered. This conclusion is not supported by recent Supreme Court case law. To the contrary, some patent scholars argue that § 154 “does no more than afford patent holders the same rights as those enjoyed by owners of tangible property under common law.”

Moreover, the Federal Circuit’s approach is seemingly based off of the categorical assumption that invention and innovation will cease if the protections of the patent laws are subjected to the antitrust laws. It is clear that the founders of the Patent Act intended the right to exclude afforded by the patent grant to promote consumer welfare in the long term by encouraging investment in the research and development of new technologies. Many scholars, but few courts, challenge this assumption. These scholars say that there is little to no empirical evidence that adding some limitations to a patentee’s power would actually lead to a decrease in technological advancement. In fact, many argue that overly broad protection of intellectual

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285 Xerox, 203 F.3d at 1324 (“But it is also correct that the antitrust laws do not negate the patentee's right to exclude others from patent property.”) (quoting Intergraph Corp. v. Intel Corp., 195 F.3d 1346, 1362 (Fed.Cir.1999)). 35 U.S.C. 154(a)(1) states, in relevant part, that “[e]very patent shall contain a . . . grant to the patentee, his heirs or assigns, of the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States.”

286 Xerox, 203 F.3d at 1327 (“In the absence of any indication of illegal tying, fraud in the Patent and Trademark Office, or sham litigation, the patent holder may enforce the statutory right to exclude others from making, using, or selling the claimed invention free from liability under the antitrust laws.”) (emphasis added).

287 Melamed & Stoepelwerth, supra note 276, at 411 (“[T]he Supreme Court has repeatedly rejected assertions of intellectual property rights as defenses to conduct that would otherwise be condemned under the Sherman Act.”).

288 Melamed & Stoepelwerth, supra note 276, at 410-11.

289 Id. at 414.

290 See Part IB, supra.

291 See Melamed & Stoepelwerth, supra note 276, at 414-16.
property stifles innovation.\textsuperscript{292} The approach taken by the Federal Circuit fails to assess these economic realities by outright upholding the patent laws, even if the patent holder’s conduct has an anticompetitive effect.\textsuperscript{293}

By and large, the Federal Circuit’s Xerox decision exempts patent holders from antitrust liability. However, even if we think that this approach gives patentees too much freedom, at least other players in the market know the clear boundaries of what the patent holder has proprietary rights to and they can attempt to innovate around those boundaries. Notwithstanding this one benefit, the Federal Circuit’s holding was incorrect and should not be followed by the Seventh Circuit.

\textbf{D. The Ninth Circuit’s Approach Best Harmonize the Patent and Antitrust Laws}

Despite the Seventh Circuit’s inclination that the Ninth Circuit “just got it wrong,” the \textit{Kodak II} holding best recognizes, and attempts to reconcile the opposing tugs of the antitrust and intellectual property laws. Overall, the \textit{Kodak II} decision makes up for everything that the Federal Circuit’s approach lacks. By correctly applying Supreme Court precedent and refusing to categorically allow patent law considerations overtake the antitrust laws, the Ninth Circuit promulgated a sounder approach. This is the approach that the Seventh Circuit should have adopted in \textit{Abbott II}.

On the whole, the Ninth Circuit set out to address the competing concerns of the patent and antitrust laws, rather than sweep them under the rug as the Federal Circuit did in \textit{Xerox}. While generally recognizing that a patent holder has the right to refuse to sell or license a patent good, the court refused to believe that this right necessarily

\textsuperscript{292} \textit{Id.} (“[Limitations on intellectual property rights reflect that . . . too much protection for intellectual property rights can retard innovation by, for example, inhibiting the development of improvement patents.”). \\
gave patentees free reign to violate the antitrust laws. The court correctly read the recent Kodak I decision in this light.

At the very least, the court reads Kodak I as standing for the proposition that “intellectual property rights do not confer an absolute immunity from antitrust claims.” This principle cannot be disputed. But, the court was also correct in interpreting Kodak I as standing for the proposition that a firm, holding a legitimate monopoly in one market, can be held liable for using that power to enhance a monopoly in a second market. While noting that Kodak I did not address unilateral refusals to deal in a patented product, the court recognized that § 2 of the Sherman Act clearly “condemns exclusionary conduct that extends natural monopolies into separate markets.” This principle was also recognized by the Second Circuit in Berkey Photo. Because patented property should be treated no differently than real property, the Ninth Circuit was correct in extending this prohibition to patent holders.

Furthermore, the Ninth Circuit, in following the lead of the First Circuit in Data General, correctly required patent holders to present valid business reasons for exercising their statutory right to exclude in an allegedly anticompetitive manner. The court recognized that not all conduct on the part of a patent holder, which presumptively falls under the statutory right to exclude, “benefit[s] consumers by making a better product or service available—or in other ways—and instead has the effect of impairing competition.”

294 Image Technical Servs., Inc. v. Eastman Kodak Co. (“Kodak II”), 125 F.3d 1195, 1215 (9th Cir. 1997).
295 Id. at 1216. (“[T]he Supreme Court in [Kodak I] refutes the argument that the possession by a manufacturer of ‘inherent power’ in the market for its parts ‘should immunize [that manufacturer] from the antitrust laws in another market.’”) (citing Kodak I, 504 U.S. at 470 n29).
296 Kodak II, 125 F.3d at 1216.
298 Kodak II, 125 F.3d at 1212.
that the Patent Act does not purport to limit a patentee’s exercise of its statutory right to exclude to any particular reasons, the Ninth Circuit did not believe that a patent holder should be allowed to do so for anticompetitive purposes; If the producer of any other form of real property should not be allowed to do so, then a patent holder should not be treated any differently. Thus, the court refused to promulgate a per se rule that a patentee cannot violate the antitrust laws by exercising its right to exclude.

However, the court did recognize that the underlying purposes of the patent laws deserve some deference. Thus, as a means for allowing a jury to “account for the procompetitive effects and statutory rights extended by the intellectual property laws,” the court, like the First Circuit, held that a patentee’s exercise of its statutory right to exclude is presumptively a valid business justification. The court reiterated that this is a rebuttable presumption. Yet, unlike the First Circuit, the court held that an antitrust plaintiff may rebut this presumption of legitimacy by showing that the patent holder’s justification was pretextual. The court justified this by holding that “[n]either the aims of intellectual property law, nor the antitrust laws justify allowing a monopolist to rely upon a pretextual business justification to mask anticompetitive conduct.”

This presumption approach, gives respect to the goals of the patent laws, but also recognizes that a patentee should not be allowed to outright harm competition simply because he has a patent. The Federal Circuit criticized this approach and felt that it severely undermined the incentives lying at the heart of the patent laws. However, Kodak II does not stand for the proposition that a patentee cannot exercise its right to exclude under a patent grant to protect his investment. The Ninth Circuit simply holds that a patentee should

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300 Kodak II, 125 F.3d at 1216-17.
301 Id. at 1218.
302 Id.
303 Id. at 1212.
304 Id. at 1219.
305 Melamed & Stoepelwerth, supra note 276, at 427.
not be able to use its legal monopoly power in an anticompetitive manner. 306 This approach attempts to address economic realities by recognizing that the harm associated with a refusal to deal (shutting competitors out of the secondary market) was not offset by any efficiencies or potential benefits to consumers. 307 The Ninth Circuit’s approach does not seek to proscribe a patentee’s exercise of its statutory right to exclude, but rather proscribe patentees from doing so for the purpose of monopolizing or attempting to monopolize a secondary market.

The Ninth and First Circuits’ presumption approach allows the court to assess any potential anti-competitive effects of a monopolist’s conduct by requiring the alleged monopolist to put forth evidence of a business justification that advances consumer welfare, and allowing the antitrust plaintiff to rebut that evidence with a showing of net damage to the competitive process. Because this approach holds the concerns of both the patent and antitrust laws to be of equal importance, it is far superior to that of the Federal Circuit. Thus, the Seventh Circuit should have adopted the approach of the Ninth Circuit.

One may enjoy the fruits of her lawfully obtained property, including whatever monopoly profits that property enables her to earn, but she may not sacrifice such profits strategically, by using that property in ways that serve no legitimate purpose (i.e., one that neither benefits consumers nor promotes efficiency) in order to create additional market power. In other words, a firm, even a monopolist, can profit from its property (including its intellectual property) but has not legal entitlement to extend its power beyond the intellectual property grant or to create additional market power.

306 Id. at 1217.
D. The Added Wrinkle of Schor v. Abbott Labs

Unfortunately, Schor v. Abbott Labs was not your typical battle of the intellectual property and antitrust laws. From the perspective of the patent holder, patents covering pharmaceutical products entail many special considerations that your average utilitarian patent does not.\textsuperscript{308} The threat that placing antitrust limitations on a patent holder’s right to exclude poses to the incentives at the heart of the patent laws is particularly pronounced in the pharmaceutical context.\textsuperscript{309}

A compelling argument can be made that limiting the scope of drug patents may severely diminish the incentives to invest in research and development in these markets. In the pharmaceutical field, research and development costs can be much greater than in other technical fields.\textsuperscript{310} The time and money necessary to bring a drug to fruition can be on the order of hundreds of millions of dollars.\textsuperscript{311} Additionally, the number of developed drugs that acquire FDA approval and actually become successful on the market is low.\textsuperscript{312} Thus,


\textsuperscript{309} See id. at 1581-82.

\textsuperscript{310} Id. at 1581.

\textsuperscript{311} Id.

\textsuperscript{312} Id. at 1581-82. Burk and Lemley discussed why drugs are so expensive to develop:

Some of this cost is a result of the labyrinthine regulatory process and the detailed study that is required to sell a drug for consumption by humans. A major additional part of the cost stems from the uncertainty of the R&D efforts. Pharmaceutical companies may try hundreds of compounds before identifying a
once a pharmaceutical firm has a commercially viable drug in its possession, the potential harm that can be caused by an unscrupulous copyist is particularly great. This is not only due to the high level of investment that the drug company has made, but also because drugs are extremely easy to copy—once the chemical compound is known, it can be reproduced relatively inexpensively.\textsuperscript{313} Drug companies, therefore, are ultra-dependent on patent protection to protect their investments.\textsuperscript{314}

Yet, on the other hand there is this concern that the substance of these patents—the drugs themselves—can have vast life saving potential and that we should do all we can to protect the competitive market in these goods. According to the Centers for Disease Control ("CDC"), at the end of 2003, an estimated 1,039,000 to 1,185,000 persons in the United States were living with HIV/AIDS.\textsuperscript{315} Approximately 40,000 persons become infected with HIV each year.\textsuperscript{316} The CDC estimates that the average cost of lifetime treatment possible drug, and they may not know for years whether they have chosen the right one for testing.

\textit{Id.}\textsuperscript{313} \textit{Id.} at 1616-17. Burk and Lemley explain:
While imitation of a drug is reasonably costly in absolute terms, a generic manufacturer who can prove bioequivalency can avoid the R&D cost entirely and can get FDA approval much more quickly than the original manufacturer. The ratio of inventor cost to imitator cost, therefore, is quite large in the absence of effective patent protection. As a result, it is likely that innovation would drop substantially in the pharmaceutical industry in the absence of effective patent protection.

\textit{Id.}\textsuperscript{314} \textit{Id.} at 1616 ("Strong patent rights are necessary to encourage drug companies to expend large sums of money on research years before the product can be released to the market.").


\textit{Id.}\textsuperscript{316}
for HIV infection is $210,000.317 Furthermore, the U.S. Department of Health and Human Services recommends a standard treatment regimen including a protease inhibitor either alone or boosted with ritonavir.318 There are no generic versions of Norvir and (according to Schor) no other drug on the market performs Norvir’s “boosting” function.319 When it is so clear that Abbot’s Norvir has had immense effects on the treatment of HIV/AIDS, why should the court take such a lenient approach?

In evaluating Schor’s § 2 monopolization claim, the Seventh Circuit should not only have taken into account, the economic realities of the market, as discussed above,320 but potentially should have taken note of the special considerations surrounding the particular goods in question. On the one hand, in light of the overwhelming devastation caused by the HIV/AIDS virus and the utility of Abbott’s Norvir in fighting this disease, the Seventh Circuit seems particularly out of line in elevating Abbott’s patent rights over antitrust concerns. In this light, its not at all clear that we should let the producer of a necessary HIV/AIDS drug monopolize it in such an anticompetitive manner simply because they have intellectual property rights in that compound. Yet, on the other hand, when the producers of pharmaceutical compounds are so dependent on the patent system to reap the benefits of their investment, subjecting them to antitrust liability could have dire effects on the development of new drugs. While these considerations may have made Abbott II even more difficult to decide, the Seventh Circuit seemingly should have taken them into account when making its decision.

320 See Part III A-D, supra.
CONCLUSION

The Seventh Circuit missed an important opportunity in *Abbott II* to settle the law of monopoly leveraging as applied to patent holders. By essentially punting on this issue, the court gave no guidance for antitrust plaintiffs wishing to allege such a theory of antitrust liability. As supported by the abovementioned discussion, the Seventh Circuit should have adopted the approach taken by the Ninth Circuit in *Kodak II*. The Ninth Circuit’s approach balances the considerations of the patent and antitrust laws by allowing the court to address the potential anticompetitive effects of a patent holder’s conduct. Furthermore, as *Abbott II* dealt with a patented drug, vital to the treatment of HIV/AIDS, the Seventh Circuit should have taken those special considerations into account when addressing the antitrust claim.
THE SEVENTH CIRCUIT TURNS A BLIND EYE TO THE PLAYMATE: THE APPLICATION OF THE PROBATE EXCEPTION AFTER MARSHALL V. MARSHALL

GILLIAN NAGLER


INTRODUCTION

The probate exception to federal jurisdiction prohibits federal courts from hearing cases involving matters related to the probate of wills or administration of estates.1 It is a doctrine that has been described as “one of the most mysterious and esoteric branches of the law of federal jurisdiction.”2 There are two primary policy justifications underlying this exception: first, since probate proceedings are in rem the federal courts cannot interfere with the state court’s control over estate property; second, the state courts are presumed to have proficiency in dealing with probate matters.3 But while the probate exception has traditionally been applied in the context of diversity jurisdiction cases, its applicability to federal

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2 Dragan v. Miller, 679 F.2d 712, 713 (7th Cir. 1982).
3 Jones v. Brennan, 465 F.3d 304, 307 (7th Cir. 2006); see also Peter Nicolas, Fighting the Probate Mafia: A Dissection of the Probate Exception to Federal Court Jurisdiction, 74 S. CAL. L. REV. 1479, 1482-1483 (2001) (discussing various policy justifications for the probate exception).
question cases is less certain. Given that the purpose of federal question jurisdiction is to give federal courts the power to interpret federal law, should the probate exception apply to limit that authority? The recent decision of the United States Supreme Court in \textit{Marshall v. Marshall} took a significant step towards clarifying the scope of the probate exception as applied to federal question cases, holding that it does not necessarily bar a federal court from hearing a probate-related matter in the context of a bankruptcy proceeding. However, though \textit{Marshall} narrowed the applicability of the probate exception in the specific context of claims arising out of a federal bankruptcy case, it still left open the issue whether it applies to other federal question cases.

Not long after the Supreme Court’s decision in \textit{Marshall}, the United States Court of Appeals for the Seventh Circuit was faced with this very issue in \textit{Jones v. Brennan}, a case which involved a claim

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\begin{enumerate}
\item \textit{Compare} \textit{Jones}, 465 F.3d at 306 (holding the probate exception applicable in federal question cases), with \textit{Goerg v. Parungao}, 844 F.2d 1562, 1565 (11th Cir. 1988) (holding that the exception only applies to diversity cases). There are also several secondary sources on the subject which refer to the exception specifically as the probate exception to diversity jurisdiction. \textit{See, e.g., Christian J. Grostic, A Prudential Exercise: Abstention and the Probate Exception to Federal Diversity Jurisdiction, 104 Mich. L. Rev. 131 (2005); Shawn R. McCarver, Note, The “Probate Exception” to Federal Diversity Jurisdiction: Matters Related to Probate, 48 Mo. L. Rev. 564 (1983); 32A Am. Jur. 2d Federal Courts § 936 (2006) (section is titled “Probate exception to diversity jurisdiction”); 36 C.J.S. Federal Courts § 7 (2006) (“Under the probate exception to diversity jurisdiction, a federal court may not probate a will, administer an estate, or entertain an action that would interfere with pending probate proceedings in a state court”).}
\item 126 S.Ct. 1735 (2006).
\item \textit{Id.} at 1746.
\item \textit{See} \textit{Jones}, 465 F.3d at 306.
\end{enumerate}
under 42 U.S.C. § 1983 arising out of probate proceedings. In its analysis, the court cited Marshall as serving to clarify the scope of the exception. But rather than following the Supreme Court’s lead in interpreting the exception narrowly, the Seventh Circuit took a broader view and held it applicable to federal question cases. This Comment analyzes the effect that the Marshall decision has on cases involving the probate exception, specifically in the Seventh Circuit, and how that precedent should be used as a basis for formulating a clearer and narrower approach to the exception’s application to federal question cases. Part I provides background information on the history of the probate exception, and how it relates to federal jurisdiction. Part II discusses cases that applied the probate exception prior to Marshall. Part III examines the background facts and procedural history of Marshall. Part IV analyzes the Seventh Circuit’s application of Marshall in Jones v. Brennan, and suggests that it should have followed the narrowing trend evident in Supreme Court precedent and further restricted the parameters of the probate exception.

I. THE HISTORY OF THE PROBATE EXCEPTION AND ITS RELATIONSHIP TO FEDERAL JURISDICTION

A. The Origins of the Probate Exception

Though the probate exception is a doctrine that is well-established in the federal courts, its origins are not entirely clear. It is often

10 Id. at 305.
11 Id. at 306
12 Id. at 306-07.
13 Dragan v. Miller, 679 F.3d 712, 713 (7th Cir. 1982); see also Gregory C. Luke & Daniel J. Hoffheimer, Federal Probate Jurisdiction: Examining the Exception to the Rule, 39 FED. B. NEWS & J. 579 (1992) (“The probate exception is alive and well in all circuits; it survives with Supreme Court support.”).
14 Jones, 465 F.3d at 306-07; Dragan, 679 F.3d at 713; see generally John F. Winkler, The Probate Jurisdiction of the Federal Courts, 14 PROB. L.J. 77 (1997) (tracing the evolution of the probate exception beginning with the eighteenth century English court system).
analogized to the domestic relations exception, which prohibits federal courts from hearing claims involving matters related to divorce, alimony, and child custody decrees. The most common explanation grounds the probate exception in the statutory grants of jurisdiction under the Judiciary Acts of 1789 and 1875, which provided that federal courts would have jurisdiction over “all suits of a civil nature at common law or in equity.” This language is generally interpreted with reference to the structure of the eighteenth-century English judicial system and the types of claims that could be brought in the various courts. American courts have read the phrase “at common law or in equity” as granting jurisdiction to those claims that could, in 1789, have been brought in the English courts of common law and the High Court of Chancery (equity). Probate matters typically did not fall into the categories of law or equity, and were handled instead by the ecclesiastical courts. Therefore, issues involving probate were considered to be outside the scope of federal court jurisdiction.


17 For examples of decisions citing to the historical division of claims among the various types of English courts as the source of origin for the probate exception, see Marshall v. Marshall, 126 S.Ct. 1735, 1746 (2006); Markham v. Allen, 326 U.S. 490, 494 (1946); Jones v. Brennan, 465 F.3d 304, 306-307 (7th Cir. 2006); Golden v. Golden, 382 F.3d 348, 357 (3d Cir. 2004); Moser v. Pollin, 294 F.3d 335, 340 (2d Cir. 2002); Georges v. Glick, 856 F.2d 971, 973 (7th Cir. 1988); Goerg v. Parungao, 844 F.2d 1562, 1565 n.8 (11th Cir. 1988).

18 See, e.g., Markham, 326 U.S. at 494; Nicolas, supra note 3, at 1500.

19 See, e.g., Golden, 382 F.3d at 357; Nicolas, supra note 3, at 1500. For a thorough and detailed discussion of the historical jurisdiction of the English courts, see Winkler, supra note 14, at 78-88. In addition to probate of wills, the ecclesiastical courts also had exclusive jurisdiction over matrimonial issues, hence the relationship between the probate and domestic relations exceptions. See James E.
The accuracy of this historical interpretation of the probate exception’s origins has recently been questioned. For example, in the Seventh Circuit’s decision in Dragan v. Miller, Judge Richard Posner pointed out two problems with the theory:

First, there is no ecclesiastical court in America, and it is not obvious why the language of the Judiciary Act of 1789 should be taken to refer exclusively to English rather than American courts. . . . Second, the scope of the exclusive jurisdiction of the ecclesiastical court is very uncertain. In particular, it appears not to have extended beyond personal property; apparently the court of chancery had extensive jurisdiction over the inheritance of land.\(^{21}\)

Judge Posner’s skeptical view of this justification for the probate exception is shared by other courts and legal scholars as well. The Supreme Court described the exception as arising from “misty understandings of English legal history,”\(^{22}\) and recognized that the federal equity courts have jurisdiction over some probate-related claims, including “suits ‘in favor of creditors, legatees and heirs’ and other claimants against a decedent’s estate.”\(^{23}\) Additionally, a detailed account of the various interests involving probate matters and the relief available to enforce those interests in both English and Colonial

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\(^{20}\) See, e.g., *Markham*, 326 U.S. at 494; Winkler, *supra* note 14, at 1500-01.

\(^{21}\) Dragan v. Miller, 679 F.2d 712, 713 (7th Cir. 1981) (internal citations omitted).

\(^{22}\) *Marshall*, 126 S.Ct. at 1741. In his concurring opinion, Justice Stevens echoed this characterization, describing the statement in *Markham* that the English chancery courts lacked jurisdiction over probate matters as a “bald assertion” and a theory “only sporadically and tentatively cited as justification for the exception.” *Id.* at 1751.

\(^{23}\) *Markham*, 326 U.S. at 494 (internal citations omitted).
American courts reveals that the distinction among law, equity, and ecclesiastical claims may not be as clear-cut as courts have assumed.24 Because of the confusion surrounding its historical origins, at least one scholar has characterized the probate exception as a “myth of federal law” which should be abandoned.25 This uncertainty, however, has not stopped federal courts from regularly applying the doctrine.26

B. The Relationship Between the Probate Exception and Federal Jurisdiction

Modern federal court jurisdiction is defined by Article III of the United States Constitution,27 and 28 U.S.C. §§ 1331 and 1332.28 There is nothing in the language of these provisions that explicitly bars federal courts from hearing probate claims; rather the probate exception is an implied restriction on federal jurisdiction that has been developed through the common law.29 This raises an interesting question: why allow a common law doctrine to limit an exercise of

24 Winkler, supra note 14, at 78-101; see also Nicolas, supra note 3, at 1518-19.
25 Winkler, supra note 14, at 78, 152.
27 Section 1, cl. 2 reads in pertinent part: “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States.”
28 The grant of federal question jurisdiction under the Judiciary Act of 1875, 18 Stat. at 470, was later codified as 28 U.S.C. § 1331: “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” Diversity jurisdiction originally granted by the Judiciary Act of 1789, 1 Stat. at 78, is codified in 28 U.S.C. 1332(a):
   The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between (1) Citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state, defined in section 1603(a) of this title as plaintiff and citizens of a State or of different States.
29 Nicolas, supra note 14, at 1520.
federal jurisdiction that would otherwise meet the constitutional and statutory criteria?

One way that courts have attempted to justify the restriction on federal jurisdiction is by characterizing the exception as statutory in origin.\(^ {30}\) But since this historical foundation has been called into question,\(^ {31}\) the exception has also been justified based on policy considerations. Among the policies claimed to be served by the probate exception are the promotion of legal certainty and judicial economy, respect for the expertise of the state courts in dealing with probate matters, and the interest in avoiding unnecessary interference with state probate system.\(^ {32}\) This concern with the function of the state courts has led some scholars to advocate for an application of the probate exception based on the doctrine of prudential abstention.\(^ {33}\) Under the various theories of abstention, federal courts have discretion to decline to exercise jurisdiction to protect an “important countervailing interest” of a state.\(^ {34}\) Therefore, it has been suggested that even if a probate-related claim appears to fall outside the parameters of the probate exception, courts should nonetheless undertake an abstention analysis to determine if it should hear the case.\(^ {35}\)

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\(^{30}\) See supra notes 16-20 and accompanying text.

\(^{31}\) See supra notes 21-24 and accompanying text.

\(^{32}\) Storm v. Storm, 328 F.3d 941, 944 (7th Cir. 2003); see also Nicolas, supra note 3, at 1483.

\(^{33}\) See, e.g., Nicolas, supra note 3, at 1528-40, 1546; Grostic, supra note 4, at 144.

\(^{34}\) 32A AM. JUR. 2D FEDERAL COURTS § 1229 (2006). For additional information on the types of abstention, see, for example, 17A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & VIKRAM DAVID AMAR, FEDERAL PRACTICE AND PROCEDURE § 4241; Nicolas, supra note 3, at 1528-41.

\(^{35}\) Nicolas, supra note 3, at 1546; Grostic, supra note 4, at 144-149.
II. THE APPLICATION OF THE PROBATE EXCEPTION PRIOR TO MARSHALL

A. Markham v. Allen

Markham v. Allen is an early decision in which the Supreme Court attempted to limit the applicability of the probate exception. In its opinion in Marshall, the Court described Markham as its “most recent and pathmarking pronouncement on the probate exception.” At issue in the case was whether there was federal jurisdiction over “a suit brought by the Alien Property Custodian against an executor and resident heirs to determine the Custodian’s asserted right to share in decedent’s estate which is in course of probate administration in a state court.” In her will, California resident Alvina Wagner left property to several German citizens. Her heirs-at-law, six California residents, filed a petition in state court for a determination of heirship, claiming that they were entitled to Wagner’s estate because under California law “the German legatees were ineligible as beneficiaries.” As Custodian, Markham issued an order vesting in himself the interests of the German legatees. He then brought suit in federal court for a declaratory judgment that his was the sole interest in Wagner’s estate, and that the California heirs-at-law had no such interest.

36 326 U.S. 490, 494-95 (1946); see also Hermann & Dearborn, supra note 8, at 85.
38 Markham, 326 U.S. at 491-492. The petitioner’s role as an Alien Property Custodian was pursuant to § 5(b)(1)(B) of the Trading with the Enemy Act, § 301, 55 Stat. 839 (as amended by the War Powers Act 1941). For more information on this statute and the authority granted to Alien Property Custodians, see Bethany Kohl Hipp, Comment, Defending Expanded Presidential Authority to Regulate Foreign Assets and Transactions, 17 EMORY INT’L L. REV. 1311, 1316-1335 (2003).
39 Id.
40 Id. at 492.
41 Id.
42 Id.
Though the district court entered judgment in Markham’s favor, the Ninth Circuit reversed citing lack of subject matter jurisdiction due to the applicability of the probate exception. It reasoned that since the state probate court was “‘in possession of the property, its right to proceed to determine heirship cannot be interfered with by the federal court.’” The Supreme Court, however, held that the probate exception did not extend to the situation at hand. It articulated the following test for determining when the probate exception bars federal jurisdiction:

[W]hile a federal court may not exercise its jurisdiction to disturb or affect the possession of property in the custody of a state court…it may exercise its jurisdiction to adjudicate rights in such property where the final judgment does not undertake to interfere with the state court’s possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court.

In applying this test, the Court concluded that the declaration of Markham’s sole interest in the estate did not qualify as an interference with the state’s possession of the property because “the effect of the judgment was to leave undisturbed the orderly administration of the decedent’s estate in the state probate court.” Since the power to administer the estate remained with the state court, the federal court was not attempting to exercise probate jurisdiction and therefore was not barred from hearing the claim. The Court, however, did not stop its analysis upon concluding that federal jurisdiction was proper, and

43 Id. at 493.
44 Id.
45 Id. (quoting Allen v. Markham, 147 F.2d 136, 137 (9th Cir. 1945)).
46 Markham, 326 U.S. at 495.
47 Id. at 494 (internal citations omitted) (emphasis added).
48 Id. at 495.
49 Id.
went on to consider whether or not the district court should have used its discretion to decline to hear the suit because it involved issues of state law.\textsuperscript{50} It reasoned that such an exercise of discretion was unnecessary in this situation for two reasons: first because “[t]he mere fact that the district court . . . is required to interpret state law is not in itself a sufficient reason for withholding relief to petitioner”\textsuperscript{51}; and second, because the district court was exercising power granted to it by a federal statute.\textsuperscript{52}

B. From Markham to Marshall: Confusion in the Federal Courts Regarding the Scope of the Probate Exception

Since the Supreme Court’s decision in \textit{Markham}, the “[l]ower federal courts have puzzled over the meaning of the words ‘interfere with the probate proceedings.’”\textsuperscript{53} This confusion is manifested in two ways: first, there are several different tests used by the courts to determine the parameters of the exception;\textsuperscript{54} second there is disagreement regarding its applicability to federal question cases.\textsuperscript{55}

1. Overview of the Tests Applied in Probate Exception Analysis

In response to the Supreme Court’s definition of the exception articulated in \textit{Markham}, three primary tests have been developed by the lower courts to determine whether there is interference with state

\textsuperscript{50} \textit{Id.}
\textsuperscript{51} \textit{Id.}
\textsuperscript{52} \textit{Id.} at 495-96. Section 17 of the Trading with the Enemy Act “specially confers on the district court, independently of the statutes governing generally jurisdiction of federal courts, jurisdiction to enter ‘all such orders and decrees . . . as may be necessary and proper in the premises to enforce the provisions’ of the Act.” \textit{Id.} (quoting the Trading with the Enemy Act, § 301, 55 Stat. 839).
\textsuperscript{54} \textit{See} Nicolas, supra note 3, at 1488; Grostic, \textit{supra} note 4, at 133.
\textsuperscript{55} \textit{Jones} v. \textit{Brennan}, 465 F.3d 304, 306 (7th Cir. 2006).
probate proceedings.\textsuperscript{56} The first is the \textit{nature of the claim} test, which “examines the nature of the plaintiff’s claim, with the plaintiff’s position vis-à-vis the will being the dispositive factor. Under the ‘nature of the claim’ test, if the plaintiff’s claim rests upon an assertion that the will is invalid . . . then the case falls within the probate exception.”\textsuperscript{57} An example of the application of this test can be seen in the Court of Appeals for the Second Circuit’s decision in \textit{Moser v. Pollin}.\textsuperscript{58} That case involved a dispute regarding a will that had been admitted to probate which left the decedent’s estate entirely to his sister to the exclusion of his only child.\textsuperscript{59} The court concluded that since the plaintiff’s claim for tortious interference with inheritance was “in substance nothing more than a thinly veiled will contest,” it qualified as a “pure probate” matter over which the federal court was unable to exercise jurisdiction.\textsuperscript{60}

Another example of a test applied by courts is the \textit{route} test. This test:

\begin{quote}
[E]xamines the route that the suit would take had it been brought in state court. . . . [I]f the dispute under state law could be adjudicated only in a probate court, then there is no federal court jurisdiction. If, however, under state law the state courts of general jurisdiction would have jurisdiction over the dispute, then federal court jurisdiction exists.\textsuperscript{61}
\end{quote}

This test was applied by the Court of Appeals for the Sixth Circuit in \textit{Lepard v. NBD Bank}, where a claim for breach of fiduciary duty in the administration of a trust was held to be barred by the probate

\textsuperscript{56} The various tests are laid out in detail in Nicolas, \textit{supra} note 3, at 1488-92 and Grostic, \textit{supra} note 4, at 133-135.
\textsuperscript{57} Nicolas, \textit{supra} note 3, at 1488.
\textsuperscript{58} 294 F.3d 335, 340-341 (2d Cir. 2002).
\textsuperscript{59} \textit{Id.} at 335.
\textsuperscript{60} \textit{Id.} at 340-341.
\textsuperscript{61} Nicolas, \textit{supra} note 3, at 1489.
exception because the state probate courts had exclusive jurisdiction over all probate matters.62 Though the application of the route test involves a fairly straight-forward interpretation of state law, it leads to inconsistent results since “the scope of the probate exception varies . . . according to the internal division of jurisdiction within each state between its probate courts and its courts of general jurisdiction.”

The third and final test is referred to as the practical test. This approach was developed by Judge Posner and is applied in the Seventh Circuit.63 Under this approach, the probate exception applies when the exercise of federal jurisdiction would “impair the policies served by the probate exception.”64 In Dragan v. Miller, the court concluded that there was no jurisdiction over a tortious interference with inheritance claim based on weighing such factors as an interest in judicial economy, relative expertise of the state and federal court, and the promotion of legal certainty.65 Judge Posner focused on the fact that as a practical matter this claim was essentially a will contest, and because the procedure for will contests was governed exclusively by the Illinois Probate Code, the factors of judicial economy and relative expertise weighed heavily against an exercise of federal jurisdiction.66

2. The Circuit Split Regarding the Applicability of the Probate Exception to Federal Question Cases

The probate exception has typically been applied in cases based on diversity of jurisdiction.67 This is due to the fact that with probate

62 384 F.3d 232, 237 (6th Cir. 2004)
63 The test was first articulated in Dragan v. Miller, 679 F.2d 712, 715 (7th Cir. 1981). Another example of its application is Storm v. Storm, 328 F.3d 941, 944 (7th Cir. 2003).
64 Dragan, 679 F.2d at 715. For more information on policy considerations see supra note 32 and accompanying text.
65 Dragan, 679 F.2d at 715-16.
66 Id. at 716.
67 Jones v. Brennan, 465 U.S. 304, 306 (7th Cir. 2006). As further evidence of this proposition, note that all of the cases discussed in Part II.B.1, supra, were based on diversity of jurisdiction.
cases, “the cause of action is usually either a breach of contract claim or a garden-variety state common law claim—such as fraud, breach of fiduciary duty, negligence, or wrongful death.”\textsuperscript{68} Its application to federal question cases, however, is not quite as certain.\textsuperscript{69} One court—the Court of Appeals for the Eleventh Circuit—explicitly stated the inapplicability of the probate exception to federal question cases in \textit{Goerg v. Parungao}.\textsuperscript{70} The court pointed to Congress’ power to create bankruptcy jurisdiction and the preemption of state law in this area under the Supremacy Clause of the Constitution to reach the conclusion that the probate exception “relates only to 28 U.S.C. § 1332 and has no bearing on federal question jurisdiction, the jurisdiction invoked in bankruptcy cases.”\textsuperscript{71} The Ninth Circuit, however, came to a contrary conclusion, “specifically reject[ing] the \textit{Goerg} pronouncement and [holding] that the probate exception is applicable in bankruptcy cases.”\textsuperscript{72} It found the policy rationale of avoiding federal interference with state probate proceedings to be “as relevant to federal question cases as it is to diversity cases.”\textsuperscript{73}

\textbf{III. MARSHALL v. MARSHALL: THE SUPREME COURT REVISITS THE ISSUE OF THE SCOPE OF THE PROBATE EXCEPTION}

When the Supreme Court decided \textit{Marshall} in 2006, it was the first time it addressed the probate exception since \textit{Markham} sixty years earlier.\textsuperscript{74} In an interesting twist, this “arcane” doctrine became the subject of renewed attention because of the quasi-celebrity marriage of a Playboy model to a billionaire over three times her age,

\textsuperscript{68} Nicolas, \textit{supra} note 3, at 1494-95.
\textsuperscript{69} \textit{Jones}, 465 U.S. at 306.
\textsuperscript{70} 844 F.2d 1562, 1565 (11th Cir. 1988).
\textsuperscript{71} \textit{Id}.
\textsuperscript{73} \textit{Id}.
\textsuperscript{74} 126 S.Ct. 1735 (2006). The \textit{Markham} decision, 326 U.S. 490 (1946), is discussed in more detail \textit{supra} Part II.A.
and the resulting dispute over his estate following his death. It was a battle that started in a Texas probate court, later moving to a California bankruptcy court and federal district court, to the Ninth Circuit Court of Appeals, and eventually being heard by the United States Supreme Court.

A. Facts and Procedural History of Marshall

The petitioner in Marshall, Vickie Lynn Marshall, is better-known as Playboy model Anna Nicole Smith. In 1994, she married Texas billionaire J. Howard Marshall (“J. Howard”); he was 89 years old, she was 26. Just over a year after their marriage, J. Howard died, leaving a will that provided nothing for Vickie and named his son, Pierce, as the ultimate beneficiary. During the course of the proceedings in a Texas probate court regarding J. Howard’s will, Vickie filed for Chapter 11 bankruptcy in a California court. Pierce then filed a proof of claim in the bankruptcy proceeding, claiming that Vickie had defamed him and the debt arising from her alleged defamation was not dischargeable.

75 Pfander, supra note 19, at 320.
76 The procedural history of the Marshall case is somewhat complicated, and involves two separate, but related claims heard by the Bankruptcy and District Courts of the Central District of California. The citations for these various decisions are provided as they are addressed in the following paragraphs.
77 For more information than one could possibly want on Vickie Lynn Marshall, a.k.a. Anna Nicole Smith, see, for example, http://www.annanicole.com and http://en.wikipedia.org/wiki/Anna_Nicole_Smith. As evidence of her popularity (notoriety?), a Google™ search for her name turned up 2.5 million results (as of December 2, 2006). For the remainder of this article, I will refer to her as “Vickie,” as that is the name under which the various claims at issue were brought.
78 Marshall, 126 S.Ct. at 1741; Pfander, supra note 19, at 320.
79 Marshall, 126 S.Ct. at 1741-42.
80 Id. at 1742. The citation for the initial bankruptcy claim is In re Marshall, 253 B.R. 550 (Bankr. C.D. Cal. 2000).
81 Marshall, 126 S.Ct. at 1742. Pierce’s defamation claim was based on the allegation that Vickie’s lawyers told the media that he “had engaged in forgery, fraud, and overreaching to gain control of his father’s assets.” Id. (citing one of the
Vickie responded to Pierce’s defamation allegations asserting the defense of truth. She then counterclaimed against Pierce for tortious interference with an expected inheritance. Among the allegations made by Vickie in support of her counterclaim were that Pierce “effectively imprison[ed] J. Howard against his wishes; surround[ed] him with hired guards for the purpose of preventing contact between him and Vickie . . . and transfer[ed] property against J. Howard’s expressed wishes.” The bankruptcy court found in Vickie’s favor and awarded damages in the amount of nearly $450 million (less whatever she received out of the Texas probate proceedings), plus punitive damages. In addition, in a second, related bankruptcy court proceeding, the court held that it had the authority to enter judgment on the tortious interference counterclaim because it qualified as a “core proceeding” to a case brought under title 11.

two opinions entered by the District Court of the Central District of California, In re Marshall, 275 B.R. 5, 9 (Bankr. C.D. Cal. 2002). Pierce claimed that the debt arising from the alleged defamation would not be dischargeable because it involved “willful and malicious injury by the debtor.” Id. (quoting 11 U.S.C. § 523(a)(6)).

For additional information on tortious interference with inheritance, see RESTATEMENT (SECOND) OF TORTS § 774B (1979) (“One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift.”).

Marshall, 126 S.Ct. at 1742.

In re Marshall, 253 B.R. at 553, 561.

Marshall, 126 S.Ct. at 1742-1743; In re Marshall, 257 B.R. 35, 39-40 (Bankr. C.D. Cal. 2000). Under 28 U.S.C. § 157(b)(1), “[b]ankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11…and may enter appropriate orders and judgments[.]” A core proceeding is defined as including “counterclaims by the estate against persons filing claims against the estate[,]” 28 U.S.C. § 157(b)(2)(C), which the Bankruptcy Court believed was sufficient to bring Vickie’s counterclaim against Pierce under its authority to enter a final judgment, In re Marshall, 257 B.R. at 39-40. If a claim is not considered to be a core proceeding, then a bankruptcy judge may still hear the case, but instead of entering a final judgment, proposed findings and conclusions are submitted to the district court for de novo review. 28 U.S.C. § 157(c)(1).
Pierce contested the judgment of the bankruptcy court on the grounds that the tortious interference claim could only be heard by the Texas probate court, and that the probate exception barred the bankruptcy court from considering it or entering a final judgment. The bankruptcy court rejected Pierce’s probate exception argument as not being timely raised and therefore waived as grounds for a challenge of subject matter jurisdiction. It also engaged in a brief analysis of whether the exception is even applicable to federal question cases, concluding that it should be narrowly construed to permit federal courts to hear claims other than those involving “probating of a will, administering a decedent’s estate, or assuming control of property in the custody of the state court.”

Upon review, the United States District Court for the Central District of California upheld the bankruptcy court’s determination that the probate exception was not a bar to federal jurisdiction over Vickie’s tortious interference claim, but it applied a different analysis. The district court disagreed with the determination that Pierce had waived his probate exception argument, but ultimately concluded that such an argument was not applicable to the issue at hand because there was no interference with the Texas probate proceeding. In addition to this holding, the district court also expressed as dictum its belief that the probate exception “likely applies to all matters in federal court, not just those premised on diversity jurisdiction.”

After an intermediate bankruptcy proceeding in the Central District of California in which the original findings were modified and adopted, the case was appealed to the Ninth Circuit. The Ninth

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87 Marshall, 126 S.Ct. at 1742.
88 In re Marshall, 257 B.R. at 38.
89 Id. at 37-38.
91 Id. at 619
92 Id. at 621.
93 Id. at 620.
Circuit reversed the decision of the District Court, holding that even though Vickie’s claim “does not involve the administration of an estate, the probate of a will, or any other purely probate matter,”96 the federal courts were nonetheless barred from hearing claim by the probate exception.97 The court reached this conclusion based on its broad interpretation of the exception as reaching “not only direct challenges to a will or trust, but also questions which would ordinarily be decided by a probate court in determining the validity of the decedent’s estate planning instrument. Such questions include fraud, undue influence upon a testator, and tortious interference with the testator’s intent.”98 Vickie’s claims, in the opinion of the Ninth Circuit, were a “disguised attack” on the disposition of J. Howard’s property under a trust instrument and therefore within the scope of the probate exception.99

B. The Supreme Court’s Narrow View of the Probate Exception

After the Ninth Circuit reversed the bankruptcy court judgments entered in Vickie’s favor,100 she appealed to the United States Supreme Court.101 The Court granted certiorari “to resolve the apparent confusion among federal courts concerning the scope of the probate exception.”102 The Court ultimately agreed with the district court that the probate exception was not applicable to Vickie’s claims,103 and criticized the Ninth Circuit for the “sweeping extension” of its application.104

95 In re Marshall, 392 F.3d 1118 (9th Cir. 2004)
96 Id. at 1133.
97 Id. at 1137.
98 Id. at 1133.
99 Id. at 1137.
100 Id.
102 Id. at 1744.
103 Id.
104 Id. at 1741.
The Supreme Court supported its narrow interpretation of the probate exception based on a similar approach taken in *Ankenbrandt v. Richards*, a case involving the domestic relations exception to federal jurisdiction. In *Ankenbrandt*, the plaintiff brought suit against her ex-husband and his companion seeking damages for sexual abuse of the plaintiff’s children. The Court reversed the finding of the district court and the Fifth Circuit Court of Appeals that the plaintiff’s tort claim fell within the domestic relations exception and could therefore not be heard by the federal courts. The domestic relations exception, the Court noted, should only apply to divest federal courts of jurisdiction over such narrow issues as “divorce, alimony, and child custody decrees.” It reasoned that while state courts are proficient in dealing with such matters, “federal courts are as equally equipped to deal with complaints alleging the commission of torts.” Therefore, if the domestic relations exception is to be construed narrowly, then given their similar origins, the probate exception should be as well.

The Marshall Court’s attempt to limit the applicability of the probate exception builds on its earlier articulation of the exception’s scope in *Markham*. It recognized the confusion caused by the language “‘interfere with the probate proceedings,’” and offered the following clarification of the phrase:

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106 *Marshall*, 126 S.Ct. at 1744-45. See *supra* note 15 and accompanying text for further information regarding the domestic relations exception.
109 *Ankenbrandt*, 504 U.S. at 703.
112 *Id.* at 1747-48; see the discussion of *Markham*, 326 U.S. 490 (1946), *supra* Part II.A.
113 *Marshall*, 126 S.Ct. at 1747-48 (quoting *Markham*, 326 U.S. at 494)
[W]e comprehend the ‘interference’ language in Markham as essentially a reiteration of the general principle that, when one court is exercising *in rem* jurisdiction over a *res*, a second court will not assume *in rem* jurisdiction over the same *res*. Thus, the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent’s estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction.\(^{114}\)

The Court then analyzed Vickie’s claims under this standard.\(^{115}\) First, her claims did not involve a matter of pure probate, such as probating a will or administering an estate, but rather alleged the “widely recognized tort” of tortious interference with inheritance.\(^{116}\) Second, she sought in personam jurisdiction over her stepson, Pierce, and did not seek to gain control over property in the custody of the state court.\(^{117}\) Furthermore, the Court found no policy justification for applying the probate exception to this situation because “[t]rial courts, both federal and state, often address conduct of the kind Vickie alleges. State probate courts possess no ‘special proficiency…in handling [such] issues.’”\(^{118}\) Based on this analysis, the Court held that federal jurisdiction over Vickie’s claims was not barred by the probate exception.\(^{119}\)

\(^{114}\) *Marshall*, 126 S.Ct. at 1748 (internal citations omitted).

\(^{115}\) *Id.*

\(^{116}\) *Id.*

\(^{117}\) *Id.*

\(^{118}\) *Id.* at 1748-49 (quoting Ankenbrant v. Richards, 504 U.S. 689, 704 (1992)).

\(^{119}\) *Id.* at 1746.
IV. THE SEVENTH CIRCUIT’S INTERPRETATION OF THE PROBATE EXCEPTION AFTER MARSHALL

A. Jones v. Brennan

In Jones v. Brennan, the Seventh Circuit had its first opportunity to apply the Supreme Court’s decision in Marshall.120 Lois Jones brought suit under 42 U.S.C. § 1983 against Cook County probate judges, the county’s public guardian and two of his deputies, and four private lawyers appointed by the court as guardians ad litem, and requested compensatory and punitive damages.121 She claimed that the defendants “conspired to deprive her of property without due process of law in the course of probate proceedings involving her father’s estate.”122 In her complaint, Jones made a number of allegations, including that the probate judges communicated ex parte with the guardians and failed to require guardians to provide accountings of the estate, that the guardians and Jones’s siblings bargained for certain estate property, that illegal searches were conducted of Jones’s belongings by the guardians, and that Jones was prevented from spending time with her father before his death due to false reports made by the guardians to convince the court to enter a protective order against her.123

The United States District Court for the Northern District of Illinois dismissed the suit for lack of jurisdiction based on the Rooker-Feldman doctrine, which prohibits federal courts other than the Supreme Court of the United States from hearing an appeal from a

120 465 F.3d 304, 305-06 (7th Cir. 2006).
121 Id. at 305.
122 Id.
123 Id. At the time of commencement of probate proceedings, Jones’s father was still alive. Since he was incapable of handing his own affairs, his estate was already in the control of the probate court. He died while the proceedings were still ongoing. Id.
decision made by a state court.\textsuperscript{124} On appeal, the Seventh Circuit disagreed with the district court’s dismissal based on \textit{Rooker-Feldman}, since the federal suit was filed before the state court proceedings regarding the estate of Jones’s father were completed, and matters were raised that were not included in the state court claim.\textsuperscript{125} The Seventh Circuit was instead concerned with a different jurisdictional issue: whether or not Jones’s claims would be barred from being heard in federal court by the probate exception.\textsuperscript{126}

In considering whether the probate exception applied to Jones’s claims, the Seventh Circuit cited the Supreme Court’s recent decision in \textit{Marshall} as clarifying of the scope of its application.\textsuperscript{127} As stated by the Supreme Court, and reiterated by the Seventh Circuit, the probate exception “precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction.”\textsuperscript{128} The court recognized, however, that this standard is not without its ambiguities. While the exception’s applicability in diversity cases is well-established,\textsuperscript{129} the Seventh Circuit pointed out that “courts are divided over its applicability to federal-question cases, such as \textit{Jones}.”\textsuperscript{130} Joining the Ninth Circuit, and disagreeing with the Eleventh, the Seventh Circuit held the exception applicable to federal question cases.\textsuperscript{131}

\textsuperscript{124} \textit{Id.} The \textit{Rooker-Feldman} doctrine is so-named for the two cases which articulated the concept: Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983).

\textsuperscript{125} \textit{Marshall}, 465 F.3d at 305. Matters raised in the federal suit that weren’t included in the state suit included the alleged bargaining between the guardians and the siblings and the denial of access between Jones and her father. Jones v. Brennan, 465 F.3d 304, 305 (7th Cir. 2006);

\textsuperscript{126} \textit{Marshall}, 465 F.3d at 306.

\textsuperscript{127} \textit{Id.}

\textsuperscript{128} \textit{Id.} (quoting Marshall v. Marshall, 126 S.Ct. 1735, 1748 (2006)).

\textsuperscript{129} \textit{See} sources cited \textit{supra} note 4.

\textsuperscript{130} \textit{Jones}, 465 F.3d at 306.

\textsuperscript{131} \textit{Id.} The cases cited by the Seventh Circuit in its discussion of the circuit split are In re Marshall, 392 F.3d 1118, 1131-32 (9th Cir. 2004) (probate exception
The Seventh Circuit reached this conclusion as a matter of statutory interpretation.\(^{132}\) After engaging in a brief discussion of the history of the probate exception,\(^{133}\) the court looked to the evolution of the jurisdictional statutes to support its conclusion that the probate exception is indeed applicable to federal question cases.\(^{134}\) It reasoned that because Congress did not significantly alter the language of the statutes granting jurisdiction to the federal courts after the probate exception had become established, the intention was that it would apply to federal-question as well as diversity cases.\(^{135}\) Furthermore, it found the two primary policy justifications behind the exception to be equally applicable in both types of cases: first, since the actions involve a res under the control of a state court, another court should not be able to interfere; and second, the state courts are believed to be more proficient at handling probate-related matters.\(^{136}\) Finally, the court did not see a problem with applying the exception to federal question cases, concluding that “since state courts are authorized to decide issues of federal law unless Congress decrees otherwise, confining a class of federal-law cases to state courts does not deprive litigants of their federal rights.”\(^{137}\)

The court next considered each of Jones’s claims to determine if they were barred by the probate exception.\(^{138}\) With regard to the claim of “maladministration of her father’s estate,” the court expressed the belief that the probate exception clearly applied because the plaintiff was essentially “asking the district court to take over the

\(^{132}\) Jones, 465 F.3d at 306-07.

\(^{133}\) See supra Part I.A for a more detailed discussion of the historical origins of the probate exception.

\(^{134}\) Jones, 465 F.3d at 307.

\(^{135}\) Id.

\(^{136}\) Id.

\(^{137}\) Id.

\(^{138}\) Id. at 307-08.
administration of the estate.” However, the application of the probate exception was not as clear with respect to some of the other claims, such as the alleged deprivation by the court officials and guardians of the plaintiff’s property interest in her father’s estate without due process. The court concluded: “Though we are dubious that any of the plaintiff’s federal claims are outside the probate exception, the matter is not so clear that the judgment dismissing the case on jurisdictional grounds can be sustained without further probing in the district court.”

B. Issues with the Seventh Circuit’s Application of the Probate Exception

In its approach to the application of the probate exception in Jones, the Seventh Circuit displayed some inconsistencies with its own precedent as well as that of the Supreme Court. First, in Dragan the court pointed out that the historical basis for interpreting the scope of the statutory grant of federal jurisdiction was severely flawed. But in Jones, it cited that very same historically-based interpretation of the statutory language as the reason the probate exception should apply to federal question cases. Second, though the Seventh Circuit has developed a test to determine the applicability of the probate exception, it did not appear to implicate that test at all in its discussion of the plaintiff’s claims. And finally, the court seems to be expanding the parameters of the probate exception in spite of attempts by the Supreme Court to limit its applicability. Taken together, the Supreme Court’s decisions in Markham and Marshall indicate a trend towards narrowing the application of the probate exception,

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139 Id. at 307.
140 Id. at 308.
141 Id.
142 See supra Part I.A.1, specifically note 21 and accompanying text.
143 See supra notes 131-134 and accompanying text.
144 See supra notes 63-64 and accompanying text.
particularly when there is an issue of federal law involved.\textsuperscript{145} In earlier cases, the Seventh Circuit itself also advocated for a narrow interpretation.\textsuperscript{146} Yet in Jones, the court took a contrary approach and adopted an expanded view of the exception, holding it applicable to federal question cases without any further qualification or guidance to the lower courts as to application of this rule moving forward.\textsuperscript{147}

Such an extension of the exception is arguably unnecessary, since the concerns about avoiding interference with state law are not nearly as compelling in a federal question case as they are in cases premised on diversity.\textsuperscript{148} A litigant should have the opportunity to have a legitimate federal question heard by a federal court, regardless of whether that federal issue implicates probate matters. The Seventh Circuit should therefore adopt an approach to the application of the probate exception that weighs the federal interest more strongly against the state interest when a federal question is involved. First, the court should interpret narrowly the types of claims that even trigger the probate exception analysis, limiting it to “pure probate” matters such as probating a will and administering an estate or those that seek control over property that is already in possession of a state court. If the exception is in fact implicated, then the next step would be an abstention-type analysis.\textsuperscript{149} This would give precedent to the federal interest while still taking into account any compelling interest the state may have in litigating the matter.

\textsuperscript{145} See supra Parts II.A and III.B

\textsuperscript{146} The court stated that it “had cautioned that the probate exception, as a judicially created exception to the statutory grant of diversity jurisdiction, should be construed narrowly.” Storm v. Storm, 328 F.3d 941, 944 (7th Cir. 2003) (citing Georges v. Glick, 856 F.2d 971, 973 (7th Cir. 1988); Rice v. Rice Found., 610 F.2d 471, 475 (7th Cir. 1979)).

\textsuperscript{147} 465 F.3d at 306.

\textsuperscript{148} See supra note 68 and accompanying text.

\textsuperscript{149} See supra notes 33-35 and accompanying text.
CONCLUSION

Despite being a source of great confusion, federal courts seem reluctant to abandon the probate exception. The Supreme Court, through its decisions in *Markham* and *Marshall*, appears to be taking steps to narrow the application of the exception, particularly when there is an issue of federal law involved. The Seventh Circuit in *Jones*, however, disregarded this narrowing trend by holding that the exception applies to federal question cases. The court instead should have adopted an approach that limits the application of the exception in the specific context of federal question cases. Such an approach would be consistent with recent Supreme Court precedent, as well as the policy concerns underlying federal question jurisdiction.
POST-VERDICT MOTION PRACTICE AFTER 
FUESTING V. ZIMMER

CHRISTOPHER PROESEL*


INTRODUCTION

Justice Frankfurter once called the Federal Rules of Civil Procedure “the product of the progress of centuries from the medieval court-room contest—a thinly disguised version of trial by combat—to modern litigation.”¹ Their purpose is to ensure a quick and efficient disposition of a lawsuit while placing all litigants on an equal playing field and promoting overall fairness.² For example, judicial efficiency can often be served by affording the trial court an opportunity to correct a case absent appeal.³ A court’s rules should certainly encourage attorneys to practice in a manner that best promotes judicial economy. However, compliance with these rules does not always require the “better practice.” Indeed, such a requirement may undermine the parallel goal of the rules to promote just results. After


¹ Johnson v. N.Y., N.H. & H.R. Co., 344 U.S. 48, 62 (1952) (Frankfurter, J., dissenting). The Federal Rules of Civil Procedure are promulgated by the U.S. Supreme Court pursuant to the Rules Enabling Act and are approved by Congress.

² See Fed. R. CIV. P. 1 (noting that the rules “shall be construed and administered to secure the just, speedy, and inexpensive determination of every action”).

³ See infra note 52.
all, the Federal Rules of Civil Procedure replaced the Field Code and common law pleadings primarily because of the formality and harshness of the latter two systems.

Recently, in *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, the U.S. Supreme Court held that a verdict-losing litigant must file a post-verdict motion for judgment as a matter of law pursuant to Rule 50(b) in order for a court of appeals, based on the legal sufficiency of the evidence, to either enter judgment for that litigant or order a new trial. This requirement promotes judicial efficiency by allowing the trial court to correct a case, which should not be submitted to the jury because of the legal insufficiency of the evidence, without having the parties go through an appeal process that could lead to a new trial. However, according to the Seventh Circuit, harmless error review of a trial court’s evidentiary ruling differs distinctly from review of the sufficiency of evidence, and, thus, is permitted even though an appellant did not move for judgment as a matter of law after the jury’s verdict. While the “best practice” may be to require the post-verdict motion for the same reasons as in *Unitherm*, such a requirement is not necessary in light of Federal Rule of Evidence 103(a), which, according to the Seventh Circuit, “make[s] clear that a party is not required to renew an objection to an evidentiary motion in order to preserve its right to appeal.”

A review of Federal Rule of Civil Procedure 50 jurisprudence and of the purpose and meaning of Federal Rule of Evidence 103 reveals that the Seventh Circuit’s decision in *Fuesting v. Zimmer* is correct. The purpose of this Note is to expand on the Seventh Circuit’s reasoning in *Fuesting* in order to provide the attorneys practicing in federal courts with a detailed interpretation of *Unitherm*’s effect on an appellant’s ability to seek a new trial on appeal based on a claim of evidentiary error.

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5 *Id.* at 940 (reasoning that a “preserved claim of error on appeal is meaningless if the court of appeals, handcuffed by Rule 50, has no authority to award relief”).
6 (“*Fuesting II*”) 448 F.3d 936 (7th Cir. 2006).
Specifically, this Note will argue, as did the *Fuesting* panel, that satisfaction of Rule 103(a)’s conditions is sufficient, by itself, to give the court of appeals the power to grant a new trial where the trial court engaged in prejudicial error. In order to reach this conclusion, Part I first discusses the various court rules that are at play here—Federal Rules of Civil Procedure 50 and 59, and Federal Rule of Evidence 103. Next, Parts II and III relay the facts and reasoning of both the Supreme Court’s decision in *Unitherm* and the Seventh Circuit’s decision in *Fuesting*, respectively. Lastly, Part IV analyzes *Fuesting* in three ways: (a) by directly confronting a “subtle tension” recognized by the Seventh Circuit panel and demonstrating that an appellate court’s lack of power, after *Unitherm*, to review the sufficiency of the evidence absent a post-verdict motion for judgment as a matter of law does not preclude the court from engaging in harmless error review; (b) by surveying the Supreme Court’s jurisprudence extracting the appropriate procedures under Rule 50 and determining that the underlying policies of those decisions are not relevant to a situation in which a party seeks a new trial on appeal based upon evidentiary error; and (c) by contending that the Supreme Court, in amending Rule 103(a), implicitly determined that not affording the trial court an opportunity to correct its mistaken rulings does not preclude a party from seeking relief on appeal.

I. BACKGROUND – THE RULES

A. Federal Rule of Civil Procedure 50

The Supreme Court promulgated Rule 50 in order to speed up litigation and to prevent unnecessary retrials without sacrificing full and fair consideration of the issues raised by litigants. The rule does not alter the common law right of litigants to request that the trial

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7 *Fuesting II*, 448 F.3d at 939.
court reserve a question of law and take “verdicts subject to the ultimate ruling on the questions reserved.” Indeed, it still allows courts to remove issues from the jury’s consideration “when the facts are sufficiently clear that the law requires a particular result.” Rather, Rule 50 merely simplifies the process of raising and preserving this question of the sufficiency of the evidence, a legal question to be decided by the trial court. Because this common law right to have courts reserve questions of law during jury trials has been interpreted by the Supreme Court to be consistent with the Seventh Amendment, Rule 50 does not run afoul of a party’s constitutional right to a trial by jury.

Essentially, Rule 50 codifies the motion for a directed verdict and the motion for judgment notwithstanding the verdict. A litigant can now move for “judgment as a matter of law” at any time before submission of the case to the jury, but only after the other party has been fully heard on the issue. If the trial court finds that “there is no legally sufficient evidentiary basis for a reasonable jury to find for [the

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11 See Montgomery Ward, 311 U.S. at 250; 9A WRIGHT ET AL., supra note 8, § 2521.
12 See Redman, 295 U.S. at 659. In a later case stating the constitutionality of Rule 50(b) specifically, the Supreme Court, while primarily holding that Redman controlled, also relied on 28 U.S.C. § 2106, which it considered “broad enough to include the power to direct entry of judgment [as a matter of law] on appeal.” Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 322 (1967).
13 FED. R. CIV. P. 50. Indeed, the original version of the rule included these terms in its language. However, in 1991 the Supreme Court amended the rule to give both motions the common name of “motion for judgment as a matter of law.” The purposes of the change were to adopt names that better describe the role of the motions and to give both motions a common name because the same standard applies to both of them. See id., Advisory Committee Note to 1991 Amendments. Throughout this paper, I periodically use the terms directed verdict and judgment notwithstanding the verdict, because they are still very much a part of the trial lawyer’s vocabulary.
14 Id. at 50(a)(2).
non-moving] party,” it may enter judgment for the movant on that issue.15 Or, in its discretion, the court may deny the motion and submit the issue to the jury.16 By so doing, the court is considered to have reserved its decision on this question of law until after the jurors return a verdict or reach impasse.17 At that point, the movant may renew its motion for judgment as a matter of law, and “may alternatively request a new trial or join a motion for a new trial under Rule 59.”18 If the party does so move, the trial court may rule one of three ways: it can enter judgment on the verdict, order a new trial, or set aside the jury’s verdict and enter judgment as a matter of law for the movant.19

B. Federal Rule of Civil Procedure 59

Rule 59 allows the trial court to grant a new trial for any of the reasons for which new trials have traditionally been granted in actions at law in U.S. courts.20 Parties most commonly base their motions for a new trial on the verdict being against the weight of the evidence, the damages being excessive, or the trial court committing a prejudicial error of law.21 New trials are also granted because the trial was not fair in light of newly discovered evidence22 or the misconduct of jurors,

15 Id. at 50(a)(1).
17 FED. R. CIV. P. 50(b).
18 Id. Subsections (c) and (d) go into more detail regarding the procedure for when the two motions are made in the alternative. See infra Part IV(B).
19 FED. R. CIV. P. 50(a). Of course, this first option is not available if the jury does not return a verdict, as subsection (b)(2) points out.
20 Id. at 59(a).
22 See 11 WRIGHT ET AL., supra note 8, §2808 (noting that the motion will only be granted if the new evidence is of facts existing at time of trial, new evidence is admissible and probably effective to change the result of the original trial, and movant is “excusably ignorant of the facts”); see also FED. R. CIV. P. 60(b)(2).
judges, or counsel.23 Also, Rule 59 permits the trial court to order, on its own initiative, a new trial “for any reason that would justify granting one on a party’s motion.”24 A U.S. district court has the power to weigh evidence and assess the credibility of witnesses, and it has discretion to grant a new trial if the verdict appears to the court to be against the weight of the evidence.25

C. Federal Rule of Evidence 103

In 1975 the Supreme Court created and adopted the Federal Rules of Evidence “to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence.”26 Rule 103(a) was not a groundbreaking pronouncement but rather stated the law as generally accepted at the time.27 It prohibited a court of appeals from reversing a trial court’s ruling on the admissibility of evidence unless “a substantial right of the party is affected”28 and unless the following is satisfied:

Objection.—In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

Offer of Proof.—In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

23 See 11 Wright ET AL., supra note 8, § 2809–10.
24 FED. R. CIV. P. 59(d).
26 FED. R. EVID. 102.
27 See id. at 103, Advisory Committee Note for 1972 Proposed Rules.
28 Id. at 103(a); see infra Part IV(A).
But, even if a party does not object to errors at trial, the district court may take notice of “plain errors” that affect the substantial rights of the party.29

The most recent and interesting development in the rule came with the 2000 addition of the proviso at the end of subsection (a). It reads: “Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial,30 a party need not renew an objection or offer of proof to preserve a claim of error for appeal.”31 Before this amendment the courts of appeals took at least three different approaches in determining “whether a losing party must renew an objection or offer of proof when the evidence is or would be offered at trial, in order to preserve a claim for error on appeal.”32 The approaches ranged from always requiring a renewal,33 to distinguishing between objections to evidence and offers of proof,34 to only requiring a renewal in certain situations.35

It is clear from the language of the 2000 amendment that the Supreme Court has adopted the third approach and only requires a party to renew an objection or offer of proof when the trial court does not make a definitive ruling on the record.36 However, although a definitive ruling preserves a party’s claim of error for appeal, an appellate court will only review that ruling “in light of the facts and

29 FED. R. EVID. 103(d).
30 This Note focuses on rulings before trial, because such a ruling was at issue in Fuesting.
31 Id. at 103(a). If the error was not adequately preserved at or before trial, a court of appeals cannot reverse the trial court unless the error was plain. Id. at 103(d).
32 Id., Advisory Committee Note for 2000 Amendment.
33 See id. (citing Collins v. Wayne Corp., 621 F.2d 777 (5th Cir. 1980)).
34 See FED. R. EVID. 103, Advisory Committee Note for 2000 Amendment (citing Fusco v. General Motors Corp., 11 F.3d 259 (1st Cir. 1993)).
35 See FED. R. EVID. 103, Advisory Committee Note for 2000 Amendment (citing Rosenfeld v. Basquiat, 78 F.3d 84 (2d. Cir. 1996)).
36 See FED. R. EVID. 103(a).
circumstances before the trial court at the time of the ruling.”37 An
appellant cannot rely upon any facts that have materially changed
since the advance ruling was made, unless it brings them to the
attention of the district court in a renewed objection or offer of proof.38

II. THE SUPREME COURT’S DECISION IN
UNITHERM FOOD SYSTEMS, INC. V. SWIFT-ECKRICH, INC.

In Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.39 the U.S.
Supreme Court added to its jurisprudence interpreting Federal Rule of
Civil Procedure 50.

In 2000, Unitherm Food Systems sought a declaration from an
Oklahoma federal court that ConAgra Food’s patent40 on its process
for browning precooked meats was invalid, and further “alleged that
ConAgra had violated § 2 of the Sherman Act . . . by attempting to
enforce a patent obtained by fraud on the Patent and Trademark
Office.”41 After finding the patent invalid, the district court allowed
the § 2 claim to proceed to trial.42 Prior to jury deliberations, ConAgra
moved, pursuant to Federal Rule of Civil Procedure 50(a), for the
court to direct a verdict in its favor due to the evidence being legally
insufficient to support a verdict to the contrary.43 After the court
denied the motion, the jury decided in Unitherm’s favor, and ConAgra
appealed the decision without either renewing its motion for judgment
as a matter of law under Rule 50(b) or moving for a new trial under

37 Id., Advisory Committee Note for 2000 Amendment. (citing Old Chief v.
United States, 519 U.S. 172, 183 n.6 (1997) (instructing reviewing courts to
“evaluate the trial court’s decision from its perspective when it had to rule and not
indulge in review by hindsight”)).
38 See Old Chief, 519 U.S. at 182.
40 ConAgra Foods, Inc. is the parent company of Swift-Eckrich, Inc. and is
referred to in this Note as the respondent in Unitherm.
41 Id. at 983–84.
42 Id. at 984.
43 Id.
Rule 59. On appeal, the Federal Circuit agreed with ConAgra that the evidence was insufficient to prove the legal elements of antitrust liability; so, it vacated the judgment and ordered a new trial. The Supreme Court, however, determined that the Federal Circuit could not remand for a new trial because, without a post-verdict motion by ConAgra, it did not have the power to review the sufficiency of the evidence before the jury. In other words, the court of appeals was powerless to act on appeal, so the jury verdict endured.

The Supreme Court justified its decision as consistent with the text and application of the Federal Rules of Civil Procedure, as recognizing judicial efficiency as a key policy concern, and, simply, as fair. The Court required the post-verdict motion, because determining whether to grant a new trial or enter a judgment as a matter of law “calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart.” Furthermore, the denial of the pre-verdict motion for judgment as a matter of law cannot form the basis for review, because denial of that motion is not error, but rather an

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44 Id.
45 Id. The Federal Circuit has previously held that the appellant’s failure to file a post-verdict motion in the district court precludes the appellate court from reviewing the sufficiency of the evidence. See Biodex Corp. v. Loredan Biomedical, Inc., 946 F.2d 850, 862 (Fed. Cir. 1991). However, in Unitherm, it was bound to apply the regional circuit law—in this case, the Tenth Circuit—which allowed such review where the appellant did file a pre-verdict Rule 50(a) motion. See Cummings v. General Motors Corp., 365 F.3d 944, 950–51 (10th Cir. 2004). Hence, in Unitherm, the Supreme Court settled an inter-circuit split on the issue of whether a court of appeals could grant judgment as a matter of law where the appellant had not filed a Rule 50(b) motion at the trial court level.
46 Unitherm, 126 S.Ct. at 987. The Federal Circuit could only order a new trial on antitrust liability if ConAgra filed a Rule 59 motion after the verdict. Similarly, it could only enter judgment for ConAgra, if the food company had renewed its pre-verdict motion as specified in Rule 50(b).
47 See id. at 989.
48 Id. at 985–86 (quoting Cone v. W. Va. Pulp & Paper Co., 330 U.S. 212, 216 (1947)).
exercise of the trial court’s discretion.\textsuperscript{49} Rule 50(a) merely permits the district court to grant a motion for judgment as a matter of law if the court determines that “there is no legally sufficient evidentiary basis for a reasonable jury to find for [the non-moving] party.”\textsuperscript{50} It does not require the court to grant the motion.\textsuperscript{51} Indeed, the Court suggested that it is usually more efficient for trial courts to submit the case to the jury.\textsuperscript{52} Lastly, the Court does not consider the filing of timely motions to be artificial requirements. Rather, they are essential parts of certain federal rules of procedure, “‘firmly grounded in principles of fairness.’”\textsuperscript{53}

As a result of the Supreme Court’s opinion in \textit{Unitherm}, if an appellant does not timely file a Rule 50(b) motion, a court of appeals will lack the power to determine whether the evidence evinced at trial was legally sufficient for a reasonable jury to find for the appellee.\textsuperscript{54}

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\textsuperscript{49} \textit{Unitherm}, 126 S.Ct. at 988-89.
\textsuperscript{50} FED. R. CIV. P. 50(a)(1).
\textsuperscript{51} \textit{Unitherm}, 126 S.Ct. at 988.
\textsuperscript{52} \textit{Id.} at 988–89. This point is illustrated by Professor Wright in his popular treatise on federal practice and procedure:

\begin{quote}
If judgment as a matter of law is granted and the appellate court holds that the evidence in fact was sufficient to go to the jury, an entire new trial must be had. If, on the other hand, the trial court submits the case to the jury, though it thinks the evidence insufficient, final determination of the case is expedited greatly. If the jury agrees with the court's appraisal of the evidence, and returns a verdict for the party who moved for judgment as a matter of law, the case is at an end. If the jury brings in a different verdict, the trial court can grant a renewed motion for judgment as a matter of law. Then if the appellate court holds that the trial court was in error in its appraisal of the evidence, it can reverse and order judgment on the verdict of the jury, without any need for a new trial. For this reason the appellate courts repeatedly have said that it usually is desirable to take a verdict, and then pass on the sufficiency of the evidence on a post-verdict motion.
\end{quote}
\textsuperscript{53} \textit{9A WRIGHT ET AL., supra} note 8, § 2533.
\textsuperscript{54} \textit{See Unitherm}, 126 S.Ct. at 987. In dissent, Justice Stevens suggested that 28 U.S.C. § 2106 permitted the court of appeals to consider the sufficiency of the

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Furthermore, if a Rule 59 motion is also not made, the court of appeals has no power to grant any relief to the appellant seeking a directed verdict or a new trial based on insufficiency of the evidence.55

III. THE SEVENTH CIRCUIT’S DECISION IN FUESTING V. ZIMMER, INC.

In a case with the same procedural posture as Unitherm but where the appellant sought a new trial on appeal based on evidentiary error at trial and not insufficiency of the evidence, the U.S. Court of Appeals for the Seventh Circuit distinguished the Supreme Court’s decision in Unitherm and remanded the case for a new trial.56

In 2002, plaintiff Fuesting sued Zimmer, Inc. in an Illinois federal court for negligently manufacturing his prosthetic knee.57 Before trial, Zimmer moved in limine, pursuant to Federal Rule of Evidence 702, to exclude the testimony of Fuesting’s expert witness.58 The trial court evidence despite the appellant’s failure to file the Rule 50(b) motion. Id. at 989–90 (Stevens, J., dissenting). § 2106 permits a federal appellate court to:

[A]ffirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Although the Court has recognized the broad grant of authority in this statute, it has made clear that this authority must be exercised “consistent with the requirements of the Federal Rules of Civil Procedure as interpreted by [the] Court.” Id. at 986 (majority opinion); see supra note 19 and accompanying text.

55 See id. at 988.

56 Fuesting v. Zimmer, Inc. (Fuesting II), 448 F.3d 936, 941–42 (7th Cir. 2006). Only one other court of appeals has considered the issue whether Unitherm requires a party to file a post-verdict motion in order to seek a new trial on appeal based on an erroneous evidentiary error by the trial court. The First Circuit agrees with the Seventh Circuit’s assessment. See Vazquez-Valentin v. Santiago-Diaz, 459 F.3d 144, 146 n.2 (1st Cir. 2006) (Unitherm does not mean that a party has to file a post verdict motion in order to preserve an evidentiary objection on appeal.”).

However, the First Circuit’s treatment of the issue was dicta and, therefore, offered little analysis.

57 Fuesting II, 448 F.3d at 937.

58 Id.
denied the motion, and the expert testified at trial that Zimmer’s air sterilization method led to the prosthesis’s premature failure and, hence, Fuesting’s injuries.\textsuperscript{59} After the trial and before the court submitted the case to the jury, Zimmer moved for judgment as a matter of law under Rule 50(a).\textsuperscript{60} The trial court denied the motion, and the jury later returned a verdict for Fuesting.\textsuperscript{61} After the verdict, Zimmer did not renew its motion for judgment as a matter of law nor move for a new trial.\textsuperscript{62} However, it did appeal, arguing for a new trial based on the trial court’s prejudicial error in allowing plaintiff’s expert to testify and based on the trial court’s flawed jury instructions.\textsuperscript{63}

On appeal, the Seventh Circuit ruled, pursuant to \textit{Daubert v. Merrell Dow Pharmaceuticals, Inc.}\textsuperscript{64} and Rule 702, that the testimony of Fuesting’s expert was scientifically unreliable and that the district court erred in allowing it to be offered at trial, thereby prejudicing the manufacturer’s case.\textsuperscript{65} Then, having assessed the remaining evidence as legally insufficient for a reasonable jury to find for the plaintiff, the Seventh Circuit reversed the jury’s verdict and ordered the district court to enter judgment for Zimmer.\textsuperscript{66} Subsequently, Fuesting petitioned for a rehearing, and the court of appeals stayed consideration of the petition until after the Supreme Court decided the \textit{Unitherm} case.\textsuperscript{67} In its opinion after the rehearing, the Seventh Circuit held that \textit{Unitherm} clearly prohibited it from ordering judgment for Zimmer as a matter of law because awarding judgment involves a full

\begin{itemize}
\item \textsuperscript{59} Id. at 937–38.
\item \textsuperscript{60} Id. at 938.
\item \textsuperscript{61} Id.
\item \textsuperscript{62} Id.
\item \textsuperscript{63} Id.
\item \textsuperscript{64} 509 U.S. 579 (1993). In \textit{Daubert}, the Supreme Court developed the criteria by which expert testimony should be allowed under Federal Rule of Evidence 702.
\item \textsuperscript{65} Fuesting v. Zimmer, Inc. (\textit{Fuesting I}), 421 F.3d 528, 536–37 (7th Cir. 2005), \textit{rev’d in part on reh ‘g}, 448 F.3d 936 (7th Cir. 2006). While the substance of this evidentiary holding may be non-trivial to the development of \textit{Daubert} jurisprudence, this Note is primarily concerned with the procedural posture of the case.
\item \textsuperscript{66} \textit{Fuesting I}, 421 F.3d at 437.
\item \textsuperscript{67} \textit{Fuesting II}, 448 F.3d at 937.
\end{itemize}
examination of the sufficiency of the evidence, which must be performed first by the trial court. The court, nonetheless, remanded the case for a new trial based on the district court’s prejudicially erroneous evidentiary ruling. Referring to the situation as a “subtle tension,” the Seventh Circuit panel reasoned that Unitherm did affect a reviewing court’s ability to remand for a new trial based on the sufficiency of the evidence but did not affect its power to engage in harmless error analysis. Indeed, the court admits that “determining whether an evidentiary error is harmless necessarily requires some weighing of the sufficiency of the evidence.”

However, it overcomes this hurdle by gathering the support of Federal Rule of Evidence 103, prior precedent, and the scholarship of influential commentators. First, says the court, the Federal Rules of Evidence explain that, once a party objects to the admission or exclusion of evidence, it is not required to renew the objection in order to preserve its right to appeal, providing the district court made a definitive ruling on the record. A preserved claim of error on appeal, according to court, would be rendered meaningless if an appellate court could not review the error because it was “handcuffed” by Rule 50. Secondly, the Seventh Circuit does not believe the Supreme Court would have established an expansive rule that makes a post-verdict motion a prerequisite to appeal without addressing the “the substantial body of cases in which courts of appeals have awarded new trials purely on the basis of evidentiary errors.” Lastly, the court invokes the expertise of Charles Wright and James Moore, who agree

68 _Id._ at 939.
69 _Id._
70 _Id._
71 _Id._ (elaborating later that “[a]n appellate court cannot truly determine whether an error was harmless without considering the force of the other evidence presented to the jury”).
72 _Id._ at 941.
73 _Id._ at 940 (interpreting _Fed. R. Evid._ 103(a)).
74 _Id._
75 _Id._
in their treatises on federal practice that courts of appeals can review properly preserved claims of error, even though the appellant had not filed a post-verdict motion in the trial court.76

IV. ANALYSIS

At first glance, despite the Seventh Circuit’s compelling reasons for granting a new trial, the panel’s decision appears at odds with the broad language used by Justice Thomas in his majority opinion in Unitherm. For example, Justice Thomas states that the “Court’s observations about the necessity of a postverdict motion under Rule 50(b), and the benefits of the district court’s input at that stage, apply with equal force whether a party is seeking judgment as a matter of law or simply a new trial.”77 And later, after summarizing the relevant precedent used to support his view, he remarks that “these outcomes merely underscore our holding today—a party is not entitled to pursue a new trial on appeal unless that party makes an appropriate postverdict motion in the district court.”78

However, this broad language can and should be limited by the remainder of the Court’s opinion that focused entirely on Rule 50, which itself is concerned solely with directing verdicts and ordering new trials based on the legal sufficiency of the evidence before the jury. The Seventh Circuit in Fuesting II correctly distinguishes Unitherm on the fact that the defendant manufacturer’s appeal requested a new trial based on the prejudicial effect of the trial court’s erroneous evidentiary ruling and not on sufficiency of the evidence,

76 Id. at 941. See 12 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 59.55 (3d ed. 2005) (“A motion for a new trial is not required to preserve properly made objections for appellate review, and is therefore not a prerequisite to an appeal from the judgment.”); 11 WRIGHT ET AL., supra note 8, § 2818 (“[t]he settled rule in federal courts . . . is that a party may assert on appeal any question that has properly been raised in the trial court. Parties are not required to make a motion for a new trial challenging the supposed errors as a prerequisite to appeal.”).
78 Id. at 987 (emphasis added).
the grounds on which ConAgra sought a new trial in *Unitherm*.\(^79\) A court is not asked to consider the sufficiency of the evidence when engaging in harmless error review.\(^80\) And, in light of the Supreme Court’s amendment to Federal Rule of Evidence 103(a), affording the district court an opportunity to correct its erroneous evidentiary ruling is not as important to the judicial process as obtaining the court’s input on whether the evidence is insufficient for a reasonable jury to find for one of the parties.\(^81\) Therefore, an appellant does not need to file a post-verdict motion for a new trial under Rule 59 in order to obtain relief on appeal.

### A. Sufficiency of the Evidence as a Factor in Harmless Error Analysis

*Unitherm* clearly prohibits a court of appeals from evaluating the sufficiency of the evidence, absent a timely filed post-verdict motion.\(^82\) However, the Seventh Circuit in *Fuesting* never really explored the role that such an evaluation plays in a reviewing court’s harmless error analysis. It expressed concern that its examination of whether error is harmless or prejudicial involves “what might be considered an implicit weighing of the sufficiency of the evidence,” but it doesn’t confront this problem directly.\(^83\) Rather, the court downplays the issue as not too significant because the Federal Rules of Evidence and prior precedent clearly, in the court’s view, create a well-established rule that a post-verdict motion is not required for a court of appeals to review a claim of evidentiary error.\(^84\) In distinguishing the holding in *Unitherm* from the case before it, the Seventh Circuit

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\(^79\) See *Fuesting II*, 448 F.3d at 939.
\(^81\) Compare *FED. R. CIV. P.* 103, Advisory Committee Note for 2000 Amendment, *with* *Marceaux v. Conoco*, Inc., 124 F.3d 730, 734 (5th Cir. 1997).
\(^82\) *Unitherm*, 126 S.Ct. 980, 989 (2006).
\(^83\) See *Fuesting II*, 448 F.3d at 939.
\(^84\) See *id.* at 940 (“Nevertheless, the ability of the court of appeals to award a new trial where there is prejudicial evidentiary error is well-established and undisturbed by *Unitherm*.”) (emphasis added).
implicitly asserts that review of sufficiency of the evidence and harmless error analysis are separate things, but it never says why.  

Indeed, the two assessments are wholly distinct, and the Supreme Court has consistently reminded courts of this. In determining in Fahy v. Connecticut whether a defendant convicted of painting swastikas on a synagogue was prejudiced by the erroneous admission of the unconstitutionally obtained can of black paint and paint brush, the Court clarified that it was “not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of.” Rather, the Court focused on whether the exclusion of the evidence could have changed the outcome of the trial.  

The harmless error rule represents a reaction by Congress to the past appellate practice of frequently reversing criminal convictions based on technical mistakes made at trial that had slight effect on the outcome of the trial. Today, the statute states that on appeal “the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.” It is commonly understood that the error affects the substantial rights of a party at trial if it affects the outcome of the trial. The statute applies to both criminal and civil cases, and its

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85 See id. at 939.
87 Fahy, 375 U.S. at 86.
88 Id. at 95.
89 See Kotteakos, 328 U.S. at 757–61 (“So great was the threat of reversal, in many jurisdictions, that criminal trial became a game for sowing reversible error in the record, only to have repeated the same matching of wits when a new trial had been thus obtained.”); 1 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 17 (2d ed. 2006). The Kotteakos opinion offers a detailed account of the legislative history of the harmless error rule. 328 U.S. at 758–60.
language has since been replicated in the Federal Rules of Criminal Procedure,93 Civil Procedure,94 and Evidence.95

The harmless error rule is expressed in general terms, because an error’s prejudicialness necessarily depends on the particular circumstances of the case.96 Nevertheless, the Supreme Court has provided courts with some basic guidelines to follow when engaging in harmless error analysis.97 First, in response to the appellate courts’ previous propensity to “tower” above trials “as impregnable citadels of technicality,” the Supreme Court views the harmless error rule as urging appellate courts to avoid applying the rules so rigidly when their infringement really does not affect the outcome of the trial.98 Second, the reviewing court should scrutinize the error in relation to the entire record of the proceedings, because only then can it assess the error’s effect on the trial.99 Thirdly, the court must do this “tempered but not governed in any rigid sense of stare decisis by what has been done in similar situations.”100 Indeed, reviewing courts must decide the harmlessness of error based on the unique circumstances of each case, because, for example, the jurors in one trial might place less emphasis on evidence than the jurors in a separate but similar trial.

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92 But see Kotteakos, 328 U.S. at 762 (acknowledging that the statute makes no distinction between civil and criminal cases, but not interpreting this as meaning the same criteria should always be applied to both kinds of cases).
93 FED. R. CRIM. P. 52.
94 FED. R. CIV. P. 61.
95 FED. R. EVID. 103(a).
96 See Kotteakos, 328 U.S. at 761 (describing the analysis as “transcending confinement by formula or precise rule” and as a matter “for experience to work out”).
97 See Mueller & Kirkpatrick, supra note 89, § 17 (extracting five general guidelines from Kotteakos).
98 See Kotteakos, at 760–61 (quoting Marcus A. Kavanagh, Improvement of Administration of Criminal Justice by Exercise of Judicial Power, 11 A.B.A. J. 217, 222 (1925)); Mueller & Kirkpatrick, supra note 89, at § 17. (advising that “the message is not to insist on applying the rules for their own sake, but rather to see them as tools that can help achieve a fair and just result”).
99 See Kotteakos, 328 U.S. at 762.
100 Id.
would place on the same evidence. Nevertheless, some important factors can be derived from the decisions of the Supreme Court and courts of appeals. For example, the amount of interest the jury expressed in the evidence, the level of persuasiveness of the evidence, the presence of other evidence in the record that defuses the prejudicial quality of the erroneously admitted evidence, and the inclusion of a jury instruction that cures the prejudicial effect of the evidence are all factors that an appellate court should consider when engaging in harmless error review. Appellate courts also consider the amount of persuasiveness of other evidence that addresses the same issue as does the improperly admitted evidence, in order to determine whether the latter was merely cumulative.

Lastly, the Supreme Court in *Kotteakos* stressed that the question is not whether, after removing the improper evidence from the record, there remains enough to support the result. Rather, the proper focus is on the erroneously admitted evidence’s impact upon the decision that was reached by a particular trier of fact. A reviewing court’s role in harmless error review is not to decide whether the jury’s decision was correct. However, sufficiency of the evidence undoubtedly could play a role in deciding an error’s prejudicialness.

Harless error review is considered so difficult because it requires a court to get into the minds of the jurors. “The crucial thing is the impact of the thing done wrong on the minds of other men, not on one’s own.” Id. at 764. This is not always easy to do when, to the appellate court’s minds, the record leans in favor of one of the parties.

The factors relating to errors of admission sometimes vary from those relating to errors of exclusion. See Robert W. Gibbs, *Prejudicial Error: Admissions and Exclusions of Evidence in the Federal Courts*, 3 VILL. L. REV. 48, 53–59 (1957). This Note focuses on harmless error review pertaining to evidence that was admitted since the trial court in *Fuesting* erroneously admitted evidence.

See Gibbs, supra note 102, 53–57.

See MUELLER, supra note 89, at § 19.

*Kotteakos*, 328 U.S. at 765.

*See id.* at 764.

*Id.* at 763.

*Id.* at 764.
After all, if, absent the error, the evidence in the record would have been insufficient for the jury to decide otherwise, the appellant simply could not have been prejudiced.109 Similarly, supposing the error never happened, if the evidence in the record would then have been insufficient, as a matter of law, for a reasonable jury to reach the same result, the appellant was undeniably prejudiced by the error.110 This is all very axiomatic. In fact, one could say that the sufficiency of the evidence analysis by itself answers the harmlessness inquiry in such situations.

On the other hand, courts worry much more over situations where a reasonable jury could have reached either the same or the opposite result, if the trial court did not err.111 After all, harmless error review is concerned with the effect of the error on the decision of a specific jury,112 whose members are indeed reasonable113 but which, of course, is not any reasonable jury. In theory, although an appellate court believes that the jury’s decision, absent improperly admitted evidence, was nevertheless correct, it must still find prejudicial error and order a new trial if the record demonstrates that the same jury would have reached a contrary result after a trial in which that evidence was excluded.114 If the court affirmed in such a situation, it would be denying the losing party its constitutional right to a trial by jury.115 The court can only affirm here if the record shows that the jury’s decision would not have been affected by the error.116

But the Supreme Court in Unitherm is concerned with stepping on the prerogative of the trial court to review the sufficiency of the evidence in the first instance given its “feel” for the case; not with the

109 See Gibbs, supra note 102, at 61.
110 Id.
111 Id.
112 See Kotteakos, 328 U.S. at 764.
113 Or at least an appellate court assumes so on review. See Goins v. United States, 99 F.2d 147, 151 (4th Cir. 1938).
114 See Kotteakos, 328 U.S. at 764; Gibbs, supra note 102, at 62.
115 See Gibbs, supra note 102, at 62.
116 See Kotteakos, 328 U.S. at 765.
jury’s role to decide questions of fact.\textsuperscript{[117]} Therefore, it does not invoke the more troubling question of the role of sufficiency of the evidence analysis in harmless error review, but rather the self-evident results described above.\textsuperscript{[118]} But this should not strip appellate courts of the power to engage in harmless error review when an appellant fails to file a Rule 50(b) motion, which necessarily means after \textit{Unitherm} that the court cannot review the sufficiency of the evidence.\textsuperscript{[119]} Courts of appeal consider their appraisal of the sufficiency of the evidence not as dispositive of the prejudice question but only as one of the many factors upon which they base their conclusion.\textsuperscript{[120]} So, even if \textit{Unitherm} does dictate that appellate courts can no longer employ this factor in its harmless error analysis, the ability of the courts to engage in that analysis should not suffer. For there are a number of factors the court can use to determine whether the record shows that the jury might well have reacted differently if not for the trial court’s error.\textsuperscript{[121]}

\textbf{B. Rule 50 Jurisprudence and the Power of the Courts of Appeal}

\textit{Unitherm} was the most recent decision in a long line of Supreme Court cases determining the applicable procedures required by Federal Rule of Civil Procedure 50 since its adoption in 1938.\textsuperscript{[122]} Two major concerns underlie most of these cases: the importance of (1) providing the trial court, which benefits from a first-hand understanding of the case, an opportunity to rule on whether to grant judgment as a matter


\textsuperscript{[118]} See notes 109 & 110 and their accompanying text.

\textsuperscript{[119]} See \textit{Unitherm}, 126 S.Ct. at 989.

\textsuperscript{[120]} See Gibbs, \textit{supra} note 102, at 61–63.

\textsuperscript{[121]} See \textit{supra} notes 102–104 and their accompanying text.

of law or to order a new trial, and (2) protecting the judgment winner’s rights when the judgment is set aside on appeal. These concerns, however, are not present in an appellate court’s determination of whether a trial court’s evidentiary error was prejudicial to the appellant.

In Rule 50 jurisprudence the motion on which the district court rules and the theories advanced by the movant determine the appellate court’s power upon appeal.123 For example, in Montgomery Ward & Co. v. Duncan, where the Supreme Court first determined the appropriate procedure under Rule 50(b), the Court held that the Eighth Circuit could not order the district court to enter judgment for the plaintiff where the district court granted the defendant’s motion for judgment as a matter of law after the jury returned a verdict for the plaintiff.124 In that case, after the verdict, the defendant had renewed his pre-verdict motion for directed verdict based on insufficiency of the evidence and, alternatively, moved for a new trial based on evidentiary error and excessive damages.125 The district court found that the evidence was insufficient as a matter of law to prove negligence and directed a verdict for the defendant without considering the arguments advanced in support of the motion for a new trial.126 Ultimately, the Supreme Court determined that the defendant was entitled to have the trial judge consider these arguments for a new trial, and accordingly remanded the case for a ruling on that motion.127

Subsequently, the Supreme Court heard a number of cases in which it emphasized the importance of giving the verdict winner an opportunity to invoke the discretion of the trial judge to grant a new trial, and did not allow the court of appeals to enter judgment as a

123 Montgomery Ward, 311 U.S. at 250–51
124 311 U.S. at 255.
125 Id. at 245–46.
126 Id. at 246.
127 Id. at 252, 255; see Wright et al., supra note 8, § 2540, for the process on appeal when the trial court grants both the motion for judgment as a matter of law and the motion for a new trial, grants one and not the other, or grants neither of them.
matter of law for the verdict loser.\textsuperscript{128} In \textit{Cone v. West Virginia Pulp & Paper Co.} the verdict-losing defendant did not renew its Rule 50(a) motion after the verdict but did move for a new trial based on the trial court’s error in admitting certain evidence.\textsuperscript{129} After the trial court denied the Rule 59 motion, the Fourth Circuit reversed the judgment entered on the verdict\textsuperscript{130} and ordered the district court to enter judgment for the defendant, because the evidence, excluding that prejudicially admitted by the trial court, was insufficient for a reasonable jury to find for the plaintiff.\textsuperscript{131} The Supreme Court subsequently reversed and remanded for a new trial, reasoning that, before a court of appeals can enter judgment as a matter of law for the verdict loser, the trial court must be given an opportunity to exercise its discretion—with the judge’s first-hand view of the proceedings before him—to enter judgment as a matter of law or grant a new trial.\textsuperscript{132} According to the Court, the purpose of Rule 50 was furthered by affording the trial judge this “last chance to correct his own errors without delay, expense, or other hardships on appeal.”\textsuperscript{133}

Cases like \textit{Cone} display the Supreme Court’s concern with protecting the rights of a party whose jury verdict has been set aside on appeal and who may have legitimate grounds for a new trial—grounds which should be considered by the district court in the first instance because of its “feel” for the case on the whole.\textsuperscript{134} However, the Court makes clear that this concern does not warrant “an ironclad

\textsuperscript{129} \textit{Cone}, 330 U.S. at 213.
\textsuperscript{130} A district court’s order denying or granting a motion for a new trial is not appealable, save in exceptional circumstances. The denial of the motion is reviewable, though, when the movant appeals the judgment entered on the verdict for errors of law committed at trial. \textit{See Fairmont Glass Works v. Cub Fork Coal Co.}, 287 U.S. 474, 481–85 (1933).
\textsuperscript{131} \textit{Cone}, 330 U.S. at 214.
\textsuperscript{132} \textit{Id.} at 216.
\textsuperscript{133} \textit{Id.} (citing \textit{Greer v. Carpenter}, 323 Mo. 878, 882 (1929)).
rule that the court of appeals should never order dismissal or judgment for [the] defendant when the plaintiff’s verdict has been set aside on appeal.”135 Rather, the court of appeals has the power to do take a number of actions when it determines that the trial court erroneously denied the verdict loser’s Rule 50(b) motion for judgment as a matter of law. It may, at its discretion, “(1) order a new trial at the verdict winner’s request or on its own motion,136 (2) remand the case for the trial court to decide whether a new trial or entry of judgment for the defendant is warranted, or (3) direct the entry of judgment as a matter of law for the defendant.”137

_Fuesting_ differs from _Montgomery Ward_ and its progeny in one major respect: the court of appeals did not direct judgment for the defendant. The plaintiff whose verdict had been set aside on appeal was awarded a new trial at which proper rulings would be rendered.138 Such a result remedies the prejudicial effect of the erroneously admitted evidence upon the defendant’s case, without prejudicing the plaintiff’s case, which at trial relied on that evidence. In fact, the ultimate outcome in _Fuesting_ was the same as that in the cases, like _Cone_, where the appellant did not file a Rule 50(b) motion.139 However, in those cases, the appellant did move the trial judge after the verdict for a new trial.140 The Supreme Court in _Unitherm_ places a lot of emphasis on this fact.141 For example in _Cone_, the Court did not

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135 Id. at 326.
136 Id at 328–29.
137 Weisgram v. Marley Co., 528 U.S. 440, 451–52 (2000). For example, in _Neely_, the appellate court had the power to direct judgment for the verdict-losing defendant where the trial court had denied both the defendant’s Rule 50(b) and Rule 59 motions. 386 U.S. at 319–21.
138 See Fuesting v. Zimmer (_Fuesting II_), 448 F.3d 936, 942 (7th Cir. 2006).
140 Id. at 213.
allow the appellate court to enter judgment for the verdict loser because the district court was not given a chance through a Rule 50(b) motion to exercise its discretion to grant judgment as a matter of law or, alternatively, order a new trial. According to the Court, the trial court’s “appraisal of the bona fides of the claims asserted by the litigants is of great value in reaching a conclusion as to whether a new trial should be granted.”

The Supreme Court now reads Cone and the cases like it as leading to the conclusion that “a party is not entitled to pursue a new trial on appeal unless that party makes an appropriate postverdict motion in the district court.” But those cases are interpretations of Rule 50, not Rule 59. The Court would have ordered a new trial in Cone even if the appellants had not moved for one under Rule 59. The trial court’s “appraisal of the bona fides of the claims” is important in deciding whether to grant a new trial under a Rule 50(b) motion. That is, it is important for the district court, after deciding that the evidence is legally insufficient to support the verdict, to choose in the first instance between entering judgment as a matter of law and ordering a new trial—a Rule 50(b) decision—not between ordering a new trial or entering judgment on the verdict—a Rule 59 decision. Allowing the district court to decide in the former situation protects the party whose jury verdict was set aside on appeal. There may be situations in which important considerations remain that entitle the verdict winner to a new trial. A determination of whether these considerations exist depends on the intricacies of the case, which the

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142 330 U.S. at 215 (emphasizing that the trial court has “discretion to choose between the two alternatives” because “there are circumstances which might lead [it] to believe that a new trial rather than a final termination of the trial stage of the controversy would better serve the ends of justice”).
143 Id. at 216.
144 Unitherm, 126 S.Ct. at 987.
149 See Neely, 386 U.S. at 325.
trial court is intimately familiar with, and which, therefore, must first be passed upon by the trial court. If it determines, in its discretion, that a new trial should be ordered, the verdict winner is protected without prejudicing the verdict loser. If it decides that a retrial is unnecessary and judgment should be entered for the verdict loser, the verdict winner can appeal this judgment, and the court of appeals can review the decision based on a full record and based on the parties’ arguments that are focused on the appropriate issues.

On the other hand, *Fuesting* was not concerned with protecting the verdict winner. Its verdict was not set aside on appeal pursuant to a Rule 50(b) motion based insufficiency of the evidence; it was set aside because an improper ruling on evidence prejudiced the defendant’s case. The Seventh Circuit’s decision to order a new trial was necessary to protect the defendant. Indeed, the defendant in *Unitherm* was also allegedly prejudiced by a jury verdict that could not legally have been reached given the evidence presented at trial, but a sufficiency of the evidence determination must first be made by the trial court because of its feel for the case; the idea being that the record for appeal would be more complete and the parties more informed of the issues on appeal. The admissibility of evidence, on the other hand, is a pure question of law, with which the court of appeals must regularly and characteristically deal. Indeed, in *Neely v. Martin K. Eby Construction Co.*, one of the Rule 50 cases that the Supreme Court cites in *Unitherm*, the Supreme Court this is “precisely the kind of issue that the losing defendant below may bring to the court of appeals without ever moving for a new trial in the district court.” Furthermore, the district court has already ruled on that question at or

150 *See Cone*, 330 U.S. at 218.
151 *See FED. R. CIV. P. 50(c). In its note on the 1962 Amendment, the Advisory Committee points out that “[e]ven if the verdict-winner makes no motion for a new trial, he is entitled upon his appeal from the judgment *n.o.v.* not only to urge that that judgment should be reversed and judgment entered upon the verdict, but that errors were committed during the trial which at the least entitle him to a new trial.”
152 *See Unitherm*, 126 S.Ct. at 985–86.
153 *See Neely*, 386 U.S. at 327.
154 *Id.*
before trial, thereby offsetting the need for it to reassert its ruling on a post-judgment motion.

C. Satisfying Rule 103 Alone Is Enough to Preserve Evidentiary Error for Appeal

If an appellant satisfies Rule 103(a)(2), a court of appeals has the power to review that party’s claim of error and to order a new trial where the error affected the appellant’s substantial rights.155 This is the case even if the appellant did not move for a new trial after entry of the judgment pursuant to Rule 59.156 Unitherm and its forerunners do not prohibit this result because the trial court’s unique feel for the case does not give it any special advantage in dealing with evidentiary questions, and therefore the court could not add anything to the record that would benefit the reviewing court on appeal. Furthermore, the Advisory Committee Note on the 2000 amendment to Rule 103(a) implicitly shows that the Supreme Court does not consider giving the trial court an opportunity to correct its previous mistakes as important as allowing the court to rule on the legal sufficiency of the evidence before the jury.157

By amending Rule 103(a) to its current language, the Supreme Court rejected the approach taken by some courts of appeals that all losing parties must renew an unsuccessful motion in limine in order to preserve a claim of error for appeal.158 These courts often referred to,

155 See FED. R. CIV. PRO. 103(a).
156 See Fuesting v. Zimmer (Fuesting II), 448 F.3d. 936, 941–42 (7th Cir. 2006).
158 See FED. R. CIV. PRO. 103, Advisory Committee Note for 2000 Amendment (citing Collins v. Wayne Corp., 621 F.2d 777 (5th Cir. 1980) for requiring such a requirement as opposed to the amendment, which only requires the losing party to renew its objection when the trial court does not make a definitive ruling on the record).
among other reasons for such a requirement, the importance of giving “the trial judge an opportunity to reconsider his in limine ruling with the benefit of having been witness to the unfolding events at trial.” But the amended Rule 103(a) recognizes that some motions in limine need not be renewed at trial because many pretrial evidentiary rulings involve pure questions of law that cannot be decided with any greater accuracy in the heat of trial. That is not to say, though, that a losing party never has an incentive to renew his pretrial objection for the sake of preserving his prospects for appeal. As the Supreme Court made clear in Old Chief v. United States, a definitive advance ruling is reviewed in light of the facts and circumstances before the trial court at the time of the ruling. Therefore, an appellant will want to renew its motion for a new trial based on an erroneous evidentiary ruling if the relevant facts and circumstances change materially after the advance ruling has been made.

In light of these considerations in crafting the amendment to Rule 103(a), it is unlikely that the Supreme Court intended that a post-judgment motion be a prerequisite to seeking a new trial on appeal based on a claim of a prejudicially erroneous evidentiary ruling, because the appellate process would gain very little from such a strict requirement. The only benefit is that such a rule affords the trial court an opportunity to correct the errors that he made previously, at or before trial. If, given that opportunity, the judge reverses his prior prejudicial rulings, he would order a new trial, and an appeal would have been avoided. However, the potentially highly prejudicial

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159 Another popular reason is to discourage parties “from refraining from making an objection at trial in order to reserve an opportunity to assert reversible error on appeal.” United States v. Roenigk, 810 F.2d 809, 815 (8th Cir. 1987); see James J. Duane, Appellate Review of in Limine Rulings, 182 F.R.D. 666 (1999).
160 Duane, supra note 159 (quoting Marceaux v. Conoco, Inc., 124 F.3d 730, 734 (5th Cir. 1997)).
161 See Duane, supra note 159.
163 FED. R. EVID. 103, Advisory Committee Note for 2000 Amendment.
164 See Marceaux, 124 F.3d at 734.
consequences of such a rigid procedural rule vastly outweigh this slight benefit. The resulting injustice of denying relief to the verdict loser is unacceptable where the evidentiary error by the trial court affected the outcome of the trial.

In a situation where the appellant has satisfied Rule 103(a), he has stated specific grounds for his objection and the judge has definitively ruled on the objection on the record.\(^{165}\) Where the evidentiary objection does not draw anymore force from the specific context in which it is made at trial, the trial court’s reasoning for ruling the way it did before trial will remain unchanged. Hence, a renewed objection would be unnecessary, and a motion for a new trial based on that same object would be similarly redundant. A reassertion of the trial court’s pretrial ruling would add nothing of value to the record. In contrast, a Rule 59 motion is required when the appellant seeks a new trial on appeal based on excessive or inadequate damages, because the trial judge must be given an opportunity to exercise his discretion.\(^{166}\) Unlike an evidentiary ruling, though, the trial judge cannot rule on the legal adequacy of damages until after the jury returns its verdict, so the necessity of a post-verdict motion is obvious.

As a result, the reviewing court can rule on the question of law on the basis of a complete record. It then can engage in a harmless error analysis.\(^{167}\) If the court deems the error to have prejudiced the appellant and the appellant did not move after the verdict for judgment as a matter of law based on sufficiency of the evidence (excluding that erroneously admitted), the only possible relief the court could grant is a new trial. An initial determination by the trial court of whether to grant a new trial is completely unnecessary and does not aid the court of appeals in any way. The only appropriate response to a motion for a new trial where evidence that affected the outcome of a trial should not have been presented is to grant the motion. A denial by the trial court would be reversed under the most deferential standard of review.

\(^{165}\) See Fed. R. Evid. 103(a).
\(^{166}\) See Ryen v. Owens, 446 F.2d 1333, 1334 (D.C. Cir. 1971); Baker v. Dillon, 389 F.2d 57 (5th Cir. 1968).
\(^{167}\) See 28 U.S.C. 2111.
CONCLUSION

If presented with the opportunity, the U.S. Supreme Court should not extend Unitherm Food Systems v. Swift-Eckrich to require an appellant to file a post-verdict motion when it seeks a new trial on appeal based on the trial court’s allegedly erroneous evidentiary ruling. The Unitherm decision should properly be restricted to those cases in which the verdict-loser requests that judgment be entered in its favor given the legal insufficiency of the evidence, because, as this Note has demonstrated, review of the sufficiency of the evidence and harmless error review are two distinct assessments. Furthermore, the Court’s Rule 50 jurisprudence does not merely focus on the trial court’s “feel” for the case but more specifically on how that first-hand experience places it in a unique position to decide whether to grant judgment as a matter of law or, in the alternative, a new trial. Rule 50 affords the trial court great discretion in deciding which of these orders better promotes justice given the unique circumstances of each case. In contrast, the appellant only appealing for a new trial based on trial court error does not deny the trial court an opportunity to exercise this discretion but merely presents a pure question of law, with which courts of appeal characteristically deal.

That is not to say that the judicial system does not benefit from such an appellant renewing its motion for judgment as a matter of law after the verdict and, in the alternative, requesting a new trial based on evidentiary error. Indeed, as the Seventh Circuit pointed at, this is the “better practice” that attorneys should follow, because it serves the purpose of Rule 50 by speeding litigation and preventing unnecessary retrials. However, in circumstances like those in Fuesting, appellate courts should recognize that speedy litigation is a small sacrifice to ensure overall fairness to parties whose substantial rights were affected by the trial court’s error.

168 See Fuesting v. Zimmer, Inc. (Fuesting II), 448 F.3d 936, 941 (7th Cir. 2006); see also supra note 52.
INTRODUCTION

The convicted sex offender is perhaps the most despised and unsympathetic member of American society; and specifically those convicted of crimes against children are considered the vilest. The societal view of sex offenders is best exemplified by the words of Justice Kennedy in *McKune v. Lile*, where he succinctly stated: “Sex offenders are a serious threat in this Nation.”1 This view spans the continuum from the most respected jurist to the average person. It stems from the fact that these offenders harm children and other vulnerable persons.2 It also stems from the belief that since sex offenders are released back into society, they are more likely than other criminals to re-offend.3 This societal view also makes it easier

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2 See id.
3 Id.; but see ERIC LOTKE, NAT’L CENTER ON INSTITUTIONS AND ALTERNATIVES, INC., SEX OFFENSES: FACTS, FICTIONS, AND POLICY IMPLICATIONS 2 (2006), available at http://66.165.94.98/stories/SexOffendersReport.pdf (noting that “[r]ecidivism rates are relatively low, typically running in the 3-13% range, and among the lowest of all types of crimes”).
for legislatures to justify regulations against sex offenders as communities look for ways to reduce the frequency and severity of sex crimes.4

In the name of public safety, localities require sex offenders to not only publicly classify themselves but also restrict where sex offenders may live and what public spaces sex offenders may enter and enjoy.5 These restrictions against sex offenders pass without opposition, garner support from the community, and when challenged in court are uniformly upheld.6 Not only do the courts dismiss any and all constitutional arguments, but they also allude to the fact that any restriction against sex offenders would pass rational basis review for the safety of children is always a legitimate interest.7

In September 2006, the United States Circuit Court for the Seventh Circuit entertained Brown v. Michigan City, which dealt with the “rights” of sex offenders and upheld a law directed at a sex offender.8 The Seventh Circuit did not stray from the path set by previous courts and may even have gone a step further, upholding an ordinance which bans a specific individual from entering public parks.9 In upholding this ordinance, the Seventh Circuit has aided the general trend to strip convicted sex offenders of their rights.

Part I focuses on the background of Brown v. Michigan City including the facts and reasoning behind the decision as well as the

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4 See LOTKE, supra note 3, at 1.
6 Patrick Whitnell, Legal Notes: Coping with the Paroled Sex Offender Next Door, (2006), http://www.cacities.org/index.jsp?zone=wcm&previewStory=24692# See, e.g., McKune, 536 U.S. at 33. (stating in regards to Kansas’ Sexual Abuse Treatment Program, “[s]tates thus have a vital interest in rehabilitating convicted sex offenders”).
7 462 F.3d 720, 722 (7th Cir. 2006).
8 Id.
history of regulations against sex offenders and their constitutionality as decided by both the Seventh Circuit and the Supreme Court. Part II analyzes the decision made by the Seventh Circuit in *Brown v. Michigan City*. It examines the Seventh Circuit’s decision and finds that the deferential use of the rational basis standard of review is flawed. If rational basis review is used for each and every sex offender law, then any restriction placed on sex offenders will be deemed constitutional. This places sex offenders in a unique situation, although they are released back into society they do not have the same rights as any other citizen and any law which passes rational basis review can strip them of even more rights.

I. BACKGROUND

A. *Brown v. Michigan City: The Facts*

In 1995, Mr. Brown was convicted of one count of child molestation.\(^{10}\) He was sentenced to six years in prison with three years suspended.\(^{11}\) After his release, in 1999, Mr. Brown was placed on probation for the remaining three years and completed court-required counseling.\(^{12}\) Between 1995 and 2002, Mr. Brown complied with sex offender laws to the best of his knowledge and had no arrests.\(^{13}\) Each day during that time span Mr. Brown did, however, frequent Washington Park.\(^{14}\)

Washington Park is a large public park located on Lake Michigan.\(^{15}\) Residents may enter Washington Park with a resident pass.\(^{16}\) Mr. Brown began visiting Washington Park on a daily basis

\(^{10}\) *Id.* at 723. 
\(^{11}\) *Id.* at 723 n.3. 
\(^{12}\) *Id.* 
\(^{13}\) *Id.* at 724. 
\(^{14}\) *Id.* at 722. 
\(^{15}\) *Id.* 
\(^{16}\) *Id.*
with his wife in 1988.\textsuperscript{17} When they visited the park, they would, according to Mr. Brown, “sit and watch the sunsets and sunrises, drink coffee, [and] smoke cigarettes.”\textsuperscript{18} After his wife’s death, Mr. Brown continued this daily ritual.\textsuperscript{19} Over the course of approximately fourteen years, Mr. Brown would drive to Washington Park, park by the lake, drink coffee, and smoke cigarettes.\textsuperscript{20} For the most part, he did not leave his vehicle.\textsuperscript{21}

In 2002, the Michigan City Department of Parks became aware of Mr. Brown, when he had been observed at Stone Lake Beach in LaPorte, Indiana, watching beach patrons with binoculars.\textsuperscript{22} An investigation by the LaPorte police discovered that Mr. Brown was a convicted sex offender.\textsuperscript{23} Subsequently, the LaPorte Recreation Director informed the Michigan City Police Department of Mr. Brown.\textsuperscript{24} The City admits that, while Mr. Brown’s daily activities were innocent, combined with his conviction of child molestation, his activities raised a “red flag.”\textsuperscript{25} With this knowledge, police approached Mr. Brown in Washington Park on four separate occasions.\textsuperscript{26} On the fourth occasion, a city attorney informed Mr. Brown that he was no longer allowed in the park.\textsuperscript{27} Mr. Brown complied with this order and never re-entered Washington Park.\textsuperscript{28}

\begin{itemize}
\item \textsuperscript{17} \textit{Id.}
\item \textsuperscript{18} \textit{Id.} (quoting Brown’s deposition testimony).
\item \textsuperscript{19} \textit{Id.} at 722.
\item \textsuperscript{20} \textit{Id.} Mr. Brown would also “watch people at the beach, sometimes with binoculars.” \textit{Id.} at 722 n.1. While Mr. Brown claims he only watched women on the beach, the city council alleges that he watched children and that the “women” he was watching were actually teenage girls. \textit{Id.}
\item \textsuperscript{21} \textit{Id.} at 722
\item \textsuperscript{22} \textit{Id.} at 723.
\item \textsuperscript{23} \textit{Id.}
\item \textsuperscript{24} \textit{Id.}
\item \textsuperscript{25} \textit{Id.} (quoting Recreation Director Garbacik’s deposition testimony).
\item \textsuperscript{26} \textit{Id.} at 723- 24.
\item \textsuperscript{27} \textit{Id.} at 724.
\item \textsuperscript{28} \textit{Id.}
\end{itemize}
On July 31, 2002, the Michigan City Parks and Recreation Board informed Mr. Brown of a meeting at the Park Office, located in Washington Park, at which the Board would discuss the banning of Mr. Brown from Michigan City Park properties. Mr. Brown did not attend the meeting. On August 1, 2002, the Michigan City Parks and Recreation Board convened, and a Park Department attorney presented Resolution 548, entitled “A Resolution Prohibiting the Use of Park Department Properties by an Individual Having a Child Molesting History.”

WHEREAS, it was brought to the attention of this Board by the Department staff and the Michigan City Police Department that during the period of a recent summer day camp program for children conducted at Washington Park, an individual, namely, Robert E. Brown, who was recognized by members of the Michigan City Police force as a convicted child molester, was observed by the Police and the Department staff frequenting Washington Park in a recreational/camping vehicle, while having a set of binoculars and a camera in his possession, and WHEREAS, this Board has determined that in order to discharge its responsibilities of child protection and safety, it is necessary to designate all properties and programs under the jurisdiction of the Department to be OFF LIMITS to any person who has been convicted of child molesting under Indiana Code, IC 35-42-4-3, or convicted of any other sex crime in which the victim is a child under the age of 18 years, and to ban such person from all Michigan City Parks and Recreation Department properties indefinitely.

NOW THEREFORE, BE IT RESOLVED BY THE MICHIGAN CITY PARKS AND RECREATION BOARD AS FOLLOWS:
(1) That ROBERT E. BROWN . . . is hereby BANNED from all properties or programs operated under the jurisdiction of the
In presenting Resolution 548, the Park Department attorney explained that Mr. Brown had been involved in a “series of incidents . . . involving the safety and protection of children,” had been convicted of child molestation, and had been engaged in suspicious activity at Washington Park. Mr. Brown’s activities included visiting the park everyday, on one occasion watching people with binoculars and a camera, and on numerous occasions driving slowly by a children’s day camp located in the Park. The attorney stressed that the Board was responsible for the “care, custody, and safety of [children who visit the park].” The Board unanimously passed the Resolution.

After Mr. Brown commenced litigation, in August 2002, the Board reconvened for a special session without notifying Mr. Brown. At the session the Board rescinded Resolution 548 and passed in its stead Resolution 552, entitled “A Resolution Prohibiting the Use of Park Department Properties by an Individual Having a Child Molesting History, Whose Observed Behavior Constitutes a Threat to the Safety of Children.” Resolution 552 is substantially similar to its predecessor except that rather than making the park properties “OFF

Michigan City Department of Parks and Recreation and that in the event said individual is found upon any such property, he shall be considered a trespasser, and shall be removed forthwith, or be subject to arrest for failure to depart the premises.

(2) That all properties and programs operated under the jurisdiction of this Department are hereby declared OFF LIMITS to any person who has been convicted of child molesting under Indiana Code, IC 35-42-4-3, or convicted of any other sex crime in which the victim is a child under the age of 18 years, and in the event that such individual is identified and found upon any such property, he shall be considered a trespasser and shall be ordered to remove himself forthwith, or be subject to arrest for failure to depart the premises.

32 Id. at 725.
33 Id.
34 Id.
35 Id.
36 Id.
37 Id.
LIMITS to any person who has been convicted of child molesting under Indiana Code, IC 35-42-4-3, or convicted of any other sex crime in which the victim is a child under the age of 18 years,” Resolution 552 makes the Michigan City Parks “OFF LIMITS to the said Mr. Robert E. Brown who has been convicted of child molesting under Indiana Code, IC 35-42-4-3, and whose observed behavior in Washington Park is deemed by this Board to constitute a threat to the safety of children.”38

The Park attorney explained at the meeting that the proposed change was necessary to prevent Mr. Brown from a successful motion for class certification.39 The attorney stated: “Resolution No. 548 must be ‘narrowly tailored’ and it is ‘narrowly tailored’ if it targets and eliminates no more than the exact source of evil it seeks to remedy.”40 The Park Board unanimously voted to rescind Resolution 548 and to adopt Resolution 552.41

B. Brown v. Michigan: The Decision

Mr. Brown attacked Resolution 552 on three separate constitutional grounds.42 He claimed that this ordinance violates his substantive property interest in the Michigan City Parks and his substantive liberty interest based upon damage to his reputation, and that the application of this resolution violated his procedural due process rights.43

The United States District Court for the Northern District of Indiana dismissed each of these claims and granted summary judgment in favor of Michigan City.44 It held that Mr. Brown had neither a

38 Id. at 725-26 (emphasis added).
39 Id. at 726.
40 Id.
41 Id.
42 Id.
43 Id.
protected property interest to enter a public park nor a protected liberty interest in his reputation to demand due process protections. It also stated that although the right of access to a public park may be important, it is not fundamental. The district court further found that the ban was rationally related to the compelling interest of protecting children, noting that Michigan City was not “bound to wait until Mr. [Brown] again committed child molestation or attempted child molestation in order to act.” Finally, the district court inquired as to whether this ban was an arbitrary exercise of power. It reasoned that the ban was not an arbitrary exercise of power as the ban did not “shock the contemporary conscience.”

The Seventh Circuit affirmed the district court’s opinion and held that the Michigan City Park Ordinance violated neither substantive due process nor procedural due process. The court reasoned that Mr. Brown is not entitled to a constitutional property interest in the public parks, that Mr. Brown failed to demonstrate he was deprived of a valid liberty interest, and that, because no valid property or liberty interest was involved, it was not necessary to analyze what process was due to Mr. Brown.

1. Substantive Due Process

The Seventh Circuit held that, according to the United States Supreme Court in Washington v. Glucksberg, there is only a narrow category of fundamental rights—“the rights to marry, to have children, to direct the education and upbringing of one’s children, to marital

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45 Id. at *5-7.
46 Id. at *11.
47 Id. at *12 (quoting Doe v. City of Lafayette, 377 F.3d at 767 n.8).
49 Id. (quoting County of Sacramento v. Lewis, 523 U.S. 833, 848 n.8 (1998).
50 The panel consisted of Judges Ripple, Manion, and Kanne.
51 Brown v. Michigan City, 462 F.3d 720, 734 (7th Cir. 2006).
52 Id. at 729-32.
privacy, to use contraception, to bodily integrity, and to abortion.” 54
The court found that the right to enter a public park is not contained in
this narrow list and that the list should not be expanded to include it. 55
Further, the court found that the ban of Mr. Brown was rationally
related to the goal of protecting the children of the community and
thus passes rational basis review. 56

2. Procedural Due Process

To determine whether Resolution 522 violated procedural due
process the Seventh Circuit first analyzed whether Mr. Brown was
deprived of a protected interest and whether process was due. 57 The
court relied on the framework propounded by the Supreme Court in
Mathews v. Eldridge 58 focusing on factors such as the private interest
affected by the official action, the risk of an erroneous deprivation of
such an interest, and the probable value of procedural safeguards. 59

The court reasoned that for there to be a property interest an
individual must have a legitimate claim of entitlement. 60 The court
found that the distribution of park passes to residents did not create a
legitimate interest in visiting the park. 61 Accordingly, the Constitution
does not guarantee access to Washington Park. 62 Further, the court
reasoned that for Michigan City to have implicated a liberty interest,
the ordinance needed to not only defame Mr. Brown but also to alter
his legal status, such as depriving him of a right. 63 The court found

54 Brown, 462 F.3d at 732 (quoting Glucksberg, 521 U.S. at 720) (noting that
there may also be a right to refuse unwanted lifesaving medical treatment).
55 Brown, 462 F.3d at 732.
56 Id. at 734.
57 Id. at 728.
59 Brown, 462 F.3d at 728.
60 Id.
61 Id.
62 Id. at 729.
63 Id. at 730 (citing Paul v. Davis, 424 U.S. 693 (1976)).
that Mr. Brown’s claims did not satisfy these requirements, because he could not establish that he had a right to enter the public park.\textsuperscript{64}

For Mr. Brown’s procedural due process claims, the court held that Mr. Brown was neither deprived of a property interest or a liberty interest, and accordingly did not need to determine whether Mr. Brown received adequate process.\textsuperscript{65}

\textbf{C. Regulating Sex Offenders}

The term “sex offender” has two broad definitions. A sex offender can be:

\begin{quote}
[A]ny person who willfully and lewdly commits any lewd or lascivious act, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing, or gratifying the lust, passions, or sexual desires of that person or the child.\textsuperscript{66}
\end{quote}

Or, a sex offender can be defined as “any person who commits an act by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.”\textsuperscript{67}

\begin{footnotesize}
\textsuperscript{64} Brown, 462 F.3d at 731.
\textsuperscript{65} Id.
\textsuperscript{66} MARCUS NIETO & DAVID JUNG, CAL. STATE LIBRARY, THE IMPACT OF RESIDENCY RESTRICTIONS ON SEX OFFENDERS AND CORRECTIONAL MANAGEMENT PRACTICES: A LITERATURE REVIEW 1 (2006), available at http://www.library.ca.gov/crb/06/08/06-008.pdf (quoting CAL. PENAL CODE § 288(a) (West 2005)). In Indiana, a sex offender is an individual who has been convicted of any of the following offenses or has attempted to commit any of the following offenses: rape, criminal deviate conduct, child molesting, child exploitation, vicarious sexual gratification, child solicitation, child seduction, sexual misconduct with a minor, incest, sexual battery, kidnapping if the victim is less than 18, criminal confinement if the victim is less than 18, and possession of child pornography. IC 11-8-8-5.
\textsuperscript{67} NIETO & JUNG, supra note 66, at 1 (quoting CAL. PENAL CODE § 288(b)(1)).
\end{footnotesize}
In a given year, there are 60,000 to 70,000 arrests for child sexual assault and 15,000 to 20,000 arrests for rape. Child molesters are likely to recidivate at a rate of 12.7%, whereas rapists have a recidivism rate of 18.9%. Currently, there are an estimated 550,000 registered sex offenders in this country. Because of this large number and the belief that sexual offenders are more likely to be repeat offenders, legislatures use a variety of policies to protect the public against sex offenders. Specifically, sex offender legislation is intended to prevent the occurrence of sex offenses.

In 1994, Congress enacted the Jacob Wetterling Act which requires sex offender registration. Two years later, Congress enacted

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68 NIETO & JUNG, supra note 66, at 1 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CRIME CHARACTERISTICS: VICTIM/OFFENDER RELATIONSHIP (2004)).
69 NIETO & JUNG, supra note 66, at 2.
70 Id.
71 See LOTKE, supra note 3, at 2; but see id. at 2-3 (citing to Solicitor General of Canada Karl Hanson’s 2004 study finding that the overall recidivism rate for new sex crimes is 13.7%, the recidivism rate for child molestation is 12.7%, the recidivism rate for child molestation within families is 8.4%, and the recidivism rate for rape is 18.9%); see also id. at 2 (quoting DEPARTMENT OF REHABILITATION AND CORRECTION, STATE OF OHIO, TEN YEAR RECIDIVISM FOLLOW-UP OF 1989 SEX OFFENDER RELEASES 12 (2001)):

Certainly any instance of sexual recidivism is cause for concern, and we should not lose sight that even a 1% sexual recidivism rate represents a certain number of victims of sexual assault. However, there is a rather widespread misconception that sex offenders, as a whole, are repeat offenders. While this study is obviously unable to determine the actual rate of reoffense, it is clear that a sex offender returning to an Ohio prison for a new offense is a fairly unusual occurrence.

Compared to other recidivism rates—79% for stealing motor vehicles and 77% for possession of stolen property—sexual recidivism is extremely low. See LOTKE, supra note 3, at 3; see also NIETO & JUNG, supra note 66, at 2 (noting that on average the “recidivism rates for all types of sex offenders are lower than for other offenders”).

72 See LOTKE, supra note 3, at 1.
Megan’s Law requiring states to make sex offender registries available to the public.\textsuperscript{74} Following the lead of Congress, states began passing similar legislation.\textsuperscript{75} All fifty of the states have registration requirements and make the registries available to the public.\textsuperscript{76} Seventeen states have civil commitment statutes for “sexually violent predators.”\textsuperscript{77} These statutes require that a sex offender who has been adjudicated a “sexually violent predator” be committed to a medical facility after completion of his criminal sentence.\textsuperscript{78}

Further, local legislatures have begun passing distance marker legislation and child safety zone legislation.\textsuperscript{79} Distance marker legislation provides that sex offenders cannot reside within a certain distance of schools, daycare centers, or any other places where children gather.\textsuperscript{80} Child safety zone legislation provides that a sex offender may not loiter within certain feet of areas where children may congregate.\textsuperscript{81} The Michigan City Parks and Recreation Board’s ordinance banning Mr. Brown from all Michigan City parks is the logical extension of the general trend in sex offender legislation.\textsuperscript{82}

\textsuperscript{74} 42 U.S.C. § 14071(e); \textit{see also} NIETO & JUNG, supra note 66, at 2.
\textsuperscript{76} NIETO & JUNG, supra 66, at 8-9.
\textsuperscript{77} \textit{Id.} at 3.
\textsuperscript{78} \textit{Id.}
\textsuperscript{79} \textit{See id.; see also} Whitnell \textit{supra} note 5 (noting that some localities have also begun creating Zoning Dispersal legislation which limit the number of sex offenders who may live in the same residential dwelling).
\textsuperscript{80} \textit{See} NIETO & JUNG, \textit{supra} note 66, at 3 (noting that 22 states have enacted some form of distance marker legislation, ranging from 500 feet to 2,500 feet). In Illinois a child sex offender cannot reside within 500 feet of a school or school property. 720 ILL. COMP. STAT. § 5/11-9.3(b-5) (2006). In Indiana, a violent sex offender cannot reside within 1,000 feet of any school property for the duration of parole. IND. CODE § 11-13-3-4(g)(2)(B)(2006). Wisconsin does not have a sex offender residency restriction law.
\textsuperscript{81} \textit{See} NIETO & JUNG, \textit{supra} note 66, at 15 (Typical distance is 300 ft. No reported court decisions affecting Child Safety Zone legislation, but two courts have upheld ban from city parks).
\textsuperscript{82} \textit{See} Brown v. Michigan City, 462 F.3d 720 (7th Cir 2006).
demonstrates how sex offender legislation has narrowed from the general to the specific and how sex offender legislation has the ability to strip sex offenders of their rights.\textsuperscript{83}

\textit{D. Constitutional Challenges}

Before the United States Supreme Court, the laws directed against sex offenders have experienced constitutional challenges from various fronts.\textsuperscript{84} Sex offender laws have been attacked on various bases including violating the First Amendment, the \textit{ex post facto} clause, and double jeopardy.\textsuperscript{85} Under each challenge, state and federal courts have upheld legislation directed at sex offenders.\textsuperscript{86} Regardless of whether there has been a violation or not, the Court has held that the laws directed against sex offenders pass rational basis review; the laws are deemed as rational means to the legitimate goal of protecting children.\textsuperscript{87} The Court, finding that no violation has occurred under any of these theories, applies the less stringent rational basis review.\textsuperscript{88} Under this standard, each of these laws passes muster.\textsuperscript{89} For example, “residency restrictions do not offend the equal protection clause. They represent a rational legislative determination that excluding sex offenders from areas where children congregate will advance the state’s interest in protecting children.”\textsuperscript{90}

\begin{flushleft}
\begin{footnotesize}
\textsuperscript{83} \emph{Id.}\textsuperscript{.}
\textsuperscript{84} \textit{See Nieto \& Jung, supra} note 66, at 43.
\textsuperscript{85} \emph{Id.}\textsuperscript{.}
\textsuperscript{86} \emph{Id.}\textsuperscript{.}
\textsuperscript{88} \textit{See, e.g., Smith}, 538 U.S. at 102-03; \textit{McKune}, 536 U.S. at 48.
\textsuperscript{89} \textit{See, e.g., Smith}, 538 U.S. at 102-03; \textit{McKune}, 536 U.S. at 48.
\textsuperscript{90} \textit{Nieto \& Jung, supra} note 66, at 44.
\end{footnotesize}
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1. The Supreme Court

In *Kansas v. Hendricks*, the Supreme Court upheld the civil commitment of a sexually violent predator under the Kansas Sexually Violent Predator Act.\(^{91}\) The Act which intended to prevent recidivism, established a procedure to civilly commit for long term care a sex offender who is deemed to be a “sexually violent predator.”\(^ {92}\) Specifically, in *Kansas*, Hendricks sought to prevent the state from committing him as sexually violent predator after he had served his prison sentence.\(^{93}\) The Court found that the act did not violate the constitutional prohibition against double jeopardy, the ban on *ex post facto* lawmaking, or due process.\(^ {94}\) In addressing the substantive due process argument, the Court noted that although freedom from physical restraint is a core liberty interest, an “involuntary civil confinement of a limited subclass of dangerous persons” is not contrary to the understanding of ordered liberty.\(^{95}\) Further, because the Act entails civil commitment proceedings, it is non-punitive and therefore does not violate double jeopardy or the *ex post facto* clause.\(^ {96}\) In 2000, the Supreme Court revisited the alleged punitive nature of civil commitment legislation.\(^{97}\) It found Washington’s Community Protection Act\(^ {98}\) constitutional as the statute was civil rather than criminal.\(^ {99}\) The Court, expanding its holding in *Kansas v. Hendricks*, held that a civil commitment of a sexually violent predator is constitutional both facially and as applied.\(^ {100}\)

\(^{93}\) *Kansas*, 521 U.S. at 354.
\(^{94}\) *Id.* at 371.
\(^{95}\) *Id.* at 357.
\(^{96}\) *Id.* at 369.
\(^{97}\) *See* Seling v. Young, 531 U.S. 250 (2001).
\(^{99}\) *Seling*, 531 U.S at 260-61.
\(^{100}\) *Id.* at 267.
In 2003, the Supreme Court upheld the Alaska Sex Offender Registration Act. The Act which requires registration and community notification was criticized as constituting retroactive punishment. The Court reasoned that the Alaska law is not punitive, and thus does not violate the ex post facto clause. However, a dissenting Justice Stevens noted that proper analysis would have included asking whether the registration statute affects a protected liberty interest.

Similarly, in Connecticut Department of Public Safety v. Doe, the Court upheld Connecticut’s Megan’s Law on procedural due process grounds. It held that states are permitted to classify all sex offenders as a group and require registration and notification. Here, the Court did not address substantive due process, but Justice Scalia’s concurrence suggests that there is the possibility that such a claim may be successful. Justice Scalia noted: “Absent a claim . . . that the liberty interest in question is so fundamental as to implicate so-called ‘substantive’ due process, a properly enacted law can eliminate it.” Accordingly, as there was no claim that this violated substantive due process, the law was held constitutional.

These cases dealing with sex offender legislation decided by the Supreme Court demonstrate the Court’s trend to uphold sex offender legislation against attacks on various constitutional fronts. These

102 Smith, 538 U.S. at 92.
103 Id. at 105-06.
104 Id. at 111-12 (Stevens, J., dissenting) (finding both that a protected liberty interest as involved and that registration and notification requirements are punitive).
106 Conn., 538 U.S. at 8.
107 See id. (Scalia, J., concurring).
108 Id.
109 Id.
cases also demonstrate that substantive due process may be the only successful claim available.  

2. The Seventh Circuit

The Seventh Circuit has also established a line of precedent upholding claims against sex offender laws. Further, the Seventh Circuit has specifically addressed the issue of a regulation specifically banning a sex offender from a public park.

In 2003, in *Doe v. Lafayette*, a Seventh Circuit panel held that banning sex offenders from a public park violates the First Amendment because it punishes a person for his thoughts. In comparing the sex offender to other criminals, the court noted:

> [W]e would not sanction criminal punishment of an individual with a criminal history of bank robbery (a crime, like child molestation, with a high rate of recidivism . . .) simply because she or he stood in the parking lot of a bank and thought about robbing it . . . [Further,] punishment of a drug addict who stands outside a dealer’s house craving a hit but successfully resists the urge to enter and purchase drugs would be offensive to our understanding of the bounds of the criminal law.

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111 *See Conn.*, 538 U.S. at 8.
112 *See, e.g.*, *Doe v. City of Lafayette (Lafayette II)*, 377 F.3d 757, 774 (7th Cir. 2004) (rejecting petitioner’s challenges based on the First and Fourteenth Amendments.).
113 *Doe v. City of Lafayette (Lafayette I)*, 334 F.3d 606 (7th Cir. 2003), rev’d on *rehearing en banc*, *Lafayette II*, 377 F.3d 757.
114 334 F.3d at 613.
115 *Id.* at 612.
However, in 2004, on rehearing *en banc*, the Seventh Circuit reversed the panel’s decision by holding that the park ban does not violate either the First Amendment or Due Process.116

In *Doe v. Lafayette*, Doe, a convicted sex offender, was banned from all public parks in Lafayette, Indiana.117 Doe had a long history of arrests and crimes for sexual offenses directed towards children.118 The act that precipitated the ban was Doe’s “cruising” the parks and watching children, actions that were brought to the attention of the Lafayette Police Department.119 Doe admits that he went to a public park, and upon seeing some children, felt that he should leave before he did anything.120 In his own words, Doe stated regarding the occurrence:

> When I saw the three, the four kids there, my thoughts were thoughts I had before when I see children, possibly expose myself to them, I thought of the possibility of, you know, having some kind of sexual contact with the kids, but I know with four kids there, that’s pretty difficult to do. It’s a wide open area. Those thoughts were there, but they, you know, weren’t realistic at the time. They were just thoughts.121

Subsequently, the superintendent of the Lafayette Parks and Recreation Department sent a letter to Doe informing him that he was prohibited from entering any of the City’s parks.122 The Seventh Circuit, sitting *en banc*, held that Doe was not being punished for his impure thoughts in violation of the First

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116 *Lafayette II*, 377 F.3d at 758.
117 *Id.*
118 *Id.*
119 *Id.* at 759.
120 *Id.*
121 *Id.* at 760 (quoting Doe’s deposition testimony).
122 *Id.*
Amendment. The court reasoned that the City did not ban Doe from the parks for having these thoughts; rather, the City banned him because these were not mere thoughts because he was on the brink of acting on these thoughts. The court also held that Doe was not being deprived a fundamental right, because his right to enter the parks is not “fundamental.” The court relied on the same reasoning it applied in Brown v. Michigan. The court emphasized the narrowness of fundamental rights and presented an exhaustive list of those rights which have been deemed fundamental. The Seventh Circuit continued stating:

By banning Mr. Doe from the parks, the City only has deprived him of the “right” to go to the City’s parks which he wishes to use for allegedly innocent, recreational purposes. That this right is not “fundamental” to Mr. Doe’s personhood is readily apparent not only from a comparison to other “fundamental” rights, but also from the fact that Mr. Doe has not even entered the City’s parks since at least 1990.

Finding that the City had violated neither the First nor Fourteenth Amendments, the court applied the rational basis standard to review the City’s ban. The banning of a sex offender from entering a public park is rationally related to the interest in protecting children. Further, the court alluded that this ban would also pass the higher standard of strict scrutiny because the interest in protecting children is

123 Id. at 766.
124 Id. at 767.
125 Id. at 770.
126 See Brown v. Michigan City, 462 F.3d 720, 732 (7th Cir. 2006).
127 Lafayette II, 377 F.3d at 770-71.
128 Id. at 771.
129 Id. at 773.
130 See id.
compelling, and the ban of one sex offender based on his near relapse is narrowly tailored.131

More recently, the Seventh Circuit in *Harris v. Donahue* remanded a prison inmate case where the Department of Prisons banned minor children from visiting sex offender parents.132 The court recognized that there is a cause of action as to whether this ban violates a due process liberty interest to associate with your own kids but offered no opinion as to whether it would be successful.133

The Seventh Circuit has been less consistent than the Supreme Court in regards to legislation directed against sex offenders; in some decisions it has demonstrated their unconstitutionality and in others it has emphasized the possibility for successful claims.134 However, as with the Supreme Court, precedent still holds that these laws will be held constitutional under the rational basis standard of review.135

II. ANALYSIS OF BROWN V. MICHIGAN CITY

Although precedent demonstrates that claims against sex offender legislation have been almost universally unsuccessful, it is less clear whether a court would view such regulations as a deprivation of rights.136 Precedent has left the door open to whether there can be a successful substantive due process challenge.137 In *Brown*, the Seventh Circuit closes this door.138 Technically, the Seventh Circuit remains true to both its own precedent as well as the general trend of Supreme

131 *Id.* at 773-74.
132 *Harris v. Donahue*, 175 Fed. Appx. 746, 748 (7th Cir. 2006).
133 *Id.*
134 *See id.*; Doe v. City of Lafayette (*Lafayette I*), 334 F.3d 606 (7th Cir. 2003), *rev’d on reh’g en banc, Lafayette II*, 377 F.3d 757.
135 *See Lafayette II*, 377 F.3d 757.
136 *See, e.g., id.* at 770-71; Seling v. Young, 531 U.S. 250 (2001).
Court precedent. However, it fails to look at other factors and seems to be focused on obtaining the “popular” outcome.

A. Brown v. Michigan City: Sex offenders do not have a property interest in visiting and enjoying a public park.

In Brown v. Michigan, the court rejected the argument that Mr. Brown had a fundamental right to enter and enjoy the parks in Michigan City, Indiana. The court reasoned that an individual must have a legitimate claim of entitlement in order to claim a property interest and that Mr. Brown did not have a legitimate expectation of enjoying a city park, even though admission to the park is free to Michigan City residents and even though Mr. Brown had a history and practice of entering and enjoying Washington Park.

It is widely accepted that a fundamental right is a right which is deeply rooted in this “[n]ation’s history, legal traditions, and practices.” To state that the openness of public parks is not deeply rooted in our history, legal traditions, and practices is a difficult proposition to make. Since this nation’s inception, tracts of land have been held in trust for public use and public enjoyment. Legal analysis and tradition rely upon the openness of parks.

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such

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140 Brown, 462 F.3d at 732-33.
141 Id. at 732.
use of the streets and public places has, from ancient
times, been a part of the privileges, immunities, rights,
and liberties of citizens.

Specifically, First Amendment forum analysis relies on the concept
that parks are open, making “streets and parks” the paradigmatic
location for free expression.\(^{146}\) And in practice parks are held open to
the public; the general public cannot be excluded from a park for an
unreasonable duration\(^ {147}\) and a particular class of persons cannot
arbitrarily be excluded from entering and enjoying a public park.\(^ {148}\)

Further, in \textit{City of Chicago v. Morales}, a plurality of the Court
stated that there is a fundamental right to loiter in a public place.\(^ {149}\) In
determining the constitutionality of the city of Chicago’s gang
loitering ordinance, it noted that “an individual’s decision to remain in
a public place of his choice is as much a part of his liberty as the
freedom of movement inside frontiers that is ‘a part of our
heritage.’”\(^ {150}\) The plurality thus stated that “the freedom to loiter for
innocent purposes is part of the ‘liberty’ protected by the Due Process
Clause of the Fourteenth Amendment.”\(^ {151}\) The Supreme Court has also
held that there is a fundamental interest in interstate travel, but it is

it may be abridged or denied. \textit{Hague}, 307 U.S. at 516.

\(^{147}\) 64 C.J.S. \textit{Municipal Corporations} § 1557 (2006) (citing Nebraska City v.
Nebraska City Speed & Fair Ass’n, 186 N.W. 374 (Neb. 1922); Sherburne v. City of
Portsmouth, 58 A. 38 (N.H. 1904)).

\(^{148}\) 64 C.J.S. \textit{Municipal Corporations} § 1557 (2006) (citing Blackman Health
Resort v. City of Atlanta, 151 S.E. 525 (Ga. 1921)).

\(^{149}\) \textit{City of Chicago v. Morales}, 527 U.S. 41, 53 (1999); \textit{but see id. at 83}
(Scalia, J., dissenting); \textit{id. at 98} (stating that there is no constitutional right to loiter).

\(^{150}\) \textit{City of Chicago}, 527 U.S. at 54 (quoting \textit{Kent v. Dulles}, 357 U.S. 116, 126
(1958)).

\(^{151}\) \textit{City of Chicago}, 527 U.S. at 53.
unclear whether there is a comparable interest in intrastate travel and whether entering a public park would constitute intrastate travel.152

The Seventh Circuit’s narrow construction of what is a fundamental right fails to analyze all the relevant factors; it fails to examine the history and openness of parks, the importance of parks in legal doctrine, and the general freedoms to travel and loiter.153 The right to enter a park does not fit into any of the pigeon-holed rights that the Supreme Court has deemed fundamental.154 However, like these rights, there is a history, tradition, and practice of opening parks to the public.155 Further the right to loiter and the right to travel support that argument that there may be a right, or at least an interest in access to public parks.156

Additionally, in Doe v. Lafayette, the Seventh Circuit analyzed whether the right to enter the parks was fundamental to the individual.157 It determined that because Doe had not entered the parks in over twelve years, his personhood was not implicated.158 This is factually distinct from the situation in Brown.159 Mr. Brown had been entering and enjoying the parks for over fifteen years.160 Not only did he go to Washington Park as part of his daily schedule, but he enjoyed

152 See Memorial Hosp. v. Maricopa County, 415 U.S. 250, 254-56 (1974) (reasoning that there is a right to intrastate travel); but see Bray v. Alexandria Women’s Health Clinic, 506 U.S. 263, 276-77 (1993) (commenting that there is not a fundamental right to intrastate travel).
153 See Brown v. Michigan City, 462 F.3d 720, 732-33 (7th Cir. 2006).
154 See id. at 732.
157 Doe v. Lafayette (“Lafayette II”), 377 F.3d 757, 771 (7th Cir. 2004) (reasoning that the right to enter a park “is not ‘fundamental’ to Mr. Doe’s personhood . . . from the fact that Mr. Doe has not even entered the City’s parks since at least 1990”)
158 Id.
159 See Brown v. Michigan City, 462 F.3d 720, 722 (7th Cir. 2006).
160 Id.
the park for other purposes such as fishing, boating, and picnicking. Unlike Doe, Mr. Brown’s personhood was implicated by the ban.

These cases and the facts present in Brown v. Michigan City demonstrate that an argument can be made that a fundamental interest or right has been implicated. However, the Seventh Circuit brushes aside this case law and these factual distinctions and decides the case as if the ban against Mr. Brown was no different than any other restriction against a sex offender.

**B. Brown v. Michigan City: Sex offenders do not have a liberty interest in protecting their reputation.**

The Seventh Circuit also rejected Mr. Brown’s claim that Michigan City infringed upon his liberty interest in his reputation by classifying him as a “present threat” to children in the ordinance. In doing so, the court relied on the test created in Paul v. Davis. There, the Supreme Court held that mere injury to reputation alone does not deprive an individual of a liberty interest. In order to successfully claim that one is deprived of a liberty interest, the claimant must show not only that his reputation was harmed but also that his legal status has been altered as well.

Mr. Brown is a sex offender and based upon general sex offender registration and notification laws, Mr. Brown will always be known as

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161 Brief of Petitioner-Appellant at 5, Brown v. Michigan City, No. 05-3912 (7th Cir. Sept. 5th, 2006).
162 Compare Brown, 462 F.3d at 722, with Lafayette II, 377 F.3d at 771.
164 Brown, 462 F.3d at 732-34.
165 Id. at 729-30.
166 Id. at 730.
168 Id.
According to the law of Indiana, he has a reporting duty for life. His name, address, photograph, physical description, and crime are readily available for anyone to view. The legislation in this case is different. This is special legislation directed at Mr. Brown in his individual capacity. The Park Board had given him a different status than other sex offenders. Not only must he comply with all other city, county, state, and federal laws, but Mr. Brown must also comply with a park ordinance which bans him from all city parks. This is an alteration of his legal status. He has lost a right that every other citizen and every other sex offender in Michigan City still holds. Additionally beyond this altered status, Mr. Brown is also known as a “present threat.”

The facts in this case may satisfy the requirements of Paul v. Davis; however, the Seventh Circuit was quick to come to the decision that Mr. Brown did not have an altered status and that he was not denied a right. This is another example of how leniently sex

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170 See IND. CODE 11-8-8-7.

171 Id.

172 Reporting and residency restrictions apply to all sex offenders, whereas this ordinance applies solely to Mr. Brown.

173 See Brown, 462 F.3d at 726. Special legislation is legislation directed a particular person or class, as opposed to the general public. BARRON’S LAW DICTIONARY (2003). Special legislation is valid as long as it comports with the Constitution, specifically the 14th Amendment. Id. Special legislation must pass rational basis review. Id.

174 See Brown, 462 F.3d at 725.

175 Id.

176 Id.

177 Id.

178 Id. at 729.


180 Brown, 462 F.3d at 730.
offender legislation is reviewed, allowing rights of a whole class of people, and in some cases an individual, to be stripped away.

C. Brown v. Michigan City: Rational Basis Review

In Brown v. Michigan City the court, having found no constitutional violation, reviewed the park ordinance under the rational basis standard of review. According to this standard, the government interest must be legitimate and the means employed to meet that end must be rational. Under this deferential standard it is easy to see why sex offender laws pass constitutional muster. The Michigan City Park Board has a legitimate reason for keeping Mr. Brown out of the parks. He is a convicted sex offender, specifically a child molester, who frequently visits a park where children are present. The legitimate reason is the interest in protecting children from a sex offender. The means to that end is also rational; the City is preventing one known child molester from entering a park where children are present.

However, it would not be as easy for sex offender legislation to be found constitutional if the courts applied a higher standard of scrutiny, such as strict scrutiny. For strict scrutiny there needs to be a compelling governmental interest and means narrowly tailored to serve that interest. Any municipality can argue that the protection of children and other victims is a compelling interest, but a court must

\[181\] Id. at 733.
\[182\] Id.
\[183\] See id. at 733-34 (noting that children are vulnerable members of society which the City must shield from sexual abuse).
\[184\] Id. at 734.
\[185\] Id.
\[186\] Id.
\[187\] Id.
\[189\] Id.
determine whether that interest is served by the law and whether that law is narrowly tailored.\textsuperscript{190}

Strict scrutiny should be applied to the park ordinance. It should be applied because the ordinance deals with a fundamental property right to access a public park and a fundamental liberty interest in one’s reputation.\textsuperscript{191} Alternatively, it should also be applied because this ordinance is based upon a suspect classification: a prior sex offense.\textsuperscript{192} Sex offenders, based on registration and notification, are an easily identifiable group with little political power.\textsuperscript{193} On the other hand those that legislate against sex offenders have the power of the public behind them.\textsuperscript{194} A heightened protection is necessary to ensure the validity of laws against sex offenders.\textsuperscript{195} Accordingly, because of the implication of fundamental rights and the classification of sex offender, strict scrutiny is necessary to judge the park ordinance.\textsuperscript{196} In Brown the ordinance is narrowly tailored because the Park Board modified its ordinance after the commencement of the litigation to only affect Mr. Brown.\textsuperscript{197} It is less clear whether this ordinance actually serves its purpose.\textsuperscript{198} Thus, this ordinance may not pass strict scrutiny review because although it is narrowly tailored, and although there is a compelling interest, there is no obvious nexus or evidence as to whether the children in the Michigan City parks are safer because one convicted sex offender is no longer permitted to enter the parks.

\begin{thebibliography}{9}
\bibitem{190} Id.
\bibitem{191} See 16B AM. JUR. 2D Constitutional Law § 815 (2006).
\bibitem{192} See id.
\bibitem{193} Bret R. Hobson, Banishing Acts: How Far May States Go to Keep Convicted Sex Offenders Away From Children?, 40 GA. L. REV. 961, 987 (2006) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803)).
\bibitem{194} See id. at 987-88.
\bibitem{195} Id.
\bibitem{196} See 16B AM. JUR. 2D Constitutional Law § 815.
\bibitem{197} Brown v. Michigan City, 462 F.3d 720, 726 (7th Cir. 2006).
\bibitem{198} See id. If the purpose to protect children, the banning of one particular sex offender as opposed to all sex offender seems to not serve the purpose. See also Whitnell, supra note 5.
\end{thebibliography}
D. What rights should sex offenders be entitled to?

Sex offenders rest in a gray area of civil rights. Registration and required public access make sex offenders an easily identifiable group.\textsuperscript{199} Distance marker legislation and child safety zone legislation are quickly limiting where convicted sex offenders may live, work, and even loiter.\textsuperscript{200} Sexually violent predator acts commit sex offenders even after their sentence has been served.\textsuperscript{201} All of these laws place restrictions upon sex offenders after they have served their sentence, and place heavy restrictions upon sex offenders as they re-enter society.\textsuperscript{202} Upon re-entrance, they have neither the rights of an imprisoned individual nor the rights of an ordinary citizen.\textsuperscript{203}

\textit{Brown v. Michigan City} represents, yet another law which restricts the liberty of a sex offender and strips away a sex offender’s rights.\textsuperscript{204} The Seventh Circuit responded to the question of whether sex offenders have rights in the negative.\textsuperscript{205} This decision allows a piece of special legislation by a municipality to ban one individual from entering the public parks.\textsuperscript{206} It stands for the proposition that a sex offender does not have the right of access or enjoyment to a public space because of his past crime.\textsuperscript{207} This may lead to a slippery slope.\textsuperscript{208} Here, Mr. Brown is not allowed in the park because he is a threat to children, but what is there to stop possible future legislation which may ban a sex offender from a library, museum, etc., because children may be present.\textsuperscript{209} \textit{Brown} also stands for the proposition that a

\textsuperscript{199} See NIETO, supra note 66 at 8-9.
\textsuperscript{200} See id. at 3; see also Doe v. Miller, 405 F.3d 700 (8th Cir. 2005).
\textsuperscript{201} See NIETO, supra note 66 at 3; see also Kansas v. Hendricks, 521 U.S. 346.
\textsuperscript{202} See Whitnell, supra note 5.
\textsuperscript{203} See Hobson, supra note 193 at 988.
\textsuperscript{204} Brown v. Michigan City, 462 F.3d 720 (7th Cir. 2006).
\textsuperscript{205} Id. at 734.
\textsuperscript{206} Id.
\textsuperscript{207} Id.
\textsuperscript{208} See id.
\textsuperscript{209} Id.
sex offender’s liberty interest is not implicated when a legislativing body creates a tailored piece of legislation which not only names and identifies a particular person, but calls him a “present threat.”210

Sex offenders are a class of individuals who are an easy target for legislation.211 However, the judiciary cannot in good faith strictly uphold each and every act, law, or ordinance directed against sex offenders.212 Although the majority of the population may approve of sex offender laws and although at the core of the law there may be a rational basis, the judiciary still has a constitutional duty to protect citizens from the “tyranny of the majority.”213 It can be argued that:

Justices betray their duty of judicial review when they turn substantive due process analysis into a mere academic exercise, placing a few defined pigeonholes of fundamental rights on one side that receive strict scrutiny protection from legislative threats and relegating everything else to a second side that triggers only highly deferential review. If courts blindly apply rational basis review whenever the threatened right is deemed less than fundamental, even the most severe, unfair restraint may survive.214

In the realm of sex offender laws, whether the claim is based on fundamental rights or other punitive challenges, the courts have continually found no violation and the ordinance always passes the deferential review granted.215 But, a heightened standard is necessary to justify certain regulations against sex offenders because sex offenders resemble a discrete and insular minority with no political

210 Id.
211 Whitnell, supra note 5.
212 See Hobson, supra note 193 at 988.
213 Id. at 989.
214 Id. at 988.
215 See, e.g., Seling v. Young, 531 U.S. 250 (2001); Doe v. City of Lafayette, 377 F.3d 757, 770- 71 (7th Cir. 2004).
power and because sex offender laws substantially restrict where a sex offender may live, work, and loiter.216

CONCLUSION

Focusing solely on the general trend, the Seventh Circuit conformed to precedent. Neither the Supreme Court nor the Seventh Circuit has struck down a piece of sex offender legislation based on a constitutional challenge. However, this is not good policy. Although sex offenders may be a serious threat to society, the judiciary cannot base their decisions solely on the status of the individual. Sex offender legislation punishes those who have already fulfilled their sentence. It is upon their re-entrance to society that legislation restricts their freedoms. To restrict them solely based on their status punishes them twice for the same crime.

Specifically, in the case of Brown v. Michigan City, the Seventh Circuit had the opportunity to decide about the rights of Mr. Brown without looking at the outcome. There is no Supreme Court precedent as to whether child safety zone legislation is constitutional or whether banning an individual from a park is constitutional and the facts of the case are distinguishable from that of the Doe v. Lafayette. Further, in regards to Mr. Brown’s liberty interest in his reputation, this ordinance was specifically tailored to him and identified him as a present threat to children. It resulted in a change of status that could satisfy the test propounded in Paul v. Davis. And finally, the court glossed over this analysis and found this ordinance to pass rational basis review.

According to this precedent, as established by the Seventh Circuit, sex offenders do not have the rights of a citizen. Sex offenders only have rights which are left to them after legislation is done with them. Currently, they do not have the right to remain anonymous, the right to live where they choose, the right to loiter where they choose, and possibly the right to enter a public park. As legislation against sex offenders continues its growth it is unclear what rights sex offenders will be left with.

216 See Hobson, supra note 193, at 987.
In order to protect this “unpopular” group, the judiciary must not follow the tyranny of the majority. The Seventh Circuit and other courts must make reasoned decisions based on the law, not the outcome and apply a stricter standard of review when the fundamental rights of an unpopular group are slowly being stripped away.
WHO’S THE BOSS? SEVENTH CIRCUIT LIMITS EXECUTIVE BRANCH

ROY CHAMCHARAS*


INTRODUCTION

Since the September 11 attacks on the United States, there have been numerous articles about President Bush’s alleged expansion of executive authority – be it the warrantless surveillance of US citizens, detainment of enemy combatants, or signing statements on prisoner torture.1 However, an opinion issued by the United States Court of Appeals for the Seventh Circuit introduced a fascinating method of executive authority curtailment. In Freedom from Religion Foundation, Inc. v. Chao, the Seventh Circuit expanded the doctrine of “taxpayer standing” to apply to executive branch actions funded by general congressional appropriations.2 At first glance, the Seventh Circuit simply seems to be establishing a check on the executive and

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2 See Freedom from Religion Found., Inc. v. Chao, 433 F.3d 989 (7th Cir. 2006), rehearing, en banc, denied by Freedom from Religion Found., Inc. v. Chao, 447 F.3d 988 (7th Cir. 2006).
granting power to the taxpaying public with this ruling. However, a closer analysis of this case reveals the decision to be a double-edged sword, since the case also grants power to the federal courts – leading to potentially unaccountable, undemocratic results. With Freedom from Religion v. Chao, the gate has been opened for taxpayers to bring lawsuits challenging virtually any executive action. These challenges can effectively provide “judicial vetoes” of executive actions which might not easily be remedied by the democratic process. The judicial branch is now in a position of authority over the acts of the other branches of government. Furthermore, by disregarding Supreme Court precedent regarding the narrowness of taxpayer standing, the Seventh Circuit added additional confusion to the maze of taxpayer standing doctrine.

This Note is divided into four Sections. Section I of this Note briefly describes taxpayer standing and its history in the courts. Section II discusses the Seventh Circuit decision in Freedom from Religion. Section III analyzes that decision in light of precedent, reasoning, and public policy. Finally, Section IV concludes that the decision was incorrectly decided.

I. A BRIEF HISTORY OF AMERICAN TAXPAYER-STANDING DOCTRINE

Based on Supreme Court interpretation of Article III of the U.S. Constitution, standing is required to invoke the power of a federal court. The “irreducible constitutional minimum of standing” has three

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3 433 F.3d at 996-97.
4 Id. at 1000 (Ripple, J., dissenting).
5 Massachusetts v. Mellon, 262 U.S. 447, 488-489 (1923)
6 Frank I. Michaelman, Popular Law and the Doubtful Case Rule, 81 Chi.-Kent. L. Rev. 1109 (2006) (“[W]hen the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles.”)
parts: (1) the plaintiff must allege an actual or imminent "injury in fact"; (2) there must be some causal connection between the injury and the conduct complained of; (3) the plaintiff must demonstrate that a favorable decision would likely redress that injury.\(^8\) Standing also consists of “prudential” principles, which deny standing to a plaintiff who has been injured as a result of the defendant’s conduct but who is not the proper person to bring suit.\(^9\)

The concept of standing as a limitation on judicial jurisdiction has had a tortured history in the Supreme Court.\(^10\) “Standing frequently has been identified by both justices and commentators as one of the most confused areas of the law,”\(^11\) although it is generally agreed that standing is one of the most important doctrines regarding judicial power.\(^12\)

### A. Supreme Court Precedent Regarding Taxpayer Standing

The taxpayer standing doctrine is “the principle that a taxpayer has no standing to sue the government for allegedly misspending the public’s tax money unless the taxpayer can demonstrate a personal stake and show some direct injury.”\(^13\) The taxpayer doctrine was established since the conduct of the federal government was found to

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9 Freedom from Religion Found., 433 F.3d at 990.


12 United States v. Hays, 515 U.S. 737, 742 (1995); Allen v. Wright, 468 U.S. 737, 750 (1984) (“The Art. III doctrine that requires a litigant to have "standing" to invoke the power of a federal court is perhaps the most important of these doctrines.”).

be too far removed from individual taxpayer returns for any injury to the taxpayer to be traced to the use of tax revenues.\textsuperscript{14}

The Supreme Court laid out the boundaries on taxpayer standing in a series of cases which commentators divide into “eras.”\textsuperscript{15} Professor Chemerinsky divides these cases into four eras: 1) initial cases preventing taxpayer standing; 2) the Warren Court’s expansion of taxpayer standing; 3) the Burger Court’s virtual elimination of taxpayer standing; and 4) the Rehnquist Court’s decisions.\textsuperscript{16}

In the early 1920s, \textit{Frothingham v. Mellon}\textsuperscript{17} established that “the basic rule is that taxpayers do not have standing to challenge how the federal government spends tax revenue.”\textsuperscript{18} In \textit{Frothingham}, the Court dismissed a taxpayer suit challenging federal expenditures under the Maternity Act.\textsuperscript{19} In that unanimous opinion, Justice Sutherland emphasized the basic function of limiting judicial review of congressional acts:

\begin{quote}
The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct or restrain the action of the other . . . Looking through forms of words
\end{quote}

\textsuperscript{14} Freedom from Religion Found., 433 F.3d at 990.

\textsuperscript{15} See supra note 10, at 168-97 (Professor Sunstein divides American standing history into five distinct eras.); see also ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 90 (Professor Chemerinksy divides American standing into four sets).

\textsuperscript{16} ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 90 (2d ed., 2002).

\textsuperscript{17} 262 U.S. 447 (1923).

\textsuperscript{18} In re U.S. Catholic Conference, 885 F.2d 1020, 1027 (2d Cir. 1989).

\textsuperscript{19} 262 U.S. 447, 487-88.
to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. *To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess.*

As such, taxpayer standing to challenge expenditures in general was denied in *Frothingham v. Mellon* because the impact of spending upon the taxpayer was deemed too tenuous, and impeded upon separation of powers principles.21

Up to 1952, the Supreme Court was consistently applying the taxpayer standing doctrine, as in *Doremus v. Board v. Education*22. In that case, the Court applied the *Frothingham* taxpayer-standing doctrine and dismissed the case for lack of standing when plaintiffs brought suit claiming a violation of the Establishment Clause through a New Jersey law which allowed public school teachers to read Bible passage in the classroom.23 The Court held that the injury to the taxpayer was too remote from the federal treasury and too indeterminable to be a real injury.24 The Court concluded that Article III’s requirements were therefore insufficiently satisfied and federal courts lacked jurisdiction.25

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21 *Id.* at 489
22 342 U.S. 429, 433-34 (1952)
23 *Id.* at 430.
24 *Id.* at 434.
25 *Id.* at 434-35.
A major change occurred in the late 1960s when the Warren Court created an exception to the concept of taxpayer standing.\textsuperscript{26} In \textit{Flast v. Cohen}, the Court overturned a lower court’s application of \textit{Frothingham} when it created an exception stating that “a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power.”\textsuperscript{27} In \textit{Flast}, taxpayers tried to stop the expenditures under the Elementary and Secondary Education Act of 1965.\textsuperscript{28} Chief Justice Warren held that taxpayer standing depends on “whether there is a logical nexus between the status asserted and the claim sought to be adjudicated.”\textsuperscript{29} The Court explicitly distinguished \textit{Flast} (involving an Establishment Clause violation through Congress’s tax and spending power) against \textit{Frothingham} (dealing with Tenth Amendment violation by Congress not on tax and spending power).\textsuperscript{30} The \textit{Flast} Court justified the exception stating that "the specific evils feared by [its drafters] that the taxing and spending power would be used to favor one religion over another or to support religion in general."\textsuperscript{31}

In introducing the \textit{Flast} exception, the Court developed a two prong test to determine whether the plaintiffs as taxpayers had standing to sue: (1) the taxpayer must “allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause” and (2) the taxpayer must show that the challenged

\begin{itemize}
\item \textsuperscript{26} Flast v. Cohen, 392 U.S. 83, 101 (1968) (“We find no absolute bar in Article III to suits by federal taxpayers challenging allegedly unconstitutional federal taxing and spending programs.”)
\item \textsuperscript{27} \textit{Id.} at 106.
\item \textsuperscript{28} \textit{Id.} at 85.
\item \textsuperscript{29} \textit{Id.} at 102.
\item \textsuperscript{30} \textit{Id.} at 85.
\item \textsuperscript{31} DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854, 1865 (U.S. 2006)
\end{itemize}
enactment exceeds specific constitutional limitations upon the exercise of the taxing and spending power.32

In 1970s and 80s, under the Burger Court, the narrowness of the taxpayer standing exception introduced in Flast was revealed. In Schlesinger v. Reservists Committee to Stop the War and United States v. Richardson, the Court denied standing because the taxpayer plaintiffs did not challenge a congressional enactment under the Taxing and Spending Clause, but rather an action of the Executive Branch.33 Another ruling emphasizing the narrowness of Flast occurred in Valley Forge Christian College v. Americans United for Separation of Church and State.34 In that case, the Court dismissed a taxpayer suit attempting to challenge a federal grant of property to the Valley Forge Christian College.35 The Court distinguished Valley Forge from Flast by stating that the allegedly unconstitutional action in Valley Forge was an executive action, not a congressional statute as it was in Flast.36 Consequently, “[a]fter Richardson, Schlesinger, and Valley Forge the only situation in which taxpayer standing appears permissible is if the plaintiff challenges a government expenditure as violating the Establishment Clause.”37

33 Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 228 (1974); United States v. Richardson, 418 U.S. 166 (1974); D.C. Common Cause v. District of Columbia, 858 F.2d 1, 3-4 (D.C. Cir. 1988) (“The Court has never recognized federal taxpayer standing outside these narrow facts, and it has refused to extend Flast to exercises of executive power.”)
35 Id. at 486-87.
36 The Court in Valley Forge held the taxpayers failed the Flast test in two respects: (1) the source of their complaint was not a congressional action - Flast limited taxpayer standing to challenges directed "only [at] exercises of congressional power" and (2) the property transfer was not an exercise of authority conferred by the Taxing and Spending Clause of Art. I, § 8. Valley Forge, 454 U.S. at 479-80.
37 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 93 (2d ed. 2002).
Subsequently, under Chief Justice William Rehnquist, the Court reaffirmed *Flast* in *Bowen v. Kendrick*, permitting a taxpayer challenge to a federal grant program that funded teen pregnancy prevention through religious organizations.\(^{38}\)

In 2006, in *DaimlerChrysler Corp. v. Cuno*, the Court rejecting granting standing to taxpayers for allegedly unconstitutional congressional actions under the Commerce.\(^{39}\) Consequently, if previous Supreme Court rejections to expanding the narrow *Flast* exception were not explicit, *DaimlerChrysler* reinforced the idea that the Supreme Court was never comfortable with the *Flast* exception in the first place and wanted to keep it narrow.\(^{40}\)

**B. Other Court Interpretations of Supreme Court Precedent**

The narrowness of the *Flast* and *Bowen*, when applied to taxpayer standing, has been noted by sister Court of Appeals and some commentators. Notably, one commentator stated, "Fate has not been kind to the *Flast* decision. In the field of taxpayer standing, it has been limited to very narrow confines."\(^{41}\)

The Court of Appeals for the District of Columbia Circuit reconciled Supreme Court precedent involving taxpayer standing by emphasizing the narrowness of the cases, "*Schlesinger*, *Valley Forge*, and similar cases must be understood as limiting the *Flast* exception to the Court's general rule against federal taxpayer standing."\(^{42}\)

In *In re Catholic Conference*, the Second Circuit had the opportunity to address an application of *Flast* to executive action. *In re Catholic Conference* involved a pro-abortion group bringing suit against the U.S. Government because the Internal Revenue Service

\(^{39}\) DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854, 1865 (U.S. 2006).
\(^{40}\) Id.
\(^{42}\) D.C. Common Cause v. District of Columbia, 858 F.2d 1, 4 (D.C. Cir. 1988)
granted tax-exempt status to the Catholic Church.43 The plaintiffs alleged that the Catholic Church, through its campaigning against abortion, violated the IRS’s prohibition on lobbying and campaigning for tax-exempt entities.44 Citing Supreme Court precedent, the Second Circuit distinguished In re Catholic Conference with the Flast and Bowen opinions by noting that the plaintiff’s complaint centered on an alleged executive branch action.45 Thus, the Second Circuit made clear the narrowness of Flast’s exception to Frothingham’s rule against taxpayer standing.”46

The Court of Appeals for the Third Circuit also emphasized the narrowness of Flast and Bowen in its ruling denying standing in Rocks v. City of Philadelphia.47 The court noted that Flast and Bowen serve as precedential authority only if establishment and free exercise clauses and congressional taxing and spending power are involved.48

II. THE SEVENTH CIRCUIT’S APPROACH IN FREEDOM FROM RELIGION FOUNDATION v. CHAO

A. The Majority Decision in the Three Judge Panel

In Freedom from Religion Foundation v. Chao, the party claiming taxpayer standing was the Wisconsin-based Freedom from Religion Foundation, a non-profit tax exempt national association of nontheists that had been “working since 1978 to promote free thought and defend

43 885 F.2d 1020, 1028 (2d Cir. 1989).
44 Id. at 1022.
45 Id. at 1028.
47 Rocks v. City of Philadelphia, 868 F.2d 644, 649 (3d Cir. 1989) (“Flast and Bowen are extremely limited holdings. They hold that federal taxpayers have standing to raise establishment clause claims against exercises of congressional power under the taxing and spending power of article I, section 8 of the constitution.”).
48 Id. at 649.
the constitutional principle of the separation of state and church."

The target of the Freedom from Religion Foundation’s challenge was President Bush’s establishment of the White House Office of Faith-Based and Community Initiatives by an executive order. In holding for Freedom from Religion Foundation on partial summary judgment, Judge John C. Shabaz for the U.S. District Court for the Western District of Wisconsin noted that the government had raised concerns over jurisdictional and prudential mootness and ripeness. However, Judge Shabaz dismissed these concerns stating that the “[d]efendants must bear the heavy burden to prove that there [was] no reasonable expectation that the wrong [would] be repeated.” Judge Shabaz then concluded that the defendants failed to meet the burden.

On appeal, the government raised issues concerning standing to the Seventh Circuit. In finding for the plaintiffs, Judge Posner wrote the majority opinion for the divided panel, beginning with a statement of the issue as “whether a taxpayer can ever have standing under Article III of the Constitution to litigate an alleged violation of the First Amendment’s establishment clause unless Congress has earmarked money for the program or activity that is challenged.” Judge Posner said that District Judge Shabaz’s opinion would have

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51 Jim Towey, Patrick Purtill, Brent Orrell, Bobby Polito, Ryan Streeter, John Porter, Julieta McCarthy, Linda Shovlain, David Caprara, Elaine Chao, Tommy Thomspson, Rod Paige, John Ashcroft, and Dr. Julie Gerberding
53 Id.
54 Id.
55 Freedom from Religion Found. v. Chao, 433 F.3d 989. For a recent outline of this case, see 119 HARV. L. REV. 2260.
56 The divided panel included Judge Posner and Judge Wood in the majority, with Judge Ripple dissenting.
57 Freedom from Religion Found. v. Chao, 433 F.3d 989, 990 (7th Cir. 2006)
been correct under an “earlier view.” He then discussed the cases that developed taxpayer standing doctrine in United States jurisprudence. Judge Posner noted that Justice Frankfurter’s reading of the Article III flatly rejected taxpayer standing. Frankfurter suggested that the Framers of the Constitution did not envision individual taxpayers filing lawsuits against the federal government due to the attenuated relationship between the taxpayers and federal government at the time. Judge Posner noted that standing principles developed by the Supreme Court was divided into two types: prudential and constitutional. Although Judge Posner was talking about principles created by Supreme Court precedent, he said that the prudential principles of standing were “protean and mutable.” Judge Posner explained that the term “prudential” was “the very antithesis of a definite rule or standard.” Moreover, the majority interpreted Flast as requiring a two prong test for challenges under Article I’s tax and spending clause including: 1) not an incidental expenditure of tax funds in the administration of an essentially regulatory statute and 2) the challenged enactment exceeds specific constitutional limitations imposed on the exercise of the congressional taxing and spending power that is generally beyond the powers delegated to Congress by Article I, §8.

Since the previous Flast and Bowen rulings dealt with statutes involving specified congressional funds, the majority had to noted that this case involved no specific statutory program involved in this case. Despite that, the court held that “the difference [between a

58 Id.
59 Similar to Section II of this paper, Judge Posner went into Frothingham, Doremus, Flast, and Bowen. Freedom from Religion Found., 433 F.3d at 990.
60 Id.
61 Id.
62 Id. at 991.
63 Id. at 992.
64 Id.
65 Id.
66 Id. at 994
specific statutory program and a general program] [could not] be controlling.”

Judge Posner set forth some interesting hypotheticals on the when taxpayer standing would not be necessary but could be used: “Suppose Homeland Security built a mosque to reduce the likelihood of terrorism, taxpayer standing would not be essential to challenge the violation of the Establishment Clause.”

Because of the present case’s similarity with the facts in Flast, Judge Posner noted that “the Court in Flast carved an exception for an incidental expenditure of tax funds in the administration of an essentially regulatory state.” However, Judge Posner then said that he was going to put to one side the term “regulatory.” He then focused on the term “incidental” and called that term relative. He never returned to the word “regulatory” that was in the controlling Flast precedent.

Judge Posner even performed a law and economics analysis with taxpayer standing and the Establishment Clause:

Imagine a suit complaining that the President was violating the [Establishment] Clause by including favorable references to religion in his State of the Union address. The objection to his action would not be to any expenditure of funds for a religious purpose; and though an accountant could doubtless estimate the cost to the government of the preparations, security arrangements, etc., involved in a State of the Union address, that cost would be no greater merely because the President had mentioned Moses rather than John Stuart Mill. In other words, the marginal or incremental

67 Id.
68 Id.
69 Id. at 995.
70 Id.
71 Id.
72 Id.
cost to the taxpaying public of the alleged violation of the Establishment clause would be zero.\textsuperscript{73}

In the end, the Seventh Circuit ruled in a three judge panel that “[t]axpayers have standing to challenge grants by a federal agency to religious institutions pursuant to statutes that authorize grants to public and private institutions for services, even though the grants have not been made by Congress itself.”\textsuperscript{74}

In this expansion of established taxpayer-standing doctrine, the majority held that it should not matter whether the program was executive or congressional, or whether a program was funded through general appropriations rather than earmarked appropriations.\textsuperscript{75} As such, the majority expanded taxpayer standing doctrine on two fronts: permitting taxpayer standing when the program at issue is created by the executive branch, rather than just those created by the legislative branch, and permitting taxpayer standing when the program is funded with general appropriations, rather than just specific congressional grants.

\textbf{B. The Ripple Dissent in the Three Judge Panel}

In a forceful dissent, Judge Ripple noted that although there might be an initial appeal towards limiting executive power by using federal judiciary power, the majority’s approach simply cuts the concept of taxpayer standing “loose from its moorings.”\textsuperscript{76} Judge Ripple explained how the majority opinion was a dramatic expansion of standing doctrine that did not follow Supreme Court precedent.\textsuperscript{77} He explained that the modern doctrine of standing was “hard-born” and “well-established” and “important” in the Nation’s jurisprudence.\textsuperscript{78} He

\begin{itemize}
\item \textsuperscript{73} Id.
\item \textsuperscript{74} Id. at 997.
\item \textsuperscript{75} Id.
\item \textsuperscript{76} Id. at 998 (Ripple, J. dissenting).
\item \textsuperscript{77} Id. at 997.
\item \textsuperscript{78} Id.
\end{itemize}
scolded the majority stating, “We cannot ignore or treat as malleable what the Supreme Court has mandated.” The disagreement is not about the Tax and Spending Clause, but rather the constitutional provision. He said that previous rulings apropos standing were “not simply prudential matters of judicial restraint but constitutional requirements” and required that the plaintiff show that he personally suffered actual or threatened injury due to the action of the defendant and that it would be favorably decided. A showing of concrete injury is an “irreducible constitutional minimum.” There must be a nexus between the taxpayer and the constitutional infringement alleged. A mere disagreement with the government policy is hardly a case or controversy.

Judge Ripple said that the majority’s expansive standard made virtually any executive action subject to taxpayer suit. Federal courts could now intrude on the decision-making prerogatives of the executive branch. The judiciary would effectively be managing the executive. He described the majority’s approach as inching toward the concept of citizen standing, which has been strictly forbidden by Supreme Court precedent.

Finally, Judge Ripple cited sister court cases such as District of Columbia common Cause v. District of Columbia and In re United States Catholic Conference. He said that the Seventh Circuit “ought

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79 Id.
80 Id. at 998.
81 Id. at 997.
82 Id.
83 Id. at 1000.
84 Id.
85 Id. at 998.
86 Id. at 1000.
87 Id. at 996.
88 Id.
89 858 F.2d 1 (D.C. Cir. 1988).
90 885 F.2d 1020 (2d Cir. 1989).
to follow the same course and, in the process, adhere to the principles set forth in the Supreme Court’s case law.”

C. The Denial of En Banc Rehearing

After the three judge panel reversed the lower court’s ruling, the government petitioned the Seventh Circuit for a rehearing en banc. In a fascinating ruling, Chief Judge Flaum and Judge Easterbrook, in separate concurring opinions, agreed with a new dissenting opinion written by Judge Ripple that the Supreme Court needed to resolve the controversy.

Chief Judge Flaum also wrote a concurring opinion denying rehearing en banc but stated “the position set forth in the dissent is one which could eventually command high court endorsement.” And that “the needed consideration of this important issue by that tribunal would be unnecessarily delayed by our further deliberation.”

Judge Easterbrook hinted at a disagreement with Judge Posner throughout his opinion. He began his concurring opinion for denial of rehearing en banc by stating that his vote “[did] not imply that [he] deem[ed] the panel’s resolution beyond dispute or the issue unimportant. To the contrary, the subject is both recurring and difficult, and there is considerable force in Judge Ripple’s dissent, and in the standing analysis of Judge Sykes dissent from Laskowski v. Spellings, which extends this panel’s holding.”

Even though both Judge Flaum and Judge Easterbrook noted the tension between Supreme Court precedent and Judge Posner’s decision, they still voted

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91 Freedom from Religion Found., 433 F.3d at 1001.
92 Freedom from Religion Found., Inc. v. Chao, 447 F.3d 988 (7th Cir. 2006)
93 Id. at 988-89 (Flaum, C.J., Easterbrook, J. concurring, with Ripple, J. dissenting).
94 Id. at 988 (Flaum, C.J. concurring).
95 Id.
96 Id. at 989 (Easterbrook, J. concurring).
97 Id.
to deny rehearing *en banc*, thereby letting Judge Posner's decision stand.98

Judge Easterbrook criticized the Supreme Court decisions as arbitrary.99 He stated that “comprehensiveness and rationality are not [the taxpayer standing] doctrine’s hallmarks.”100 Judge Easterbrook stated that “Nothing we can do would eliminate the tensions between *Flast* and *Bowen v. Kendrick*, on the one hand, and *Frothingham* and *Valley Forge* (plus the many cases such as *Defenders of Wildlife*) on the other.”101

In an interesting hypothetical application of the Seventh Circuit decision, Judge Easterbrook noted how the Supreme Court ruled in a prominent case that an atheist father had no standing to challenge the words “under God” in the pledge of allegiance.102 He then suggested that, according to the Seventh Circuit ruling, the atheist father might be able to overcome that hurdle.103

In concluding his denial for rehearing *en banc*, Judge Easterbrook stated:

> The problem is not of our creation and cannot be resolved locally. There is no logical way to determine the extent of an arbitrary rule. Only the rule's proprietors can bring harmony -- whether by extension or contraction -- or decide to tolerate the existing state of affairs.104

In the denial of rehearing *en banc*, both Judge Flaum and Judge Easterbrook decided not to wade into the matter of taxpayer standing and noted that the Seventh Circuit was not the right forum to discuss

98 Id. at 988.
99 Id. at 989.
100 Id.
101 Id. at 990 (Easterbrook, J. concurring).
102 Id.
103 Id.
104 Id. (citations omitted).
Instead Judge Flaum simply called both Judge Ripple and Judge Posner’s opinions “scholarly” and said that the Seventh Circuit was not able to resolve this issue.106

D. The Dissent in the Denial for En banc Rehearing

The denial of rehearing en banc drew another vigorous dissenting opinion from Judge Ripple, which was joined by Judges Manion, Kanne, and Sykes.107 The dissenting opinion by Judge Ripple again stated that the majority’s holding drastically expands the Supreme Court 1988 ruling in Bowen v. Kendrick, permitting “virtually any executive action to be subject to taxpayer suit.”108 The dissent compared Bowen, which granted taxpayers standing to challenge a specific congressional appropriation to pay a religious institution to help adolescent sexual problems with the present case, which involves an executive order which uses general appropriations.109 Highlighting the circuit split, the dissent cited the Second Circuit case of In re United States Catholic Conference (which denied pro-choice supporters standing to challenge the Catholic Church’s tax-free status) as an example of the appropriate method of applying the two part test developed in Flast v. Cohen.110

Instead of accepting the rationale of Judge Easterbrook, Judge Ripple stated his belief that:

[T]his case also reflects a view about the nature of Article III judicial power, the case has serious implications for judicial governance, and we, as officers of that branch, have a special duty to ensure that a decision expanding the authority that we claim

105 Id.
106 Id. at 998 (Easterbrook, J. concurring).
107 Id. at 990.
108 Id. at 990 (Ripple, J. dissenting).
109 Id.
110 Id. at 991.
for ourselves represents the considered judgment of every judge on this court. Such a review is especially appropriate when the Government specifically charges, as it has here, that the court has "greatly exceeded its authority by ignoring the Supreme Court's own rules . . . and substituting its own views of what the law rationally ought to be."

Judge Ripple also stated that the Seventh Circuit "decided an important federal question in a way that conflicts with the relevant decisions" of the Supreme Court and has "entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Judge Ripple cited the requirements for certiorari and applied those requirements to the case; he concluded that the Supreme Court should accept certiorari.

At the conclusion of his dissent, Judge Ripple reached a similar conclusion as Judge Flaum and Judge Easterbrook - that the Supreme Court needed to resolve the tensions created by this case. He ended his opinion by stating “the Government therefore has one last forum in which to seek a return to traditional principles governing the right of a taxpayer to challenge a decision of the executive.”

III. ANALYSIS

A. Following Precedent

Examining the three judge panel and the denial of rehearing en banc, there were five opinions written by four judges from the Seventh

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111 Id. at 990.
112 Id. at 991.
113 Id. at 991.
114 Id.
115 Id.
Circuit.\textsuperscript{116} Only the majority opinions which expanded taxpayer standing bemoaned the “tension which has evolved in this area of jurisprudence.”\textsuperscript{117} Although dissenting Judge Ripple also requested that the Supreme Court resolve the issues raised by the case, his opinion demonstrated how a narrow and faithful application of Supreme Court precedent would avoid the necessity of such another sweeping assessment of taxpayer standing doctrine by the Supreme Court.\textsuperscript{118} The Courts of Appeals for the Second Circuit and the District of Columbia similarly did not mention any difficulties in applying Supreme Court precedent to comparable cases.\textsuperscript{119} One reason that Judge Ripple found no need to mention the arbitrariness and tension was because his opinion was properly following Supreme Court precedent.\textsuperscript{120}

In this case, the Freedom from Religion Foundation has not suffered any concrete and particularized injury, but rather is seeking "to employ a federal court as a forum in which to air his generalized grievances about the conduct of government."\textsuperscript{121} Both \textit{Frothingham} and \textit{Flast, supra}, reject that basis for standing as incompatible with Article III.\textsuperscript{122}

Regardless of the wisdom of permitting taxpayer standing or not in various situations, the Seventh Circuit is bound to follow the

\textsuperscript{116} Freedom from Religion Found., Inc. v. Chao, 447 F.3d 988 (7th Cir. 2006), contained Judge Flaum, Judge Easterbrook, and Judge Flaum’s opinions; Freedom from Religion Found., Inc. v. Chao, 433 F.3d 989 (7th Cir. 2006), contained Judge Posner and Judge Ripple’s opinions.

\textsuperscript{117} Freedom from Religion Found., 447 F.3d 988.

\textsuperscript{118} Id.

\textsuperscript{119} See generally D.C. Common Cause v. District of Columbia, 858 F.2d 1, 4 (D.C. Cir. 1988) and In re United States Catholic Conference, 885 F.2d 1020, 1028 (2d Cir. 1989).

\textsuperscript{120} See Freedom from Religion Found., 447 F.3d at 997-1001 (Ripple, J. dissenting).

\textsuperscript{121} Flast v. Cohen, 392 U.S. 83, 106 (1968).

\textsuperscript{122} United States v. Richardson, 418 U.S. 166, 175 (1974).
Supreme Court precedent. *Flast* was established as a narrow exception to the doctrine barring taxpayer standing. Exceptions should be construed narrowly. Now the exception is threatening to swallow the entire doctrine of taxpayer standing in the method that Judge Posner applied.

**B. Contrary to guiding principles**

The standing doctrine serves four values: 1) enforcing separation of powers principles by restricting the availability of judicial review; 2) serves judicial efficiency by preventing a flood of lawsuits; 3) improves judicial decision by ensuring there is a specific controversy and an advocate with sufficient personal concern to effectively litigate a matter; and 4) ensuring judicial fairness in that people raise only their own rights and concerns. The Seventh Circuit’s expansion of the taxpayer standing doctrine in *Freedom from Religion v. Chao* forces an examination of the purposes of having standing doctrine in the first place.

First, the standing doctrine serves as an essential element to the separations of power doctrine. The Seventh Circuit’s expansion of taxpayer standing doctrine has shifted the allocation of power between the branches of government. The court is effectively inching towards a judicial veto on executive programs, enabling the courts, "to assume a position of authority over the governmental acts of another and co-equal department," and to become "virtually continuing..."

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123 Bowen v. Kendrick, 487 U.S. 589, 618 (1988) ("Although we have considered the problem of standing and Article III limitations on federal jurisdiction many times since [*Flast*], we have consistently adhered to *Flast* and the narrow exception it created to the general rule against taxpayer standing").

124 Freedom from Religion Found., Inc. v. Chao, 433 F.3d 997 (Ripple, J. dissenting).

125 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 60-62 (2d ed. 2002).

126 *Freedom from Religion Found.*, 433 F.3d 997.

monitors of the wisdom and soundness of Executive action.” When a court interferes with a legislative act or the action of an elected executive, it thwarts the will or representatives of the actual people. Or as Professor Sunstein points out, judges are removed from political accountability and selected from a highly educated elite. Once a “constitutionalized” decision is issued by a federal court, as occurred in the disastrous Dred Scott decision, very few democratic remedies remain.

Justice Powell also saw the expansion of standing as a threat to the proper functioning of the system of checks and balances, as well as to democratic principles of government:

Relaxation of standing requirements is directly related to the expansion of judicial power. It seems to me inescapable that allowing unrestricted taxpayer or citizen standing would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government.

Second, the standing doctrine serves an important function in improving judicial efficiency by restricting a flood of lawsuits. The Seventh Circuit decision expanded the doctrine of taxpayer standing to include executive actions and general appropriations, thereby expanding the avenues in which plaintiffs can bring suit. Plaintiffs

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128 Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (citations omitted).
130 See supra note 10, at 216.
131 Dred Scott v. Sandford, 60 U.S. 393 (1857).
133 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 60-62 (2d ed. 2002).
134 Freedom from Religion Found. v. Chao, F. 433 F.3d 989 (7th Cir. 2006).
now need only frame their complaints in methods that comport with a violation of the Establishment Clause.\textsuperscript{135}

Third, the taxpayer standing doctrine serves to improve judicial decisions so that the judiciary only decides specific cases with particularized remedies.\textsuperscript{136} In this case, the Seventh Circuit is permitting plaintiffs with no concrete or particularized injury to bring suit against the executive branch.\textsuperscript{137} The harm alleged by Freedom from Religion Foundation is the executive branch’s general use of tax revenue.\textsuperscript{138} As a result, due to the unparticularized and unspecific claim of the plaintiffs, the only remedy possible by the judicial branch would be, in essence, a judicial veto.

Fourth, the taxpayer standing doctrine serves to ensuring fairness so that taxpayers only bring lawsuits for which there is a demonstrable personal and cognizable injury or imminent injury. With the Seventh Circuit’s decision in Freedom from Religion Foundation, the purpose served by the doctrine is under fire.\textsuperscript{139} By expanding the doctrine to encompass executive actions, taxpayers can bring lawsuits against the executive branch based on the potential harm done to others simply because they pay taxes. Such a fluid basis for standing has the possibility of becoming a method “to air his generalized grievances about the conduct of government.”\textsuperscript{140} The list of potential damages to hypothetical people is large. The court has further opened the door by not limiting lawsuits to those who have a nexus with the injury alleged.

\textsuperscript{135} Id.
\textsuperscript{136} ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 60-62 (2d ed. 2002).
\textsuperscript{137} Freedom from Religion Found., F. 433 F.3d at 1000 (Ripple, J. dissenting).
\textsuperscript{138} Id. at 994 (majority opinion).
\textsuperscript{139} Id. at 989-1000.
\textsuperscript{140} Flast v. Cohen, 392 U.S. 83, 106 (1968).
C. Judicial Responsibility

Since *Marbury v. Madison*, the Judiciary’s responsibility has been to interpret the Constitution and draw limitations on power for the branches of government, including the judicial branch itself. 141 Yet in their concurring opinions denying rehearing *en banc*, both Judges Flaum and Easterbrook refused let the entire court review the issues concerning judicial self-government created by *Freedom from Religion Foundation v. Chao*. 142 The denial of rehearing made Judge Posner’s opinion the law of the land, unless the Supreme Court accepts certiorari. It is an abdication of its duty for an appellate court to close its doors 143 to resolve tensions that other circuits have answered faithfully without changing Supreme Court precedent. 144 In fact, Chief Judge Flaum suggested that “the position set forth in the dissent is one which could eventually command high court endorsement.” 145

CONCLUSION

Taxpayer standing has been prohibited by a line of Supreme Court cases with one narrow exception – if it involves a specific congressional expenditure of funds that violates the Establishment Clause. In *Freedom from Religion Foundation Inc. v. Chao*, the Seventh Circuit improperly expanded Supreme Court precedent by permitting taxpayer standing in situations involving executive actions and use of general congressional funds. At first glance, the Seventh Circuit seems to be granting power to the taxpaying public to be a check on the executive branch. However, closer analysis of this case

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142 *Freedom from Religion Found., Inc. v. Chao*, 447 F.3d 988-89 (7th 2006).
143 *Flast*, 392 U.S. at 111.
144 See generally D.C. Common Cause v. District of Columbia, 858 F.2d 1, 4 (D.C. Cir. 1988); In re United States Catholic Conference, 885 F.2d 1020, 1028 (2d Cir. 1989).
145 See generally D.C. Common Cause, 858 F.2d at 4; Catholic Conference, 885 F.2d at 1028.
reveals the decision to be a power grab by the Seventh Circuit with potentially unaccountable, undemocratic results. As a result, the executive and legislative branches of the government may now be subordinate to the judicial branch rather than co-equal. By not following Supreme Court precedent narrowly and faithfully, like sister courts have done, the Seventh Circuit has also added a cloud of confusion over the complex doctrine of taxpayer standing. Furthermore, the majority and dissenting opinions agreed that the controversy warranted Supreme Court intervention, yet the denial of rehearing en banc made the divided three judge panel’s precedent-changing opinion the law of the land unless the Supreme Court accepts certiorari.
INTRODUCTION

For over the past two decades, Congress has been extending federal jurisdiction over crime control to encourage states to work more aggressively to attack the problem of violent crimes committed by repeat offenders and criminals serving shortened sentences.\(^1\) Congress enacted the Armed Career Criminal Act (“ACCA”) in 1984 to promote this important federal sentencing principle of more severely punishing violent repeat offenders.\(^2\) The ACCA is a recidivist statute, or a “three strikes law,” that substantially raises the penalty for

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possession of a firearm if a defendant has three previous convictions for a violent felony.\(^3\) In the two decades after the ACCA’s enactment, the Federal Circuit Courts of Appeals consistently interpreted the ACCA’s term “violent felony” to encompass intentional violent acts that present a serious potential risk of physical injury to others.\(^4\) In 2004, the United States Supreme Court in \textit{Leocal v. Ashcroft} held that drunk driving offenses are not crimes of violence\(^5\) under the Comprehensive Crime Control Act (“CCCA”), provided that the offenses either do not have an intent component or require only a showing of negligence.\(^6\) Nonetheless, in 2005, the Court of Appeals for the Seventh Circuit misapplied precedent and misinterpreted the ACCA’s statutory text by expanding the ACCA’s predicate violent acts to include negligent drunk driving.\(^7\)

\(^3\) 18 U.S.C. § 924(e); United States v. Caldwell, No. 97-5252, 2000 WL 331950, at *8 n.3 (6th Cir. Mar. 23, 2000). Along with violent felonies, a serious drug offense also qualifies as a predicate act under the ACCA. This Comment, however, will focus strictly on violent felony convictions as the case at issue, United States v. Sperberg, focuses on a violent felony conviction as predicate act.

\(^4\) See United States v. Sacko, 178 F.3d 1 (1st Cir. 1999) (sexual assault); United States v. Altsman, 89 Fed. Appx. 357 (3d Cir. 2004) (attempted kidnapping); United States v. Wardick, 350 F.3d 446 (4th Cir. 2003) (assault); United States v. Matthews, 278 F.3d 560 (6th Cir. 2002) (reckless aggravated assault); United States v. Coles, 97 Fed. Appx. 665 (7th Cir. 2004) (armed robbery); United States v. McKinney, 328 F.3d 993 (8th Cir. 2003) (attempted burglary); United States v. Greenberg, 104 Fed. Appx. 34 (9th Cir. 2004) (robbery); United States v. Maddox, 388 F.3d 1356 (10th Cir. 2004) (escape); United States v. Lee, 208 F.3d 1306 (11th Cir. 2000) (robbery and burglary). This list of cases is not meant to be an exhaustive list of violent felonies, but is meant to illustrate the type of intentionally, violent acts Courts of Appeals have considered a predicate violent felony under the ACCA.

\(^5\) The Seventh Circuit, in United States v. Bell, 187 Fed. Appx. 610, 613 (7th Cir. 2006), has stated that the terms “crime of violence” and “violent felony” are interchangeable. Thus, for the purposes of this Comment, these terms are also interchangeable and reference to a statute referring to a “violent felony” or one to a “crime of violence” is distinction without a difference.


\(^7\) This Comment focuses on drunk driving offenses that lack injury or death but are made felonious by state recidivist laws. Normally, charges of driving under the influence which lack any injury or death are misdemeanors, but many states have
The Seventh Circuit in *United States v. Sperberg* categorized the offense of drunk driving as a violent crime thereby qualifying drunk driving as a predicate violent felony subject to recidivist sentence enhancement under the ACCA.  

In expanding the ACCA’s predicate violent acts, the Seventh Circuit relied on its decision in *United States v. Rutherford* where it held that drunk driving is a crime of violence under § 4B1.2(a)(2) of the United States Sentencing Guidelines. The court noted that although *Rutherford* dealt with the Sentencing Guidelines, the language of § 4B1.2(a)(2) is identical to that of § 924(e) of the ACCA, and, thus, there is “no basis for reading the provisions differently.” Despite the Supreme Court’s holding in *Leocal* that drunk driving is not a crime of violence under the CCCA, the Seventh Circuit distinguished *Sperberg* from *Leocal* concluding that the CCCA employed operatively different language.

The Seventh Circuit erred in relying on *Rutherford* and categorizing drunk driving as a violent felony under the ACCA. In light of drunk driving’s non-violent nature, the Seventh Circuit’s expansion of the ACCA’s predicate acts blurs the distinction between crimes of violence and crimes of neglect and allows excessive penalties for crimes that Congress did not intend for heightened punishment. Part I of this Comment will trace the relevant judicial and legislative history necessary to analyze the *Sperberg* decision. Part II will set out the factual background to the issues raised in *Sperberg* and detail the reasoning of the court. Lastly, Part III will discuss why *Sperberg* was incorrectly decided: first, the Seventh Circuit should have followed the Supreme Court’s suggestion in *Leocal* that the recidivist statutes, or “three strikes laws,” which make a repeat DUI charge a felony.

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8 *United States v. Sperberg*, 432 F.3d 706 (7th Cir. 2005).
9 *United States v. Rutherford*, 54 F.3d 370 (7th Cir. 1995).
10 *Sperberg* 432 F.3d at 709.
11 *Leocal*, 543 U.S. 1.
12 *Sperberg* 432 F.3d at 709.
13 *See id.*
14 *See Leocal*, 543 U.S. at 11 (referring to the consequences of interpreting § 16 of the CCCA to include accidental or negligent conduct).
predicate acts under the ACCA should not be enlarged to include crimes of neglect; second, the Seventh Circuit should have interpreted the ACCA under a *ejusdem generis* analysis rather than interpreting the ACCA’s pertinent clause in isolation; and finally, drunk driving should not be considered a violent felony considering Congress’ legislative intent in enacting the ACCA.

I. BACKGROUND

A. The State of the Law Prior to United States v. Sperberg

1. The Armed Career Criminal Act

In 1984, Congress observed that nearly 25 million American households, or three out of every ten, were affected by crimes involving theft and violence.\(^{15}\) Congress explained that it had become apparent that a large number of these crimes were committed by a very small number of chronic offenders.\(^{16}\) As a response to protect the public from the continuing crimes of these habitual offenders, Congress enacted the ACCA to supplement the states’ law enforcements efforts against armed “career” criminals whose livelihood is “crime for profit.”\(^ {17}\) The ACCA raises the penalty for possession of a firearm by a felon from a maximum of ten years in prison to a mandatory minimum of fifteen years and a maximum of life in prison without parole, probation, or suspension of sentence allowed, if the defendant has three previous convictions for a violent felony or a serious drug offense.\(^ {18}\) Section 924(e)(2)(B) of the ACCA defined the term “violent felony” to mean:

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16 *Id.*
any crime punishable by imprisonment for a term exceeding one year . . . that

(i) has an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.19

The Supreme Court has made it easier for courts to determine which crimes constitute a “violent felony” by instructing that state convictions for the felonies listed in the § 924(e) can be used as predicate violent felonies to raise the defendant’s sentence if the court finds that the state statute defining the defendant’s prior offenses corresponds to the generic meaning of those crimes listed in § 924(e) as predicate offenses.20 Determining which crimes fall under the “otherwise involves” clause, however, has not been so simple since the Supreme Court has left the question solely for its lower courts to determine.21

2. The ACCA and United States v. Doe

Since the ACCA’s enactment, the federal courts of appeals have repeatedly been presented with the question of what types of offenses

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19 18 U.S.C. § 924(e)(2)(B)(i)-(ii) (emphasis added). The “otherwise involves” clause is the operative clause in which this Comment focuses on.

20 Taylor, 495 U.S. at 602. State convictions may also be used as predicate violent felonies if the charging paper and jury instructions actually required the jury to find all the elements of the generic meaning of the offense to convict the defendants.

constitute violent felonies under the ACCA. In 1992, the First Circuit in *United States v. Doe* held that a felon in possession of a firearm is not itself a “violent felony” under § 924(e) of the ACCA. Writing for the court, then Chief Judge Breyer observed that the statute gives several specific examples such as burglary, arson, extortion, use of explosives and then adds “or otherwise involves conduct that presents a serious potential risk of physical injury to another,” and stated that simple possession of a firearm did not fit within the literal language of the ACCA. Judge Breyer explained that simple firearm possession usually does not involve violence, and the same risk of physical harm that accompanies burglary or arson cannot easily be imagined to accompany conduct that normally constitutes simple firearm possession. Judge Breyer specifically provided the example of drunk driving and explained that Congress did not intend to enhance sentences based on such non-violent convictions because § 924(e) of the ACCA “calls to mind a tradition of crimes that involve the possibility of more closely related, active violence.” Although Judge Breyer recognized a strong argument that a previously convicted felon who possesses a gun reveals a willingness to break the law again, he stressed that the legislature expressed this concern in the context of criminalizing the conduct and not on whether the felony was “violent” for sentence enhancement purposes. Additionally, Judge Breyer

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24 Id. at 224 (emphasis in original) (referring to 18 U.S.C. § 924(e)).

25 Id.

26 Id. at 225.

27 Id. at 226.
noted that there is no legislative evidence that Congress’ use of the words “serious potential risk,” instead of the more traditional language “substantial risk,” was thereby intended to include gun possession crimes or drunk driving.

3. The United States Sentencing Guidelines

The concern over the problem of violent crimes committed by repeat offenders which prompted Congress to enact the ACCA was the same concern which prompted it to enact the Sentencing Reform Act of 1984 (“SRA”). While the ACCA’s purpose is mainly to be “tough on crime,” however, the SRA was enacted to serve multiple purposes: first, ensuring that defendants serve their complete sentences; second, establishing a uniform sentencing scheme by narrowing the wide disparity in sentences imposed across federal jurisdictions; and third, creating a proportional system that “imposes appropriately different sentences of criminal conduct of different severity.”

As part of the SRA, Congress created the United States Sentencing Commission (“Commission”), an independent body within the judicial branch, and charged it with “establish[ing] sentencing policies and practices for the Federal criminal justice system.” Congress set general goals for federal sentencing and imposed upon the Commission a variety of responsibilities. Among those responsibilities, Congress directed the Commission to establish maximum and minimum sentences for certain offenses based on the characteristics of a crime. The Commission implemented this

28 Id. (referring to the language in 18 U.S.C §§ 16, 3142(f), 3156(a)(4).
29 United States v. Doe, 960 F.2d 221, 226 (1st Cir. 1992).
31 Id.
32 United States v. LaBonte, 520 U.S. 751, 753 (1997).
33 Id.
directive by promulgating the Federal Sentencing Guidelines ("Guidelines") in 1987.35

Like the ACCA, the Guidelines also contain a career offender provision which specifies a sentence enhancement for repeat offenders who have been convicted of at least three "crimes of violence."36 Section 4B1.2(a) of the Guidelines defines the term "crime of violence" with language precisely identical to that of § 924(e) of the ACCA.37 Section 4B1.2 provides that the:

The language of § 924(e) and the language of § 4B1.2 were not always identical, however.39 Initially, the language of § 4B1.2(1)(ii) was identical to 18 U.S.C. § 16(b) of the CCCA. 40 The change did not occur until 1989 when the Sentencing Commission amended §4B1.2(1) to language identical to § 924(e)(2)(B)(i)-(ii) of the

35 See Labonte, 520 U.S. at 753.
38 U.S.S.G. §4B1.2
39 Bazan-Reyes v. INS, 256 F.3d 600, 608 (7th Cir. 2001).
40 18 U.S.C. §16(b) provides that a crime of violence includes "any . . . offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." See also Bazan-Reyes, 256 F.3d at 608.
ACCA. In amending the original § 4B1.2(1), the Sentencing Commission specifically noted that the amendment was not intended to change the substance of the guideline, but only to clarify its meaning. The Commission intended to clarify that courts must be guided by actual conduct when determining a “violent felony,” and that mere possession of a firearm is not a crime of violence under § 4B1.2(1)(ii), just as it is not a crime of violence under the ACCA.

Unlike the ACCA, however, the Guidelines are advisory and do not require a judge to impose mandatory minimum. In 2004, the Supreme Court in United States v. Booker excised the mandatory provisions of the Guidelines and held that although judges must still consider the Guidelines, they are not required to follow the Guidelines in any particular case. In exercising discretion to follow the Guidelines, a judge may consider the offense behavior and the offender’s characteristics. Taking the offense level and criminal history category together, the Guidelines specify a recommended

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41 Section 924(e)(2)(B)(i)-(ii) defines “violent felony” as any crime that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.
42 Id. (citing to U.S. Sentencing Guidelines Manual app. C at 106-07 (1991)).
44 See United States v. Bell, 966 F.2d 703 (1st Cir. 1992); United States v. Doe, 960 F.2d 221 (1st Cir. 1992); also United States v. Powell, 813 F. Supp. 903 (Mass. Dist. Ct. 1992) (extending the First Circuit’s reasoning in Bell and Doe to the Bail Reform Act and holding that felon in possession of a firearm is not a crime of violence).
47 U.S.S.G. § 1A2.
narrow sentencing range in which a judge should impose a sentence.\textsuperscript{48} The Guidelines allow the judge to enhance a recidivist’s sentence based on a prior conviction without having it mentioned in the indictment or proved to a jury beyond a reasonable doubt.\textsuperscript{49} Additionally, unlike the ACCA, the Guidelines allow for the possibility of supervised release.\textsuperscript{50} Thus, although the language of the ACCA and the Guidelines are identical, the application of the Guidelines in determining a sentence in an advisory fashion may produce a shorter sentence than the ACCA’s mandatory minimum of fifteen years.\textsuperscript{51}

4. The Guidelines and \textit{United States v. Rutherford}

Three years after the First Circuit decided \textit{Doe}, the Seventh Circuit in \textit{United States v. Rutherford} was asked to determine as a matter of first impression whether a vehicular assault committed by a drunk driver constitutes a crime of violence under § 4B1.2 of the Guidelines.\textsuperscript{52} Answering in the affirmative, the majority\textsuperscript{53} explained that drunk driving poses serious risks to other motorists and pedestrians.\textsuperscript{54} As such, drunk driving satisfied subsection (ii) of § 4B1.2(a) because the offense “involves conduct that presents a serious

\textsuperscript{49} \textit{Booker}, 543 U.S. at 244 (specifically exempting a prior conviction from impermissible judicial factfinding); \textit{Almendarez-Torres}, 523 U.S. 224, 226-27, 247 (1998).
\textsuperscript{50} U.S.S.G §4B1.1; see \textit{Rutherford}, 54 F.3d at 371.
\textsuperscript{52} \textit{Rutherford}, 54 F.3d 370.
\textsuperscript{53} Id. at 371 (J.J. Cummings and Rovner joining in the majority).
\textsuperscript{54} Id. at 376-77.
potential risk of physical injury to another.”55 The majority noted, however, that qualifying felony drunk driving as a crime of violence under the “otherwise” clause was “somewhat troubling,” and invited the Commission to re-evaluate its definition of crime of violence to determine whether drunk driving should qualify as a predicate act of crime of violence.56 Judge Easterbrook observed in his concurrence that the defendant Rutherford was not charged with drunk driving, but rather was charged with a crime of assault57 which resulted from driving under the influence and causing serious bodily injury to another with a motor vehicle.58 Thus, while the majority concluded that all drunk driving offenses are crimes of violence, Judge Easterbrook suggested that a crime of violence existed in Rutherford’s case only because of the presence of first degree assault and injury.59 But ten years later, Judge Easterbrook referred to his Rutherford concurrence saying, “[m]y concurrence is all very nice, but there was a reason why I was writing for myself. The decision, of course, is the decision of the majority. And there it is.”60

At the time Rutherford was decided, neither the Seventh Circuit nor any other court had determined whether a vehicular assault committed by a drunk driver or any other similar offense constitutes a crime of violence under § 4B1.2 of the Guidelines.61 Since Rutherford,

55 Id.
56 Id. at 377.
57 Id. at 378 (J. Easterbrook concurring). Alabama Code § 13A-6-20(a)(5) provides that a person commits the crime of assault in the first degree if, while driving under the influence of alcohol or a controlled substance or any combination thereof in violation of Section 32-A-191 he causes serious bodily injury to the person of another with a motor vehicle.
58 United States v. Rutherford, 54 F.3d 370, 378 (7th Cir. 1995) (J. Easterbrook concurring) (stating that “[d]runk driving is a lesser included offense that [first degree assault while driving under the influence] creates”).
59 See id.
61 Rutherford, 54 F.3d at 375.
however, the Fifth, Eighth, Tenth, and Eleventh Circuits have all found Rutherford’s reasoning persuasive and have held DUI as a “crime of violence” within the meaning of § 4B1.2. Each of those circuits explicitly referred to Rutherford’s analysis that drunk driving is inherently dangerous and, as such, is a violent felony under the Guidelines because of its inherent risk of presenting physical injury to another. Additionally, the Eighth Circuit in United States v. Chauncey adopted a line of reasoning similar to that in Judge Easterbrook’s Rutherford concurrence and held involuntary manslaughter resulting from a DUI as a “crime of violence” under § 4B1.2.

5. The CCCA and Leocal v. Ashcroft

Nine years after Rutherford, in 2004, the federal courts were again faced with the question of whether drunk driving constitutes a “crime of violence.” This time, however, the question arose in the context of the Comprehensive Crime Control Act of 1984 (“CCCA”). The CCCA broadly reformed the federal sentencing system by revising bail and forfeiture procedures to ensure that criminals serve an appropriate amount of time in prison. Congress used the term “crime of violence” in numerous places throughout the CCCA to define the elements of particular offenses. Title 16 U.S.C. § 16 of the CCCA defines “crime of violence” as:

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62 United States v. DeSantiago-Gonzalez, 207 F.3d 261 (5th Cir. 2000); United States v. McCall, 439 F.3d 967 (8th Cir. 2006); United States v. Moore, 420 F.3d 1218 (10th Cir. 2005); United States v. McGill, 450 F.3d 1276 (11th Cir. 2006).
63 See DeSantiago-Gonzalez, 207 F.3d at 264; McCall, 439 F.3d at 972; Moore, 420 F.3d at 1221; McGill, 450 F.3d at 1281.
64 See United States v. Chauncey, 420 F.3d 864 (8th Cir. 2005).
66 Id. at 6.
67 Id.; see also H.R. REP. NO. 105-157, at 3 (1997) (stating that the CCCA “eliminated parole in the federal criminal justice system and required offenders convicted of federal crimes to serve at least 85 percent of their sentences”).
68 Leocal, 543 U.S. at 6 (providing several examples of how Congress employed the term “crime of violence” to define the elements of particular offenses,
(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The question of whether drunk driving was a crime of violence under this section of the CCCA made its way to the United States Supreme Court, which answered in the affirmative.69 The Court in *Leocal v. Ashcroft* held that drunk driving offenses are not crimes of violence under § 16, provided that the offenses either do not include a *mens rea* component or require only a showing of negligence in the operation of vehicle.70 The Court focused on § 16’s emphasis on the use of physical force, which the court concluded requires active employment against the person or property of another.71 The Court found that a DUI offense could not include this requisite type of physical force because while one may actively employ *something* in an accidental manner, it is much more unusual to say that a person may actively employ physical force against another by accident.72 Thus, the Court concluded, § 16’s key phrase, “the use . . . of physical force against the person or property of another,” suggests a higher degree of intent than the negligent or merely accidental conduct found in drunk driving.73

such as: 18 U.S.C. § 1959 which prohibits threats to commit crimes of violence in aid of racketeering activity and § 3142(f) which requires a pretrial detention hearing for those alleged to have committed a crime of violence.

69 *Id.* at 12-13.
70 *Id.*
71 *Id.* at 9.
72 *Id.*
73 *Id.* at 10.
In footnote seven of the Court’s opinion, the Court compared the type of conduct referred to § 4B1.2 of the Guidelines to the type of conduct in § 16(b) of the CCCA, and observed that § 4B1.2 refers to the risk that an accident may occur when an individual drives drunk and § 16(b) refers to the risk that an individual may use force against another in committing a DUI offense.74 Despite its distinction, however, the Court favorably cited Doe later in its opinion by citing to Judge Breyer’s observation that drunk driving was not a “violent felony” under the ACCA because § 924(e) “calls to mind a tradition of crimes that involve the possibility of more closely related, active violence.”75 Referencing Doe with approval, the Court stated that the term “crime of violence” combined with § 16’s emphasis on the use of physical force “suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses.”76 Thus, drunk driving was not a crime of violence under the CCCA because § 16’s language requires a higher mens rea than the merely accidental or negligent conduct involved in a DUI offense.77

Additionally, the Court provided the example Congress’ use of the term “crime of violence” in § 101(h) of the Immigration and Nationality Act (“INA”) to support its holding that drunk driving was not a “crime of violence.”78 Under § 101(h), Congress added the term “crime of violence” to a list that distinguished drunk driving from crimes of violence.79 Section 101(h) defines the term “serious criminal offense” to mean:

(1) any felony;
(2) any crime of violence, as defined in section 16 of title 18; or

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74 Id. n.7.
75 Leocal v. Ashcroft, 543 U.S. 1, 11 (2004) (citing United States v. Doe, 960 F.2d 221, 225 (1st Cir. 1992)).
76 Leocal, 543 U.S. at 11.
77 Id. at 10 n.7.
78 Id. at 12.
(3) any crime of reckless driving or of driving while intoxicated under the influence of alcohol or of prohibited substances if such crime involves personal injury to another.” 8 U.S.C. § 1101(h).80

Because Congress chose to list drunk driving resulting in injury in a distinct provision separate from “crimes of violence,” the Court explained that interpreting “crime of violence” under § 16 to encompass DUI offenses would leave § 101(h)(3) practically devoid of significance.81 Thus, the Court concluded, the distinct provision for these separate offenses bolsters its conclusion that § 16 does not itself encompass DUI offenses.82

II. THE SEVENTH CIRCUIT CATEGORIZES DRUNK DRIVING AS A VIOLENT FELONY IN UNITED STATES V. SPERBERG

In 2005, despite the Supreme Court’s holding in Leocal that negligent drunk driving offenses are not crimes of violence, the Seventh Circuit categorized drunk driving as a violent felony subject to recidivist enhancement under the ACCA.83 In United States v. Sperberg, the Seventh Circuit expanded the ACCA’s predicate violent acts and allowed heightened punishments to be imposed on defendants with a criminal history of negligent crimes.84

80 Leocal, 543 U.S. at 12 (citing 8 U.S.C. § 1101(h)) (emphasis in original).
81 Id. (citing Duncun v. Walker, 533 U.S. 167, 174 (2001)) (stating “[a]s we must give effect to every word of statute wherever possible...the distinct provision for these offenses under § 101(h) bolsters our conclusion that § 16 does not itself encompass DUI offenses).
82 Leocal, 543 U.S. at 12.
83 United States v. Sperberg, 432 F.3d 706, 709 (7th Cir. 2005).
84 Id.
A. Facts

Roland Sperberg pled guilty to possessing a firearm, which normally carries a maximum penalty of 10 years of imprisonment. Sperberg was sentenced to 210 months, however, because the district judge concluded that he had been convicted of at least three other “violent felonies” under the ACCA. Sperberg had a lengthy criminal conviction record and many of his convictions may have qualified as a predicate act under the ACCA’s definition of “violent felony.” The district judge specified three in particular, including one for drunk driving in Wisconsin.

Wisconsin treats operating while under the influence (“OWI”) as a misdemeanor but elevates the charge to a felony for repeated OWI convictions. Thus, after seven OWI convictions, Wisconsin elevated Sperberg’s eighth OWI conviction to a felony under state law. Sperberg contended that his drunk driving conviction was not a crime of violence under the ACCA.

B. The Court of Appeals for the Seventh Circuit Opinion

Writing for the court, Judge Easterbrook stated that Rutherford, which held that drunk driving is a “violent felony” under § 4B1.2, was

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85 Id. at 707.
86 18 U.S.C. § 922(g).
87 Sperberg was convicted by guilty plea in the United States District Court for the Western District of Wisconsin, Shabaz, J., of possessing a firearm despite prior felony convictions. See Sperberg, 432 F.3d 706.
88 Id. at 707.
89 Id.
90 Id. at 707, 709.
92 Sperberg, 432 F.3d at 708.
93 Id.
94 Id. at 707.
controlling.\textsuperscript{95} The Seventh Circuit noted that although \textit{Rutherford} dealt with the Guidelines, the language and context of § 4B1.2(a) of the Guidelines is identical to that of § 924(e) of the ACCA, and, thus, there is “no basis for reading the provisions differently.”\textsuperscript{96} The Seventh Circuit also distinguished \textit{Sperberg} from the Supreme Court’s decision in \textit{Leocal}, which held that drunk driving is not a violent felony under § 16 of the CCCA.\textsuperscript{97} The Seventh Circuit emphasized the difference in statutory language of § 16, which speaks of “using” force whereas § 924(e) speaks of conduct that “presents” a serious potential risk of physical injury to another.\textsuperscript{98} The Seventh Circuit explained that the Supreme Court thought that to “use” force is to apply it deliberately, which excluded the offense of drunk driving because although driving is deliberate, the application of force is not.\textsuperscript{99} By contrast, the Seventh Circuit stated, § 924(e)(2)(B)(ii)’s “presents” asks about consequences rather than whether the offender deliberately applied force.\textsuperscript{100} Because of this difference, the Seventh Circuit found that \textit{Rutherford} survives \textit{Leocal} as “materially different language justifies a different interpretation.”\textsuperscript{101}

The Seventh Circuit noted, however, that Sperberg’s best argument was that \textit{Leocal} cited \textit{Doe} with apparent approval, which stated that § 924(e) as a whole “calls to mind a tradition of crimes that involve the possibility of more closely related, active violence” which cannot be said to include drunk driving.\textsuperscript{102} Indeed, the Seventh Circuit mentioned that not all crimes fit \textit{Doe}’s description of “crime of violence,” and the catch-all “otherwise” clause in subsection (ii) “calls for risky activity to be classified with more traditional crimes of

\textsuperscript{95} \textit{Id.} at 709.

\textsuperscript{96} \textit{Id.}

\textsuperscript{97} \textit{Id.}

\textsuperscript{98} \textit{Id.}

\textsuperscript{99} \textit{Id.}

\textsuperscript{100} \textit{Id.}

\textsuperscript{101} \textit{Id.}

\textsuperscript{102} \textit{Id.} (quoting United States v. Doe, 960 F.2d 221, 225 (1st Cir. 1992)).
violence.”¹⁰³ But the court stated that several circuits have decided¹⁰⁴ the question whether drunk driving is a violent felony under § 924(e)(2)(B)(ii), and if the Seventh Circuit were to switch sides, “it would more likely aggravate than eliminate a conflict.”¹⁰⁵ Therefore, the court stated, Rutherford stands controlling and shall remain the circuit’s position.¹⁰⁶

III. THE SEVENTH CIRCUIT ERRED IN RELYING ON RUTHERFORD

Sperberg incorrectly followed Rutherford’s reasoning in holding that drunk driving is a crime of violence under the ACCA: first, Rutherford’s holding that drunk driving is crime of violence under § 4B1.2 of the Guidelines is questionable in light of Leocal; second, the offense involved in Sperberg was mere negligent drunk driving while the offense involved in Rutherford was vehicular assault with injury resulting from drunk driving; and lastly, sentence enhancement under the Guidelines is not nearly as severe as it is under the ACCA.¹⁰⁷

Sperberg’s enlarging of the predicate acts under the ACCA raises serious concerns of overly severe punishments because it opens the

¹⁰³ Sperberg, 432 F.3d at 709.
¹⁰⁴ Although the courts are now in agreement, at the time Sperberg was decided, the circuits had split as to whether drunk driving was a violent felony for purposes of the ACCA. The Tenth Circuit in United States v. Moore, 420 F.3d 1218, 1224 (10th Cir. 2005) held that drunk driving was a violent felony, and the Eighth Circuit in United States v. Walker, 393 F.3d 819, 828 (8th Cir. 2005) held that it was not. Since Sperberg, the Eighth Circuit reheard en banc in United States v. McCall, 397 F.3d 1028 (8th Cir. 2006) and rejected the analysis in Walker and held that drunk driving qualified as a violent felony under § 924(e)(B)(ii).
¹⁰⁵ Sperberg, 432 F.3d at 709.
¹⁰⁶ Id.
door to a host of crimes of neglect that were not meant for heightened punishment.\footnote{108 See Sperberg, 432 F.3d at 709.} Under Sperberg’s holding, a person may be exposed to severe, heightened punishment under the ACCA for negligent drunk driving despite the ACCA’s purpose of targeting violent career offenders who commit intentional, active crimes for profit.\footnote{109 See H.R. Rep. 98-1073, at 3.} Because Sperberg raises such serious implications, the Seventh Circuit should revisit Sperberg and analyze § 924(e)(B)(2)(ii) of the ACCA by following the Supreme Court’s suggestion in Leocal that the predicate acts under the ACCA should not be enlarged to include drunk driving and other crimes of neglect.\footnote{110 See Leocal v. Ashcroft, 543 U.S. 1, 11 (2004) (citing United States v. Doe, 960 F.2d 221, 225 (1st Cir. 1992)).} Moreover, interpreting § 924(e)(B)(2)(ii)’s “otherwise involves” clause to include only crimes similar in nature to the enumerated crimes which precedes it demonstrates that negligent crimes do not fit within the meaning of the ACCA.\footnote{111 See Federal Maritime Comm’n v. Seatrain Lines, Inc., 411 U.S. 726, 734 (1973) (instructing that “catch-all” provisions should be interpreted within the categories similar in type to those specifically enumerated within the statute).} Finally, tracing the legislative history also reinforces the conclusion that the ACCA should not be expanded to include drunk driving and other crimes of neglect.\footnote{112 See United States v. McCall, 439 F.3d 967, 979 (8th Cir. 2006) (Lay, J. dissenting).}

A. The Predicate Acts under the ACCA in a Post-Leocal World

Sperberg should not have relied on Rutherford in interpreting § 924(e)(B)(2)(ii) because Rutherford was not decided in a post-Leocal world where drunk driving is not considered a crime of violence under § 16(b) of the CCCA.\footnote{113 See Leocal, 543 U.S. at 11.} Rutherford interpreted § 4B1.2 of the Guidelines to include drunk driving as a violent felony, but Rutherford was decided nine years before the Supreme Court’s decision in...
Leocal.\textsuperscript{114} Post-Leocal, drunk driving would not be considered a violent felony under § 4B1.2 of the Guidelines because the Commission specially noted that § 4B1.2(a) should still have the same substantive meaning as § 16(b) of the CCCA despite its amended language identical to the ACCA.\textsuperscript{115} Because § 4B1.2(a) in effect has the same substantive meaning as § 16(b), interpreting § 4B1.2(a) to include drunk driving would thus contravene Leocal’s holding that drunk driving is not a “crime of violence” under § 16(b).\textsuperscript{116} In light of Rutherford’s questionable holding, the Sperberg court should not have relied on Rutherford but rather should have relied on Leocal’s suggestion that Doe should be followed.\textsuperscript{117}

Doe correctly held ACCA’s predicate acts should not be enlarged to include crimes of neglect that raise only the possibility of violence because interpreting otherwise would blur the distinction between the violent crimes that Congress sought to distinguish for heightened punishment and other crimes.\textsuperscript{118} Although Sperberg was correct in concluding that the word “presents” in § 924(e)(B)(2)(ii) focuses on the consequences of hurting a person, the court’s main inquiry should have been whether the conduct by its nature involves a serious potential risk of physical harm against others.\textsuperscript{119}

Rutherford, for example, correctly observed that subsection (ii) of the “crime of violence” definition focuses on the conduct involved in the offense, and its sole concern is with the actions of the offender.\textsuperscript{120}

\textsuperscript{114} See Leocal, 543 U.S. 1; United States v. Rutherford, 54 F.3d 370 (7th Cir. 1995).

\textsuperscript{115} U.S. Sentencing Guidelines Manual app. C at 106-07 (1991) (stating that in amending the original § 4B1.2(1), the Sentencing Commission specifically noted that the amendment was not intended to change the substance of the guideline, but only to clarify its meaning).

\textsuperscript{116} Leocal, 543 U.S. 1.

\textsuperscript{117} Id. at 11.

\textsuperscript{118} Id. (stating interpreting § 16 to include accidental or negligent conduct would blur distinction between violent crimes and negligent crimes for purposes of sentence enhancement); Doe, 969 F.2d at 225.

\textsuperscript{119} See Sperberg, 432 F.3d at 709.

\textsuperscript{120} United States v. Rutherford, 54 F.3d 370, 376 (7th Cir. 1995).
The Rutherford majority, however, failed to distinguish that the defendant Rutherford was not charged with drunk driving, but rather was charged with a crime of assault resulting from drunk driving and causing serious bodily injury to another with a motor vehicle. The nature of the drunk driving offense in Rutherford includes assault and injury, while the type of the drunk driving at issue in Sperberg lacked any injury. The lesser included offense of mere drunk driving, without assault or injury, simply does not involve a serious potential risk of physical harm to others that is associated with assault resulting from drunk driving.

As Doe pointed out, the consequences of physical harm are significantly more likely to accompany inherently more dangerous crimes, such as burglary or arson, than to accompany accidental or negligent crimes such as drunk driving where there is no assault or injury. Thus, the reckless disregard in § 924(e) relates not the general conduct or to the possibility that harm will result from a person’s conduct, but to the serious potential risk that physical harm that will result from committing the offense.

The Leocal Court provides the classic example of burglary to illustrate such a difference: the offense of burglary falls within the meaning of “crime of violence” not because the offense can be committed in a generally reckless way or because someone may be injured, but because burglary, by its nature, involves a substantial risk that a burglar will deliberately use force against a victim and create physical harm. In contrast, mere drunk driving, without any assault or injury, does not have the accompanying serious potential risk that physical harm will result. Although burglars are inherently more dangerous when they violate gun possession laws, “drunk drivers are

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121 Id.
122 Id.; See Sperberg, 432 F.3d 706.
123 See United States v. Doe, 960 F.2d 221, 225 (1st Cir. 1992).
124 Id. at 224-25.
125 Leocal v. Ashcroft, 543 U.S. 1, 10 (2004).
126 Id.
127 Doe, 960 F.3d at 225.
not inherently more dangerous to society when they violate gun possession laws."\(^{128}\) As Doe emphasized, there is no reason to believe that Congress meant to enhance sentences based on proof of drunk driving convictions because the term violent felony “calls to mind a tradition of crimes that involve the possibility of more closely related, active violence.”\(^{129}\)

The tension between the Supreme Court’s contrary initial observation in footnote seven that the risks associated with the conduct in § 16(b) of the CCCA are different from those of § 4B1.2 of the Guidelines, and the Court’s later favorable citation to Doe’s observation that DUI is not a “crime violence” under § 924(e) of the ACCA, “underscores the unsettled nature of whether Congress intended to include drunk driving convictions in the category of violent felonies as defined in § 924(e).”\(^{130}\) Although Leocal’s observation in its footnote seven and its approval of Doe seem contradictory, the contradiction can be reconciled if one interprets the Court’s distinction of the risks of drunk driving under § 4B1.2 of the Guidelines to be referring to risks associated with drunk driving that involves assault and injury to another.\(^{131}\) This conclusion is reinforced by the Court’s referencing to Doe with approval and its ultimate holding that a “crime of violence” requires a higher mental state than the merely accidental or negligent conduct involved in a DUI offense.\(^{132}\) Thus, although the predicate act of drunk driving involving assault and injury may “present a serious potential risk of physical injury to another,” merely accidental or negligent drunk driving does not.\(^{133}\)

Moreover, the Leocal court focused on the conduct that creates a “substantial risk” under § 16(b) of the CCCA and found that drunk

\(^{128}\) *McCall*, 439 F.3d at 974 (Lay, J. dissenting).

\(^{129}\) See *Doe*, 960 F.3d at 225.

\(^{130}\) *McCall*, 439 F.3d at 982 (Lay, J. dissenting).

\(^{131}\) *Leocal*, 543 U.S. at 11.

\(^{132}\) Id.

driving did not carry such a substantial risk.\textsuperscript{134} Section 924(e) of the ACCA, however, focuses on the higher threat of “serious potential risk.”\textsuperscript{135} Used as an adjective, the definition of the term “serious” means “dangerous” or “potentially resulting in death or other severe consequences” such as serious bodily harm.\textsuperscript{136} In contrast, “substantial,” in tort’s substantial-factor context, refers to the causation that exists when one's conduct is an important or significant contributor to another’s injuries.\textsuperscript{137} As drunk driving does not carry a “substantial risk” that physical harm will result, it is less likely that drunk driving would carry the higher “serious potential risk” that physical harm will result.\textsuperscript{138} Therefore, as Judge Breyer observed in \textit{Doe}, Congress’ use of the words “serious potential risk” instead of the more traditional “substantial risk” shows that Congress did not intend to include non-violent crimes such as drunk driving within the scope of the ACCA.\textsuperscript{139}

\textit{Leocal} further points out that INA § 101(h)’s list of “serious criminal offenses” includes distinct and separate provisions for a “crime of violence” and for driving under the influence.\textsuperscript{140} The structure of INA § 101 demonstrates that Congress distinguished drunk driving offenses involving injury from “crimes of violence” and knew that drunk driving was separate from and not subsumed within the term “crimes of violence.”\textsuperscript{141} Thus, the structure of INA § 101 demonstrates that Congress knows how to include drunk driving in a separate provision if it intends to qualify drunk driving as a predicate act for sentence enhancement under the ACCA.\textsuperscript{142}

\textsuperscript{134} \textit{Leocal}, 543 U.S. at 11.
\textsuperscript{136} \textit{BLACK’S LAW DICTIONARY} (8th ed. 2004).
\textsuperscript{137} \textit{Id}.
\textsuperscript{138} \textit{See} United States v. Doe, 960 F.2d 221, 226 (1st Cir. 1992).
\textsuperscript{139} \textit{Id}.
\textsuperscript{140} \textit{Leocal}, 543 U.S. at 12.
\textsuperscript{142} \textit{See id}.
However, Judge Easterbrook’s apprehension with aggravating a conflict by not finding drunk driving as a crime of violence is understandable. After all, all of the circuits who have been asked to determine whether drunk driving constitutes a crime of violence have answered in the affirmative. But even if the Supreme Court were to agree with the circuits’ holding of drunk driving as crime of violence under § 4B1.2(a) of the Guidelines, the Seventh Circuit could still find that drunk driving is not a crime of violence under § 924(e) of the ACCA because these seemingly contradictory holdings can be reconciled. Although § 4B1.2(a) of the Guidelines and § 924(e) of the ACCA have identical language, their effects on sentence enhancements have drastically different results. The ACCA’s mandatory fifteen-year minimum imposes a much harsher penalty than would likely happen under a judge’s interpretation of the Guidelines and application of it an advisory fashion.

Under the Guidelines, the sentencing judge would take into account a number of factors determined by Congress to be pertinent to sentencing for those charged with possession of firearm and who also have previous convictions. The Guidelines establishes different offense levels based on certain characteristics of the offense such as whether the gun was a machine gun, whether the defendant committed the act after sustaining two previous felony convictions, etc. The Guidelines then specify a number of points that take into account

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143 United States v. Sperberg, 432 F.3d 706, 709 (7th Cir. 2005);
144 United States v. DeSantiago-Gonzalez, 207 F.3d 261 (5th Cir. 2000);
United States v. McCall, 439 F.3d 967 (8th Cir. 2006); United States v. Moore, 420 F.3d 1218 (10th Cir. 2005); United States v. McGill, 450 F.3d 1276 (11th Cir. 2006).
146 Id.
147 Id.
149 U.S.S.G. § 2K2.1(a).
certain characteristics of the defendant’s criminal history background and categorizes the points into different criminal history categories. Taking the base offense level and the criminal history category together, a judge would impose a sentence within a specified range of months. Under this framework, a recidivist defendant likely would be sentenced to a penalty far less than he would be under the ACCA.

To illustrate, consider the hypothetical of Defendant Drinker:

Defendant Drinker was an alcoholic. Drinker was a frequent patron of a bar in Indiana which was across the state border and three miles away from his home in Illinois. Although Drinker could have easily walked the distance, Drinker believed he was able to handle his alcohol and stay in control while driving. The area between the bar and Drinker’s home was also an area known for high incidences of crime, and Drinker thought he would be much safer driving rather than walking home while inebriated. Between 1988 and 2000, Drinker was arrested and charged five times for driving under the influence. None of Drinker’s DUI offenses resulted injuries, deaths, or damage to property. After the first two DUI misdemeanor convictions, the court raised Drinker’s three subsequent DUI offenses to class 4 felonies for which Drinker served a total of seven years in prison (three years each for two felonies, and one year for the other felony), 90 days of probation, and paid the court a total of $5,000 in fines. In 2004, one year after Drinker was released

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from serving his last DUI conviction, Drinker decided he would no longer drive but would walk to and from his favorite bar. Because the area was unsafe, Drinker bought a handgun from a friend who sent it to Illinois from Florida. Drinker carried the handgun with him to and from the bar every night. One night Drinker was arrested and charged with possession of a firearm under 18 U.S.C. 922(g)(1). Drinker's only other offenses in his criminal history are the two DUI misdemeanors and three DUI felonies. Drinker pled guilty hoping to get a lenient sentence from the court.

If the judge decided to apply the Guidelines, Drinker would have a base offense level of 24 because the Guidelines specify a base level of 24 if a defendant committed the offense of possession of a firearm "subsequent to sustaining at least two felony convictions of...a crime of violence."\textsuperscript{154} The Guidelines specify a number of points for certain offense behavior: Drinker would have 6 points for the two DUI felonies that he served three years each on because the Guidelines specify "3 points for each prior sentence of imprisonment exceeding one year and one month."\textsuperscript{155} The judge would then add 2 points for the DUI felony that he served one year on because the Guidelines specify adding "2 points for each prior sentence of imprisonment of at least sixty days [that have not already been counted]."\textsuperscript{156} Finally, the Guidelines would specify the judge to add 2 more points since Drinker was arrested just one year after he was released from serving time on his last DUI conviction.\textsuperscript{157} Drinker would have a total of 10 criminal history points putting him in a criminal history category of V.\textsuperscript{158} For a

\textsuperscript{154} U.S.S.G. § 2K2.1(2).
\textsuperscript{155} U.S.S.G. § 4A1.1(a).
\textsuperscript{156} U.S.S.G. § 4A1.1(b).
\textsuperscript{157} U.S.S.G. § 4A1.1(e).
defendant with a base offense level of 24 and a criminal history category of V, the judge would impose a sentence between 92-115 months. Thus, under the Guidelines, Drinker would receive a sentence between approximately 7.5 years and 9 years.

If, on the other hand, Drinker had been charged under the ACCA, the judge would be required to impose at least a fifteen-year mandatory minimum, or 180 months. This is nearly double the amount that Drinker would serve under the Guidelines. Although § 4B1.2(a) of the Guidelines and § 924(e) of the ACCA have the same identical language, their effects are drastically different as the Drinker hypothetical illustrates. The Seventh Circuit should distinguish drunk driving under § 924(e) of the ACCA from drunk driving under § 4B1.2(a) of the Guidelines because a crime of violence under the § 924(e) should encompass only truly violent crimes that deserve such severely heightened punishment. The difference between § 4B1.2(a) and § 924(e) is a crime of violence that considers an advisory Guidelines-type enhancement and a crime of violence that mandates a more severe ACCA-type enhancement. Because the ACCA imposes such an excessive penalty, the Seventh Circuit should have distinguished Sperberg from Rutherford by concluding that drunk driving under § 924(e) of the ACCA should receive a sentence that is at least 15 years.

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159 Id.
161 See 18 U.S.C. § 924(e).
164 See United States v. Doe, 960 F.2d 221, 225 (1st Cir. 1992).
driving is not the type of conduct that warrants an ACCA-type penalty enhancement.\textsuperscript{166} The Seventh Circuit should reconcile \textit{Rutherford} in limiting the types of drunk driving crimes deserving of heightened punishment under the ACCA by adopting Judge Easterbrook’s line of reasoning in his \textit{Rutherford} concurrence and hold that a crime of violence exists where there is both assault and injury.\textsuperscript{167}

\textit{B. Applying Ejusdem Generis}

Despite \textit{Leocal}’s holding that drunk driving is not a “crime of violence,” \textit{Sperberg} expanded the predicate acts under the ACCA to include the drunk driving as a predicate violent crime.\textsuperscript{168} The effect of \textit{Sperberg} is that § 924(e)(2)(B)(ii)’s “otherwise involves” clause has been enlarged to include crimes of neglect despite the list of violent, active crimes that precedes the clause.\textsuperscript{169} The term “otherwise,” however, is an elastic term,\textsuperscript{170} and \textit{Leocal} instructs that when interpreting a statute that features an elastic term, the context of the term should be construed in light of the terms surrounding it.\textsuperscript{171} Thus, the catch-all “otherwise involves” clause should be construed in light of the nature of violent, active crimes because specific statutory language should control more general language when there is conflict between them.\textsuperscript{172}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{166} \textit{Id.}
\item\textsuperscript{167} See United States v. Rutherford, 54 F.3d 370, 378 (7th Cir. 1995).
\item\textsuperscript{168} United States v. Sperberg, 432 F.3d 706, 709 (7th Cir. 2005).
\item\textsuperscript{169} See 18 U.S.C. § 924(e)(2)(B)(ii).
\item\textsuperscript{170} See United States v. McCall, 439 F.3d 967, 979 (8th Cir. 2006) (Lay, J. dissenting) (citing to WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1984)) (observing that “when used as an adverb, ‘otherwise,’ means (1) ‘in a different way or manner’; (2) ‘in different circumstances’; and (3) ‘in other respects.’ Depending on which definition of "otherwise" one chooses to apply, and which elements of the chosen definition one emphasizes, the "otherwise involves" provision can be read to support both the "any crimes" and "similar crimes" interpretations.
\item\textsuperscript{171} \textit{Leocal v. Ashcroft}, 543 U.S. 1, 9 (2004).
\item\textsuperscript{172} \textit{Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.}, 534 U.S. 327 (2002).
\end{enumerate}
\end{footnotesize}
The Supreme Court instructs that “catch-all” provisions should be interpreted within the categories similar in type to those specifically enumerated within the statute.\(^{173}\) When general words follow an enumeration of more specific items, the “sensible and long established” maxim of *ejusdem generis* limits the understanding of the general words to refer to the items belonging to the same class that is defined by the more specific terms in the list.\(^{174}\) The doctrine of *ejusdem generis* does not apply “where there are no specific terms followed by general terms,”\(^{175}\) where all of the terms in the statute are general,\(^{176}\) or where the terms in question are both specific in nature.”\(^{177}\) Similarly, the doctrine should not be applied to restrict the general terms following a class of particular terms where the particular terms exhaust the class.\(^{178}\)

Section 924(e)(2)(B)(ii) enumerates four specific crimes of burglary, arson, extortion, and those involving use of explosives followed by the catch-all provision “or otherwise involves conduct that presents a serious potential risk of physical injury to another.”\(^{179}\) The specific crimes do not exhaust the types of “violent felonies” that may fall under the catch-all “otherwise involves” provision.\(^{180}\) For

\(^{174}\) Holder v. Hall, 512 U.S. 874, 917 (1994); see also Washington State Dep’t of Soc. & Health Servs. V. Guardianship Estate of Keffler, 537 U.S. 371, 384 (2003) (“Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the proceeding specific words”); Norfolk & Western R. Co. v. Train Dispatchers, 499 U.S. 117, 129 (1991); *McCall*, 439 F.3d at 976 (Lay, J. dissenting).
\(^{176}\) Bourdeau, *supra* note 175; see also Accident & Cas. Ins. Co. of Winterthur, Switzerland v. Cook, for Use of State, 33 S.E.2d 571 (1932); McNamara v. State, 181 N.E. 512 (1932).
\(^{178}\) Bourdeau, *supra* note 175.
\(^{179}\) 18 U.S.C § 924(e)(2)(B)(ii).
\(^{180}\) See id.
example, armed robbery may well be a violent crime that presents a serious potential risk of physical injury to another but armed robbery is not included amongst the enumerated specified crimes.\textsuperscript{181} Analyzing 924(e)(2)(B)(ii) under the principle of \textit{ejusdem generis}, the “otherwise involves” clause should not be read in isolation but should be construed to embrace only crimes similar in nature to the enumerated violent crimes.\textsuperscript{182} In light of drunk driving’s non-violent nature, the “otherwise involves” clause should not be interpreted to encompass drunk driving offenses which are made felonious by state recidivist statutes but do not have elements of assault or injury to other persons.\textsuperscript{183} Rather, the “otherwise involves” clause should be read to encompass only serious violent crimes that are similar to nature to burglary, arson, extortion, and those involving use of explosives.\textsuperscript{184}

\textbf{C. Congressional Intent in Enacting the ACCA}

The legislative history of the ACCA strongly reinforces the conclusion that the “otherwise involves” clause should be interpreted to include only crimes similar in nature to the enumerated crimes that precede it.\textsuperscript{185} The history of the ACCA reveals that Congress focused its efforts on targeting career offenders—those who commit serious crimes as a means of livelihood\textsuperscript{186} and whose occupation solely consists of “crime for profit.”\textsuperscript{187} Interpreting the “otherwise involves” clause to include drunk driving and other crimes of neglect would thus make little sense, as no one can possibly make a livelihood from driving drunk since drunk driving “is not the result of plan, direction,

\textsuperscript{181} \textit{Id.}
\textsuperscript{182} Guardianship Estate of Keffler, 537 U.S. at 384; United States v. McCall, 439 F.3d 967, 979 (8th Cir. 2006) (Lay, J. dissenting).
\textsuperscript{183} United States v. McCall, 439 F.3d 967, 979 (8th Cir. 2006) (Lay, J. dissenting).
\textsuperscript{184} \textit{Id.}
\textsuperscript{185} \textit{Id.}
\textsuperscript{187} H.R. Rep. 98-1073.
or purpose but of recklessness at worst and misfortune at best.”188 Including drunk driving as predicate violent felony within the ACCA’s purview would not only be unusual, but it would open the door to permitting severe penalties for negligent crimes that were not meant for heightened punishment.189 Because interpreting the “otherwise involves” clause in isolation produces an unusual and unjust result, the legislative history of the ACCA should be consulted “to verify that what seems to us an unthinkable disposition . . . was indeed unthought of.”190

When Congress enacted the ACCA in 1984, the sentence enhancement provision was contained in § 1202 and was targeted at convicted felons possessing a firearm who had three previous convictions for “robbery or burglary.”191 In 1986, § 1202 was recodified as 18 U.S.C. § 924(e) by the Firearms Owners’ Protection Act, and just five months later, was amended again by the Career Criminal Amendments Act of 1986 to its present form.192 The 1986 amendment expanded the predicate offenses triggering sentence enhancement from “burglary or robbery” to “a violent felony or serious drug offense.”193


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188 United States v. Rutherford, 54 F.3d 370, 372 (7th Cir. 1995).
189 See United States v. Doe, 960 F.2d 221, 225 (1st Cir. 1992).
192 Taylor, 495 U.S. at 581; United States v. McCall, 439 F.3d 967, 979 (8th Cir. 2006) (Lay, J. dissenting).
193 Taylor, 495 U.S. at 581; United States v. McCall, 439 F.3d 967, 979 (8th Cir. 2006) (Lay, J. dissenting).
The Report explains that Congress intended § 924(e)(2)(B)(i) to include such “felonies involving physical force against a person such as murder, rape, assault, robbery, etc.” The Report further explains that the other major discussion involved which offenses against property would qualify as predicate acts under the ACCA. The Subcommittee agreed to add “State and Federal crimes against property such as burglary, arson, extortion, use of explosives and similar crimes as predicate offenses where the conduct involved presents a serious risk of injury to a person.” Congress’ determination that § 924(e)(2)(B)(ii) should encompass offenses directed against property and its reference to “similar crimes” indicates that the “otherwise involves” clause was intended to encompass crimes similar in nature to the violent, active crimes against property such as burglary, arson, extortion, and crimes that involves the use of explosives—not negligent crimes such as drunk driving.

CONCLUSION

Driving under the influence of alcohol is among America’s deadliest crimes as alcohol and automobiles can be a lethal combination. DUI is a nationwide problem and the legislature has

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196 Id. (emphasis in original).
put effort into prohibiting it and imposing appropriate penalties.\textsuperscript{200}

Drunk driving is with little doubt a very reckless act that poses serious risks to other motorists and pedestrians.\textsuperscript{201} “After all,” the Court of Appeals for the Seventh Circuit has said, that is “why it is forbidden.”\textsuperscript{202} But the dangers and seriousness of drunk driving “does not warrant [the court’s] shoehorning it into statutory sections where it does not fit.”\textsuperscript{203} Drunk driving simply does not fit within the meaning of “violent felony” as defined by the ACCA. \textit{Sperberg} incorrectly relied upon \textit{Rutherford}, which is questionable in a post-\textit{Leocal} world.

The enhancements under the advisory Guidelines are also not nearly as severe as the mandatory minimum and maximum set by the ACCA. The Seventh Circuit’s expansion of the ACCA’s predicate acts to include drunk driving raises serious concerns of opening the door to include a host of negligent crimes that were not meant for severely heightened punishment. By reading the “otherwise involves” clause in isolation and disregarding Congress’ intent in enacting the ACCA, \textit{Sperberg} produces an unusual, and unjust, result of punishing drunk drivers under an act targeted at rehabilitating chronic violent offenders and protecting the public from those whose occupation is crime for profit.

\textsuperscript{200} \textit{Leocal v. Ashcroft}, 543 U.S. 1, 13 (2004).
\textsuperscript{201} \textit{United States v. Sperberg}, 432 F.3d 706, 708 (7th Cir. 2005).
\textsuperscript{202} \textit{Id}.
\textsuperscript{203} \textit{Leocal}, 543 U.S. at 13.
HOO KING THE CROOK:
THE SEVENTH CIRCUIT JUSTIFIES THE
SUSPICIONLESS SEARCH OF A PROBATIONER

MEIRA GREENBERG*


INTRODUCTION

Criminal convictions for less serious crimes such as damaging property or fleeing from the police may result in a prison sentence or probation.¹ Commonly, individuals in such cases will agree to forgo a criminal trial and enter into a plea bargain,² in which they may admit guilt in an effort to secure a more favorable sentence of probation rather than prison time. Although plea bargains are presumed constitutional, not every condition of probation is permissible.³ In assessing the validity of the conditions of probation, courts have taken two different approaches: (1) constitutional analysis approach;⁴ and (2)

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the consent/contract approach.\textsuperscript{5} Courts that have used the first approach engage in a determination of whether the condition agreed to is constitutional\textsuperscript{6} whereas courts that have used the second approach engage in a determination of whether the condition was accepted voluntarily.\textsuperscript{7} This Comment contends that the constitutional approach is better and argues that the consent/contract approach improperly hooks the crook when it upholds constitutionally questionable probationary conditions upon the basis that a convict voluntarily consents to the condition to avoid a prison sentence.

Recently, the United States Court of Appeals for the Seventh Circuit, in \textit{United States v. Barnett}, upheld an agreed order that required the accused to consent to suspicionless searches during the probation period.\textsuperscript{8} Judge Posner,\textsuperscript{9} writing for the unanimous three judge panel, reasoned that probationers may be subject to suspicionless searches because they voluntarily consent to waive their Fourth Amendment rights in favor of the less appealing choice of facing a prison sentence, which is similar to many waivers made by recipients of plea bargain agreements.\textsuperscript{10}

The \textit{Barnett} decision is important because it lends credence to the consent approach, a little used argument asserted to support the suspicionless search of a probationer.\textsuperscript{11} Under the consent theory, an individual waives their right to Fourth Amendment protection and procedure, and thus the requirement that searches be reasonable is deemed moot.\textsuperscript{12} Thus, \textit{Barnett} supports a loophole by which the state

\textsuperscript{5} United States v. Barnett, 415 F.3d 690, 692 (7th Cir. 2005).
\textsuperscript{6} \textit{Knights}, 534 U.S. at 118.
\textsuperscript{7} \textit{Barnett}, 415 F.3d at 692.
\textsuperscript{8} Id.
\textsuperscript{9} Judge Richard Posner is an expert in the economics of law. He has published many works on this topic. http://www.law.uchicago.edu/faculty/posner-r/
\textsuperscript{10} \textit{Barnett}, 415 F.3d at 692.
\textsuperscript{11} Prior to \textit{Barnett}, practitioners had attempted to use the consent theory, but the Supreme Court specifically declined to review this line of reasoning because the search was permissible under the standard Constitutional analysis approach. United States v. Knights, 534 U.S. 112, 120 n.6 (2001).
may conduct searches that are not permissible under the Fourth Amendment so long as the probationer consents to such searches as a prerequisite of probation in lieu of a prison sentence.\footnote{Barnett, 415 F.3d at 692.}

This Comment will contend that the Seventh Circuit’s decision in \textit{Barnett} did not sufficiently examine the propriety of upholding a suspicionless search within the terms of a plea bargain agreement upon the consent approach because such requirements are unreasonable under constitutional analysis. Thus, a suspicionless search as a probationary term constitutes an unconstitutional condition absent more direction from the Supreme Court that either a suspicionless search is permissible under the Fourth Amendment or that the consent approach justifies complete removal of a probationer’s Fourth Amendment rights.

Part I of this Comment lays out the landscape of a probationer’s Fourth Amendment protection by briefly discussing the case law leading up to the Seventh Circuit’s decision in \textit{Barnett}. Part II recounts the \textit{Barnett} litigation by setting forth the procedural and factual record and then detailing the opinion issued by the court. Part III analyzes the consent theory by comparing the typical consent case in which the individual is not in custody to the consent given by an individual as a prerequisite of probation. Part IV examines the contours of a plea bargain agreement, reviews the sentencing guidelines for probation and then compares a plea bargain agreement to an agreed order that a probationer signs as a prerequisite of release. Part V explores the doctrine of unconstitutional conditions and contends that a probationary suspicionless search condition constitutes an impermissible condition on constitutional rights. Part VI reviews the recent Supreme Court decision of \textit{Samson v. California} and contends that this decision cautions against permitting suspicionless searches of probationers. Part VII questions the Seventh Circuit’s assertion that even if a suspicionless search was an impermissible condition of probation, the remedy would be rescission and require Barnett to go to prison.
I. THE FOURTH AMENDMENT PROTECTS A PROBATIONER

Probationers are subject to less Fourth Amendment Protection than a free citizen.\textsuperscript{14} The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” by police officers and other government officials.\textsuperscript{15} Normally, this constitutional right is protected by the probable cause and warrant requirement.\textsuperscript{16} However, the Supreme Court decisions of Griffin v. Wisconsin and United States v. Knights lowered the requisite probable cause standard to the standard of reasonable suspicion for probationers.\textsuperscript{17} The Court justified this lowered standard on one of two bases: either that the search constitutes a special need of the state\textsuperscript{18} or that in light of the government’s need and the probationer’s lowered expectation of privacy, the search is reasonable under the Fourth Amendment.\textsuperscript{19}

A. Griffin v. Wisconsin

In 1984, nearly 2,000,000 adults were on probation or parole in the United States.\textsuperscript{20} The primary purpose of probation and parole is to place the offender back into the community; however, the offender’s release into the community is not without restriction.\textsuperscript{21} In virtually

\begin{footnotesize}
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\item Knights, 534 U.S. at 119.
\item U.S. CONST. amend. IV.
\item Johnson v. United States, 333 U.S. 10, 13 (1948). The warrant and probable cause requirements protect individuals from unreasonable searches and seizures and significantly limit police action.
\item Knights, 534 U.S. at 119; Griffin v. Wisconsin, 483 U.S. 868, 872 (1987).
\item Griffin, 483 U.S. at 872.
\item Knights, 534 U.S. at 122.
\item 18 U.S.C. § 3561. Probation may be used as an alternative to incarceration, provided that the terms and conditions of probation can be fashioned so as to fully meet the statutory purposes of sentencing, including promoting respect for law,
\end{enumerate}
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every case, conditions accompany the release of the probationer.22 One frequently imposed condition of probation requires the probationer to submit to searches.23 In Griffin, the United States Supreme Court articulated the scope of a probationer’s Fourth Amendment rights, and held that those rights did not prohibit a probationer from being required to consent to searches as a prerequisite of probation.24

The petitioner in Griffin challenged the condition of his probationary terms which permitted the state to conduct a warrantless search of his home.25 In that case, the officers conducted a warrantless search after receiving notice from a known informant that the probationer may be in possession of weapons.26 The officers did not obtain a warrant before conducting the search, but rather relied upon the probationer’s consent to submit to such searches.27

The Griffin Court held that a search of a probationer predicated upon reasonable suspicion was justified under the special needs doctrine.28 Reasonable suspicion is a standard determined by weighing all of the facts including the reliability of the informant and the probationer’s history to assess whether there is sufficient evidence to believe that the probationer violated the terms of his probation.29 Although a probationer’s home is subject to Fourth Amendment protection, the special needs doctrine permits, under limited circumstances, reductions of a probationer’s Fourth Amendment

providing just punishment for the offense, achieving general deterrence, and protecting the public from further crimes by the offender.

22 Higdon v. United States, 627 F.2d 893, 897 (9th Cir. 1980). Common conditions of probation include obeying all laws, refraining from alcohol use, avoiding association with other convicts, reporting to a probation agent on a regular schedule, and advising probation agent of any change in address or employment.

23 See, e.g., Owens v. Kelley, 681 F.2d 1362, 1366 (11th Cir. 1982).

24 483 U.S. at 873.

25 Id. at 870.

26 Id. at 872.

27 Id. at 870.

28 Id. at 875. The reasonable suspicion standard is a lower standard than the probable cause standard.

29 Id. at 871.
protection because a “special needs beyond that of law enforcement make the warrant and probable cause requirement impracticable” and make the search reasonable under the Fourth Amendment.\(^{30}\)

The Court reasoned that the state’s operation of a probation system operates as a special need beyond law enforcement interests, in part because evidence discovered in such a search is rarely used in criminal trial, but rather is only admissible at probation revocation hearings.\(^{31}\) It found that the purposes of probation, to promote rehabilitation and to prevent recidivism, justify a probation officer supervising the probationer to ensure that these goals are met, but cautioned that the degree of supervision is not unlimited.\(^{32}\) Thus, where an officer has reasonable suspicion that the probationer is engaged in criminal activity the officer may conduct a search of the probationer as part of a legitimate probationary condition.\(^{33}\)

**B. United States v. Knights**

After *Griffin*, the lower courts split on whether the probationary search condition would permit officers to use incriminating evidence discovered in the search not only at the probation revocation hearing, but also in subsequent criminal trials.\(^{34}\) In *Knights*, the petitioner challenged a probationary condition that permitted officers to conduct warrantless searches with or without reasonable cause after evidence of Knights’ participation in arson was discovered during a search pursuant to this condition.\(^{35}\) The *Knights* Supreme Court held that the

\(^{30}\) *Id.* at 873.

\(^{31}\) *Id.* at 873-874; *see also* Penn. Bd. of Prob. & Parole v. Scott, 524 U.S. 357 (1998). This case talks about how the normal Fourth Amendment protection provided by the exclusionary rule, which bars the admission of evidence in violation of the Fourth Amendment, does not apply in a parole revocation hearing because the parole revocation process is not inherently adversarial and thus does not demand safeguards of this nature.

\(^{32}\) 483 U.S. at 874-75.

\(^{33}\) *Id.* at 879.


\(^{35}\) *Id.* at 114.
Fourth Amendment permitted the search of a probationer based upon reasonable suspicion, and thus evidence garnered pursuant to the search was admissible in future criminal trials.36

The Court reasoned that the search of a probationer is justified under the reasonableness requirement of the Fourth Amendment.37 A search is reasonable if the balance between the probationer’s reasonable expectation of privacy38 and the government’s interest in conducting the search justifies the infringement on a probationer’s Fourth Amendment rights.39 A probationer, by virtue of his status, has a reduced expectation of privacy.40 Moreover, the Court acknowledged that “just as other punishments for criminal convictions curtail an offender’s freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens.”41 Consequently, probationers who are made unequivocally aware of the search condition and who sign the consent form may reasonably be deemed to have notice of their lessened privacy rights.42 On the other side of the scale is the government’s interest in preventing recidivism and promoting rehabilitation, which counters the probationer’s reduced expectation of privacy.43 Thus, under the Court’s holding in Knights, the Fourth Amendment permits courts to condition probation upon submission to searches conducted with reasonable suspicion because such searches are reasonable.44

36 Id. at 121.
37 Id.
38 It is not just the individual’s subjective expectation of privacy, but also the expectation of privacy that society deems acceptable such that it is willing to protect that individual’s subjective expectation. Wyoming v. Houghton, 526 U.S. 295, 300 (1999).
39 Knights, 534 U.S. at 119.
40 Id.
41 Id.; see also Minnesota v. Murphy, 465 U.S. 420, 438 (1984).
42 Knights, 534 U.S. at 119.
43 Id.
44 Id. at 121.
Although the government attempted to justify the search based upon the probationer’s consent to the probationary term, the Court specifically declined to rule on this argument. The government argued that the probationer had voluntarily accepted the probationary condition and had the option to decline the terms and go to prison instead. Further, the government argued that such conditions are analogous to the “voluntary decision defendants often make to waive their right to trial and accept a plea bargain.” However, the Court declined to determine both whether consent itself justified the search and whether searches conducted with less than reasonable suspicion would violate the Fourth Amendment because the search in this case was conducted with reasonable suspicion and thus permissible.

The Griffin and Knights cases demonstrate that probationers are entitled to less Fourth Amendment protection than free-citizens, but intimate that probationers are not without some degree of protection. In assessing the degree of protection the Fourth Amendment requires, both cases employed a balancing test to determine the government’s interest in conducting the search and the privacy infringement suffered by the probationer. However, neither case answered the question of whether a probationer’s consent to a probationary condition would alone permit the search or whether the Fourth Amendment would permit a suspicionless search based upon the probationer’s status. These questions were answered in the affirmative by the Seventh Circuit.

45 Id. at 120 n. 6.
46 Id. at 118.
47 Id.
48 Id. at 120 n. 6.
49 Id.; Griffin, 483 U.S. at 875.
50 Knights, 534 U.S. at 119; Griffin, 483 U.S. at 873.
51 United States v. Barnett, 415 F.3d 690, 693 (7th Cir. 2005).
II. UNITED STATES V. BARNETT: JUSTIFYING THE SUSPICIONLESS SEARCH OF A PROBATIONER

On July 18, 2005, the Seventh Circuit Court of Appeals ruled on the validity of a search conducted by police officers pursuant to a probationer’s consent to the search as part of the terms of his probation. Judge Posner authored the opinion for a three-judge panel, which also consisted of Judge Coffey and Judge Kanne. The court upheld the suspicionless search, reasoning that the probationary waiver should be viewed in light of both consent and plea bargain analysis since a probationer may contract away their Fourth Amendment rights, thereby justifying a suspicionless search.

A. Facts of the Case

Curtis Barnett (“Barnett”) was found guilty of fleeing from police and destroying state property, both of which are felonies under Illinois law. The trial judge sentenced Barnett to one year of intensive probation in lieu of a prison sentence. As a condition of probation, as set forth in the agreed order, Barnett was required to “submit to searches of [his] person, residence, papers, automobile, and/or effects at any time such requests are made by the Probation Officer, and consent to the use of anything seized as evidence in Court proceedings.” Barnett’s lawyer acknowledged that Barnett bargained

52 Id. at 691. This case was before the Seventh Circuit on appeal from a decision by the S.D. of Illinois District Court to deny the motion to quash evidence because the lower court held that Barnett’s consent to suspicionless searches as part of his probationary condition provided justification for the search. United States v. Barnett, No. 03-CR-30170, 2004 WL 391830, at *1 (S.D. Ill. Feb. 27, 2004).
53 Barnett, 415 F.3d at 691.
54 Id. at 692.
55 Id. at 691.
56 Id. The difference between intensive probation as opposed to regular probation is the number of conditions that an individual is required to subject himself as a prerequisite of being granted the probationary sentence.
57 Id.
for these terms so that he could avoid a prison sentence. Soon thereafter, police conducted a suspicionless search of Barnett’s apartment and discovered a firearm in violation of the terms of his probation.

B. Seventh Circuit’s Opinion

The Seventh Circuit held that a suspicionless searches of a probationer is permissible when the probationer agrees to these searches as a term of his probation based upon the intersection of both consent and plea bargain law. First, the court looked to normal consent analysis and acknowledged that an individual may waive their constitutional rights if the waiver is both knowing and intelligent. Second, the court compared the probationary condition of a plea bargain to a contractual agreement. In either case, the court noted that Barnett was given the choice of prison or probation and voluntarily accepted the consequences of that decision.

Consent is an exception to the warrant requirement. The Seventh Circuit reasoned that there was nothing unusual about a person consenting to a search and relinquishing Fourth Amendment rights when they believe they will be better off waiving the right than by standing on it. Of course, probation, which subjects individuals to only occasional suspicionless searches, is less invasive than prison, which does not provide even a modicum of Fourth Amendment protection. Expanding on this line of reasoning, Judge Posner opined that a bargained for probation sentence is the equivalent of a plea

58 Id. at 691-92.  
59 Id. at 691.  
60 Id. at 692.  
61 Id.  
62 Id.  
63 Id. at 691-92.  
65 Barnett, 415 F.3d at 692.  
66 Id.
bargain. He noted that a plea bargain is a form of contract and is thus enforceable and presumed to benefit both parties, though one party may give up constitutional rights. Accordingly, Barnett gave up very little considering the alternative of prison that loomed ahead.

Barnett raised two arguments against validating the suspicionless search waiver upon the consent approach. Barnett argued that the blanket waiver of Fourth Amendment rights invites officers to abuse this privilege and conduct arbitrary, capricious or harassing searches. In addition, Barnett argued that the contract was indefinite because the waiver he signed subjected him to suspicionless searches, but the police manual required officers to have reasonable suspicion before conducting a search of a probationer’s home. This, Barnett argued, created a discrepancy in the terms of the agreed order, which invalidated the contract. The Seventh Circuit rejected both arguments.

First, the Seventh Circuit reasoned that interpreting the contract as an invitation for harassment and improper behavior was inappropriate because if two interpretations of a contract are possible, and one interpretation would make the contract unenforceable while the other term would be enforceable, then the contract is interpreted with the

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67 Id. Note that there is a discrepancy as to whether this was an actual plea bargain agreement. The district court described the probationary condition waiver a bargain between the people and the State because the judge could have sentenced him to prison and Barnett was not involuntarily placed on probation since he could have refused the condition and went to jail. United States v. Barnett, 03-CR-30170, 2004 WL 391830, at *2 (S.D. Ill. Feb. 27, 2004).
68 Barnett, 415 F.3d at 692.
69 Id.
70 Id.
71 Id.
72 The bargaining process requires that the parties assent to the terms and that the agreement is definite. Definiteness protects the promissary’s expectation interest.
73 Barnett, 415 F.3d at 692.
74 Id.
75 Id. at 693.
term that is enforceable. Second, it reasoned that the indefinite argument must fail because the remedy for an indefinite contract is rescission, which places both parties in the position they would have been in prior to the contract. Under the rescission theory, Barnett’s position prior to the probation contract was a prison sentence and Barnett did not want to serve a prison sentence and so withdrew this argument. After dismissing Barnett’s arguments, the Seventh Circuit queried no further about whether the imposition of a suspicionless search condition should be upheld by the constitutional approach to a probationer’s Fourth Amendment rights, unlike the Court’s analysis in Griffin and Knights.

III. JUSTIFYING THE SUSPICIONLESS SEARCH UPON CONSENT

The Seventh Circuit erroneously equates the consent given by a probationer to the consent given by a free individual. It fails to account for a significant difference, namely, that the free individual retains a meaningful choice to decline to consent to the search, while the probationer is subject to the search regardless of his supposed consent. In part, the Barnett court upheld the suspicionless search because it reasoned that consent is an exception to the Fourth Amendment requirement of reasonableness. The two cases cited most often in support of the Seventh Circuit’s view of consent, Schneckloth v. Bustamonte and Zap v. United States, evince an important distinction between consent given by a free individual and consent that is given in the context of a prerequisite of probation. Failure to account for this difference undermines the Seventh Circuit’s decision

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76 Id.
77 Id.
78 Id.
79 See id.
80 Id. at 692.
82 328 U.S. 624 (1946).
to uphold the suspicionless search of a probationer based upon a consent approach.

In *Schneckloth*, the Court delineated the parameters of a Fourth Amendment consent case and determined that an individual need not be specifically advised of the right to decline an officer’s request to search for the individual’s consent to validate the search.83 Although it was widely accepted that consent created an exception to the warrant requirement, the prosecutor had the burden of proving that the consent was freely and voluntarily given.84 The narrow question before the Court was whether an individual could freely and voluntarily give consent if they were unaware of the ability to decline the officer’s request to conduct the search.85 “Voluntariness is a question of fact to be determined from all the circumstances;”86 knowledge of a right to refuse is only one factor to be taken into account in that determination.87

The Court created a narrow holding when it proclaimed that the consent must be both voluntary and given without coercion and only applies when the subject of the search is not in-custody.88 For example, if police officers were to come to someone’s door and claim to have a warrant, then the officer in effect announces “that the occupant has no right to consent or to resist the search . . . the situation is instinct with coercion . . . where there is coercion there cannot be consent.”89 Finally, the Court reasoned that although consent is considered a waiver of Fourth Amendment rights, waiver is really a “standard enunciated . . . in the context of the safeguards of a fair

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83 412 U.S. at 249.
84 *Id.* at 219.
85 *Id.* at 222.
86 *Id.* at 226.
87 *Id.* at 229. Other factors may include age, education, length of detention, prolonged nature of the questioning, and the physical punishment inflicted such as the deprivation of food or sleep.
88 *Id.* at 249. The Court declined to determine the standard of consent for one who was already in custody, but recognized that other courts are particularly sensitive to the heightened possibility of coercion in this context. *Id.* at 240 n. 29.
89 *Id.* at 234.
criminal trial. Thus, there is a difference between waiver and consent and the degree of voluntariness needed for each to be constitutionally permissible.

Proponents of the consent theory also use Zap v. United States to support their contention that a suspicionless search may be bargained for and thus upheld upon the doctrine of consent. In Zap, the petitioner had entered into a contract with the Navy Department in which he was to conduct experimental work on airplane wings. The contract provided that all accounts and records of the petitioner would be made available to the government at all times. The government conducted a search pursuant to this term of the contract and discovered that the petitioner had committed fraud and overcharged for various fees assessed to the Navy. The Court upheld the suspicionless search conducted pursuant to the terms of the contract reasoning that “to obtain the government’s business [the petitioner] specifically agreed to permit inspection of his accounts and records,” and thus he voluntarily waived his right to privacy protected by the Fourth Amendment.

In both Schneckloth and Zap the petitioner was free to walk away and refuse to consent to the search. It is axiomatic that a voluntary choice assumes the ability to decline. However, in the case of a probationer like Barnett, the probationer is not free to walk away from a plea bargain as the petitioners were free to walk away from consenting to a search in Schneckloth and Zap. The Seventh Circuit

90 Id. at 236.
91 Id. at 238.
92 328 U.S. 624 (1946).
93 Id. at 626.
94 Id. at 627.
95 Id.
96 Id. at 628.
97 See Schneckloth, 412 U.S. at 220; Zap, 328 U.S. at 327.
99 See Barnett, 415 F.3d at 692. Had Barnett walked away from the plea bargain terms he would have been subject to the same searches while in prison. See generally Hudson v. Palmer, 468 U.S. 517 (1984).
failed to recognize this important point. Thus, “to speak of consent in [the context of a probationary waiver] is to resort to a manifest fiction, for the probationer who purportedly waives his rights by accepting a condition [he] has little genuine opportunity to refuse.”\textsuperscript{100} Barnett could not voluntarily consent to suspicionless searches because if he refused to sign the probationary waiver, he would be placed in prison where he would still be subject to suspicionless searches.\textsuperscript{101} Accordingly, the consent doctrine should not justify the suspicionless search of a probationer.

Moreover, public policy cautions against using the consent approach to justify the infringement of a probationer’s constitutional rights because it could result in a slippery slope of unfettered prosecutorial discretion. It is easily imagined that the consent theory could justify a probationary condition that restricted travel, but could this not, taken to its logical, though extreme, conclusion, justify the restriction of a probationer’s movement to a 4x4 square, permit the restriction of speech during certain hours, or allow the conduction of cavity searches without cause without any indication that these conditions are in fact necessary for the probationer’s rehabilitation or for public safety?

Perhaps these conditions sound outlandish and that no one would consent to such probationary terms. But, are there not thoroughly invasive searches conducted in prison, a threat of gang rape, murder, and possible solitary confinement such that an individual faced with these conditions in prison might voluntarily consent to the probationary conditions to be carried out in the privacy of his own home?\textsuperscript{102} And if probation benefits the probationer, and is given in return for this consent to these conditions, then under the Seventh Circuit’s reasoning the probationary terms would be permissible.

\textsuperscript{100} Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment 440-41 (4th ed. 2004).
\textsuperscript{101} See Hudson v. Palmer, 468 U. S. 517 (1984) (holding that prisoners have no Fourth Amendment protection and thus may be subject to suspicionless searches).
Requiring the court to conduct a formal Fourth Amendment analysis and determine the reasonableness of the search condition before conditioning probation upon the search requirement, prevents prosecutorial abuse that might otherwise be upheld under the consent approach. Thus, the court should not be allowed to require the prospective probationer to consent to unreasonable probationary terms. This scenario demonstrates an improper “hooking of the crook” by providing no real choice between the constitutional infringements outside of the location where the infringement might occur, yet justifying the infringement upon meaningful consent. The Seventh Circuit’s failure to adequately account for this distinguishing fact, inherent in any probationary consent, undermines the analogy between a normal consent case and probationary consent. However, the Seventh Circuit did not solely rely on the probationary condition as a straightforward consent case, but also argued that consent of a probationary condition as part of a plea bargain, justified the condition.

IV. THE PROBATIONARY CONDITION AS A PLEA BARGAIN

The Seventh Circuit improperly implied that a probationer’s consent to the terms of his probation is the equivalent of a plea bargain. But even if the probation in Barnett was part of a plea bargain agreement, the court should still have been required to demonstrate that the condition of suspicionless searches was reasonably related and served the purposes of probation. “A plea bargain is a negotiated agreement between the defense and the prosecution in a criminal case. Typically the defendant agrees to plead guilty to a specified charge in exchange for an oral promise of a lower

103 The reasonableness of the search must be determined by conducting a formal Fourth Amendment analysis and balancing the interest of the state in conducting the search against the interest of the probationer’s reasonable expectation of privacy. See Part I.

sentence.” Plea bargains are deemed to be valid contractual agreements that benefit both sides. As such, an individual who is party to an improper plea agreement is entitled to all of the remedies associated with a contract in addition to other protections that ensure fairness in criminal proceedings.

Individuals often waive their constitutional rights within a plea bargain agreement, but the waivers of these rights are generally related to the current criminal trial. Recall that a plea bargain is an agreement between the prosecution and the defendant. Thus, the prosecution often requests waivers that assist them at trial and makes trying the case more cost and time efficient. For example, a guilty plea sometimes involves relinquishing certain constitutional rights, such as the right against self-incrimination, right to a trial by a jury, and right to confront accusers. But, ordinarily, such plea bargain waivers may not require waiver of other rights such as protection of double jeopardy, right to challenge the sentence imposed, and right to challenge the Defendant’s competency to stand trial. Finally, for a waiver to be upheld, unlike consent, the prosecution is required to inform the individual of his constitutional right and the right to refuse

106 Barnett, 415 F.3d at 692; United States v. Rubbo, 396 F.3d 1330, 1334 (11th Cir. 2005);
108 See id.
109 See id. at 486.
110 See generally Liberetti v. United States, 516 U.S. 29, 33 (1995) (where the defendant plead guilty, which he acknowledged waived other constitutional rights against self-incrimination and the right to a jury); Rubbo, 396 F.3d at 1332 (where the Defendant may agree to cooperate, plead guilty, and waive rights to appeal); United States v. McKinney, 406 F.3d 744, 745 (5th Cir. 2005) (where the Defendant agreed to cooperate and help the prosecution secure the convictions of other individuals involved in the drug distribution scheme).
111 Bennett L. Gershman, Prosecutorial Misconduct, Chapter 7, misconduct in plea bargaining process.
112 Id.
the plea bargain. Thus many waivers declare the individual’s constitutional rights and then explicitly inform the individual that by signing the waiver he forfeits his rights.

Barnett’s probationary condition that waived all of his Fourth Amendment protection raises three questions. First, was Barnett’s probationary waiver in fact a plea bargain or was it a normal probationary condition that was dubbed a plea bargain? Second, did the plea bargain terms conform to the purposes and spirit of probation and should that matter? And third, given that a plea bargain normally assists the prosecution at the current trial, should a plea bargain that waives constitutional rights, require infringement of those rights in subsequent trials?

The language used by the Barnett court in the United States District Court opinion creates an inference that Barnett’s probation was not in fact part of the terms of a plea bargain, but rather normal conditions consented to by a prospective probationer. This inference is supported by the fact that the district court found that the consent doctrine should apply and not the doctrine of plea bargaining. Although it is true that Barnett’s lawyer conceded that Barnett had signed and consented to the conditions of intensive probation supervision and that this consent constituted a bargain between Barnett and the People of the State of Illinois, the government defended the search on the basis of consent and not on the basis of enforcing the terms of the plea bargain. Further, the court described this bargain not as an agreement in which Barnett consented to waive his rights at trial for a reduced sentence, but as a normal consent to probation where the “condition was one among many accepted in the place of going to prison.” The term bargain was used because the court stated, “what is not present in this case is a defendant who was

114 See id. at 236.
116 Id.
117 Id. at *2.
118 Id. at *3.
involuntarily placed on probation . . . and who has no right to refuse the conditions.\textsuperscript{119} This language creates an inference that the bargain was merely to stay out of prison and not a term of in a comprehensive plea bargain agreement.

Normally, a prosecutor enters into a plea bargain agreement before the suspect is convicted and the suspect pleads guilty as part of the plea bargain in return for the prosecutor’s recommendation of a reduced sentence.\textsuperscript{120} Though one may easily recognize that the prosecutor may well wield more bargaining power, at least there is the notion that the prosecutor will not be overly greedy in their offered terms of the plea bargain because to do so would jeopardize their ability to make a deal that is both cost and time efficient.\textsuperscript{121} This is not the case if the defendant is already found guilty and the risks of trial have passed.\textsuperscript{122} Post conviction, the prosecutor has all of the cards and can condition a reduced sentence on any condition he so desires.\textsuperscript{123} In this instance the plea bargain analysis should not apply.

But, even if Barnett’s condition was in fact part of a broader plea bargaining scheme, should not the probationary condition comport with the policy and purpose behind probation? Probation is an alternative to incarceration and may serve as an independent sentence if it is fashioned to fully meet the statutory purposes of sentencing, “including respect for the law, providing just punishment for the offense, achieving general deterrence, and protecting the public from further crimes by the defendant.”\textsuperscript{124} Further, the court may impose conditions of probation only to the extent that those conditions are both reasonably related to the offense or history of the defendant and

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{119} Id.
\item \textsuperscript{121} Id.
\item \textsuperscript{122} Id.
\item \textsuperscript{123} Id. at 1918; see also Part III supra.
\item \textsuperscript{124} Sentencing Guidelines, § 5B1.1, November 1, 2006.
\end{enumerate}
\end{footnotesize}
the conditions involve only those deprivations of liberty or property as are reasonably necessary for the purpose of sentencing.\textsuperscript{125} The language used by the sentencing guidelines regarding probation is remarkably close to the analysis conducted in a typical constitutional approach, namely, a determination of whether the search is reasonable based upon the government’s interests in ensuring the rehabilitation of the probationer and preventing recidivism is balanced against the privacy expectations of the probationer.\textsuperscript{126} Although it is clear that a probationary condition that requires submission to searches predicated upon reasonable suspicion are appropriate both because it serves the policy and purpose of the probationary statute and is reasonable under the Fourth Amendment, there is no indication that a suspicionless search standard is equally appropriate because the Seventh Circuit’s opinion failed to conduct a Fourth Amendment analysis and neglected to point to any proof in the record that such a condition was reasonably necessary and conformed to the policies of the probationary sentence.\textsuperscript{127}

In this case, Barnett was charged with destroying state property and running from police.\textsuperscript{128} Assuming we are concerned that this individual has a higher penchant than the normal citizen to commit this type of crime based on past performance, is a subsequent suspicionless search of Barnett’s house or his person likely to stop a recurrence of this type of crime? Arguably it does not. Nor is it likely that the police will catch Barnett for recommitting property damage by subjecting him to suspicionless searches. Thus, the government should not justify search conditions unrelated to the probationary policy simply because it attaches such a condition to a plea bargain scheme.

Finally, the waiver required Barnett to both submit to suspicionless searches and to permit the use of any evidence discovered during the search in both a probation revocation hearing

\textsuperscript{125} \textit{Id.} at § 5B1.3; 18 U.S.C. § 3553
\textsuperscript{128} \textit{Id.}
and a subsequent criminal trial.\textsuperscript{129} This issue was not raised by Barnett’s counsel or by the court; however, this condition should be deemed impermissible because the United States Supreme Court has justified removing normal Fourth Amendment protection simply because of the unique situation of a probationer and the atmosphere of a probation revocation hearing.\textsuperscript{130} Normal exclusionary rules and careful assessment of Fourth Amendment propriety do not apply in a probation revocation hearing because it is not deemed an adversarial process.\textsuperscript{131} Although the Court in \textit{United States v. Knights} permitted evidence discovered in a search into a subsequent trial, this was only after determining the search did \textit{not} violate the Fourth Amendment thus the exclusionary rule would not apply.\textsuperscript{132} Here, not only during an adversarial process did the Seventh Circuit justify the removal of all Fourth Amendment protection, but also condoned the expansion of the primary place in which these protections are most sacrosanct by allowing evidence to be submitted at a subsequent criminal trial.\textsuperscript{133}

Justifying the complete removal of Fourth Amendment protection as part of a plea bargaining process, a process where constitutional rights are dependent upon a kind of contract in which one side has all of the bargaining power,\textsuperscript{134} should be narrowly construed and required to comport with the constitutional guidelines of those rights that the bargain purports to limit. Although constitutional rights may be waived within the plea bargain process, these concessions are not beyond judicial review and may be overturned if the agreement constitutes an unconstitutional condition.\textsuperscript{135} The Supreme Court has consistently refused to justify a search of a probationer or parolee

\textsuperscript{129} \textit{Barnett}, 415 F.3d at 691.
\textsuperscript{131} \textit{Id.} at 365.
\textsuperscript{132} 534 U.S. 112, 122 (2001).
\textsuperscript{133} See more about this in \textit{Scott}, 524 U.S. 357.
upon the consent/contract approach and it is arguably because such a condition would in fact create an unconstitutional condition.

V. DOES THE FOURTH AMENDMENT WAIVER CONSTITUTE AN UNCONSTITUTIONAL CONDITION?

The doctrine of unconstitutional conditions may invalidate a plea bargain that conditions probation upon a suspicionless search. The doctrine of unconstitutional conditions precludes the government from conditioning discretionary privileges upon an individual’s waiver of a constitutional right in certain circumstances. Thus, even if the probationer consents to a complete waiver of his Fourth Amendment rights as a condition of bargained-for-probation, the search condition may be nonetheless unlawful under this doctrine.

The Supreme Court’s decision in Minnesota v. Murphy supports the contention that the government may not condition probation upon an individual’s waiver of constitutional rights in all circumstances. In Murphy, the defendant was twice questioned about the murder and rape of a teenage girl, but he was never charged with the crime. On an unrelated incident, Murphy pled guilty to a reduced charge of false imprisonment for which he was sentenced to a suspended prison term of sixteen months and three years of probation. The probationary terms required Murphy to “participate in a treatment program for sexual offenders . . . report to his probation officer as directed, and be truthful with the probation officer ‘in all matters.’” During the course of treatment, Murphy admitted to his counselor that he had

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139 Id. at 437.
140 Id. at 422.
141 Id.
142 Id.
committed a rape and murder.\textsuperscript{143} The counselor relayed this information to Murphy’s probation officer, who then set up a meeting during which the probation officer intended to ask Murphy questions regarding the rape and murder.\textsuperscript{144} Murphy was compelled to truthfully answer the probation officer’s questions as a condition of his probation.\textsuperscript{145} He asserted that the probationary condition that required him to answer questions truthfully was in violation of his Fifth Amendment rights.\textsuperscript{146}

The Court did not agree with Murphy’s assessment of the probationary condition.\textsuperscript{147} The Court reasoned that a penalty case is a situation where the state not only compels an individual to testify, but also induces their waiver of Fifth Amendment rights by “threatening to impose economic or other sanctions ‘capable of forcing the self-incrimination which the Amendment forbids.’”\textsuperscript{148} Thus, a state may not “expressly or by implication, assert[] that invocation of the privilege would lead to revocation of probation.”\textsuperscript{149} The Court reasoned that Murphy’s probationary conditions prohibited only false statements, but did not restrict his freedom to answer particular questions and it did not require that he waive his future Fifth Amendment rights.\textsuperscript{150}

Similarly, in \textit{National Treasury Employees Union v. Von Raab},\textsuperscript{151} the Court limited the government’s ability to condition the receipt of a benefit upon the waiver of Fourth Amendment rights. In \textit{Von Raab}, the government restricted certain jobs with the U.S. customs service department to those individuals who consented to submit to

\begin{footnotesize}
\begin{itemize}
    \item \textsuperscript{143} \textit{Id.} at 423.
    \item \textsuperscript{144} \textit{Id.}
    \item \textsuperscript{145} \textit{Id.} at 424.
    \item \textsuperscript{146} \textit{Id.}
    \item \textsuperscript{147} \textit{Id.} at 427.
    \item \textsuperscript{148} \textit{Id.} at 434.
    \item \textsuperscript{149} \textit{Id.}
    \item \textsuperscript{150} \textit{Id.} at 436.
    \item \textsuperscript{151} 489 U.S. 656 (1989).
\end{itemize}
\end{footnotesize}
suspicionless drug-testing. Specifically, individuals who handled guns, drugs, or “classified material” were required to submit to such searches as a condition of employment. The Court did not examine whether employees legally consented to such searches by signing valid waivers nor did it reason that submission to such searches was bargained for because the employee had access to better job positions. The Court granted certiorari to determine whether the government could condition the benefit of employment upon a prospective employee’s waiver of their Fourth Amendment rights. The Court dealt with this question by employing the constitutional approach.

Under the constitutional approach, the Court determines the reasonableness of the search condition by balancing the individual’s expectation of privacy against the government’s interest in conducting the search without individualized suspicion. The Court acknowledged that the government had a substantial interest to ensure that employees who handled guns and drugs were not under the influence and were trustworthy and dependable. Although individuals have a high expectation of privacy as relates to body fluid taken for drug testing, the Court held that the government interest outweighed the individual’s privacy expectation. Thus, the government may condition employment on an employee’s submission to drug testing where such employee may handle drugs or guns. However, the Court declined to uphold the government’s drug testing

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152 Id. at 661. Urine testing is a search, and thus must be examined under the Fourth Amendment test for to determine its reasonableness.
153 Id. at 664.
154 Id. at 660. Employees do not sign waivers, but were sent a later stating that if they wished to pursue the job they must submit to these searches and that a drug screening center would contact them to make arrangements.
155 Id. at 665.
156 Id.
157 Id. at 665-66.
158 Id. at 670.
159 Id. at 672.
160 Id. at 679.
of employees who handle classified material because the government failed to demonstrate a serious need to justify the invasion of Fourth Amendment protection.161

In both Murphy and Von Raab, the Court determined the validity of certain conditions that the government placed upon a benefit. Although in each instance it was possible to assess the validity of the required condition by employing the consent approach and examining the contractual agreement between the parties, instead, the Court examined the condition using a constitutional approach.162 Thus the unconstitutional conditions doctrine applies in situations where the government “seeks to achieve its desired result by obtaining bargained-for consent.”163 And the government may only condition a grant or deny a benefit where the condition is constitutionally permissible, which requires the court to analyze the conditionality of the condition.164

A search condition may be constitutionally permissible if it is reasonable under the Fourth Amendment.165 “Where a condition of probation requires a waiver of precious constitutional rights, the condition must be narrowly drawn; to the extent that it is overbroad it is not reasonably related to the compelling state interest in reformation and rehabilitation and is an unconstitutional restriction on the exercise of the probationer’s privacy.”166

The Seventh Circuit failed to discuss the unconstitutional conditions doctrine in Barnett, likely because it had already dismissed this notion and the language of Minnesota v. Murphy in an earlier

161 Id. at 678.
162 See, e.g., id. at 665-66. Similarly, this is the same approach the Court employed in United States v. Knights where the Court was required to determine the validity of the waiver of Fourth Amendment rights as a prerequisite of probation. 534 U.S. 112, 118 (2001).
164 Id.
166 Wayne R. LaFave, Search and Seizure: A treatise on the Fourth Amendment, 5 SearchSzr § 10.10 (2007).
Judge Posner opinion, United States v. Cranley.\textsuperscript{167} In Cranley, the court allowed Wisconsin to condition probation upon a probationer’s waiver of Fifth Amendment rights as a prerequisite to probation because it reasoned that “Wisconsin need not provide probation as a possible sentencing option.”\textsuperscript{168} The court then dismissed the unconstitutional conditions doctrine because while it agreed that Wisconsin could not condition probation upon being a non-Jew or being white, it could condition probation upon the requirement that the convict provide a “full accounting of any criminal behavior in which [the convict] engaged.”\textsuperscript{169} The court acknowledged that this condition would conflict with the language of the Murphy Court, but reasoned that in light of cases like Griffin v. Wisconsin and United States v. Knights, the trend had been to enforce terms associated with a conditional release.\textsuperscript{170} Unfortunately, the Seventh Circuit failed to acknowledge that the probationary terms in those cases were only enforced because the Court deemed them reasonable in light of Fourth Amendment analysis.\textsuperscript{171} Therefore, the Seventh Circuit should have conducted a Fourth Amendment analysis to decide whether the suspicionless search of a probationer is reasonable before permitting the government to condition probation upon the search. The Seventh Circuit’s shortcut of upholding this search condition upon the consent/contract approach is thus fatally flawed unless such conditions are permissible under the Fourth Amendment.

VI. FOURTH AMENDMENT ANALYSIS: SAMSON V. CALIFORNIA

When the Seventh Circuit decided Barnett, probationers were protected under the Fourth Amendment by the reasonable suspicion standard, as articulated by the Supreme Court in United States v.

\begin{enumerate}
\item[167] 350 F.3d 617, 620 (7th Cir. 2003).
\item[168] Id.
\item[169] Id.
\item[170] Id. at 621.
\end{enumerate}
Subsequently, in the summer of 2006, the Supreme Court permitted a suspicionless search of a parolee after determining that the search was reasonable under the Fourth Amendment in *Samson v. California*. Thus, it is necessary to determine whether the Seventh Circuit’s decision to uphold the suspicionless search of a probationer under the consent/contract approach was a harmless error in light of the more recent Supreme Court case. The Seventh Circuit’s decision to uphold the probationary condition upon consent may be permissible if that condition is reasonable under the Fourth Amendment, and thus an appropriate condition of a probationary plea bargain agreement.

The petitioner in *Samson* was a parolee who while walking down the street was approached by a police officer, who knew of Samson’s parole status and believed that there was a warrant out for Samson’s arrest. Although the police officer soon learned that there was not an outstanding warrant against Samson, the officer conducted a search of Samson’s person based solely on Samson’s status as a parolee. The Supreme Court granted certiorari on whether a suspicionless search of a parolee violated the Fourth Amendment.

The *Samson* Court conducted a Fourth Amendment analysis of the search and determined that a suspicionless search of a parolee is reasonable. An individual’s status determines their reasonable expectation of privacy. The Court used the term “continuum” to explain the relationship between an individual’s status and their reasonable expectation of privacy. At the highest end of the continuum is a free citizen who is afforded the full protection of the
Fourth Amendment. At the lowest end of the continuum is a prisoner who has no expectation of privacy, and thus does not have any protection under the Fourth Amendment. The Court determined that a parolee has a lower expectation of privacy than a probationer because parole is in addition to a prison sentence and not in lieu of prison. Thus, parolees are the second lowest on the continuum just above a prisoner.

Next, the Court examined the government’s interest in supervising parolees: preventing recidivism and promoting parolee rehabilitation. The government’s interest in supervising parolees is “overwhelming” because “parolees are more likely to commit future criminal offenses.” The Court examined the empirical evidence put forth by the Criminal Justice center in California, which demonstrated that the recidivism rate of parolees was astronomical. The Court then determined that California’s ability to conduct a suspicionless search of a parolee serves its interest in reducing recidivism in a manner that aids rehabilitation and reintegration into society. Moreover, the government’s interest in conducting suspicionless searches is significantly high because parolees are released into society regardless of whether the parolee is able to reintegrate. Thus, requiring officers to have reasonable suspicion before they conduct a search of a parolee would hinder law enforcement interest in both promoting rehabilitation and preventing recidivism when these

181 Id.  
182 Id. at 2198 n.2 (citing Hudson v. Palmer, 468 U. S. 517 (1984)).  
183 Samson, 126 S.Ct. at 2198 (this is important because a prisoner has no expectation of privacy and thus a parolee would have been accustomed to police searches); see Hudson, 468 U.S. 517.  
184 Samson, 126 S.Ct. at 2198.  
185 Id. at 2200.  
186 Id.  
187 Id. (noting that 70% of the paroled felons re-offend within 18 months).  
188 Id.  
189 Id. Prisoners are released after they complete the days of their sentence which is then reduced by good time credits earned and without regard to whether that individual is indeed ready for parole.
individuals have not demonstrated a capacity to avoid criminal conduct. Accordingly, the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee because the balance between the privacy interest of the parolee and the government’s interests make this search reasonable.

Although parolees are subject to suspicionless searches, a similar search standard for a probationer may violate the Fourth Amendment for two reasons. First, probationers have a greater expectation of privacy than prisoners and parolees, and therefore should not be similarly subject to suspicionless searches. Second, a suspicionless search standard would hinder law enforcement efforts. Thus both sides of the balancing test are impacted and demonstrate that the suspicionless search of a probationer is not justified under the Fourth Amendment.

The probationer should maintain a degree of Fourth Amendment protection. Parolees have a lesser expectation of privacy than probationers because parole is more akin to imprisonment than probation is to imprisonment. The probationer is above the parolee on the continuum and below free citizens on the continuum. Accordingly, probationers should be afforded a higher degree of Fourth Amendment protection than parolees, but less protection than free citizens. The reasonable suspicion standard provides the appropriate degree of protection.

Not only does the probationer’s expectation of privacy weigh against a suspicionless search, but the government’s interest in conducting the search is less imperative in the case of a probationer

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190 Id.
191 Id. at 2202.
192 See id. at 2198.
193 Id. at 2199.
194 See generally id. at 2198.
195 Id.
196 Id.
197 See generally id.
than in the case of a parolee. The parole system at issue in *Samson* granted prisoners parole irrespective of whether the inmate was deemed capable of reintegrating into society.\(^{199}\) It follows that the government would be significantly concerned about preventing anticipated future crime of those individuals who have not fully reformed.\(^{200}\) In contrast, probation is only granted when the sentencing judge believes that the sentence will be conducive to the convict’s rehabilitation and the convict does not pose a serious risk of recidivism that would caution against probation.\(^{201}\) Thus, the Seventh Circuit should have held that police officers must have a reasonable suspicion before searching a probationer’s apartment.

VII. RESCISSION OR REFORMATION

The proper remedy of an improperly imposed criminal sentence should be either reformation or a new trial.\(^{202}\) Yet, the Seventh Circuit opined that if the plea bargain’s suspicionless search condition was improper then the proper remedy was rescission, which would indicate that Barnett would be sentenced to jail.\(^{203}\) The court indicted this was the proper remedy because it operated under the mistaken assumption that the only feasible defense against enforcing the terms of Barnett’s plea bargain was the claim that its terms were indefinite.\(^{204}\) However, in light of the foregoing analysis, if the probationary terms were invalid, not only because they were indefinite but also unconstitutional, then the proper remedy should be reformation of the sentence or a new trial.

Barnett defended the terms of his probationary conditions, which independently purported to justify a warrantless and unreasonable search of his person and property, on the basis that the

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\(^{199}\) *Samson*, 126 S.Ct. at 2200.

\(^{200}\) *Id.*

\(^{201}\) Sentencing Guidelines, § 5B1.1 at 383 (November 1, 2006).


\(^{204}\) See *id.* at 692.
plea agreement and the probation office policy guidelines could render the agreement void for indefiniteness because, he alleged, that the terms of the plea agreement and the probation office policy guidelines, which required officers to have reasonable suspicion before conducting the search, were in contradiction. Judge Posner, however, upheld the search condition reasoning that the condition was part of a plea bargain in which Barnett received a benefit of not going to jail and the state received the benefit of being able to keep a close watch over his activities and use any discovered evidence against Barnett in a subsequent trial. But, if the contract was unenforceable because it was indefinite then the parties would be returned to the positions they would have occupied had there been no contract.

The doctrine of indefiniteness applies when the terms of a contract are not reasonably certain to create a basis for determining the existence of a breach or selecting an appropriate remedy. In such cases, the proper remedy is rescission. However, in addition to the indefiniteness argument, this condition may be challenged on the basis that the parties entered into the agreement on the mistaken belief that such a condition was constitutionally permissible. The proper review of a criminal sentence is to determine whether it is unreasonable. Where a sentence is deemed improper and unreasonable then the proper remedy is to reform the verdict or the defendant may be entitled to a new trial. Moreover, neither party has a constitutional right to explicitly enforce the terms of a plea bargain agreement. Thus the recommended and negotiated sentence does not bind the court.

205 *Id.*

206 *Id.*

207 *Id.* at 693.

208 See Restatement (Second) of Contracts § 33(2) (1981).

209 United States v. Cook, 406 F.3d 485, 488 (7th Cir. 2005).


213 *Id.*
The sentencing court determined that Barnett demonstrated the ability to be placed on probation, and although the court permitted the probation with the condition of intensified monitoring, it is entirely possible and appropriate that Barnett should be re-sentenced and subject to monitoring by police under terms and conditions that are constitutionally permissible. Thus, reforming Barnett’s probationary sentence to subject him to searches conducted with reasonable suspicion would be an appropriate remedy.\textsuperscript{214}

CONCLUSION

The Seventh Circuit’s consent/contract approach to justifying the suspicionless search of a probationer improperly hooked the crook in \textit{United States v. Barnett} when the court upheld the constitutionally questionable probationary condition of a suspicionless search upon the basis that a convict voluntarily consents to the condition to avoid a prison sentence. The court’s three page decision created a loophole around constitutional analysis and is problematic both because it paves the way for prosecutorial misconduct and creates an unconstitutional condition, summarily dismissing the implication this decision will have on a probationer’s constitutional rights.

As a consequence of the \textit{Barnett} decision, the law regarding proper analysis of probationary conditions became unclear in the Seventh Circuit. Thus, without further direction from the Supreme Court, that the suspicionless search of a probationer is permissible within the bounds of Fourth Amendment protection, courts throughout the country will inevitably muddle the analysis of questionable probationary conditions instead of applying a straightforward constitutional approach and assessing the impact of the probationary condition on a probationer’s constitutional rights.

\textsuperscript{214} \textit{See generally} Youngblood, 497 U.S. 37.
A PRESUMPTION OF REASONABLENESS: 
THE SEVENTH CIRCUIT’S UNREASONABLE 
APPROACH TO THE FEDERAL SENTENCING 
GUIDELINES

ZACHARY A. JACOBS*


INTRODUCTION

The Supreme Court’s decision in United States v. Booker rendered the Federal Sentencing Guidelines (“Guidelines”) advisory and directed appellate courts to use a “reasonableness” standard of review when considering criminal sentences.1 The question remained, however, of the relationship between the sentencing ranges provided by the Guidelines and a “reasonable” sentence.

The Seventh Circuit has chosen to grant sentences falling within the range proscribed by the Guidelines a presumption of reasonableness on appellate review.2 This approach is flawed for two reasons: first, the presumption of reasonableness is not supported by the Supreme Court’s remedial opinion in Booker and second, the court cannot find support for the presumption in the plain meaning of 18 U.S.C.A. 3553. Recent cases have highlighted both the flaws in the

2 United States v. Mykutiuk, 415 F.3d 606, 608 (7th Cir. 2005).
court’s rationales in developing the presumption, as well as a surprising inconsistency in the court’s application of the presumption.

The Supreme Court has recently granted certiorari for the question of whether Booker’s holding can be harmonized with granting a presumption of reasonableness to a sentence falling within the Guidelines. Because the Seventh Circuit has played a notable role in the history of the Guidelines, and because the Circuit’s handling of the Guidelines post-Booker has been particularly influential, the Seventh Circuit’s approaches and rationales for the presumption are likely to be featured prominently in the Supreme Court’s upcoming decision.

I. BACKGROUND

The Road to Booker

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. U.S. CONST. amend. VI

For decades, the potential conflict between judicial fact-finding in criminal sentencing and the Sixth Amendment’s jury requirement has arisen when defendants’ sentences were affected by factors neither admitted nor found by a jury.3 As state and federal statutes have increasingly sought to emphasize the virtues of uniformity and predictability, the concern that the role of the jury was being usurped by mechanical judicial determinations increased as well. The last seven years have seen the Supreme Court clarify the Sixth


In \textit{Apprendi v. New Jersey}, the Court considered a sentence given to a defendant convicted of possession of a firearm for unlawful purpose and unlawful possession of a prohibited weapon.\footnote{530 U.S. 466 (2000).} The sentencing judge determined that the defendant, who had fired shots into the home of an African American family, was eligible for an extended term of incarceration under New Jersey’s hate crime statute, and sentenced him to twelve years. The Court, in an opinion written by Justice Stevens and joined by Justices Scalia, Souter, Thomas, and Ginsburg, held that the defendant’s increased sentence violated the Sixth Amendment’s jury requirement. Because the hate crime enhancement increased the defendant’s sentence beyond the statutory maximum for the crimes to which the defendant had pled guilty, the Sixth Amendment required that it “must be submitted to a jury, and proved beyond a reasonable doubt.”\footnote{Id. at 490.} Although the holding was limited to situations in which an enhancement resulted in the sentence exceeding the statutory maximum, the Court endorsed the more broad rule that “[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.”\footnote{Id. (quoting Jones, 526 U.S. 227, 252-53 (1999) (Stevens, J., concurring)).}

Four years later the Court was faced with a similar situation in \textit{Blakely v. Washington}, in which it considered a sentence given to a defendant convicted of second-degree kidnapping involving domestic violence and the use of a firearm.\footnote{542 U.S. 296 (2004).} The sentencing judge found that the defendant had acted with deliberate cruelty, and imposed a sentence of ninety months, more than three years above the statutory
maximum without the enhancement. In an opinion written by Justice Scalia and joined by Justices Stevens, Souter, Thomas, and Ginsburg, the Court held that because the facts supporting the defendant’s additional sentence were neither found beyond a reasonable doubt by a jury, nor admitted by the defendant, the sentence violated his Sixth Amendment right to trial by jury. Despite the fact that the sentence in Blakely was below the statutory maximum, the Court nevertheless stated that the issue was controlled by the rule expressed in Apprendi. Justice Scalia clarified that “the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.”

Although the Court was willing to extend Apprendi’s rule to encompass any fact that increased a defendant’s punishment above what could have been given in its absence, it was not yet ready to consider the mandatory Guidelines. Even though the Guidelines required sentencing judges to make findings of fact that could substantially increase a defendant’s sentence, Justice Scalia made clear that “[t]he Federal Guidelines are not before us, and we express no opinion on them.”

II. UNITED STATES V. BOOKER

Freddie Booker was convicted for possessing with the intent to distribute at least 50 grams of cocaine base. Upon sentencing, the district court found by a preponderance of the evidence that the defendant had distributed several hundred grams more than the 92.5

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9 Id.
10 Id. at 303-04.
11 Id. at 301.
12 Id. at 303-04.
14 Id.
15 United States v. Booker, 375 F.3d 508, 509 (7th Cir. 2004)
grams found by the jury.\textsuperscript{16} The defendant was eligible for a range of thirty years to life in prison under the mandatory Guidelines, and was sentenced to the bottom of the range.\textsuperscript{17} Judge Posner, writing for the Seventh Circuit, considered the mandatory nature of the Guidelines to be determinative.\textsuperscript{18} The “difference between allowing a sentencing judge to consider a range of factors that may include facts that he informally finds…and commanding him to make fact-finding and base the sentence (within a narrow band) on them” was, for the court, the difference between a constitutional and unconstitutional sentencing scheme.\textsuperscript{19}

Judge Posner was unwilling to allow the consistency of the Guidelines to outweigh their constitutional flaws.\textsuperscript{20} While it was “tempting to think that maybe the guidelines can be saved by imagining the Sentencing Commission as a kind of super-judge who elaborates a code of sentencing principles much a thoughtful real judge, operating in a regime of indeterminate sentencing, might do informally in an effort to try to make his sentences consistent[,]” the importance of the Sixth Amendment’s jury requirement under \textit{Blakely} could not be ignored.\textsuperscript{21}

\textbf{A. Justice Breyer’s Remedial Opinion}

That is why we think it fair . . . to assume judicial familiarity with a “reasonableness” standard. And that is why we believe that appellate judges will prove capable of facing with greater equanimity than would Justice Scalia what he calls the “daunting prospect” of applying such a standard across the board. \textit{United States v. Booker}, 543 U.S. 220, 262-63 (2005).

\textsuperscript{16} \textit{Id.}
\textsuperscript{17} \textit{Id.}
\textsuperscript{18} \textit{Id.} at 512.
\textsuperscript{19} \textit{Id.}
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} \textit{Id.}
In *United States v. Booker*, the Supreme Court continued the reasoning of *Apprendi* and *Blakely* and found that the Sixth Amendment’s jury requirement prohibited mandatory judicial fact-finding that determined a defendant’s sentence absent specific jury findings.22 The opinion, while seemingly a logical continuation of *Apprendi* and *Blakely*, was notable for the bifurcated majorities responsible for the Court’s constitutional and remedial opinions.23 First, a majority comprised of Justices Stevens, Scalia, Souter, Thomas, and Ginsburg, held that the Guidelines were unconstitutional.24 Next, a majority made up of Justices Breyer, O’Connor, Kennedy, Ginsburg, and Chief Justice Rehnquist fashioned the remedy.25

Writing for the majority in the constitutional opinion, Justice Stevens noted that Sixth Amendment rights “are implicated whenever a judge seeks to impose a sentence that is not solely based on facts reflected in the jury verdict or admitted by the defendant.”26 In short, the Guidelines were unconstitutional so long judges were required to act in the role traditionally reserved for juries.27

Although the mandatory nature of the Guidelines was unconstitutional, the question remained of how exactly to fix them.28 Writing for a separate remedial majority, Justice Breyer adopted an approach neither party had sought and determined that the Guidelines could be salvaged if the portions making them mandatory were severed from the rest of the statute.29 First, § 3553(b)(1) was severed to remove the provision that required sentencing courts to impose a sentence within the Guidelines range, which transformed them from

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23 *Id.* at 226, 244.
24 *Id.* at 226-27.
25 *Id.* at 246.
26 *Id.* at 232.
27 *Id.* at 231-33.
28 *Id.* at 245.
29 *Id.*
mandatory to “effectively advisory.”

Second, and most importantly for this note, the Court severed §3742(e), which set forth the mandatory de novo review appellate courts used for any departures from the Guidelines.

Justice Breyer acknowledged that excising § 3742(e) left the Guidelines with no clear standard of appellate review, but quickly dismissed concerns that appellate courts would be unable to function without a statutory standard. Even in the absence of explicit statutory language, Justice Breyer wrote, courts can infer review standards from related statutory language, the structure of the statute, and the sound administration of justice. Justice Breyer noted that the appellate courts were not without experience applying a reasonableness standard to criminal sentences. Prior to 2003, the Guidelines had specifically directed the appellate courts to use a type of reasonableness analysis when reviewing sentences falling outside the proscribed Guidelines range. Additionally, the text of the Guidelines had “long required their use in important sentencing circumstances—both on review of departures . . . and on review of sentences imposed where there was no applicable Guideline . . .”

The standard for the Guidelines was now clear, at least to Justice Breyer: “The district courts, while not bound to apply the Guidelines, must consult those guidelines and take them into account when sentencing . . . The courts of appeals review sentencing decisions for unreasonableness.”

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30 Id. at 259.
31 Id.
32 Id. at 259-60.
33 Id. at 260-61.
34 Id. at 261.
35 Id.
36 Id. at 262.
37 Id. at 264.
B. Justice Scalia’s Dissent

What I anticipate will happen is that ‘unreasonableness’ review will produce a discordant symphony of different standards, varying from court to court…

Justice Scalia’s dissent in *Booker* expressed skepticism about both the legal reasoning behind the remedial opinion and about the practical effect of the “reasonableness” standard of review for the appellate courts. He noted that contrary to the Justice Breyer’s assurance that appellate courts had sufficient experience applying a reasonableness standard or review, such a standard was in actually in contrast to the bulk accepted practice of appellate sentencing review.

In Justice Scalia’s opinion, applying a standard of review to the entirety of sentencing appeals that had previously only applied to 16.7% of cases was a recipe for uncertainty. Justice Scalia summed up his apprehension about an uncertain future in the closing lines of his dissent. He wondered,

Will appellate review for ‘unreasonableness’ preserve *de facto* mandatory Guidelines by discouraging district court judges from sentencing outside Guidelines ranges? Will it simply add another layer of unfettered judicial discretion to the sentencing process? Or will it be a mere formality, used by busy appellate judges only to ensure that busy district court judges say all the right things when they explain how they have exercised their newly restored discretion? Time may tell, but today’s remedial majority will not.

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38 *Id.* at 312 (Scalia, J., dissenting).
39 *Id.* at 303-04.
40 *Id.* at 310-11.
41 *Id.*
42 *Id.* at 313.
43 *Id.*
III. THE SEVENTH CIRCUIT DEVELOPS A STANDARD OF PRESUMPTIVE REASONABLENESS

The Seventh Circuit’s understanding of the post-Booker reasonableness standard of review coalesced over the course of three cases in mid 2005. The first two of these cases, United States v. George and United States v. Dean, foreshadowed the court’s desire to find a standard of review for Guideline sentences that respected Booker’s remedial opinion. In the last of these cases, United States v. Mykytiuk, the Seventh circuit expressly adopted for the first time a presumption of reasonableness for any within-the-guidelines sentence. In each of these cases, the court took pains to reiterate the post-Booker advisory status of the Guidelines while simultaneously developing a standard of review that elevated the Guidelines above the other § 3553(a) factors.

A. George and Dean Set the Stage

In George, the court hinted that although Booker made clear that the Guidelines were advisory, the Seventh Circuit would nevertheless still be willing to treat them with a respect not necessarily afforded to the other sentencing factors in § 3553(a). The defendant in George had pled guilty to a charge of conspiracy to defraud the United States and was sentenced to 48 months imprisonment as well as roughly $614,000 in restitution. The defendant argued that under Booker’s interpretation, his sentence violated the Sixth Amendment’s

44 See United States v. George, 403 F.3d 470 (7th Cir. 2005); United States v. Dean, 414 F.3d 725 (7th Cir. 2005); United States v. Mykutiuk, 415 F.3d 606 (7th Cir. 2005).
45 George, 403 F.3d 470; Dean, 414 F.3d 725.
46 Mykutiuk, 415 F.3d 606.
47 See 18 U.S.C.A. § 3553(a); George, 403 F.3d 470; Dean, 414 F.3d 725; Mykutiuk, 415 F.3d 606.
48 George, 403 F.3d at 472-73.
49 Id.
jury requirement.\textsuperscript{50} In the opinion, Judge Easterbrook made clear that the court would not expect a sentencing judge to “record all of the considerations that 18 U.S.C. § 3553(a) lists; it [was] enough to calculate the range accurately and explain why (if the sentence lies outside it) this defendant deserves more or less.”\textsuperscript{51} The implication of that statement was clear: the court would only require explanation from a sentencing judge if the sentence imposed lay \textit{outside} the Guideline range.\textsuperscript{52} If a district court judge wished to avoid addressing the factors in § 3553(a), he could continue to find safe harbor within the Guidelines.\textsuperscript{53}

Three months later in \textit{Dean}, the court addressed more directly the status that the Guidelines would be given in post-\textit{Booker} reasonableness review.\textsuperscript{54} In \textit{Dean}, the defendant argued that the sentencing judge placed undue emphasis on the range calculated by the Guidelines and did not adequately consider the other factors in § 3553(a).\textsuperscript{55} Writing for the court, Judge Posner acknowledged that sentencing judges are required to consider the relevant factors in § 3553(a), even noting the sentencing factors’ “new vitality” in the exercise of sentencing discretion.\textsuperscript{56}

This apparent respect for the parity of sentencing factors was immediately tempered, however, by what Judge Posner considered to be the “practical objection[s]” to the defendant’s argument that the sentencing judge should consider all the § 3553(a) factors equally.\textsuperscript{57} Despite the plain language of § 3553(a), the court was unwilling to increase the workload of sentencing judges (and by extension, appellate justices) by requiring them to consider these factors in every

\textsuperscript{50} \textit{Id.} at 472.
\textsuperscript{51} \textit{Id.}
\textsuperscript{52} \textit{Id.}
\textsuperscript{53} \textit{Id.}
\textsuperscript{54} United States v. Dean, 414 F.3d 725, 728 (7th Cir. 2005).
\textsuperscript{55} \textit{Id.}
\textsuperscript{56} \textit{Id.} (citing United States v. Trujillo-Terrazas, 405 F.3d 814, 819 (10th Cir.2005)).
\textsuperscript{57} \textit{Dean}, 414 F.3d at 729.
case. In support of this reasoning, Judge Posner bemoaned the “vague and, worse perhaps, hopelessly open-ended” nature of the factors listed in § 3553(a). Showing a noteworthy disdain for the statutory factors, Judge Posner pointed to the “interminable character of inquiry into the meaning and application of each of the ‘philosophical’ concepts” in reaffirming George’s treatment of within-the-guidelines sentences.

Additionally, the court stated in Dean (without citation) that Booker “requires the sentencing judge first to compute the guidelines sentence just as he would have done before Booker, and then . . . to decide whether the guidelines sentence is the correct sentence to give the particular defendant.” This formula did not by itself bestow presumptive reasonableness, but it did grant the Guidelines a significant priority that is unsupported in Booker. By enshrining this process as one “required” by Booker, the court embraced a formulaic approach for the Guidelines while rejecting a formulaic approach when addressing the factors listed in § 3553(a). The calculation of the appropriate Guidelines sentence, of course, cannot be anything other than formulaic; what is remarkable about the Seventh Circuit’s approach is its use of that determination. After Dean, the Guidelines remained not only the sole factor that must be taken into account in each sentence, but the factor that must be taken into account prior to the consideration of any others listed in § 3553(a).

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58 Id.
59 Id.
60 Id.
61 Id. at 727.
62 See id. at 729-30.
63 Id.
64 Id.
65 Id.
B. Mykytiuk elevates the Guidelines

The best way to express the new balance, in our view, is to acknowledge that any sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness.66

With this uncited declaration, the Seventh Circuit carried George and Dean to their natural conclusions and effectively elevated the Guidelines beyond a purely advisory status.67 Writing for the court, Judge Wood framed the issue presented as a choice between two extremes: the court could grant per se reasonableness to the Guidelines at one extreme, or use “a clean slate that ignores the proper Guidelines range” at the other.68 While acknowledging that the former standard would obviously conflict with Booker’s constitutional analysis and the latter would be inconsistent with Booker’s remedy, Judge Wood attempted to strike a middle ground between these two extremes.69

Explaining how the court reached its conclusion, Judge Wood pointed out that the Guidelines “represent at this point eighteen years’ worth of careful consideration of the proper sentence for federal offenses.”70 It was natural to assume, therefore, that the Supreme Court intended for the Guidelines to continue to play an important role in sentencing.71 Many, or even most, sentences would and should continue to fall within the applicable Guideline range.72 Accordingly, the court concluded that a properly calculated Guidelines sentence was entitled to a rebuttable presumption of reasonableness at the appellate level.73 “While we fully expect that it will be a rare Guidelines

66 United States v. Mykutiuk, 415 F.3d 606, 608 (7th Cir. 2005).
67 Id.
68 Id. at 607.
69 Id. at 607-08.
70 Id. at 607.
71 Id.
72 Id.
73 Id. at 608.
sentence that is unreasonable," judge Wood wrote, “the Court’s charge that we measure each defendant’s sentence against the factors set forth in § 3553 (a) requires the door to be left open for this possibility.”

IV. THE SEVENTH CIRCUIT’S APPROACH CANNOT FIND SUPPORT IN BOOKER OR § 3553(A)

The court was careful in Mykytiuk to portray its decision as merely granting the Guidelines the status to which they were “entitled”. This deferential approach, however, does not find support in Justice Breyer’s remedial Booker opinion or the relevant text of § 3553(a). The Seventh Circuit’s grant of presumptive reasonableness to within-the-guidelines sentences is at best unsupported by Booker’s remedial opinion, and in some respects contrary to the opinion. Nothing in the Supreme Court’s Booker opinion suggests that the Court intended to grant the Guidelines preferential status in relation to the other factors in § 3553(a). Justice Breyer noted in the remedial opinion that the appropriate standard of appellate review could be inferred from pre-2003 practice, where sentences falling outside the applicable Guideline range were measured for reasonableness against § 3553(a) factors. Because § 3553(a) remained in effect after Booker, the Court directed appellate courts to use those factors, as they have in the past, in determining whether a sentence is unreasonable. Justice Breyer also pointed out that even without the mandatory provisions of § 3553(b)(1), the Guidelines “continue[] to provide for appeals from sentencing decisions (irrespective of whether the trial judge sentences within or outside the Guidelines range in the exercise

74 Id.
75 Id.
76 See United States v. Booker, 543 U.S. 220 (2005); 18 U.S.C.A. § 3553(a); U.S.S.G. § 1B1.1 et seq.
77 See Booker, 543 U.S. at 261.
78 Id.
79 Id.
80 Id.
of his discretionary power under § 3553(a)).

Had the remedial majority intended to grant within-the-guidelines sentences a presumption of reasonableness, or any preferential treatment, it seems unlikely that they would have specified that sentences both within and outside the Guidelines range should be measured for reasonableness against § 3553(a) in this manner. As Justice Scalia pointed out in his dissent, “[i]f the majority thought…the Guidelines not only had to be ‘considered’ (as the amputated statute requires) but generally to be followed—its opinion would surely say so.”

Instead, the remedial opinion explicitly states that the “numerous factors” listed in § 3553(a) “will guide appellate courts . . . in determining whether a sentence is reasonable.”

This lack of authority within Booker supporting a presumption of reasonableness is reflected by the citations within the Mykytiuk decision itself. Nowhere in the opinion does Judge Wood cite to a specific portion of Booker that supports the presumption. Instead, the portion of the opinion that expressly creates the presumption merely points out that Booker requires the district courts to consult the Guidelines and that the Sentencing Commission will continue to revise the Guidelines in light of both district and appellate court decisionmaking. Immediately following these two points, Judge Wood states that the Guidelines are “entitled” to the rebuttable presumption of reasonableness.

The Seventh Circuit’s grant of presumptive reasonableness to within-the-Guidelines sentences also conflicts with the plain language of 18 U.S.C.A. § 3553 (a). Nowhere does the statute suggest a

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81 Id. at 260.
82 Id. at 307.
83 Id. at 261.
84 See generally United States v. Mykutiuk, 415 F.3d 606 (7th Cir. 2005).
85 Id. at 608.
86 Id.
87 Id.
88 10 U.S.C.A. § 3553(a) states in relevant part:
particular order in which the factors should be considered, much less a mandate that the Guidelines be considered first.\textsuperscript{89} The Seventh Circuit’s directive to only consider the statutory factors after calculating the appropriate Guidelines sentence conflicts with Justice Scalia’s observation that § 3553(a) itself “provides no order of priority among all those factors.”\textsuperscript{90} It seems difficult to imagine that under a regime of advisory Guidelines, a statutory factor that appears fourth out of seven should be given a priority absent specific statutory language.\textsuperscript{91} By elevating the Guidelines above the other factors listed in § 3553(a), the Seventh Circuit is in danger of deferring to precisely the kind of “superjudge” Judge Posner warned against in his \textit{Booker}

\begin{quote}
The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--(1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; . . . to afford adequate deterrence to criminal conduct; . . . to protect the public from further crimes of the defendant; and . . . to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant as set for in the guidelines . . . issued by the Sentencing Commission . . . (5) any pertinent policy statement . . . issued by the Sentencing Commission . . . (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense.
\end{quote}

\begin{flushright}
\textsuperscript{89} \textit{Id.}
\textsuperscript{90} \textit{Id.}
\textsuperscript{91} \textit{Id.}
\end{flushright}
opinion. In justifying the presumption of reasonableness created in Mykutiuk, Judge Wood relied on the “careful consideration” that has gone into the Guidelines over the last two decades, but that consideration is not synonymous with the factors listed in § 3553(a).

Since their inception, the principal goal of the Guidelines has been uniformity of sentencing throughout the federal system, not the consideration of § 3553(a) factors. When appointed by Congress in 1985, the Sentencing Commission was given the primary task of decreasing the “unjustifiably wide” disparities that existed within federal sentencing. In doing so, the Commission made certain concessions and compromises that took a wide range of factors into consideration, but the Guidelines were not intended to replace the § 3553(a) factors.

V. THE SEVENTH CIRCUIT’S APPLICATION OF THE PRESUMPTION OF REASONABLENESS STANDARD

Just as opera stars often go on singing after being shot, stabbed, or poisoned, so judicial opinions often survive what could be fatal blows.

Four recent cases have demonstrated a surprising inconsistency in the court’s application of the presumption of reasonableness for within-the-guidelines sentences. In United States v. Jointer, the court addressed an eighty-seven month sentence given to a defendant convicted of distribution of crack cocaine and possession with intent to

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92 United States v. Booker, 375 F.3d 508, 512 (7th Cir. 2004).
93 United States v. Mykutiuk, 415 F.3d 606, 608 (7th Cir. 2005).
95 Id.
96 Id.
97 Booker, 375 F.3d at 516 (Easterbrook, J. dissenting).
98 See United States v. Jointer, 457 F.3d 682 (7th Cir. 2006); United States v. Demaree, 459 F.3d 791 (7th Cir. 2006); United States v. Hankton, 463 F.3d 626 (7th Cir. 2006); United States v. Gonzalez, 462 F.3d 754 (7th Cir. 2006).
distribute crack cocaine.\footnote{Jointer, 457 F.3d 682, 684 (2006).} In the district court, the sentencing judge calculated the defendant’s Guideline range, found several enhancements as well as several subtractions, and found the applicable Guideline range to be 135 to 168 months.\footnote{Id.} The district court then turned to the § 3553(a) factors and found that that, among other factors, the need for sentencing consistency across the country justified the reduction of the 100-1 ratio between crack and powder cocaine sentences to 20-1.\footnote{Id.} The sentence, after calculating the Guideline range and consulting the § 3553(a) factors was eighty-seven months.\footnote{Id.}

Judge Ripple, writing for the court, held that, by using § 3553(a) (6) to reduce the disparity between sentences for powder cocaine and those for crack, the sentencing judge erred as a matter of law.\footnote{Id. at 687.} The court noted that although the Guidelines are advisory, the court must “respectfully adhere to the 100-1 ratio that Congress has decided to implement…”\footnote{Id. at 686} Despite the fact that the district court judge followed the precise procedure laid out in Mykytiuk, the court nevertheless held that the district court’s sentencing discretion did not include overriding a particular aspect of the Guidelines with any other factor from § 3553(a).\footnote{Id. at 686-87(7th Cir. 2006).} Even while limiting the district court’s ability to implement § 3553(a) factors if they conflict with the Guideline sentencing range, the court repeatedly stressed that its decision recognized the advisory nature of the Guidelines.\footnote{Id. 687.}

Two days after Jointer, the court was faced with the issue of whether current Guidelines may be applied retroactively without triggering ex post facto problems in United States v. Demaree.\footnote{United States v. Demaree, 459 F.3d 791 (7th Cir. 2006).}
Judge Posner wrote for the court and held that because the Guidelines were no longer mandatory, they could be applied retroactively without raising ex post facto concerns. The court likened the “purely advisory” Guidelines to a joint resolution of Congress urging heavier sentences to white-collar criminals, or an increase in prison funding intended to allow for lengthier sentences. None of the analogies drawn by the court, however, squarely addressed the effect of a presumption of reasonableness.

The court did acknowledge the argument that a presumption of reasonableness granted to even an advisory Guideline system could raise ex post facto issues, but immediately dismissed such concerns out of hand. Judge Posner wrote that the sentencing judge “is not required—or even permitted—to ‘presume’ that a sentence within the guidelines range is the correct sentence and if he wants to depart give a reason why it’s not correct. All he has to do is consider the guidelines and make sure that the sentence he gives is within the statutory range and consistent with the sentencing factors listed in 18 U.S.C. § 3553(a).”

This remarkable retreat from the formulaic approach the Seventh Circuit had employed since Mykytiuk did not last for long, however. Less than a month after Demaree, the court ruled in United States v. Hankton that “the presumption that a correctly calculated Guidelines sentence is reasonable not only applies to the appellate standard of reasonableness review, but also serves as a benchmark for trial judges in evaluating whether or not a Guidelines sentence is appropriate.”

Judge Coffey, writing for the court, made clear that the only time a sentencing judge even need consider the § 3553(a) factors is

108 Id. at 794
109 Id.
110 Id. 794-95.
111 Id.
112 United States v. Hankton, 463 F.3d 626, 629 (7th Cir. 2006).
when the defendant provides convincing argument as to why they should apply.\textsuperscript{113}

Finally, the court in \textit{United States v. Gonzalez} showed a marked unwillingness to even consider a within-the-guidelines sentence as unreasonable.\textsuperscript{114} In stark contrast to the concession in \textit{Mykytiuk} that the “door must be left open” to the possibility of a sentence falling within the Guidelines being unreasonable, Judge Posner seems to discount the possibility that anything other than a departure from the Guidelines justify such a finding.\textsuperscript{115} According to Judge Posner, a sentencing judge’s lack of consideration for § 3553(a) factors was not enough to even raise the question that a within-the-Guidelines sentence may be unreasonable.\textsuperscript{116} Merely citing various § 3553(a) factors that the defendant raised, but were not addressed by the sentencing court, is insufficient to challenge a sentence as unreasonable.\textsuperscript{117} Judge Posner even goes so far as to characterize appeals of this kind as a “waste [of] time”.\textsuperscript{118} This approach seems to conflict with Judge Posner’s own warnings against sentencing judges using the presumption as a shortcut to avoid addressing more individualized, and time consuming, sentencing factors.\textsuperscript{119}

VI. THE FUTURE OF THE GUIDELINES WITHIN THE SEVENTH CIRCUIT

The motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted limited to the following Questions: 1) Was the district court's choice of within-Guidelines sentence reasonable? 2) In making that determination, is it consistent with United States v. Booker, 543 U.S. 220

\textsuperscript{113} \textit{Id.}
\textsuperscript{114} United States v. Gonzalez, 462 F.3d 754, 755 (7th Cir. 2006)
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} \textit{Id.}
\textsuperscript{118} \textit{Id.} at 756.
\textsuperscript{119} United States v. Cunningham, 429 F.3d 673, 679 (7th Cir. 2005).
In the time since *Booker*’s remedy was instituted, Justice Scalia’s predictions of a “discordant symphony of different standards” has proven somewhat accurate.121 Currently, the Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have adopted a presumption of reasonableness for sentences falling within the Guidelines.122 The First, Second, Third, Ninth, and Eleventh Circuits have rejected the presumption, but have generally given the Guidelines some level of deference.123

The Supreme Court has decided to address this Circuit split as well as other issues left unresolved by *Booker* in two upcoming cases: *Rita v. United States* and *Claiborne v. United States*.124 In *Rita*, the Court will address directly whether a presumption of reasonableness for within-the-Guidelines sentences is consistent with the Court’s *Booker* decision.125 If the Court determines that the presumption is consistent with *Booker*, it will go on to determine if that presumption is enough to justify a sentence without an explicit analysis of the §

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122 See United States v. Green, 436 F.3d 449 (4th Cir. 2006); United States v. Smith, 440 F.3d 704 (5th Cir. 2006); United States v. Williams, 436 F.3d 706 (6th Cir. 2006); United States v. Mykutiu, 415 F.3d 606, 608 (7th Cir. 2005); United States v. Tabor, 439 F.3d 826 (8th Cir. 2006); United States v. Kristl 437 F.3d 1050 (10th Cir. 2006).
123 See United States v. Jimenez-Beltre, 440 F.3d 514 (1st Cir. 2006); United States v. Fernandez, 443 F.3d 19 (2d Cir. 2006); United States v. Cooper, 437 F.3d 324 (3d Cir. 2006); United States v. Guerrero-Velasquez, 434 F.3d 1193 (9th Cir. 2006); United States v. Hunt, 459 F.3d 1180 (11th Cir. 2006).
3553(a) factors that may merit a different sentence.\textsuperscript{126} The current makeup of the Court suggests that whatever the specific outcome, a modification of \textit{Booker}’s remedy may be likely. Only Justices Breyer, Kennedy, and Ginsburg remain of \textit{Booker}’s remedial majority, while all four dissenting Justices remain.

The Seventh Circuit has not been unresponsive to the Supreme Court’s recent actions.\textsuperscript{127} In \textit{United States v. Gama-Gonzales}, Judge Easterbrook offered an opinion meant perhaps as both a summation and a defense of the Seventh Circuit’s position.\textsuperscript{128} He explained in the court’s opinion that “[t]o say that a sentence within the range is presumptively is reasonable is \textit{not} to say that district judges ought to impose sentences within the range. It is only to say that, \textit{if} the district judge does use the Guidelines, then the sentence is unlikely to be problematic.”\textsuperscript{129} Using an interesting logic, Judge Easterbrook argued that by granting the presumption, the Seventh Circuit is merely using the increased sentencing discretion granted by \textit{Booker}.\textsuperscript{130} “One permissible use of discretion[,]” according to Judge Easterbrook, “is to start with the Guidelines' framework, which is designed to curtail unjustified disparity in sentences--for avoiding unjustified disparity is one of the statutory objectives.”\textsuperscript{131}

\textit{Gama-Gonzales}’ most notable defense of the Seventh Circuit’s approach comes from Judge Easterbrook’s minimization of the presumption’s effect.\textsuperscript{132} Distilling the Seventh Circuit’s position, he wrote that “[w]hen saying that sentences within the Guidelines are presumptively reasonable, we mean no more than the modest proposition that district judges generally possess the discretion under §

\textsuperscript{126} \textit{Id}.
\textsuperscript{127} \textit{See United States v. Gama-Gonzales}, 469 F.3d 1109 (7th Cir. 2006).
\textsuperscript{128} \textit{Id}.
\textsuperscript{129} \textit{Id.} at 1110 (citations omitted, emphasis original).
\textsuperscript{130} \textit{Id}.
\textsuperscript{131} \textit{Id}.
\textsuperscript{132} \textit{Id} at 1111.
3553(a) and Booker to follow the Guidelines, if they so choose, without acting *un*-reasonably.”133

CONCLUSION

Despite the Seventh Circuit’s assurances of the presumption’s innocuous nature, Judge Easterbrook’s clarification in Gama-Gonzalez begs the question: if the presumption is nothing more than a rather generalized statement of a sentencing judge’s discretionary powers, why is it necessary at all? The uniformity of sentencing and judicial economy offered by granting sentences falling within the Guidelines a presumption of reasonableness are certainly legitimate rewards. Those rewards, however, also carry the danger that the Guidelines will become a shelter for sentencing judges wishing to avoid the complexity of individualized sentencing, and a justification for the appellate court to evade § 3553(a) factors.

As Judge Posner warned in United States v. Cunningham, “the temptation to a busy judge to impose the guidelines sentence and be done with it, without wading into the vague and prolix statutory factors, cannot be ignored.”134 By adopting the presumption of reasonableness, the Seventh Circuit has indulged that temptation in a way that allows the court to continue to extol the advisory nature of the Guidelines, the vitality of the § 3553(a) factors, and the discretion of sentencing judges while simultaneously undermining each.

133 *Id.* (emphasis original).
134 United States v. Cunningham, 429 F.3d 673, 679 (7th Cir. 2005).
STUCK IN UNFRIENDLY SKIES:
HOW THE SEVENTH CIRCUIT’S DECISION IN
SUMMERS V. STATE STREET BANK & TRUST
COMPANY LEFT UNITED AIRLINES EMPLOYEES
WITH NOTHING BUT HOT AIR

JEFFREY P. SWATZELL*


INTRODUCTION

Imagine yourself as a man in his mid-forties. You and your wife of the past fifteen years have two children, and you have spent the past twelve years working as an employee for Blue Star Airlines.¹ As an employee of Blue Star, in addition to earning a salary you participate in the company’s employee stock ownership plan, which provides you a small stake in the ownership of the airline. When the company is successful the stock price rises, so you are able to share in the company’s success.

During the first ten years that you participated in the plan the share price of Blue Star stock rose rather consistently. However, recently the airline industry has fallen on difficult times: the price of fuel has risen, people are traveling less, and as a result, Blue Star has

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¹ Yes, this is a thinly veiled reference to Oliver Stone’s masterpiece, WALL STREET (20th Century Fox 1987).
been losing money to the point where it appears that bankruptcy is a real possibility. To make matters worse, a rapid decrease in the share price of Blue Star stock has made your employee stock ownership plan practically worthless.

There are approximately ten million employees in the United States who participate in employee stock ownership plans. At the end of 2004, these plans were estimated to own $600 billion dollars in assets. It’s very likely that you or someone you know participates in this type of employee benefit plan.

The hypothetical above is not merely an unfortunate series of events conceived to make a point – these events actually happened to many United Airlines’ (“United”) employees only a few years ago. United suffered massive financial loss in the aftermath of the September 11, 2001 terrorist attacks, yet it continued to instruct the trustee managing its employee stock ownership plan to hold on to United stock. When the stock was finally sold, it was practically worthless. The employees who participated in the plan sought recourse in federal court; however, their claim against the trustee for breach of its fiduciary duty was ultimately rejected.

This Comment focuses on the Court of Appeals for the Seventh Circuit’s decision in Summers v. State Street Bank & Trust Company. Part I discusses the Employee Retirement Income Security Act ("ERISA") and introduces the concepts of employee stock ownership

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2 The ESOP Association
http://www.esopassociation.org/media/media_statistics.asp (last visited November 15, 2006). “The ESOP Association is the national association of companies with employee stock ownership plans (ESOPs) and service providers with a professional commitment to employee ownership through ESOPs.”

3 Id.

4 Employee benefit plans and welfare benefit plans are the subject of the Employee Retirement Income Security Act of 1974 ("ERISA"), which is discussed infra at Part I.


6 Id. at 408.

7 Id. at 405-11.

8 453 F.3d 404 (7th Cir. 2006).
plans and directed trustees. Part II focuses on the U.S. Department of Labor’s Field Assistance Bulletin No. 2004-03 and its determination of the fiduciary duties of a directed trustee. Finally, Part III examines the Seventh Circuit’s decision in Summers and concludes that the court erred when it denied relief to a class of current and former United employees who asserted an ERISA claim against the directed trustee of their employee stock ownership plan who had allegedly breached its fiduciary duty of prudence.

I. ERISA, ESOPS, AND DIRECTED TRUSTEES

A. The Employee Retirement Income Security Act of 1974

ERISA was enacted “to promote the interests of employees and their beneficiaries in employee benefit plans.” It was promulgated after Congress found “that there had been a rapid and substantial growth in the size, scope, and numbers of employee benefit plans and that the continued well-being and security of millions of employees and their dependents [were] directly affected by these plans.” Therefore, ERISA attempts to ensure that once an employee is guaranteed a certain benefit by his or her employer, that employee will receive the benefit. The Act protects employees “by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.” Although employers are not required to establish employee benefit plans, if they choose to create such plans then they must comply with ERISA.

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B. The Role of Fiduciaries

Under ERISA, all assets of an employee benefit plan must be held in trust by one or more trustees. Additionally, employee benefit plans must name one or more fiduciaries, who “have authority to control and manage the operation and administration of the plan.” However, an individual or entity that is not a “named fiduciary,” yet still exercises some discretionary authority and control over the plan, may still be considered a fiduciary. Under ERISA, a person is a fiduciary of a plan where:

(i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets; (ii) he renders investment advice for a fee or other compensation . . . , (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

Therefore, an individual or entity that is not a named fiduciary, but retains a certain level of control over an employee benefit plan, will have the same duties as a named fiduciary.

ERISA fiduciaries have certain affirmative duties they must fulfill, the most basic of which is the duty of loyalty. Under ERISA, fiduciaries are required to “discharge [their] duties with respect to a

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16 29 U.S.C. § 1102(a)(1). A “named fiduciary” is a “fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer of employee organization with respect to the plan or (B) by such an employee organization acting jointly.” 29 U.S.C. § 1102(a)(2).
18 Id.
19 Id. It follows, therefore, that a plan trustee who has authority and control over plan assets, will be, by definition, a “fiduciary” under ERISA.
plan solely in the interest of the participants and beneficiaries of the plan” for the exclusive purpose of providing benefits to those participants and their beneficiaries.21 According to the Court of Appeals for the Seventh Circuit, a fiduciary is in breach of this duty of loyalty if, for example, it misleads plan participants or misrepresents the terms or administration of a plan.22

Coexistent with the duty of loyalty is the duty of care, which is also commonly referred to as a duty of prudence.23 ERISA fiduciaries are required to act “with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.”24 The duty of prudence has been interpreted as “an unwavering duty on an ERISA [fiduciary] to make decisions with single-minded devotion to a plan’s

21 The duties of a fiduciary are found at 29 U.S.C. § 1104(a)(1), which states that:

[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –
(A) for the exclusive purpose of:
(i) providing benefits to participants and their beneficiaries; and
(ii) defraying reasonable expenses of administering the plan;
(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [ERISA].”

22 Tegtmeier v. Midwest Operating Eng’rs Pension Trust Fund, 390 F.3d 1040, 1047 (7th Cir. 2004) (citing Anweiler v. Am. Elec. Power Serv. Corp., 3 F.3d 986, 991 (7th Cir. 1993)).


participants and beneficiaries and, in so doing, to act as a prudent person would act in a similar situation.”

ERISA not only describes the various duties that attach to fiduciaries, but also holds fiduciaries liable for breach of those duties. Thus, a participant or beneficiary may bring a civil action against a fiduciary that “breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this [title].” A fiduciary that breaches his or her duty

shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other

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26 In addition to the duties of loyalty and prudence, ERISA requires fiduciaries to diversify “the investments of [a] plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so.” 29 U.S.C. § 1104(a)(1)(C). As the Fifth Circuit described in Metzler v. Graham

[no statute or regulation specifies what constitutes ‘diversifying’ plan investments, but the legislative history provides this guidance: The degree of investment concentration that would violate this requirement to diversify cannot be stated as a fixed percentage, because a fiduciary must consider the facts and circumstances of each case. The factors to be considered include (1) the purposes of the plan; (2) the amount of the plan assets; (3) financial and industrial conditions; (4) the type of investment, whether mortgages, bonds or shares of stock or otherwise; (5) distribution as to geographical location; (6) distribution as to industries; (7) the dates of maturity.


28 Id.
equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.\textsuperscript{29}

C. Employee Stock Ownership Plans

The plan that was at issue in \textit{Summers} was a very specific type of employee benefit plan known as an employee stock ownership plan ("ESOP" or "ESOPs").\textsuperscript{30} An ESOP is an employee benefit plan that is designed to invest primarily in securities issued by its sponsoring employer.\textsuperscript{31} A company that wants to establish an ESOP creates a trust to which it contributes shares of that employer’s stock, which are the allocated to individual employee accounts within the trust.\textsuperscript{32}

ESOPs are unique because the general duty to diversify\textsuperscript{33} "is not violated by acquisition or holding of . . . qualifying employer securities."\textsuperscript{34} Because the purpose of an ESOP is to invest in a single stock – that of the sponsoring employer – the duty to diversify simply does not attach to such plans.\textsuperscript{35}

\begin{itemize}
  \item \textsuperscript{29} \textit{Id.}
  \item \textsuperscript{30} \textit{Summers v. State St. Bank \& Trust Co.}, 453 F.3d 404, 405 (7th Cir. 2006).
  \item \textsuperscript{31} 29 U.S.C. § 1107(d)(6)(A). As ESOP is one example of a special ERISA plan known as "eligible independent account plans ("EIAPs")”. An EIAP is an individual account plan which is also a profit sharing, stock bonus, thrift, or savings plan. 29 U.S.C. § 1107(d)(3)(A).
  \item \textsuperscript{32} \textsc{The ESOP Association.}
  \item \textsuperscript{33} See supra note 26.
  \item \textsuperscript{34} 29 U.S.C. § 1104(a)(2).
  \item \textsuperscript{35} \textit{Summers}, 453 F.3d at 406. Had the duty to diversify attached to State Street, the directed Trustee in \textit{Summers}, plaintiffs could have easily argued a breach of that duty. However, because the plan at issue was an ESOP, the duty did not attach.
\end{itemize}
D. “Directed” Trustees

State Street Bank & Trust Company, the defendant-appellees in <i>Summers</i>, was what is commonly referred to as a “directed trustee” of United’s plan. The term “directed trustee” is not found within the language of ERISA; however, it is often used to describe plan trustees that “are subject to the direction of a named fiduciary who is not a trustee.” Courts have relied on this language to determine that ERISA permits directed trustees.

However, the provisions of ERISA that govern the conduct of directed trustees are, in some ways, difficult to reconcile. Clearly a directed trustee is deprived of discretion to manage and control plan assets – by definition, it must follow the direction of a named fiduciary. However, a directed trustee does have responsibility over assets held in an ERISA plan, which would seem to make such a trustee a fiduciary. Moreover, a directed trustee is obliged to follow only those directions of a named fiduciary “which are made in accordance with the terms of the plan and which are not contrary to [ERISA].”

This language has created some confusion regarding the existence and precise scope of a directed trustee’s duty of prudence. Some federal courts have held that a directed trustee is simply not a plan

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36 Id.
38 See e.g., <i>Summers</i>, 453 F.3d at 406. 29 U.S.C. § 1103(a)(1) provides that if a “plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee … [that trustee] shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to [ERISA].”
41 29 U.S.C. § 1103(a)(1); <i>Summers</i>, 453 F.3d at 406 (“An imprudent direction cannot be a proper direction since the trustee has an express statutory duty of prudence.”).
fiduciary and therefore does not have a duty of prudence. For example, in *Maniace v. Commerce Bank of Kansas City*, the Eighth Circuit held that a directed trustee was not a fiduciary, and that therefore “no fiduciary duties were [owed]” to the plan or its participants. The court reasoned that because the directed trustee could act only at the direction of a named fiduciary, the directed trustee had no discretion, and therefore could not be a fiduciary under the plan. The Eleventh Circuit reached a similar conclusion in *Herman v. NationsBank Trust Company*, where it held that “insofar as a trustee acts at the direction of a named fiduciary in accordance with the terms of the plan and ERISA’s requirements, he is not subject to the fiduciary requirement . . . to act prudently.”

However, other courts have held a directed trustee is a fiduciary, and therefore is subject to the duty of prudence. Prior to its decision in *Maniace*, the Eighth Circuit held in *FirsTier Bank, N.A. v. Zeller* that simply because a trustee is subject to direction; i.e., is a directed trustee, the trustee’s fiduciary duties are not eliminated. In *In re Worldcom, Inc. ERISA Litigation*, the district court for the Southern District of New York held that although section 1103(a)(1) may limit

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42 *Maniace v. Commerce Bank of Kansas City*, 40 F.3d 264 (8th Cir. 1994); *Herman v. NationsBank Trust Co.*, 126 F.3d 1354 (11th Cir. 1997).
43 40 F.3d at 267.
44 *Id.*
45 *Id.*
46 126 F.3d at 1361.
47 *Id.* The court does seem to hedge a little here by including the language “in accordance with . . . ERISA’s requirements.” This suggests that when the directions are improper under ERISA, a directed trustee may have a duty to take some action.
49 *Zeller*, 16 F.3d at 911. The *Maniace* court distinguished *FirsTier* by arguing that the trustee in *FirsTier* did in fact have “general fiduciary responsibility for management of all plan assets,” and thus was not truly a directed trustee. *Maniace*, 40 F.3d at 268.
50 *Id.*
51 263 F. Supp. 2d at 762.
the scope of a directed trustees duty, it does not “eliminate the fiduciary status or duties that normally adhere to a trustee with responsibility over ERISA assets.” 52 More recently, the district court for the Southern District of Texas held in *In re Enron Corporation Securities, Derivative & ERISA Litigation* 53 that although the scope of a directed trustee’s authority and discretion over plan assets is limited, “[a]t least some fiduciary status and duties of a directed trustee are preserved.” 54

II. U.S. DEPARTMENT OF LABOR FIELD ASSISTANCE BULLETIN NO. 2004-03

The United States Department of Labor (“DOL”) “promotes the welfare of the job seekers, wage earners, and retirees of the United States” in part by “protecting their retirement and health care benefits.” 55 The DOL’s Employee Benefits Security Administration is responsible for administering and enforcing the provisions of ERISA that protect participants of employee benefit plans and their beneficiaries. 56 Acting under that responsibility, the DOL issued Field Assistance Bulletin No. 2004-03 on December 17, 2004 (the “Bulletin”), 57 which attempted to clarify the scope of a directed trustee’s fiduciary duties. 58

The Bulletin provides general guidance on the Department of Labor’s “views on the responsibilities of directed trustees under ERISA, particularly with respect to directions involving employer

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52 *Id.*


54 *Id.* at 601.


58 *Id.*
After briefly examining the relevant ERISA provisions, the Bulletin discusses the extent to which a directed trustee is obligated to question the named fiduciary’s instructions and determine whether those instructions are prudent and thus acceptable under ERISA.

The Bulletin first recognizes that the fiduciary duties of a directed trustee are “significantly narrower” than the duties ascribed to other fiduciaries. In reaching its conclusion, the DOL acknowledges that it is a plan’s named fiduciary who determines whether a particular transaction is prudent, and not the directed trustee. Therefore the scope of a directed trustee’s responsibility is necessarily limited. Thus, according to the DOL, a “directed trustee does not have an obligation to duplicate or second-guess the work of plan fiduciaries.”

But, relying primarily on the Enron and WorldCom decisions discussed above, the Bulletin does suggest that directed trustees do maintain some limited duty of prudence. According to the DOL – and consistent with ERISA – this limited duty of prudence is violated “when a directed trustee knows or should know that a direction from a named fiduciary . . . is contrary to ERISA.” As noted above, a directed trustee is not obliged to second-guess the decisions made by named fiduciaries. However, the Bulletin announced two specific situations where the duty of prudence may obligate a directed trustee to act. This could occur when a directed trustee knows of: (1) “material non-public information securities.”

59 Id. at 1.
60 Id. at 1-6.
61 Id. at 2.
62 Id. at 4.
63 Id. at 2, 4.
64 Id. (citing Herman v. NationsBank Trust Co., 126 F.3d 1354, 1361-62 (11th Cir. 1997)).
66 Id.
67 Id. at 4.
68 Id. at 4-6.
regarding a security, or (2) material public information regarding a security that suggests a direction is imprudent.

A. Directed Trustees’ Duty To Act on Private Information

A directed trustee must inquire about the named fiduciary’s knowledge and consideration of “material non public information that is necessary for a prudent decision,” before following any direction by the named fiduciary “that would be affected by such information.” The Department provides an example:

[If] a directed trustee has non-public information indicating that a company’s public financial statements contain material misrepresentations that significantly inflate the company’s earnings, the trustee could not simply follow a direction to purchase that company’s stock at an artificially inflated price . . . the directed trustee, prior to following [that] direction . . . has a duty . . . to inquire about the named fiduciary’s knowledge and consideration of the information with respect to the direction.

This suggests that if a directed trustee fails to question the named fiduciary and simply follows a direction despite having knowledge of pertinent non-public information, that trustee would likely be in breach of its fiduciary duty of prudence under ERISA.

B. Directed Trustees Duty To Act On Public Information

The DOL views the directed trustees’ duty to question the named fiduciary’s direction in light of public information in a different

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69 Id. at 4.
70 Id. at 5.
71 Id. at 4.
72 Id.
manner.73 Only in “limited, extraordinary circumstances, where there are clear and compelling public indicators” might a directed trustee have to inquire about the named fiduciary’s direction before acting.74 According to the Bulletin, examples of such extraordinary circumstances are “an 8-K filing75 with the Securities and Exchange Commission, a bankruptcy filing, or a similar public indicator that call[s] into serious question a company’s viability.”76

Thus, with respect to public information, the Bulletin suggests that in the face of these extraordinary circumstances, a directed trustee would be in breach of its fiduciary duty of prudence were it to follow through on a direction from a named fiduciary without further inquiry into the situation.77

As the district court for the Eastern District of Virginia recently stated in DiFelice v. U.S. Airways,78 in the context of ERISA, “the DOL’s interpretation is especially worthy of deference.”79

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73 Id. at 5. The DOL gives three reasons to support the distinction between public and non-public information. First, it assumes that markets are efficient and that stock prices reflect publicly available information and known risks. Second, with respect to employer securities, securities law places obligations on the company, along with its officers and accountants to accurately report their financial records. Third, ERISA § 404 requires that the named fiduciary adheres to a stringent standard of care when directing trustees. Id. at 5.

74 Id. at 5-6.

75 See infra note 99. Public companies file 8-K reports “to announce major events that shareholders should know about.”

76 Field Assistance Bulletin No. 2004-03 at 5-6.

77 Id. at 6. This suggests that blindly following directions which, in the face of such circumstances, appear imprudent, is a breach of the directed trustees duty of prudence.


79 Id. at 752 n.25. The court stated that

The DOL’s interpretation of ERISA . . . is nonetheless entitled to deference depending upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all of those factors which give it power to persuade, if lacking power to control . . . deference is especially appropriate where the regulatory scheme is highly detailed and the agency can bring the benefit of specialized
Unfortunately for the plaintiffs in *Summers*, the Seventh Circuit chose to limit its application of the Bulletin, leading to what was ultimately an inequitable result.80

III. THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT’S DECISION IN *SUMMERS V. STATE STREET BANK & TRUST CO.*

When United filed for bankruptcy at the end of 2002, its employees – both current and former – owned more than half of the company’s common stock through their participation in United’s ESOP (the “Plan”).81 Plaintiffs in *Summers* were a class of those employees who participated in that Plan.82 By August of 2002, the Plan held close to 58 million shares of United common stock.83

Plaintiffs brought suit against State Street Bank and Trust Company, the Plan’s directed trustee, alleging imprudent management.84 Specifically, Plaintiffs argued that State Street breached its fiduciary duty or prudence under ERISA by maintaining all of the Plan’s assets in United stock when it knew that the Company faced extreme financial problems and a potential bankruptcy.85

experience to bear on the subtle questions in a particular case . . .
In the case of ERISA, the DOL’s interpretation is especially worthy of deference.

(internal quotations and citations omitted).

80 See *Summers v. State St. Bank & Trust Co.*, 453 F.3d 404 (7th Cir. 2006).
81 *Id.* at 405. Plaintiffs were participants in the Plan from November 17, 2001 through June 30, 2003.
82 *Id.*
83 *Id.*
84 Plaintiffs-Appellants’, Cross-Appellees’ Brief and Short Appendix in Case No. 05-4005, 2005 WL 3749800 (7th Cir. 2006).
85 *Summers*, 453 F.3d at 405-06.
86 Brief for 2005 WL 3749800 at 3
A. The Plan

The Plan named the UAL Corporation ESOP Committee (the “Committee”) as the only named fiduciary. According to the Plan, it was the Committee’s job “to establish an investment policy and objective for the Plan.” However, “it [was] understood that the Plan [was] designed to invest exclusively in [United] stock.” The Committee established a policy that did just that.

Pursuant to the Plan, the Committee retained the ability to “delegate[ ] the power to manage or control the assets of the Trust Fund,” and thus appointed the State Street Bank & Trust Company (“State Street”) as the Plan’s trustee. Consistent with the Plan’s language, State Street was instructed to invest exclusively in United Stock, making State Street a directed trustee.

B. United Airlines’ Stock Price Tumbles

United was in serious financial trouble by the summer of 2001. According to documents that United filed with the SEC in the year 2000, the airlines’ financial outlook for the following year was
“poor.”93 This bleak projection was based in part on an increase fuel costs and an overall decrease in travel.94 As a result, United reported operational losses of nearly $900 million in the first six months of 2001.95 Shares of United Stock dropped from $50 per share to $30.82 by September 10, 2001.96

The terrorist attacks of September 11, 2001 accelerated the dramatic drop in the share price of United stock.97 On September 17, the first day that the New York Stock Exchange resumed trading after the attacks, the stock closed at $17.50.98

On October 17, 2001, Jim Goodwin, then CEO of United, wrote a letter to the company’s employees.99 The letter articulated the dire financial situation that United was facing:

In the wake of [the September 11th terrorist attacks], we are in nothing less than a fight for our life. Never in our 75-year history have we faced an economic challenge of this magnitude, where the drop-off in air travel has been so unexpected and prolonged. Our number one priority now is to get United into a financial position that will allow us to continue operating . . . In the past, we struggled to make a profit. Now we’re in a struggle just to survive . . . Today, we are literally hemorrhaging money. Clearly, this bleeding has to be stopped – and soon – or United will perish sometime next year.100

93 Plaintiffs-Appellants’, Cross-Appellees’ Brief and Short Appendix in Case No. 05-4005, 2005 WL 3749800, at *11 (7th Cir. 2006).
94 Id.
95 Id.
96 Id.
97 Id.
98 Id.
99 Id. The letter, which was addressed to all company employees, was filed with the Securities Exchange Commission as an “8-K report.” Public companies file 8-K reports to announce major events that are of interest to shareholders.
100 Id. at *12.
The stock price fell an additional twenty percent in the days immediately following the publication of the letter.\textsuperscript{101} In light of these events, Business Week reported that bankruptcy was likely UAL’s “only hope.”\textsuperscript{102}

C. State Street Bank & Trust Company’s Response

As the Plan’s directed trustee, State Street was in charge of managing the Plan’s assets.\textsuperscript{103} As the price of United stock continued to fall, and the financial press began to speculate as to United’s potential bankruptcy, State Street became concerned.\textsuperscript{104} Therefore, State Street employed CitiStreet, an employee benefits service provider, to monitor United stock.\textsuperscript{105}

CitiStreet put United stock on its “watch list”\textsuperscript{106} in December of 2001, where it remained through September of 2002.\textsuperscript{107} On August 15, 2002, more than eight months after United stock was first placed on CitiStreet’s watchlist, and almost an entire year after Goodwin’s letter, State Street informed the Committee that it may be imprudent for the Plan to continue to maintain its exclusive holdings of UAL stock.\textsuperscript{108}

In response to this warning, the Committee appointed State Street as the Plan’s investment manager, which authorized State Street to

\textsuperscript{101} Summers v. State St. Bank & Trust Co., 453 F.3d 404, 407-08 (7th Cir. 2006).
\textsuperscript{102} Plaintiffs-Appellants’, Cross-Appellees’ Brief and Short Appendix in Case No. 05-4005, 2005 WL 3749800, at *13 (7th Cir. 2006).
\textsuperscript{103} \textit{Summers}, 453 F.3d at 405.
\textsuperscript{104} \textit{id.} at 408
\textsuperscript{105} Plaintiffs-Appellants’, Cross-Appellees’ Brief and Short Appendix in Case No. 05-4005, 2005 WL 3749800, at *16 (7th Cir. 2006).
\textsuperscript{106} This allowed CitiStreet to closely monitor the stock’s performance.
\textsuperscript{107} Plaintiffs-Appellants’, Cross-Appellees’ Brief and Short Appendix in Case No. 05-4005, 2005 WL 3749800, at *16 (7th Cir. 2006).
\textsuperscript{108} \textit{Summers}, 453 F.3d at 408.
divest the Plan of its United stock and diversify its holdings. After determining that continuing with the Plan’s policy of exclusively holding and investing in United stock was inconsistent with ERISA under the circumstances, State Street began to sell shares of United stock on September 27, 2002. That afternoon, the stock closed at $2.36 per share. Based on the September 10, 2001 closing price, the roughly 58 million shares of United stock that were being held in the plan lost more than $1.5 billion between the attacks of September 11th and sell-off date over a year later.112

D. Judge Posner’s Decision

In Summers, the Seventh Circuit first had to determine whether, as a directed trustee, State Street had a “fiduciary duty with respect to the trust assets, specifically any duty ever to replace the employer’s stock . . . with some other security.” Essentially, the court had to decide whether a directed trustee has a duty of prudence; i.e., whether there can ever be a situation where a directed trustee is not required to follow a direction from a named fiduciary because the direction is improper under ERISA.

As discussed above in part I.D, while some federal courts have held that a directed trustee is simply not a plan fiduciary and therefore does not have a duty of prudence, others have reached an opposite conclusion, holding that ERISA does impose a duty of prudence –

109 Id.; Plaintiffs-Appellants’, Cross-Appellees’ Brief and Short Appendix in Case No. 05-4005, 2005 WL 3749800, at *18 (7th Cir. 2006).
110 Id. at 406-07.
111 58,000,000 shares, multiplied by a loss of $28.46 per share, works out to a total loss of $1,650,680,000.
112 Summers, 453 F.3d at 408.
113 A 3-judge panel of Judge Posner, Judge Wood, and Judge Evans heard the case; Judge Posner wrote the unanimous opinion.
114 Summers, 453 F.3d at 406.
115 See supra note 42.
although possibly a somewhat limited duty – on directed trustees.\textsuperscript{117} The \textit{Summers} court recognized this, and after blaming the confusion on the “confusing statutory picture” that ERISA creates, the court turned to the DOL Bulletin.\textsuperscript{118} On this issue, the court followed the Bulletin’s guidance. According to Judge Posner, the Bulletin affirmed that a directed trustee does in fact have a duty of prudence.\textsuperscript{119} The court reasoned that a directed trustee controls the trust assets, and therefore if the trustee were to follow an instruction whereby it is knowingly investing the assets imprudently or allowing them to remain imprudently invested, it would be a breach of that duty.\textsuperscript{120} Therefore, the court held that ERISA “expressly imposes the duty of prudence on directed trustees and forbids them to comply with directions that are not ‘proper.'”\textsuperscript{121} This determination is consistent with the language of ERISA, which requires directed trustees to follow “proper directions” which are consistent with the Act.\textsuperscript{122} However, it is in the application of this determination that the \textit{Summers} decision appears to part from both the DOL Bulletin and ERISA.

As noted above, the plaintiffs in \textit{Summers} argued that as a directed trustee, State Street violated its fiduciary duty of prudence by failing to sell the United stock held by the ESOP until just before United filed for bankruptcy.\textsuperscript{123} According to the plaintiffs, both former-CEO Goodwin’s letter and the falling stock price should have indicated to State Street that “United was going into the tank.”\textsuperscript{124} That, plaintiffs argued, should have been enough to cause State Street

\begin{footnotesize}
\begin{enumerate}
\item See supra note 48.
\item \textit{Summers}, 453 F.3d at 406-07.
\item \textit{Id.} at 406.
\item \textit{Id.} at 407.
\item \textit{Id.} Interestingly, the decision does not reflect any argument on behalf of State Street that such a duty of prudence does not or should not attach.
\item 29 U.S.C. § 1103(a)(1).
\item \textit{Summers}, 453 F.3d at 405.
\item \textit{Id.} at 408.
\end{enumerate}
\end{footnotesize}
to begin to divest the Plan of United stock. Judge Posner, however, disagreed. In his opinion, the market – shares of United stock were traded on the New York Stock Exchange – provided the best indicator of value, and even after the Goodwin letter was made public, United stock was still trading at $15.05 per share. Therefore, according to Judge Posner, it was not imprudent for State Street to assume that the market was correct, and State Street was thus not required to act based on an assumption that the market was overvaluing United.

Ultimately, according to Judge Posner, plaintiffs claim failed because of what he referred to as “a failure of proof.” However, he urged the plaintiffs to take comfort in knowing “that determining the ‘right’ point, or even range of ‘right’ points, for an ESOP fiduciary to break the plan and start diversifying may be beyond the practical capacity of the courts to determine. Here, it appears that Judge Posner may be incorrect, as it seems that DOL Bulletin established the point where a directed trustee should “break the plan” and start diversifying.

Recall from above that according to the DOL’s interpretation of ERISA, there may come a time when a directed trustee has a duty, based on public information, not to follow the named fiduciary’s direction. According to the DOL Bulletin, examples of such “extraordinary circumstances” which, in Posner’s words, would be the “right point . . . for an ESOP fiduciary to break the plan and start

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125 Id. at 407-08.  
126 Id. at 408.  
127 Id. In fact, according to Judge Posner, “it would be hubris for a trust company like state street to think it could predict United’s future more accurately than the market could.” Id. (emphasis in original).  
128 Id.  
129 Id. at 411.  
130 Id.  
131 See Field Assistance Bulletin No. 2004-03 at 4-6.  
132 Id. at 5-6.
diversifying”\textsuperscript{133} are an 8-K filing with the SEC, or a “similar public indicator that [calls] into serious question a company’s viability.”\textsuperscript{134}

Former-CEO Goodwin’s October 2001 letter acted as an example of both. Not only was the letter filed with the SEC as an 8-K, the language of letter specifically called into question United’s future.\textsuperscript{135} Goodwin ended the letter by stating “this bleeding has to be stopped – and soon – or United will perish sometime next year.”\textsuperscript{136} Such language, especially considering that it was coming from United’s CEO would appear to call “into serious question [the] company’s viability.”\textsuperscript{137} Judge Posner, however, disagreed; he relied on the idea that the market, and not Goodwin’s letter, should be the measure by which United’s viability was determined.\textsuperscript{138}

While economically this may be a sound argument, its result is simply inequitable. Judge Posner is willing to wait for the market to indicate that United is doomed to a fate of bankruptcy while the participating employees watch the value of their retirement income steadily and consistently decrease.\textsuperscript{139} The DOL Bulletin’s interpretation of the relevant ERISA provisions provides a route to an adequate remedy, and the court should have provided it.

\textsuperscript{133} Id.
\textsuperscript{134} Id.
\textsuperscript{135} Plaintiffs-Appellants’, Cross-Appellees’ Brief and Short Appendix in Case No. 05-4005, 2005 WL 3749800, at *11-12 (7th Cir. 2006).
\textsuperscript{136} Id. at *12.
\textsuperscript{137} Field Assistance Bulletin No. 2004-03 at 6. In a footnote, the Bulletin indicates that “[a] directed trustee’s actual knowledge of media or other public reports or analyses that merely speculate on the continued viability of a company does not, in and of itself, constitute knowledge of clear and compelling evidence concerning the company sufficient to give rise to a directed trustee’s duty to act.” However, the indicators in \textit{Summers} were more than mere speculation.
\textsuperscript{138} Summers v. State St. Bank & Trust Co., 453 F.3d 404, 408 (7th Cir. 2006).
\textsuperscript{139} Judge Posner does, however, make an interesting and rather persuasive argument based on risk and how the decrease in the price of United stock increased the risk in plaintiffs participation in the plan. \textit{Id.} at 408-11. However, this is a different argument for a different article.
Judge Posner reasons that the use of the word “may” by the DOL creates a standard that is not administrable.140 This, however, amounts to nothing more that placing form over substance. Notwithstanding the use of “may” as opposed to “should” or “must,” the DOL Bulletin is clear in its intent. In certain limited, “extraordinary circumstances,” a directed trustee needs to do more than blindly follow instructions.141 When such circumstances are present, continued compliance is imprudent, and therefore in violation of ERISA’s requirement that directed trustees only follow instructions that are proper under the Act.

State Street’s continued compliance with the Committee’s direction in the year after September 11, 2001 amounted to a breach of its fiduciary duty of prudence. As the price of United stock continued to fall, State Street had a duty under ERISA to take act before continuing to follow the Committee’s directions. By failing to do so, and by holding onto United stock, State Street breached that duty, and therefore it should have been held liable in Summers.

IV. CONCLUSION

Near the end of his opinion Judge Posner suggests that perhaps the time has come for Congress to rethink the concept of ESOPs.142 An ESOP is, he argues, a “seemingly inefficient method of wealth accumulation by employees,” mostly because it inherently lacks diversification.143 Moreover, the evidence “that having a stake in one’s employer will induce one to be more productive” is “weak and makes no theoretical sense.”144

140 Id. at 411.
141 Field Assistance Bulletin No. 2004-03 at 5-6.
142 Summers, 453 F.3d at 411.
143 Id.
144 Id. (citing “Motivating Employees with Stock and Involvement,” NBER Website, http://www.nber.org/digest/may04/w10177.html; Joseph Blasi, Michael Conte & Douglas Kruse, Employee Stock Ownership and Corporate Performance Among Public Companies, 50 INDUS. & LAB. REL. REV. 60 (1996)).
However, whether ESOPs may or may not be a good idea for either employers or employees, they continue to exist.\textsuperscript{145} And, as long as ESOPs continue to exist, it is the duty of the federal courts to interpret the provisions that regulate them in a manner that is consistent with ERISA. In \textit{Summers}, the Seventh Circuit failed to fulfill that duty.

Congress enacted ERISA to ensure that when an employee participating in an employee benefit plan was promised a benefit, the employee would receive that benefit.\textsuperscript{146} That goal was not achieved in \textit{Summers}. The plaintiffs participated in United’s ESOP expecting that they would receive a benefit, yet that benefit was ultimately never received.\textsuperscript{147} Consistent with ERISA, in this type of situation, it is the role of the courts to protect employees like the plaintiffs in \textit{Summers}. However, the Seventh Circuit failed to protect thousands of current and former United employees from the State Street’s inaction, inaction that was imprudent and contrary to its fiduciary duty under ERISA.

This result could have been avoided had the Seventh Circuit properly applied the standard expressed in the DOL Bulletin. In the face of specific, public indications of the types of “extraordinary circumstances” that the Bulletin outlined, the court should have held that State Street violated its fiduciary duty of prudence by continuing to follow the Committee’s improper directions and failing to take action. Diversification of the Plan’s assets was the only prudent course of action.

\textsuperscript{145} And, as noted above, participation in ESOPs does not appear to be slowing down. \textit{See supra} note 2.

\textsuperscript{146} \textit{See supra} note 25.

\textsuperscript{147} \textit{Summers}, 453 F.3d at 411.
THE SEVENTH CIRCUIT HANGS UP ON CHARITABLE RIGHTS

NICHOLAS A.J. WENDLAND


INTRODUCTION

Telemarketing, to many people, is nothing more than a nuisance and an unwanted intrusion upon home life. Yet for many non-profit charities, it represents the most effective way to inform people of their causes, and to raise money. Recently, in National Coalition of Prayer v. Carter, the U.S. Court of Appeals for the Seventh Circuit curtailed the speech that these charities can express.1 Rather than use the standard of scrutiny outlined by the Supreme Court to deal with regulations on charitable speech, the Seventh Circuit used a balancing test that has not been used since the case which created it was decided thirty-five years ago.2 In using this test, the Seventh Circuit circumvented what the concurrence calls the “firmly-established narrow tailoring requirement.”4 While the


1 See Nat’l Coal. of Prayer, Inc., v. Carter, 455 F.3d 783 (7th Cir. 2006).
3 Rowan, 397 U.S. at 736-37
4 Carter, 455 F.3d at 792 (William, J., concurring).
decision upholding the constitutionality of the statute was not necessarily incorrect, the Seventh Circuit’s rationale for so holding was incorrect. The right to free speech is a bedrock principle in our society, and the restraint of it deserves a proper test. This Comment contends that the Seventh Circuit, going against precedent, used the wrong level of scrutiny in its recent decision *Carter.*

Section I of this Comment will describe the facts and rationale behind the majority’s opinion in *Carter*, Section II will relate the relevant precedent and case law, Section III will argue the court went against this precedent in its application of the balancing test, Section IV will argue that, even if the court had not misinterpreted precedent, the application of *Rowan* was incorrect given the distinguishing facts between the two cases, finally Section V will argue that by applying *Rowan*, the Seventh Circuit restrained charitable speech without proper analysis.

I. THE FACTS AND REASONING BEHIND THE MAJORITY’S OPINION IN NATIONAL COALITION OF PRAYER V. CARTER

On any given day, more than 300,000 operators employed by various telemarketing firms are working to contact over 18 million people. Telemarketing is undoubtedly a powerful and enormously successful tool, but the majority of the public considers it an irritant. This public backlash has manifested itself in federal and state laws

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5 For the test the majority used see *Rowan*, 397 U.S. at 736-37.
7 Studies show that only .1% of the population likes to receive unsolicited calls and 69% of people find telemarketing offensive. See Hilary B. Miller & Robert R. Biggerstaff, *Application of the Telephone Consumer Protection Act to Intrastate Telemarketing Calls and Faxes*, 52 FED. COMM. L.J. 667, 686 (2000) (citations omitted).
directed at stopping what is seen as an intrusion upon the privacy of the home.\textsuperscript{8} The Indiana statute was enacted for this precise reason.\textsuperscript{9}

In 2001, Indiana enacted the Indiana Telephone Privacy Act ("the Act"), which established a statewide do-not-call list.\textsuperscript{10} The Act


\textsuperscript{9} The statue in relevant part states:

A telephone solicitor may not make or cause to be made a telephone sales call to a telephone number if that telephone number appears in the most current quarterly listing published by the division.

Ind. Code § 24-4.7-4-1 (2006). However, the Act does not apply to any of the following:

1. A telephone call made in response to an express request of the person called.
2. A telephone call made primarily in connection with an existing debt or contract for which payment or performance has not been completed at the time of the call.
3. A telephone call made on behalf of a charitable organization that is exempt from federal income taxation under Section 501 of the Internal Revenue Code, but only if all of the following apply:
   a. The telephone call is made by a volunteer or an employee of the charitable organization.
   b. The telephone solicitor who makes the telephone call immediately discloses all of the following information upon making contact with the consumer:
      i. The solicitor's true first and last name.
      ii. The name, address, and telephone number of the charitable organization.
4. A telephone call made by an individual licensed under Ind. Code 25-34.1 if:
   a. the sale of goods or services is not completed; and
   b. the payment or authorization of payment is not required; until after a face to face sales presentation by the seller.
5. A telephone call made by an individual licensed under IC 27-1-15.6 or IC 27-1-15.8 when the individual is soliciting an application for insurance or negotiating a policy of insurance on behalf of an insurer (as defined in Ind. Code 27-1-2-3).
6. A telephone call soliciting the sale of a newspaper of general circulation, but only if the telephone call is made by a volunteer or an employee of the newspaper.

Ind. Code § 24-4.7-1-1 (emphasis added).
allowed residents of Indiana to place their telephone numbers on this list and shield themselves from telephone solicitors. Under the Act, commercial telemarketers were completely prohibited from calling any resident who placed their number on the do-not-call list. The Act, however, exempted certain calls, most particularly those placed by charitable organizations exempt from federal income taxation under Section 501 of the Internal Revenue Code. Organizations falling under this category are exempt provided that the “telephone call is made by a volunteer or an employee of the charitable organization [and] the telephone solicitor who makes the telephone call immediately discloses . . [his or her] true first and last name [and t]he name, address, and telephone number of the charitable organization.”

In January 2002, Indiana commissioned a professional survey to study the Act’s effectiveness. The survey found that calls by telemarketers to numbers registered on the do-not-call list fell from an average of 12.1 per week to 1.9 per week. Additionally, “[n]early 98% of the residents who had registered their telephone numbers reported receiving ‘less’ or ‘much less’ telemarketing interruption since the Act become law.”

10 Nat’l Coal. of Prayer v. Carter, 455 F.3d 783, 785 (7th Cir. 2006).
11 Id. “Telephone Solicitor” is defined in the act as: “[A]n individual, a firm, an organization, a partnership, an association, or a corporation. Ind. Code Ann § 24.7-2-10.
12 Ind. Code § 24-4.7-4-1.
13 Carter, 455 F.3d at 784. Ind. Code § 24-4.7-4-1(3). “The Indiana Attorney General recognizes an ‘implicit exclusion’ for calls soliciting political contributions. Carter, 455 F.3d at 784. Beyond this, the ITPA specifically allows for exceptions to the do-not-call list in two other circumstances: (1) it allows newspapers to solicit sales through telemarketing, as long as the call is made by a volunteer or employee; and (2) the act permits licensed real estate agents or insurance agents to call numbers on the do-not-call list under specified circumstances. Ind. Code § 24-4.7-1-1(6) and 24.7-1-1(4) and (5), Carter, 455 F.3d at 784.
14 Carter, 455 F.3d at 784 (quoting Ind. Code § 24-4.7-1-1(3)).
15 Id. at 785.
16 Id.
17 Nat’l Coal. of Prayer v. Carter, 455 F.3d 783, 785 (7th. Cir. 2006).
The effectiveness of the Act has lead to an increasing number of Indiana residents registering their numbers.\textsuperscript{18} In May of 2003 approximately half of Indiana’s residential lines had been registered on the list, and by late 2005 that number had increased by another 500,000.\textsuperscript{19}

Plaintiffs, all tax-exempt charities, brought suit alleging that the prohibition against using professional telemarketing firms to solicit donations violated their First Amendment rights.\textsuperscript{20} In cross motions for summary judgment, the district court for the Southern District of Indiana, Indianapolis Division found in favor of the state, and the Plaintiffs appealed to the Seventh Circuit.\textsuperscript{21}

On appeal the Plaintiffs argued, among other things, that the regulation was content-based and should be subjected to strict scrutiny under \textit{United States v. Playboy Entertainment Group, Inc}. \textsuperscript{22} In

\textsuperscript{18} \textit{See id.}
\textsuperscript{19} \textit{Id.}
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} \textit{Id.}
\textsuperscript{22} Nat’l Coal. of Prayer v. Carter, 455 F.3d 783, 787 (7th Cir. 2006); The Plaintiffs’ first argument, which is not being discussed in this paper, was that they had standing to challenge the entire act, not only the exemptions which applied to them. This assertion was based on two arguments, (1) that the provisions aimed at commercial speakers showed the “real purpose” of the Act, and (2) commercial speakers may not be treated more favorably than charitable speakers. \textit{Id.} The plaintiffs contended in the first argument that the exemptions directly injured the them because they showed the true motive of the Act, which was to “suppress ‘reviled speakers vis-à-vis more favored speakers.” \textit{Id.} (citing \textit{City of Cincinnati v. Discovery Network}, 507 U.S. 410 (1993)). In \textit{Discovery} the city passed a law regulating newsracks for the supposed purpose of clearing the sidewalks of the numerous newsracks. \textit{Id.} An exemption for non-commercial handbills however, allowed 1,438 of the 1,500 newsracks to remain. \textit{Id.} This exemption was so broad as to render the legislation ineffective, and bore no relationship to the city’s asserted interests, the Court therefore struck the statute down. \textit{Id.} The plaintiffs argued that \textit{Discovery} held that “exceptions within an ordinance can show an impermissible ‘true reason’ behind legislation, and any disfavored plaintiff can request the Act be invalidated on that basis.” \textit{Id.} The Court dismissed this argument stating “[t]he case stands for the proposition that commercial speech cannot lightly be singled out as ‘less valuable’ than other speech, and that restrictions on commercial speech, like

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Playboy the U.S. Supreme Court dealt with a federal act aimed at preventing “signal bleed” – when the partial or full portions of audio or video can be seen from scrambled porn channels. The act in question required cable operators to limit the transmission of the signal to hours when children were not likely to be watching. Since the restrictions the act placed on the transmission of the channels were based on the type of content those channels transmitted, the Court found the restrictions to be “content based” and subject to strict scrutiny.

The concurrence argued that it was not a content based regulation, as the Plaintiff urged, because it was a “regulation that serves purposes unrelated to the content of expression . . . even if it has an incidental effect on certain speakers or messages but not others.” Similarly, the majority found this argument unconvincing, but did not address why they found the statute not to be content-based, instead they adopted the level of scrutiny the state suggested, which required no such analysis.

restrictions on ‘core’ First Amendment speech, must directly further a legitimate state interest.” Nat’l Coal. of Prayer v. Carter, 455 F.3d 783, 787 (7th Cir. 2006).

The second standing argument was based on the holding in Broadrick v. Oklahoma, where the Supreme Court held that a commercial speaker has the standing to assert non-commercial speakers’ rights. 413 U.S. 601, 611 (1973). The plaintiffs argued this case was the converse, where a non-commercial speaker is asserting the rights of a commercial speaker. Carter, 455 F.3d at 786. The court, however, rejected this argument and held that commercial speakers have standing to assert the rights of non-commercial speakers because the court presumes that speech accorded greater protection, namely non-commercial speech, will create a stronger case against regulation. Id. Since restrictions on commercial speech must meet a lower standard of review, the plaintiffs are not being treated less favorably if they are allowed to challenge the restrictions which must meet a higher standard, those affecting non-commercial speech. Id.


Id. at 806.

Id. at 813


Nat’l Coal. of Prayer v. Carter, 455 F.3d 783, 787-77 (7th Cir.2006).
The State urged the Seventh Circuit to apply a less traditional level of scrutiny outlined in the thirty-five year-old Supreme Court decision *Rowan v. United States Postal Service*.\(^{28}\) The State’s argument, which the court eventually adopted, stated that since Indiana’s statute, aimed at protecting residential privacy, allowed residents to “opt-in” by placing themselves on a statewide do-not-call list the only determination the court needed to make was whether the State’s interest in protecting residential privacy outweighed “the speaker’s right to communicate his or her message into private homes.”\(^{29}\)

The concurrence, however, was unconvinced by both the Plaintiff and the majority, and argued for a different level of scrutiny outlined in the Supreme Court case *Village of Schaumburg v. Citizens for a Better Environment*\(^ {30}\), and the subsequent Supreme Court cases interpreting it.\(^ {31}\) The Supreme Court in *Schaumburg* held that regulations affecting charitable speech must be narrowly tailored to advance a sufficiently strong governmental interest, without unnecessarily interfering with First Amendment Freedoms.\(^ {32}\) *Rowan*, the concurrence argued, must be read not as establishing a stand-alone test which requires a mere balancing of the parties’ interests, but rather as only an example of the substantial privacy rights of residents in their homes, and as support that an opt-in statute protecting that right can be narrowly tailored.\(^ {33}\) Further, the concurrence maintained that by employing the *Rowan* balancing test, the majority circumvents the principle of narrow tailoring analysis, and departs from firmly

\(^{28}\) 397 U.S. 728; *Carter*, 455 F.3d at 787.

\(^{29}\) *Carter*, 455 F.3d at 787.

\(^{30}\) 444 U.S. 620 (1980).


\(^{32}\) *Carter*, 455 F.3d at 793 (citing *Schaumburg*, 444 U.S. at 636-37).

\(^{33}\) *Carter*, 455 F.3d at 794.
established “bedrock constitutional principles pertaining to charitable speech.”

II. RELEVANT CASE LAW CONCERNING THE FIRST AMENDMENT

A. Content-Based and Content-Neutral Regulations on Free Speech

In *Carter*, the plaintiffs argued that the Act is a “content-based regulation because its applicability requires analysis of the content of the message in order to determine to which callers it applies.” While the majority rejects this argument with little comment, the concurrence devotes some analysis to it, and indeed finds the question of whether the Indiana Act is a content neutral regulation is a close one. It is therefore relevant to briefly discuss the issue of content neutrality.

The Supreme Court has outlined different levels of scrutiny for restrictions on free speech based on the type of speech that is being restrained, or the manner in which the speech is being regulated. One of the distinctions the Supreme Court has drawn is whether the regulation is content-neutral or content-based. In a content-based regulation, the government seeks to restrict speech based on the content of the message and is presumptively invalid and subject to strict scrutiny.

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34 Id. at 792.
36 *Carter*, 455 F.3d at 798-99.
37 Sable Commc’ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989). Examples of content based regulations include, Boos v. Barry, 485 U.S. 312, 318-19 (1988) (finding that a statute prohibiting the display of signs critical to foreign governments within 500 feet of that government’s embassy was content-based because “[w]hether individuals may picket in front of a foreign embassy depends entirely upon whether their picket signs are critical of the foreign government or not”); Simon Schuster, Inc., v. N.Y. Crime Victims Bd., 502 U.S. 105, 115-16 (1991) (illustrating the presumptive invalidity of content based regulations, the Court found a law that required income earned by a convicted criminal from published works describing his/her crime to be donated to a victim compensation fund was content based
A content neutral speech restriction is one that regulates without reference to the content of the speech.\textsuperscript{39} Rather, they regulate through time, place, and manner restrictions of the speech at issue. These regulations are not content-based even if they have an incidental effect on the speakers.\textsuperscript{40} The test for content-neutral regulations is intermediate judicial scrutiny, and was outlined by the Court in \textit{United States v. O'Brien}.\textsuperscript{41} A content-neutral regulation is justified if it (1) is within the constitutional powers of the government, (2) furthers an important or substantial governmental interest, (3) the government interest is unrelated to the suppression of free speech, and (4) is an incidental restriction on free speech that is no greater than essential.\textsuperscript{42}

\textbf{B. The Level of Scrutiny Afforded Regulations on Commercial Speech}

If, however, the regulation is content-based, it may still be constitutional, and not be strict scrutiny, if it falls into one of the lower because it imposed a financial burden on speakers because of the content of their speech).

\textsuperscript{38} Strict scrutiny requires that the government have a compelling government interest, and the statute in question be narrowly tailored to further that interest. \textit{United States v. Playboy Entm’t Group, Inc.}, 529 U.S. 803, 813 (2000). “If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. \textit{Sable Commc’ns of Cal., Inc. v. FCC}, 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989). If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative. \textit{Reno v. ACLU}, 521 U.S. 844, 874 (1997) ("[The CDA's Internet indecency provisions'] burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve"); \textit{Sable Commc’ns, supra}, at 126, ("The Government may ... regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest"). To do otherwise would be to restrict speech without an adequate justification, a course the First Amendment does not permit.” \textit{Playboy}, 529 U.S. at 813.

\textsuperscript{39} \textit{Barry}, 485 U.S. at 320.


\textsuperscript{41} 391 U.S. 367 (1968).

\textsuperscript{42} \textit{O’Brien}, 391 U.S. at 377.
valued forms of speech. Commercial speech is one such form of speech. At one time, commercial speech had no first amendment protection. In Valentine, the Court held that government cannot “unduly burden” the freedom of speech, yet observed that “[w]e are equally clear that the Constitution imposes no such restrain on government as respects purely commercial advertising.”

This early hesitance to apply first amendment protections to commercial speech is shown in Rowan. Indiana’s statute is not the first state or federal statute intended to protect the privacy of the home from unwanted intrusion. While telemarketing has been the recent target of legislation, other methods of commercial speech were targeted earlier. Rowan, the case which the majority in Carter relies on for its balancing test, was one of the first cases dealing with this issue. In 1967 Title III of the Postal Revenue and Federal Salary Act allowed householders to insulate themselves from advertisements that were deemed “erotically arousing or sexually provocative.” Once the householder had sent notice to the Postmaster General requesting the sender of such mailings to stop all future advertisements, the sender was required to delete the address from all mailing lists owned or controlled by the sender.


45 Id.


48 Id.
As mentioned above, the Court upheld the constitutionality of the statute based on a test which weighed the mailer’s right to send against the homeowner’s right to prevent unwanted communication from entering the household.49 “Weighing the highly important right to communicate. . . against the very basic right to be free from sights, sounds, and tangible matter we do not want, it seems to us that a mailer’s right to communicate must stop at the mailbox of an unreceptive addressee.”50

The two major factors in the Court’s decision to weigh in favor of the homeowner were the plenary power of the homeowner under the Act, and the affirmative action required by the homeowner. In an opinion that extensively analyzed in depth the legislative history and prior versions of the Act, the Court found that the opt-in nature of the Act effectively permitted “a citizen to erect a wall that no advertiser may penetrate without his acquiescence.”51 This “wall” the homeowner was allowed to erect could essentially block an unlimited amount of commercial mailings from being delivered to the citizen’s home.52 Because the Act required the homeowner to simply state that, in her subjective viewpoint, the mailings were erotic in nature, the homeowner could conceivably “prohibit the mailing of a dry goods catalog because he objects to the contents.”53 This sweeping power, along with the required affirmative action of opting-in by the homeowner, placed the Postmaster General in an acceptable “ministerial” role. The Act did not require the Postmaster General to decide which of the sender’s mailings were erotic, but simply carried out the wishes of the homeowner, making it only an enforcing or ministerial role.

The statute at issue in Rowan was content based, because it only allowed the homeowner to bar commercial advertisements from entering his mailbox, making the applicability of the statute based

49 Id. at 737.
50 Id. at 736-37
51 Id. at 738
52 Id.
53 Id.
upon content of the speakers’ message; yet consistent with their case
law to date, the Court did not analyze it under strict scrutiny.\textsuperscript{54}

Following \textit{Rowan}, a series of cases changed the level of
scrutiny applied to restrictions on commercial speech. In \textit{Bigelow v. Virginia}, the Court first recognized that commercial speech is entitled
to some first amendment protection.\textsuperscript{55} This protection was defined and
extended in subsequent cases\textsuperscript{56}, but it was not until the Court decided
\textit{Central Hudson Gas & Electric Corp. v. Public Service Commission}\textsuperscript{57}
that the current governing test for first amendment challenges to
commercial speech was established.\textsuperscript{58}

In \textit{Central Hudson}, the Court articulated a four prong test to
analyze the constitutionality of a restriction on commercial speech; (1)
the commercial speech must concern a lawful activity, and not be
misleading,(2) there must be a substantial government interest; (3) the
proposed regulation must directly advance the substantial government
interest; and (4) the proposed regulation must be no more extensive
than necessary to advance the government interest.\textsuperscript{59}

Following \textit{Central Hudson}, the court decided \textit{Board of
Trustees of State University of New York v. Fox}, and \textit{Cincinnati v.}\noskip\vspace{2pt}

\textsuperscript{54} The Court in \textit{Rowan} did not face a content-based argument, and therefore
did not address whether the statute was content-based or not, but subsequent cases
have found that the statute was content-based. \textit{See S. Suburban Housing Ctr. v.

\textsuperscript{55} \textit{See} 463 U.S. 60, 64-65 (1983). The \textit{Bigelow} Court balanced the public
interest in receiving information against the state’s interest in preventing the
commercial speech. Kerri L. Keller, \textit{The Supreme Court Sends First Amendment
Guarantees Up In Smoke By Applying the Commercial Speech Doctrine to Content-
421 U.S. 809, 826 (1975)).

\textsuperscript{56} \textit{See} \textit{Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.}, 425

\textsuperscript{57} 447 U.S. 557, (1980)

\textsuperscript{58} Joshua A. Marcus, \textit{Commercial Speech on the Internet: Spam and the First

557, 566 (1980).
Discovery Network.\textsuperscript{60} In Fox, the Court held that a restriction is narrowly tailored within the context of the Central Hudson test if there is a reasonable “fit” between the regulation and legislature’s intent.\textsuperscript{61} This decision seemed to weaken the narrow tailoring requirement of Central Hudson, since it only required a reasonable fit. However, Discovery Network emphasized the value of commercial speech under the reasonable fit requirement.\textsuperscript{62} In Discovery the city passed a law regulating commercial newsracks with the supposed purpose of clearing the sidewalks of the numerous newsracks.\textsuperscript{63} Non-commercial newsracks, however, constituted 1,438 of the 1,500 newsracks on the streets.\textsuperscript{64} There was no reasonable fit, since this exemption was so broad as to render the legislation ineffective, and bore no relationship to the city’s asserted interests.\textsuperscript{65}

Under current case law, the Central Hudson approach is the governing test for all restrictions on commercial speech.\textsuperscript{66} The fourth prong of the Central Hudson test is satisfied when there is a reasonable fit, as defined by Fox and Discovery, between the restriction and the purposed governmental interest behind it.

\textsuperscript{60} 492 U.S. 469 (1989); 507 U.S. 410 (1993).

\textsuperscript{61} “What our decisions require is a ‘fit’ between the legislature’s ends, and the means chosen to accomplish those ends,’ a fit that is not necessarily perfect, but reasonable[.]” Fox, 492 U.S. at 480 (citing Posadas v. Tourism Co. of P.R., 478 U.S. 328, 341 (1986)).

\textsuperscript{62} “In the area of noncommercial speech, content-based restrictions . . . are sustained only in the most extraordinary circumstances . . . By contrast, regulation of commercial speech based upon content is less problematic.’ While that statement remains true today as the continued viability of the Cent. Hudson test shows, we cannot say that the difference in value between commercial speech and noncommercial speech is as great as it was before Discovery Network.” Pearson v. Edgar, 153 F.3d 397, 404-05 (7th Cir. 1998) (quoting Curtis v. Thompson, 840 F.3d 1291, 1297-98 (7th Cir. 1988)).


\textsuperscript{64} \textit{Id.} at 418.

\textsuperscript{65} \textit{Id.} at 424-28.

C. The Level of Scrutiny Afforded Restrictions on Charitable Speech

After the Court had extended first amendment protection to commercial speech, the Court faced a series of challenges to laws regulating charitable speech. In a succession of cases upholding the challenges to these restrictions, the Supreme Court defined the method of review for a restriction on charitable speech.67 While the Court did not directly face a challenge to the constitutionality of an opt-in regulation on charitable speech directed at protecting privacy within the home, this “trilogy” of cases tackling on other restrictions on charitable speech can be read as establishing the level of scrutiny that must be applied to such restrictions.68 It is this trilogy of cases, the concurrence argues, which provides the controlling test for content-neutral restrictions on charitable speech.69

1. Schaumburg v. Citizens for a Better Environment

The first case to give protection under the first amendment for charitable speech was Schaumburg v. Citizens for a Better Environment.70 In Schaumburg an ordinance requiring any charity soliciting door-to-door or on-street for contributions was required to use at least 75% of their receipts for “charitable purposes”.71 In an

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68 Judge Williams refers to these cases as a trilogy in his concurrence in Carter, but the name has been used in many other scholarly writings and opinions. See Rita Marie Cain, Nonprofit Solicitation Under the Telemarketing Sales Rule, 57 Fed. Comm. L.J. 81, 89 (2004); John T. Haggerty, Begging and the Public Forum Doctrine in the First Amendment, 34 B.C. L. REV. 1121, 1132 (1993); Edward J. Schoen, Joseph S. Falchek, The Do-Not-Call Registry Trumps Commercial Speech, Mich. St. L. REV. 483, 524 (2005).
70 444 U.S. 620 (1980).
71 Id. at 622.
extensive review of relevant precedent the Supreme Court held that charitable solicitations, while open to limitations, are a protected form of speech subject to a higher form of First Amendment protection than that afforded commercial speech.\(^{72}\) Charitable solicitations are acknowledged to be commercial in some manner, but protected because they are “characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues[].”\(^{73}\)

The State named two governmental interests behind the statute, the protection of the public from fraud, and from invasion of privacy.\(^{74}\) The Court conceded that these interests were “substantial, “but they are only peripherally promoted by the 75-percent requirement[].”\(^{75}\) In analyzing the regulation’s effectiveness in promoting the prevention of fraud, the Court concentrated on the fact that the regulation held that any organization using more than 25 percent of its proceeds on fundraising, salaries and overhead was not charitable, but commercial, and therefore acted fraudulently in promoting itself as a charity.\(^{76}\) This was unconstitutionally overbroad because it neglected to account for organizations that are “primarily engaged in research, advocacy, or public education” and use donated funds to support those causes.\(^{77}\) The restriction lumped charities such


\(^{73}\) Schaumburg, 444 U.S. at 632

\(^{74}\) Id. at 636.

\(^{75}\) Id. at 636-39

\(^{76}\) Id. at 636

\(^{77}\) Id. at 636-37. The government identified the protection of the public from fraud, criminal conduct, and invasions of privacy as the interest to be advanced by the seventy-five percent limitation. Conceding these interests were substantial. The Court decided they were only "peripherally promoted by the [seventy-five percent]
as these together with solicitors which were in fact using the "charitable label as a cloak for profitmaking[.]"78 The Court emphasized the importance of narrowly drawing the regulation to serve the legitimate interest: "'Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone.'"79 Additionally, the Court suggested ways in which the Village could have protected against fraud in a manner less intrusive to free speech; enforcing penal laws against fraud or encouraging charitable financial transparency would have protected citizens against fraud and avoided any infringements on charitable free speech.80

The interest in protecting residential privacy was also found to be related only indirectly to the regulation, and not narrowly tailored.81 Those soliciting on behalf of those charities who met the 75-percent requirement would not be less intrusive than those representing charities who did not meet the requirement.82 The solicitation would disturb householders, regardless of which type of charity they represented.83 The regulation’s only relation to the protection of privacy is that it would reduce the total number of solicitors the householder would see, but any prohibition on solicitation would have the same effect.84

requirement," and could be "sufficiently served by measures less destructive of First Amendment interests." In analyzing these interests, the distinction between "funds for the needy" organizations and "advocacy" organizations was instrumental. Concerning the village interest in preventing fraud, the Court observed that the assumption that only those charitable organizations able to meet the seventy-five percent requirement were non-deceitful unnecessarily cramped the ability of advocacy organizations to raise and use donated funds to support research, advocacy and public education activities. Edward J. Schoen, Joseph S. Falchek, The Do-Not-Call Registry Trumps Commercial Speech, Mich. St. L. Rev. 483, 509-08 (2005).

78 Schaumburg, 444 U.S. at 637.
79 Id. (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).
81 Id. at 638
82 Id.
83 Id.
84 Id. at 638.
Schaumburg provides significant protection for charitable speech. On one level it protects charitable solicitation from regulations governing the final use of charitable funds. More significantly, however, the case creates the level of scrutiny which a content neutral regulation on charitable speech must reach in order to be held constitutional, and protects against broad prophylactic measures. In order for a limitation to stand up to a constitutional challenge, it must serve a sufficiently strong governmental interest, and be narrowly drawn. . . to serve. . . [that] interest without unnecessarily interfering with First Amendment freedoms." Finally, as both the concurrence and majority concede, this case holds that charitable speech is a protected form of speech subject to a higher form of First Amendment protection than that afforded commercial speech.

2. Secretary of Maryland v. Joseph H. Munson, Co.

Following Schaumburg, the Court invalidated a Maryland statute which prohibited charities from paying solicitors more than 25% of the

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85 Schaumburg provides significant protection to charitable organizations and professional fundraisers. Charitable solicitations are deemed protected speech under the First Amendment, and charitable organizations are accorded equal status under the First Amendment whether their purpose is to raise "funds for the needy" or to engage in advocacy of ideas and information dissemination. Further, percentage-based limitations on the ultimate application of charitable donations are considered prophylactic, unconstitutional restrictions on free speech, in the absence of a demonstration that such limitations are narrowly tailored to achieve a compelling government interest. Likewise, criminal prosecutions for fraud or trespass, or communications by potential donors that they do not want to be solicited by charitable organizations, are deemed less intrusive, more tailored means of protecting donors against fraud and invasions of their privacy. Edward J. Schoen, Joseph S. Falchek, The Do-Not-Call Registry Trumps Commercial Speech, MICH. ST. L. REV. 483, 510 (2005).

86 Vill. of Schaumburg v. Citizens for a Better Env’t, 44 U.S. 620, 636-37 (1980). This standard, as the Eighth Circuit notes, is similar to intermediate scrutiny review of a content-neutral regulation. Fraternal Order of Police v. Stenehjem, 431 F.3d 591, 597 (8th Cir. 2005).

amount raised.88 Under the statute, charitable organizations were prohibited from soliciting of any kind if they paid as expenses more than 25 percent of the amount raised.89 This statute was similar to the one at issue in Schaumburg except for the creation of an administrative waiver. The statute permitted the Secretary of State to waive the restriction for a specific charity, if that charity could show that the 25 percent limitation would effectively prevent it from raising contributions.90 The primary issue, the Court noted, was whether an administrative waiver based on a charity’s demonstration of financial need shows a sufficient narrow tailoring of the statute so as to avoid the outcome of Schaumburg.91 It was not.

Under the statute, the Secretary of State had no discretion to waive the 25 percent threshold except for instances involving financial need.92 The waiver was restricted to instances of financial necessity due to the high cost of raising contributions.93 The waiver provision did not provide relief to the charities which were of particular concern to the Court in Schaumburg, namely to charitable organizations whose costs exceeded the twenty-five percent threshold out of choice.94

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89 Id. at 951. The statute in relevant part stated:
(a) A charitable organization other than a charitable salvage organization may not pay or agree to pay as expenses in connection with any fund-raising activity a total amount in excess of 25 percent of the total gross income raised or received by reason of the fund-raising activity. The Secretary of State shall, by rule or regulation in accordance with the ‘standard of accounting and fiscal reporting for voluntary health and welfare organizations’ provide for the reporting of actual cost, and of the allocation of expenses, of a charitable organization into those which are in connection with a fund-raising activity and those which are not. The Secretary of State shall issue rules and regulations to permit a charitable organization to pay or agree to pay for expenses in connection with a fund-raising activity more than 25% of its total gross income in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions.
90 Id. at 951.
91 Id. at 962.
92 Id.
94 Id. at 963.
Charities whose high costs were due to "information dissemination, discussion and advocacy of public issues," were barred from carrying on charitable solicitation activities protected by the First Amendment.95

Furthermore, the Court ruled that the statute, like the statute in Schaumburg, was too broad and did not accomplish its objective of protecting the public against fraud and invasion of privacy.96 By punishing charitable organizations with high fundraising costs, the statute relies on the “mistaken premise that high solicitation costs are an accurate measure of fraud.”97 The statute may prevent some charities from the fraudulent misdirection of funds away from its purported goals, but this result is “little more than fortuitous.”98 Equally as possible, is that the statue would restrict First Amendment speech that results in high costs, due to the nature of the charity’s mission (such as public education, and advocacy), or restrict speech which results in high costs simply because of the unpopularity of the charity’s goals.99 Finally, the Court found that the statute completely failed in its promotion of the government’s goals; the restriction’s percentage limitation does nothing to prevent an organization which wishes to engage in fraudulent behavior from misdirecting funds solicited funds.100

Munson reiterated the Supreme Court’s holding in Schaumburg, that charitable solicitation is a protected form of speech and that a restriction on charitable solicitation must serve a sufficiently strong governmental purpose, and must be narrowly tailored to accomplish that purpose without unnecessarily interfering with protected speech.101

95 Id.
96 Id. at 966.
97 Id.
98 Id.
100 Id.
101 Edward J. Schoen, Joseph S. Falchek, The Do-Not-Call Statute Trumps Commercial Speech, MICH. ST. L. REV. 483, 513 (2005); see Richard Steinberg,

In the final case in the trilogy, the Court dealt with a statute aimed not only at the charities directly, but also at the professional fundraisers they employed. First, the statute prohibited professional fundraisers from retaining an "unreasonable" or "excessive" fee, and defined a "reasonable fee". Reasonable was defined within the statute as a percentage of gross revenues raised. Fees for professional solicitors which exceeded 35% of the amount raised were presumed unreasonable, and fees below 20% were presumed reasonable. Fees falling between 35% and 20% could be deemed unreasonable, if the state could show that advocacy or dissemination of information was not involved in the professional solicitor’s efforts. Second, the statute required professional fundraisers to disclose to potential donors the identity of the charitable organization for whom it worked, and the average percentage of gross receipts actually turned over to charities by the fundraiser for all charitable solicitations conducted in the State within the previous 12 months. Finally, the statute required professional fundraisers to obtain a license before making charitable solicitations. All three restrictions were held to violate the protections of the first amendment.

The Court struck down the first restriction, the reasonable fee provision, because it was, like the restrictions in Schaumburg and Munson, not narrowly tailored to fulfill the statute’s goals of fraud prevention and maximizing the funds which the charity would

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Economic Perspectives on Regulation of Charitable Solicitation, 39 CASE W. RES. 775, 777 n.9 (1989).

103 Id. at 784-85.
104 Id.
105 Id.
106 Id.
107 Id. at 786
receive.109 Relying heavily on their decisions in Schaumburg and Munson the Court once again held “that the solicitation of charitable contributions is protected speech[.]”110

As in Schaumburg and Munson, we are unpersuaded by the State's argument here that its three-tiered, percentage-based definition of "unreasonable" passes constitutional muster. Our prior cases teach that the solicitation of charitable contributions is protected speech, and that using percentages to decide the legality of the fundraiser's fee is not narrowly tailored to the State's interest in preventing fraud.111

The statute’s three-tiered approach would not logically prevent fraud because there was no connection between the percentage of funds retained by the fundraiser and fundraising fraud.112 A charity might “choose a particular type of fundraising drive, or a particular solicitor, expecting to receive a large sum as measured by total dollars rather than the percentage of dollars remitted.”113 Or, a charity may wish to sacrifice short-term monetary gains in order to “achieve long-term, collateral, or noncash benefits” such as advocacy or a dissemination of information[.]”114 Beyond this, the statute would cause an unacceptable chill on certain kinds of charitable speech, particularly the dissemination of information and advocacy.115 Requiring professional fundraisers to potentially litigate any time they wished to engage in advocacy or the dissemination of information, and to bear the costs of that litigation, might simply result in either driving professional fundraisers out of North Carolina or discouraging them

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109 Id. at 789.
110 Id.
111 Id.
112 Id. at 793.
113 Id. at 791-92.
114 Id.
115 Id. at 794.
from engaging in those types of charitable campaigns. Additionally, as with Schaumburg and Munson, the Court found that the goal of fraud prevention could be accomplished without restricting free speech through the state’s already existing antifraud laws.

The Court struck down the mandatory disclosure of information restriction. Forcing the commercial telemarketers to disclose the percentage of contributions given to the charities for which they work requires the telemarketers to engage in speech which they would not usually engage in, and is therefore a content-based regulation. The state’s proffered interest behind the regulation was to inform “donors how the money they contribute is spent in order to dispel the alleged misperception that the money they give to professional fundraisers goes in greater-than-actual proportion to benefit charity.” In the eyes of the Court, however, this was not a sufficiently compelling interest. The state presumed that charities derive no benefit from money collected but not given to the charity. But this assumption is incorrect because “where the solicitation is

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116 “[F]undraisers will be faced with the knowledge that every campaign incurring fees in excess of 35%, and many campaigns with fees between 20% and 35%, will subject them to potential litigation over the "reasonableness" of the fee. And, of course, in every such case the fundraiser must bear the costs of litigation and the risk of a mistaken adverse finding by the factfinder, even if the fundraiser and the charity believe that the fee was in fact fair. This scheme must necessarily chill speech in direct contravention of the First Amendment's dictates. See Munson, supra, at 969, 104 S.Ct., at 2853; N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279, 84 S.Ct. 710, 725, 11 L.Ed.2d 686 (1964). This chill and uncertainty might well drive professional fundraisers out of North Carolina, or at least encourage them to cease engaging in certain types of fundraising (such as solicitations combined with the advocacy and dissemination of information) or representing certain charities (primarily small or unpopular ones), all of which will ultimately ‘reduce[e] the quantity of expression.’” Riley v. Nat’l Fed’n of the Blind of N.C., Inc., 487 U.S. 781, 794 (quoting Buckley v. Valeo, 424 U.S. 1, 19, 39, (1976)).

117 Riley, 487 U.S. at 795.
118 Id.
119 Id. at 798.
120 Id.
121 Id.
combined with the advocacy and dissemination of information, the charity reaps a substantial benefit from the act of solicitation itself.” \(^{122}\) Moreover, the Court found that less restrictive means which were more narrowly tailored could accomplish the statute’s goals. \(^{123}\) For example, the state could publish the detailed financial data which fundraisers were required to file, or the state could simply enforce its antifraud laws to prohibit telemarketers from making false statements or obtaining money through deceit. \(^{124}\)

Since this restriction was content-based, the Court analyzed it using strict scrutiny, rather than the test outlined in \textit{Schaumburg}. \(^{125}\) However, the Court held that a regulation affecting charitable speech must be analyzed as such, even if it purports to regulate only commercial actors. \(^{126}\) Therefore, as in the case here, where a statute is directed only at the commercial telemarketers employed by charities, it necessarily affects charitable solicitation, so it must be subject to the test for fully protected charitable solicitation. \(^{127}\)

Finally, the court invalidated the third restriction, the licensing requirement. While the state has the power license speech, that power is not unlimited. \(^{128}\) The licensing requirement was imposed only on commercial solicitors, who, while their applications were pending, could not engage in charitable solicitation. \(^{129}\) States may impose reasonable time, place, or manner restrictions on solicitation through

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\(^{122}\) \textit{id.}.

\(^{123}\) \textit{id.} at 800.

\(^{124}\) \textit{id.}

\(^{125}\) \textit{id.} at 798.


\(^{127}\) “Thus, where, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply our test for fully protected expression.” \textit{Riley}, 487 U.S. at 796.

\(^{128}\) \textit{id.} at 802.

\(^{129}\) \textit{id.} at 801.
licensing requirements, however, the state must also explicitly state a time limit in which the license application will be decided.\textsuperscript{130} Because the statute in \textit{Riley} had no provision stating a time in which the licensor must either issue the license, or allow the applicant to go to court, the Court found the requirement to be unconstitutional.\textsuperscript{131}

As concurrence correctly argues, this trilogy of Supreme Court cases clearly states that charitable solicitation, regardless of its commercial undertones, is a protected form of speech, subject to a higher form of scrutiny than purely commercial speech.\textsuperscript{132} Furthermore, these cases outline the level of protection afforded charitable solicitation.\textsuperscript{133} Specifically, the Court stated:

\begin{quote}
But even assuming, without deciding, that such speech in the abstract is indeed merely “commercial,” we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech. Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon. This is the teaching of \textit{Schaumburg} and \textit{Munson}, in which we refused to separate the component parts of charitable solicitations from the fully protected whole. Regulation of a solicitation ‘must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech . . ., and for the reality that without solicitation the flow of such information and advocacy would likely cease.’\textsuperscript{134}
\end{quote}

\begin{itemize}
\item\textsuperscript{130} \textit{Id.} at 802.
\item\textsuperscript{131} \textit{Id.}
\item\textsuperscript{132} Nat’l Coal. of Prayer v. Carter, 455 F.3d 783, 792 (2006).
\item\textsuperscript{133} Vill. of Schaumburg v. Citizens for a Better Env’t, 444 U.S. 836-37.
\item\textsuperscript{134} \textit{Riley}, 487 U.S. at 796.
\end{itemize}
According to these cases, nonprofit solicitation must receive the highest First Amendment protection, requiring any regulation to be narrowly tailored to fulfill a substantial governmental interest.135

B. Seventh Circuit Case Law

The Seventh Circuit, while not directly facing an opt-in statute restricting charitable speech, is not without precedent either in how and when it has applied Rowan, or in whether the Circuit has required narrow tailoring analysis for other types of restrictions on charitable speech.

First, following Schaumburg the Seventh Circuit “uniformly applied the narrow-tailing requirement to regulations affecting charitable speech.”136 In Gresham v. Peterson, the Seventh Circuit analyzed a regulation restricting street begging to public places, and prohibiting completely “aggressive” panhandling.137 The court found

135 Carter, F.3d 455 at 792; Rita Marie Cain, Nonprofit Solicitation Under the Telemarketing Sales Rule, 57 FED. COMM. L.J. 81, 89 (December, 2004).
136 The concurrence, in footnote 1, lists a number of cases with parentheticals in support of this statement, it reads: “See, e.g., Wis. Action Coal. v. City of Kenosha, 767 F.2d 1248, 1251-59 (7th Cir. 1985) (noting that the Supreme Court "has also repeatedly stated that a regulation must be narrowly drawn" and applying a narrow-tailoring analysis); City of Watseka v. Ill. Pub. Action Council, 796 F.2d 1547, 1552-57 (7th Cir. 1986) (noting that the Supreme Court routinely requires that a time, place, and manner regulation be "narrowly tailored" and applying a four-part test that required consideration of whether the regulation was "narrowly tailored to serve the government objective"); Nat'l People's Action v. Vill. of Wilmette, 914 F.2d 1008, 1012-13 (7th Cir. 1990) (noting that the Supreme Court has reaffirmed "emphatically" that a regulation geared toward protected speech must be narrowly tailored and applying such an analysis); Gresham v. Peterson, 225 F.3d 899, 905-06 (7th Cir. 2000) (noting that regulations must be "narrowly tailored to serve a significant government interest" and applying such a test). Carter, 455 F.3d at 793.
137 The statute at issue in Gresham stated:
It shall be unlawful to engage in an act of panhandling in an aggressive manner, including any of the following actions:
(1) Touching the solicited person without the solicited person's consent.
(2) Panhandling a person while such person is standing in line and
that charities and street beggars are indistinguishable in terms of first amendment protection of their speech, and, relying on Schaumburg, found the statute to be narrowly tailored to serve a significant government interest. Additionally, the Gresham court recognized that the Supreme Court has held that charitable solicitation receives a higher level of scrutiny that commercial speech, stating:

The Court placed charitable solicitations by organizations in a category of speech close to the heart of the First Amendment, and distinguished it from "purely commercial speech" which is "primarily concerned with providing information about the characteristics and costs of goods and services." Id. Commercial speech, on the other hand, has been placed lower in the First Amendment food chain, somewhere between political speech and pornography. It deserves protection, but authorities are more free to regulate commercial speech than core-value speech.

“In Watseka, using intermediate scrutiny for a content-neutral regulation, the court found the city’s ban on door-to-door solicitation during certain parts of the day was not “narrowly tailored to achieve

waiting to be admitted to a commercial establishment;
(3) Blocking the path of a person being solicited, or the entrance to any building or vehicle;
(4) Following behind, ahead or alongside a person who walks away from the panhandler after being solicited;
(5) Using profane or abusive language, either during the solicitation or following a refusal to make a donation, or making any statement, gesture, or other communication which would cause a reasonable person to be fearful or feel compelled; or,
(6) Panhandling in a group of two (2) or more persons.

Gresham, 225 F.3d at 901-02.

Id. at 904.
Id. at 905-06.
Id. at 904.
Watseka’s legitimate objectives.” Similarly, in *City of Kenosha*, the court, relying on *Schaumburg*, held a time restriction on door-to-door, charitable solicitation to be constitutional because the “restriction [was] narrowly tailored to serve the [protectable and subordinating] interest[.]” Finally, in *Village of Wilmette*, in addressing the constitutionality of a city ordinance requiring door-to-door solicitors to submit fingerprints in order to receive a license to solicit, the court found that Supreme Court has “emphatically” reaffirmed the need for regulations on protected speech to be narrowly tailored.

Not only has the Seventh Circuit consistently applied the narrow tailoring requirement to regulations on charitable speech, but also, the court has never used *Rowan* as a stand-alone balancing test either in the commercial or charitable speech context. “Rather, consistent with Supreme Court jurisprudence, [the Seventh Circuit has] limited [its] application of *Rowan* to the framework of whether the regulation was narrowly tailored (or, relatedly, whether the government had a sufficiently strong interest in protecting residential privacy.)”

In *Curtis v. Thompson*, the court upheld an Illinois statute which prohibited real estate agents from soliciting a homeowner to sell or list their property after the homeowner had provided notice that they...

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141 City of Watseka v. Ill. Pub. Action Council, 796 F.2d 1547, 1558 (7th Cir. 1986).
142 Wisconsin Action Coalition v. City of Kenosha, 767 F.2d 1248, 1251-59 (7th Cir. 1985).
143 Nat’l People’s Action v. Vill. of Wilmette, 914 F.2d 1008, 1012 (7th Cir. 1990).
144 Nat’l Coal. of Prayer v. Carter, 455 F.3d 783, 794 (7th Cir. 2006) (William, J., concurring). Again, the concurrence provides ample authority in support of this statement, stating in footnote 5: “See, e.g., Collin v. Smith, 578 F.2d 1197, 1202 n.8 (7th Cir. 1978) (citing to *Rowan* for the proposition that the ordinances at issue were not ‘appropriately narrow ordinances’); Curtis v. Thompson, 840 F.2d 1291, 1301-02 (7th Cir. 1988) (applying *Rowan* to a narrow-tailoring analysis pertaining to a commercial speech ordinance); S. Suburban Housing Ctr. v. Greater S. Suburban Bd. of Realtors, 935 F.2d 868, 892-94 (7th Cir. 1991) (same); Pearson v. Edgar, 153 F.3d 397, 403-05 (7th Cir. 1998) (same).” *Carter*, 455 F.3d at 794 (William J., concurring).
have no desire to sell.\textsuperscript{145} The statute, like the statute at issue in \textit{Rowan} required an affirmative act by the homeowner, in the form of providing notice, in order to receive the protection under the statute.\textsuperscript{146} The purpose behind the statute was two-fold, first it was intended to prevent blockbusting\textsuperscript{147}, and second it was to protect residential privacy.\textsuperscript{148} Proceeding under the \textit{Central Hudson} framework, the court found the statute did not violate the free speech rights of the plaintiffs.\textsuperscript{149} The \textit{Curtis} court relied heavily on \textit{Rowan} in its narrow tailoring analysis, and found it to be a “case almost directly on point”.\textsuperscript{150}

In \textit{South-Suburban Housing Center v. Greater South Suburban Board of Realtors} the court again dealt with a restriction on the solicitation of real estate listings.\textsuperscript{151} The municipal ordinance at issue, which was similar to the one in \textit{Curtis}, prohibited any person from soliciting an owner of a dwelling to sell, rent, or list the dwelling any time after the owner had notified the city clerk of their desire not to be solicited.\textsuperscript{152} The clerk was to maintain a list of owners wishing not to be solicited and furnish a copy of the list to real estate firms belonging to the local multiple-listing service.\textsuperscript{153} Like in \textit{Curtis}, the court

\begin{itemize}
\item \textsuperscript{145} Curtis v. Thompson, 840 F.2d 1291, 1293 (1988).
\item \textsuperscript{146} \textit{Id}. at 1294.
\item \textsuperscript{147} Blockbusting is when a real estate agent attempts to persuade white owners to see their home by stating that property prices will lower because people of color are moving or have moved into the neighborhood.
\item \textsuperscript{148} \textit{Curtis}, 840 F.2d at 1293.
\item \textsuperscript{149} \textit{Id}. at 1299-1305.
\item \textsuperscript{150} \textit{Id}. at 1301. The \textit{Rowan} analysis in \textit{Curtis} did not receive a majority vote, but as the court in \textit{Pearson v. Edgar}, discussed infra, states: “Our \textit{Rowan} analysis in \textit{Curtis} did not garner a majority of votes. However, we reaffirmed the \textit{Rowan} analysis in \textit{S. Suburban} by a unanimous vote, so we will treat the \textit{Rowan} analysis as if it were established by a majority in \textit{Curtis}.”
\item \textsuperscript{151} \textit{S. Suburban Housing Ctr. v. Greater S. Suburban Bd. of Realtors}, 935 F.3d 868, 874 (7th Cir. 1991).
\item \textsuperscript{152} \textit{Id}. at 874-75.
\item \textsuperscript{153} \textit{Id}. 
\end{itemize}

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analyzed the restriction under *Central Hudson*, and, in its narrow tailoring analysis, relied heavily on *Rowan* as an example of a narrowly tailored statute, and as evidence of the Court’s high regard for the protection of residential privacy.\(^{154}\) Particularly, the court stated that “we are convinced that the ordinances at issue here and the statute in *Rowan* are materially indistinguishable for First Amendment purposes.”\(^{155}\) The court states:

Both in *Rowan* and instant case it is the householder who is required to take the initiative in determining that he does not wish to receive the material. The *Rowan* Court’s broad explanation of a householder’s right to exclude unwanted mail fails to eliminate the similarity between the content-specific statute in *Rowan* and the content-specific ordinances at issue here. The . . . distinction between *Rowan* allowing “a resident to insulate himself from a particular mailer” and the authority granted in the ordinances to “exclude an entire class of mailers based upon occupation and content,” is immaterial.\(^{156}\)

Despite this similarity, however, the court does not apply the *Rowan* balancing test, but once again cites to *Rowan* only in to support its analysis under *Central Hudson*.\(^{157}\)

In *Pearson v. Edgar* the statute at issue in *Curtis* was revisited, this time with the newly decided Supreme Court case *Discovery* as a guiding factor in analyzing the last two prongs of the *Central Hudson* test.\(^{158}\) Even though the act required an affirmative act by the

\(^{154}\) *Id.* at 890-94.

\(^{155}\) *Id.* at 893.

\(^{156}\) *Id.* at 894.

\(^{157}\) *Id.* at 890-94.

\(^{158}\) *Discovery* was the Supreme Court case which gave more protection to commercial speakers under the *Cent. Hudson* test. The Seventh Circuit recounted the history of *Pearson v. Edgar* at the beginning of the opinion, that synopsis states:
homeowner as a predicate to receiving protection under the statute, the court again refused to apply the Rowan balancing test.\footnote{Nat’l Coal. of Prayer v. Carter, 455 F.3d 783, 795 (7th Cir. 2006).} Using Rowan only as an example of a narrowly tailored statute, the Court found this restriction on commercial speech violated the First Amendment because it was not narrowly tailored to fit the legitimate governmental interests.\footnote{Pearson, 153 F.3d at 404.} Perhaps most significantly, the Pearson court held that its
reliance on *Rowan* in its narrow tailoring analysis under *Central Hudson* in its previous cases, *Curtis* and *South Suburban Housing Center*, was weakened by *Discovery*’s emphasis on reasonable fit. Pearson then holds that, within the context of narrow tailoring analysis, *Rowan* is not as relevant as it was before *Discovery*.

C. The Fourth, Eighth and Tenth Circuits’ Holdings on Charitable Speech Restrictions

The Seventh Circuit stands alone in its current interpretation of *Rowan*. Other circuits which have faced similar challenges to commercial and charitable telemarketing restrictions have all read *Schaumburg*, *Riley*, and *Munson* to require a narrow tailoring analysis.

In *National Federation of the Blind v. F.T.C*, the Fourth Circuit faced a challenge by nonprofit groups to the Federal Trade Commission’s regulation prohibiting calls to numbers on an opt-in do-not-call list. Like the Indiana statute in *Carter*, the regulation completely prohibited calls by charities using professional telemarketers, but not those charities using volunteers or in-house employees. The regulation, the Telemarketing Sales Rule, created a charity specific do-not-call list, which prohibited calls by charities using professional telemarketers from calling homes which had previously asked not to be called by that specific charity. However, those charities using volunteers or in-house employees were exempt from the act and its restrictions. The Fourth Circuit upheld the restriction, based on a governing test stemming from *Schaumburg*, *Munson*, and *Riley*. Under this test, in order for a regulation to withstand a constitutional attack, it must “(1) ‘serve a sufficiently strong, subordinating interest that the [government] is entitled to

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161 Id.
162 420 F.3d 331, 334 (4th Cir. 2005).
163 Id. at 335.
164 Id.
165 Id. at 336.
166 Id. at 338.
protect’ and (2) [be] narrowly drawn. . . to serve the interest without unnecessarily interfering with the First Amendment freedoms."167

The Fourth Circuit relied upon Rowan, but only to show that the protection of household privacy is a sufficiently strong governmental interest, and that the FTC’s regulation was narrowly tailored because it was opt-in. 168 According to the court:

The parallels between the law at issue in Rowan and the do-not-call list in this case are unmistakable. If consumers are constitutionally permitted to opt out of receiving mail which can be discarded or ignored, then surely they are permitted to opt out of receiving phone calls that are more likely to disturb their peace. In this way, a do-not-call list is more narrowly tailored to protecting privacy than was the law in Rowan.169

Similarly, in Mainstream Marketing Services, Inc. v. F.T.C. the Tenth Circuit faced a challenge to the same Federal Trade Commission’s regulations, but this case dealt with the restrictions imposed on commercial telemarketers.170 Like the restrictions on commercial telemarketers in the Indiana Act at issue in Carter, the federal Act prohibited commercial telemarketers from calling numbers that had been placed on the national do-not-call registry.171 Since it was a challenge on commercial restrictions, the court applied Central Hudson.172 Again, the Tenth Circuit relied on Rowan, and extensively analyzed the decision, but only “within the context of considering

168 Carter, 455 F.3d at 798; Nat’l Fed’n of the Blind, 420 F.3d at 342.
169 Carter, 455 F.3d at 798 (Williams, J., concurring) (emphasis excluded) (citing Nat’l Fed’n of the Blind, 420 F.3d at 342).
170 (“Mainstream Marketing II”), 358 F.3d 1228, 1234 (10th Cir. 2004).
171 Id.
172 Id. at 1236.
whether the federal do-not-call list was narrowly tailored.” The court found Rowan’s opt-in feature as strong evidence that the federal statute was narrowly tailored, specifically the court stated:

Like the do-not-mail regulation approved in Rowan, the national do-not-call registry does not itself prohibit any speech. Instead, it merely “permits a citizen to erect a wall . . . that no advertiser may penetrate without his acquiescence.” See Rowan 397 U.S. at 738, 90 S.Ct. 1484. Almost by definition, the do-not-call regulations block calls that would constitute unwanted intrusions into the privacy of consumers who have signed up for the list. Moreover, it allows consumers who feel susceptible to telephone fraud or abuse to ensure that most commercial callers will not have an opportunity to victimize them. Under the circumstances we address in this case, we conclude that the do-not-call registry’s opt-in feature renders it a narrowly tailored commercial speech regulation.

Perhaps most significantly, in a “precursor case to Mainstream Marketing II, the Tenth Circuit cited to [The Seventh Circuit] decision in Pearson, noting that ‘[o]ther courts have relied on Rowan’s analysis in finding that similar mechanisms of private choice in solicitation restrictions weigh in favor of finding a ‘reasonable fit[,]’ and held that ‘Rowan demonstrates that the element of private choice in an opt-in feature is relevant for purposes of analyzing ‘reasonable fit’’.”

Finally, in Fraternal Order of Police v. Stenehjem, the Eighth Circuit confronted a North Dakota statute remarkably like the Indiana

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173 Carter, 455 F.3d at 795 (Williams, J., concurring) (citing see Mainstream Marketing II, 358 F.3d at 1243-44).
174 Mainstream Marketing II, 358 F.3d at 1244-45.
175 Carter, 455 F.3d at 795-96 (William, J., concurring) (citing F.T.C. v. Mainstream Marketing, Inc. (“Mainstream Marketing I”), 345 F.3d 850, 856 (10th Cir. 2003) (citing Anderson v. Treadwell, 294 F.3d 453, 462-63 (2d Cir. 2002); Pearson v. Edgar, 153 F.3d 397, 400, 404 (7th Cir. 1998))).
statute at issue in Carter. Using the test outlined in Schaumburg, the court upheld a restriction on charitable phone solicitation. The North Dakota statute prohibited charitable solicitation by professional telemarketers, but granted an exemption for calls made by volunteers or in-house employees. Again, after finding the statute content

176 Fraternal Order of Police v. Stenehjem, 431 F.3d 591 (8th Cir. 2005).
177 Id.; Carter, 455 F.3d at 797. The North Dakota Statute in relevant part states:
In this chapter, unless the context or subject matter otherwise requires, the terms shall have the meanings as follows:
1. "Automatic dialing-announcing device" means a device that selects and dials telephone numbers and that, working alone or in conjunction with other equipment, disseminates a prerecorded or synthesized voice message to the telephone number called.
2. "Caller" means a person, corporation, firm, partnership, association, or legal or commercial entity that attempts to contact, or that contacts, a subscriber in this state by using a telephone or a telephone line.
3. "Caller identification service" means a telephone service that permits telephone subscribers to see the telephone number of incoming telephone calls.
4. "Established business relationship" means a relationship between a seller and consumer based on a free trial newspaper subscription or on the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the twenty-four months immediately preceding the date of a telemarketing call.
5. "Message" means any telephone call, regardless of its content.
6. "Subscriber" means a person who has subscribed to residential telephone services from a telephone company or the other persons living or residing with the subscribing person, or a person who has subscribed to wireless or mobile telephone services.
7. "Telephone solicitation" means any voice communication over a telephone line for the purpose of encouraging charitable contributions, or the purchase or rental of, or investment in, property, goods, services, or merchandise, including as defined in subsection 3 of section 51-15-03, whether the communication is made by a live operator, through the use of an automatic dialing-announcing device, or by other means. Telephone solicitation does not include communications:
   a. To any subscriber with that subscriber's prior express written
neutral based on *Ward*, the Eighth Circuit found that “the appropriate [test] for regulation of professional charitable solicitation is derived from [*Schaumburg*].”178 Citing previous Eighth Circuit precedent, the court explained that *Schaumburg* required an inquiry into: “(a) whether the State had a sufficient or ‘legitimate’ interest; (b) whether the interest identified was ‘significantly furthered’ by a narrowly

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request, consent, invitation, or permission.
b. By or on behalf of any person with whom the subscriber has an established personal or business relationship.
c. By or on behalf of a charitable organization that is exempt from federal income taxation under section 501 of the Internal Revenue Code, but only if the following applies:
   (1) The telephone call is made by a volunteer or employee of the charitable organization; and
   (2) The person who makes the telephone call immediately discloses the following information upon making contact with the consumer:
      (a) The person’s true first and last name; and
      (b) The name, address, and telephone number of the charitable organization.
d. By or on behalf of any person whose exclusive purpose is to poll or solicit the expression of ideas, opinions, or votes, unless the communication is made through an automatic dialing-announcing device in a manner prohibited by section 51-28-02.
e. By the individual soliciting without the intent to complete, and who does not in fact complete, the sales presentation during the call, but who will complete the sales presentation at a later face-to-face meeting between the individual solicitor or person who makes the initial call and the prospective purchaser.
f. By or on behalf of a political party, candidate, or other group with a political purpose, as defined in section 16.1-08.1-01.

N.D. CENT. CODE § 51-28-01 (year). The North Dakota Act also makes the following prohibitions:

A caller may not make or cause to be made any telephone solicitation to the telephone line of any subscriber in this state who, for at least thirty-one days before the date the call is made, has been on the do-not-call list established and maintained or used by the attorney general under section 51-28-09 or the national do-not-call registry established and maintained by the federal trade commission under title 16, Code of Federal Regulations, part 310.

N.D. CENT. CODE § 51-28-06 (emphasis added).

178 *Stenehjem*, 431 F.3d at 597
tailored regulation; and (c) whether the regulation substantially limited charitable solicitations. Following in the steps of the Fourth and Tenth Circuits, the Eighth Circuit cited Rowan extensively, but again, only in an effort to establish the legitimate interest of the State in protecting residential privacy, and that the opt-in nature of the statute made the statute narrowly tailored.

III. THE MAJORITY MISINTERPRETS CASE LAW BY RELYING ON ROWAN

It was against this backdrop of Supreme Court precedent and subsequent Circuit Court interpretations that the Seventh Circuit decided Carter. Rather than apply the scrutiny for charitable restrictions outlined in Schaumburg, the Court relies on the balancing test of Rowan. This was the incorrect decision because, to begin with, Rowan dealt with a commercial restriction, and precedent clearly shows that commercial and charitable speech are subject to different levels of scrutiny. Additionally, the court, in coming to their decision, misread, or in some cases ignored, Supreme Court and Seventh Circuit authority, as well as the persuasive holdings of its sister courts.

A. Rowan Deals With A Regulation on Commercial Speech, Not Charitable Speech

As a primary issue, Rowan did not deal with charitable solicitation. Rowan prohibited the sending of commercial mailings. This, as the concurrence correctly states, is a significant difference given the fact that both the Supreme Court and the Seventh Circuit have held that restrictions on charitable speech receive greater protection than restrictions on commercial speech. Speech aimed at soliciting funds can be divided into two categories. Commercial solicitation, whose expression is related solely to the economic interest

179 Id.
180 Id.
181 Nat’l Coal. of Prayer v. Carter, 455 F.3d 783, 793 (7th Cir. 2006); Gresham v. Peterson, 225 F.3d 899, 904 (7th Cir. 2000).
of the speaker\textsuperscript{182}, and charitable solicitation, which has, as one of its
goals economic benefit, but which is characteristically intertwined
with informative and perhaps persuasive speech seeking support for
particular causes or for particular views on economic, political, or
social issues. These two categories have separate levels of scrutiny,
neither of which is the \textit{Rowan} balancing test.

As explained \textit{supra}, the test which should be used for
restrictions on charitable solicitation is the one outlined in
\textit{Schaumburg}, and \textit{Central Hudson}, decided ten years after \textit{Rowan},
formulated the test which governs commercial restrictions.\textsuperscript{183} As the
concurrence correctly points out, the \textit{Central Hudson} test is similar to
the \textit{Schaumburg} test, yet charitable solicitations receive heightened
scrutiny and, “unlike commercial regulations, are presumptively
invalid if they are not content neutral.”\textsuperscript{184} “[W]hatever \textit{Rowan} has to
say regarding the test applicable to First Amendment challenges
involving commercial speech must be filtered through subsequent
Supreme Court authority. . . [, the \textit{Rowan}] test is no longer the
controlling law even in the commercial speech arena, much less in the
more highly protected charitable speech context.”\textsuperscript{185} Thus, even in the
context of regulations on commercial speech, \textit{Rowan} is not the
controlling test.

Not only did the Seventh Circuit misapply an invalid
commercial test to a restriction on charitable speech, but also, by
ignoring the difference between commercial speech and charitable
speech, the majority has effectively stripped the plaintiffs of their right
to have their case analyzed under the heightened level of scrutiny
afforded charitable speech.

\textsuperscript{557, 561} (1980).
\textsuperscript{183} 447 U.S. 557.
\textsuperscript{184} \textit{Carter,} 455 F.3d at 794 n.3 (citing Vill. of Schaumburg v. Citizens for a
Better Env’t, 444 U.S. 620, 636-37 (1980); \textit{Gresham,} 225 F.3d at 904; \textit{Stenehjem,
431 F.3d 59).}
\textsuperscript{185} \textit{Carter,} 455 f.3d 783, 794 (see \textit{Cent. Hudson,} 447 U.S. at 565) (William, J.,
concurring).
B. The Majority Ignores Supreme Court Precedent

*Rowan* has not become obsolete, in fact, as the majority correctly states, it has never been explicitly overruled by the Supreme Court.\(^{186}\) It has been cited frequently by both the Supreme Court and Seventh Circuit, but, as the majority concedes, only in support of the state’s great interest in protecting residential privacy, or in narrow tailoring analysis.\(^{187}\) In order to apply *Rowan* in the manner it did, the court had misinterpret Supreme Court precedent.

As explained above, *Schaumburg* undoubtedly held that charitable solicitation is under the protection of the first amendment. “Charitable solicitations. . . are within the protections of the First Amendment.”\(^{188}\) Further, the Court in *Schaumburg* was well aware of the *Rowan* case, and cited to it, but not in support of a balancing test.\(^{189}\) Instead, the Court cited to *Rowan* during its narrow tailoring analysis, as an example of less intrusive methods of protecting residential privacy than through the state’s method at issue in *Schaumburg*.\(^{190}\) The *Schaumburg* test was solidified as the governing test for regulations affecting charitable solicitation by the following cases *Munson* and *Riley*. In both these cases the Court faced challenges to regulations on charitable solicitation, and while the state interests behind the regulations were legitimate, they failed because

\(^{186}\) *Carter*, 455 F.3d at 789.

\(^{187}\) *Id.*


\(^{189}\) *Schaumburg*, 444 U.S. at 639.

\(^{190}\) Specifically, the Court stated: “Other provisions of the ordinance, which are not challenged here, such as the provision permitting homeowners to bar solicitors from their property by posting signs reading ‘No Solicitors or Peddlers Invited.’ § 22-24, suggest the availability of less intrusive and more effective measures to protect privacy.” *Schaumburg*, 444 U.S. at 633 (citing *Rowan v. Post Office Dep’t*, 397 U.S. 728 (1970)).
they were not narrowly tailored.\textsuperscript{191} Under \textit{Rowan}, narrow tailoring analysis is not required, but in its narrow tailoring analyses in subsequent cases the Court has cited to \textit{Rowan} frequently.\textsuperscript{192} In fact, the Supreme Court has never used \textit{Rowan} in support of a stand-alone balancing test, but has limited \textit{Rowan}'s application to either “establish[ing] the significance of residential privacy interests and/or to address the narrow tailoring or least restrictive means requirements.”\textsuperscript{193}

The majority dismisses the concurrence’s argument that Supreme Court precedent, specifically \textit{Schaumburg}, establishes the test for restrictions on charitable solicitation by stating that in \textit{Schaumburg}:

[\textit{T}he Court evaluated an ordinance that would forbid certain charities from soliciting door-to-door or \textit{in public streets}. The Court specifically noted that the statute was

\textsuperscript{192} In footnote 4, the concurrence cites examples of the Supreme Court using \textit{Rowan} only in narrow tailoring analysis or in support of the state’s legitimate purpose in protecting residential privacy:
\textit{Carter}, 455 F.3d at 794 n.4.
\textsuperscript{193} \textit{Id.} at 794.
“not directed to the unique privacy interests of persons residing in their homes because it applies not only to door-to-door solicitation, but also to solicitation on public streets and public ways.”

This argument, however, fails because the quote the majority used in support of its dismissal of Schaumburg discussed whether the restrictions were narrowly tailored. In Schaumburg the Court stated that the 75% requirement was not narrowly tailored because it was related to the protection of privacy “in only the most indirect of ways.” The restrictions imposed by the statute were only peripherally aimed at protecting privacy, since “householders are equally disturbed by solicitation on behalf of organizations satisfying the 75% requirement as they are by solicitation on behalf of other organizations”, and because it is directed at both door-to-door solicitation and solicitation on public streets. Schaumburg distinguished Rowan only to illustrate a statute which is narrowly tailored to protect residential privacy, not in an effort to establish the validity of the Rowan balancing test.

C. The Majority in Carter Ignores Seventh Circuit Precedent

The majority in Carter similarly ignores Seventh Circuit precedent. Following Schaumburg the Seventh Circuit “uniformly applied the narrow-tailoring requirement to regulations affecting charitable speech.” However, in the opinion the court does not even address Gresham, Watseka, City of Kenosha, or Village of Wilmette, all Seventh Circuit cases dealing with various restrictions on charitable speech, and all requiring narrow tailoring analysis. Presumably, the court rejects these cases for the same reason it rejected the Supreme

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194 Id. at 789 (quoting Schaumburg, 444 U.S. at 638-39).
195 Schaumburg, 444 U.S. at 638.
196 Id.
197 Carter, 455 F.3d at 793.
198 The facts and holdings of these cases are recounted supra.
Court’s decision in *Schaumburg*, namely that the court has not been presented with an “opt-in statute that applies only to private residences in a manner that effectively protects residential privacy.”\(^{199}\) Since the majority does not address these cases, it is difficult to guess exactly why they dismissed previous Seventh Circuit cases, however, the argument for dismissing *Schaumburg* fails for the same reason outlined *supra*.

Beyond Seventh Circuit precedent concerning charitable restrictions, the majority also dismisses the Seventh Circuit case law concerning opt-in commercial restrictions, a situation where it has consistently applied the narrow tailoring requirement.\(^{200}\) In fact, when dealing with a commercial restriction, the court has never used *Rowan* as a stand-alone balancing test. “Rather, consistent with Supreme Court jurisprudence, [the Seventh Circuit has] limited [its] application of *Rowan* to the framework of whether the regulation was narrowly tailored (or, relatedly, whether the government had a sufficiently strong interest in protecting residential privacy.)”\(^{201}\)

For challenges to commercial speech restrictions, the Seventh Circuit has continually held that *Rowan* is indeed relevant, but only within the framework of the subsequent test laid out by the Supreme Court in *Central Hudson*. In *Curtis*, *Rowan* was “almost directly on point”\(^{202}\), and in *South Suburban Housing Center*, the statute at issue and the statute in *Rowan* were “materially indistinguishable for First

\(^{199}\) *Carter*, 455 F.3d at 789.

\(^{200}\) See the Seventh Circuit history *supra*.

\(^{201}\) *Carter*, 455 F.3d at 794. Again, the concurrence provides ample authority in support of this statement, stating in footnote 5:

> See, e.g., Collin v. Smith, 578 F.2d 1197, 1202 n.8 (7th Cir. 1978) (citing to *Rowan* for the proposition that the ordinances at issue were not "appropriately narrow ordinances"); *Curtis v. Thompson*, 840 F.2d 1291, 1301-02 (7th Cir. 1988) (applying *Rowan* to a narrow-tailoring analysis pertaining to a commercial speech ordinance); *S. Suburban Housing Ctr. v. Greater S. Suburban Bd. of Realtors*, 935 F.2d 868, 892-94 (7th Cir. 1991) (same); *Pearson v. Edgar*, 153 F.3d 397, 403-05 (7th Cir. 1998) (same).

*Carter*, 455 F.3d at 794 n. 5.

\(^{202}\) *Curtis v. Thompson*, 935 F.2d 1291, 1300-01 (7th. Cir. 1988).
Amendment purposes, but in both cases the court not only refused to use the Rowan balancing test, but cited to Rowan frequently only as support for its analysis under the Central Hudson test. Additionally, in Pearson, the Seventh Circuit declared its reliance on Rowan in its narrow tailoring analysis and discussion of legitimate state interests “weakened” by the subsequent Supreme Court case Discovery.

In a footnote, the majority dismisses the argument that Pearson rejected the Rowan framework. The majority noted that Pearson distinguished the statute at issue from the statute in Rowan. Rowan, was not completely analogous to Pearson, the majority argues, because in Pearson the homeowner could not “ban any bothersome solicitation but only real estate solicitation”, whereas in Rowan, the homeowner “could prevent any material from entering his home[.]”}

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204 Pearson v. Edgar, 153 F.3d 397, 404.
205 The footnote stated:
In that case [Pearson], the statute in question forbade real estate agents from "solicit[ing] an owner of residential property to sell or list such residential property at any time after such person or corporation has notice that such owner does not desire to sell such residential property." Pearson, 153 F.3d 397 at 399. Notably, this statute does not limit its ban to times when the homeowner is inside the home that he or she owns. Perhaps that is why the district court in that case found that the state had produced "no evidence . . . that real estate solicitation harms or threatens to harm residential privacy." Id. at 404. We noted in that case that the Rowan test was not applicable to such an underbroad statute, even though the statute was of an opt in nature. Id. at 404 ("Here the state, not the homeowner, has made the distinction between real estate solicitations and other solicitations without a logical privacy-based reason." (emphasis added)). Therefore, we cannot agree with our concurring colleague that Pearson rejected the Rowan framework with respect to an opt-in statute that is not underbroad and is confined to communications aimed solely at a residence.
Carter, 455 F.3d at 790.
206 Id.
207 Pearson, 153 F.3d at 404.
“[T]he Rowan test was not applicable to such an underbroad statute, even though the statute was of an opt in nature.”208

The majority, however, fails to realize that this exact argument could be used to distinguish Carter from Rowan. The homeowner in Carter can not ban any bothersome telemarketing call; newspapers, real estate and insurance agents, calls soliciting political contributions, and charities using in-house employees or volunteers are all exempt from the do-not-call list.209

D. Other Circuits Have Analyzed Restrictions Similar to the One at Issue in Carter and Have Not Used the Test Outlined in Rowan

Besides incorrectly distinguishing Supreme Court precedent, the Seventh Circuit quickly dismisses the rulings of the Fourth, Eighth and Tenth Circuits.210 The majority in Carter, in an effort to explain why their sister circuits opted for more traditional methods of review states: “[n]either the Eighth Circuit nor the Tenth Circuit directly addressed a Rowan argument similar to the one the State presses here. Instead they reversed by employing more standard First Amendment analysis.”211 This statement is true, but misleading.212 In Stenehjem, an amicus brief filed by the Indiana Attorney General urged the Eighth Circuit to adopt a Rowan balancing test, yet unsurprisingly the court declined and analyzed the restrictions under the test on charitable restrictions outlined in Schaumburg, and cited to Rowan only as support that an opt-in feature helps to show the statute is narrowly tailored.213

208 Carter, 455 F.3d 783, 790.
209 Id. at 784. The concurrence makes this exact argument in response to the majority’s determination that the Act places the Indiana Attorney General in a “ministerial” role. Id. at 796. The discussion of this argument is dealt with below.
210 Id. at 788.
211 Id.
212 Id. at 797 (Williams J. concurring).
Similarly, in *Mainstream Marketing II*, several states supporting the federal regulations on commercial telemarketers filed amicus briefs arguing that *Rowan* created a balancing test. Not surprisingly the Tenth Circuit chose not to adopt *Rowan*’s balancing test, but instead employed the test outlined in *Central Hudson* for restrictions on commercial speech.

Additionally all three Circuits addressed *Rowan* and relied on it in support of their respective narrow tailoring analyses, at the very least the Eighth, Tenth and Fourth Circuits were aware of the balancing test in *Rowan*, and consciously choose not to accept it.

“Thus, at a minimum, these circuits did not interpret *Rowan* as requiring nothing more than a balancing of interests. More likely, they appropriately disregarded the states’ request for a truncated balancing-of-interest test and instead applied *Rowan* solely within the constraints created by subsequent Supreme Court Authority.”

E. The Majority’s Use of “Underbroad” is Misplaced and Confusing

After misinterpreting case law and applying *Rowan*, a case which requires no narrow tailoring analysis, the majority proceeded to analyze the statute under the “reasonable fit” doctrine, outlined in a manner which resembles narrow tailoring analysis.

Once we have decided to apply the *Rowan* analysis, it would seem the case is resolved, since the Supreme Court

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214 *Carter*, 455 F.3d at 798 (citing Mainstream Marketing Services, Inc. (“Mainstream Marketing II”), 358 F.3d 1228 (10th Cir. 2004) and Brief for State of California et al. as Amici Curiae Supporting Appellants in Case No. 03-1429 and Supporting appellees in Case No. 03-9571 at 1-3, *Mainstream Marketing Services, Inc.*, 358 F.3d 1228 (Nos. 03-1429, 03-6258, 03-9571, 03-9594).

215 *Carter*, 455 F.3d at 798 (citing *Mainstream Marketing II*, 358 F.3d at 1242-44.

216 *Id.* at 798 (William, J., concurring).

217 *Id.*

218 *Id.* at 790-91.
Court has already made clear that citizens in their own homes have a stronger interest in being free from unwanted communication than a speaker has in speaking in a manner that invades residential privacy. However, the Plaintiffs strenuously argue that the Act is underbroad and therefore prohibited under *Discovery Network*. We agree that if the Act was so underbroad as to fail to materially advance the State’s interest in residential privacy, Plaintiffs might prevail even under *Rowan*.  

The majority’s reliance on *Discovery* is confusing, given that *Discovery* was a case analyzing a restriction on commercial speech, and was decided using the *Central Hudson* framework. Additionally, *Discovery*, and its predecessor *Fox*, analyze the term “reasonable fit” within the context of the last two prongs of the *Central Hudson* test which both deal with narrow tailoring analysis. This makes the majority’s refusal to use proper narrow tailoring analysis even more confusing. Furthermore, *Carter* dealt with a restriction on charitable speech, and *Discovery* has not been cited, either by the Supreme Court or the Seventh Circuit, in the narrow tailoring analysis of a restriction on charitable speech.

Adding to the confusion is the majority’s reliance, within its “underbroad” analysis, on *Hill v. Colorado*, a case which upheld a statute that “prohibited knowingly approaching within eight feet of another person, without that person’s consent, ‘for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such person. . . .’ within

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219 *Id.*
221 *Id.*
222 The majority states: “the Act’s legitimacy is bolstered by the Supreme Court holding in *Hill v. Colorado.*” *Carter*, 455 F.3d 783, 790.
designated areas surrounding health care clinics.”\textsuperscript{223} The Supreme Court held the statute to be constitutional because it was a content neutral, valid time, place, and manner restriction, and was \textit{narrowly tailored} to serve a significant and legitimate governmental interests.\textsuperscript{224} The majority in \textit{Carter}, while neglecting to engage in a proper narrow tailoring analysis, cites to two commercial restriction cases (\textit{Discovery} and \textit{Hill}) in support of its underbroad analysis, both of which engage in extensive narrow tailoring analysis.


designated areas surrounding health care clinics.”\textsuperscript{223} The purpose of the statute was intended to shelter women visiting abortion clinics from unwanted encounters with abortion protestors. Nat’l Coal. of Prayer v. Carter, 455 F.3d 783, 790 (citing Hill v. Colorado, 530 U.S. 703, 706 (2000)).

\textsuperscript{224} Hill v. Colorado, 530 U.S. 703, 725 (2000).


\textsuperscript{226} Id. (quoting H.R. Rep. No. 90-722, at 125 (1967)).
the substance of governmental censorship." The final version of the act, however, resolved any constitutional issues by giving the householder “complete unfettered discretion in electing whether or not he desired to receive further material from a particular sender." The Court found that the opt-in nature of the act effectively permitted “a citizen to erect a wall that no advertiser may penetrate without his acquiescence.” This “wall” could essentially block out an unlimited amount of commercial mailings the homeowner deemed undesirable. Because the act required simply the homeowner to state that in her subjective viewpoint, the mailings were erotic in nature, the homeowner could conceivably “prohibit the mailing of a dry goods catalog because he objects to the contents.” This sweeping power, along with the required affirmative action of opting-in by the homeowner placed the Postmaster General in a “ministerial” role. The act did not require the Postmaster General to decide which of the sender’s mailings were erotic, but simply carried out the wishes of the homeowner, making it only an enforcing or ministerial role.

In an effort to analogize the Indiana statute to Rowan, the majority concentrates on the “ministerial” evaluation, and reviews extensively the Supreme Court’s legislative history examination in Rowan. The calls which were exempt were well defined and involved little discretion to decide if a call was placed by a professional telemarketer on behalf of a charity, or by a volunteer or in-house employee of the charity. The majority concluded that the role of the Indiana Attorney General was more analogous to the ministerial role of the Postmaster General.

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227 Rowan, 397 U.S. at 735.
228 Id. at 734.
229 Id. at 738
230 Id.
231 Nat’l Coal. of Prayer v. Carter, 455 F.3d 783, 788-89 (7th Cir. 2006).
232 Id. at 789.
233 The Seventh Circuit concluded that:
   [T]he Act places the Attorney General of Indiana in a ‘ministerial’ role more analogous to that of the Postmaster General in the final legislation in Rowan than that act’s objectionable predecessor. The
The majority’s concentration on the ministerial role is misplaced.\textsuperscript{234} The majority’s reasoning that the Attorney General, like the Postmaster General, is given sole discretion to decide only if the call was placed by a charity’s volunteer or in-house employee, or if it was placed by a professional telemarketing employee on behalf of the charity, is erroneous because it considers only the state’s involvement in enforcing the statute.\textsuperscript{235} While the Act in \textit{Rowan} was limited in language to material that the homeowner found erotic or sexually arousing, there was no objective test which could prevent the homeowner for prohibiting any commercial mailing as long as they deemed sexually arousing.\textsuperscript{236} By allowing the homeowner complete control over what material could be prohibited from entering the household Act at issue in \textit{Rowan} truly allowed the homeowner complete control.\textsuperscript{237} In contrast, the Indiana statute at issue in \textit{Carter} left exemptions for phone calls which the homeowner could not elect to block.\textsuperscript{238} The majority ignored the fact that the actual passage of the law with “numerous exemptions is an act of immersing itself in the regulation of the different forms of telemarketing speech.”\textsuperscript{239} By creating exceptions to the law, Indiana created telemarketing calls telephone calls that the Attorney General must allow to be placed to numbers on the do-not-call list are very well defined. For example, it involves little discretion to decide if the call was placed on behalf of a tax-exempt charity, or if the person who placed the call was a volunteer or employee of that charity. We therefore disagree with the view that \textit{Rowan} is inapplicable merely because the Act imposes well-defined restrictions on precisely what protections from unwanted communication a residential phone customer may receive by opting in to the do-not-call list.

\textit{Id.}\textsuperscript{234} \textit{Id.} at 796.
\textit{Id.}\textsuperscript{235} \textit{Id.}
\textit{Id.}\textsuperscript{237} \textit{Id.}
\textit{Id.}\textsuperscript{238} \textit{Id.}
\textit{Carter}, 455 F.3d at 796

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which the homeowners could not block. Therefore, the total power to restrict all intrusions into the home which was enjoyed by the homeowners in *Rowan* does not exist here.

**CONCLUSION**

Simply because the concurrence and majority come to the same decision does not make the *Carter* court’s oversights irrelevant. Under the majority’s test, there was no need to analyze the regulation for content neutrality. If a restriction on charitable speech regulates on the basis of content, then it is not a content neutral restriction and must be analyzed under strict scrutiny. The plaintiff argues that the act is “content-based regulation because its applicability requires analysis of the content of the message in order to determine to which callers it applies.”

“If one must necessarily look at the content of the speech to determine whether the law applies, then the law is content-based.” *Ark. Writers’ Project Inc. v. Ragland*, 481 U.S. 221, 230 (1987). For example, a call by one of the charities to educate a consumer is not banned but if the call ends with a request for a donation

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240 Unlike in *Rowan*, the state here has carved out particular categories of calls the homeowner cannot block. These state-created carve-outs include not only charitable calls made by volunteers and employees, but also certain calls by newspaper organizations, real estate agents, and insurance agents. Thus, the homeowner here does not have the plenary power to restrict all intrusions as the homeowner could in *Rowan*. Instead, Indiana has actively immersed itself in regulating the forms of telemarketing speech that homeowners are allowed to block: a homeowner has unfettered discretion to block calls from professional telemarketers, but lacks such discretion when it comes to, for example, calls initiated by employees or volunteers of charities. *Id.* at 796 (Williams, J. concurring).


it is banned. If that same call was placed by a volunteer or a paid charitable employee it is exempt. An outside fundraiser, paid the same wage, would be banned from this speech.

The Act applies its restrictions based on the content of the banned calls and the identity of the caller. A statute that defines the speech it regulates by content, or particular speakers, is evaluated as a content-based restriction on speech. *Playboy*, 529 U.S. at 811-12.

The concurrence rejects this content-based argument, stating: “Although the question of whether the Indiana Act is a content neutral regulation is a close one, it is nonetheless a ‘regulation that serves purposes unrelated to the content of expression . . . even if it has incidental effect on certain speakers or messages but not others.’” Analyzing the restriction for its content-neutrality is a hurdle which the restriction must pass in order to be found constitutional. While the argument fails, and the concurrence eventually arrives at the same conclusion as the majority the restriction was at least analyzed for content-neutrality.

The majority ignores the weight of Supreme Court precedent, Seventh Circuit precedent, and the persuasive arguments of its sister circuits, but is it relevant that the majority used the wrong test. The concurrence, the Fourth, and the Eighth Circuits, all using a higher level of scrutiny reached the same conclusion as the majority. The result may have been the same, but what is relevant is that when a government seeks to burden a right as fundamental as free speech, it is the court’s duty to analyze that regulation in the manner dictated by precedent. In this case, while the majority and concurrence reached the same conclusion, the majority’s test allowed for a less strict review.

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243 *Id.* at 21-22.
244 *Nat’l Coal. of Prayer*, 455 F.3d at 798-99 (citing Ward v. Rock Against Racism, 491 U.S. 781, 791).
245 See *Nat’l Fed’n for the Blind v. F.T.C.*, 420 F.3d 331 (4th Cir. 2005); Fraternal Order of Police v. Stenholm, 431 F.3d 591 (8th Cir. 2005).
INTRODUCTION

In Boy Scouts of America v. Dale, the Supreme Court of the United States reaffirmed its commitment to protect the First Amendment right to freedom of association. Unfortunately, it did so by holding that states could not protect gays from discrimination by forcing public associations to admit them. In Christian Legal Society v. Walker, a panel of the Seventh Circuit applied Dale to invalidate the antidiscrimination policy of the Law School at Southern Illinois University, as applied to a Christian student group wishing to exclude gays. However, the Seventh Circuit did not merely apply Dale; it extended it by holding that a school could not even deny official recognition to a student group that chose to discriminate against gays.

This Note will briefly discuss the history of public accommodations and antidiscrimination laws, and how such laws came into conflict with the First Amendment right to free association. I will then examine the Seventh Circuit’s decision in Christian Law Society and explain how the Seventh Circuit’s expansion of Dale could potentially render invalid nearly all public accommodations and

antidiscrimination laws protecting gays, reversing years of progress in removing discrimination based on sexual orientation.

I. BACKGROUND

A. Public Accommodations and Antidiscrimination Laws

After the Civil War, Congress and a number of states enacted statutes outlawing discrimination in places of public accommodation. In response to the Supreme Court’s 1883 invalidation of the Civil Rights Act of 1875, several states, including Illinois, enacted public accommodations laws restricting discrimination based on race. These state laws protected the rights of racial minorities and other groups from discrimination in public accommodations until the federal government passed the Civil Rights Act of 1964. Illinois has since

3 The 1875 Act banned discrimination on the basis of race in, among other places, “inns, public conveyances, . . . theatres, and other places of public amusement.” Civil Rights Act of 1875, § 1, 18 Stat. at 336.
4 The Supreme Court held that the Fourteenth Amendment did not grant Congress the power to pass prospective laws enforcing civil rights against infringement by non-state actors, and that any legislation passed by Congress pursuant to the Fourteenth Amendment must “necessarily be corrective in character.” Civil Rights Cases, 109 U.S. at 17-18.
5 Illinois’ current public accommodations and antidiscrimination laws can be found at 775 ILL. COMP. STAT. §§ 5/1-101 to 5/10-104 (2001).
7 The current federal civil rights laws can be found at 42 U.S.C. §§ 1981 to 2000h-6 (2000).
broadened the scope of its antidiscrimination laws to protect more disadvantaged groups,\(^8\) and to provide that protection in a greater number of public places.\(^9\)

Public and private law schools have instituted antidiscrimination policies protecting sexual-orientation since the late 1970s,\(^10\) and today, nearly every accredited law school in the country has a broad antidiscrimination policy.\(^11\) Southern Illinois University (“SIU” or the “University”) has two such policies: the Affirmative Action/Equal Employment Opportunity Policy,\(^12\) and a separate policy promulgated by the SIU Board of Trustees.\(^13\) These two policies will be referred to in this Note as the “EEO Policy” and the “Unlawful Discrimination Policy,” respectively.

B. The First Amendment and the Right to Association

The First Amendment prohibits Congress from passing any law “respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or the right of the

\(^8\) For example, women, Vietnam veterans, the elderly, and homosexuals. 775 ILL. COMP. STAT. § 5/1-102.


\(^11\) These policies vary from school to school, but typically contain language stating the law school’s commitment to a “policy against discrimination based upon age, color, handicap or disability, ethnic or national origin, race, religion, religious creed, gender (including discrimination taking the form of sexual harassment), marital, parental or veteran status, or sexual orientation.” Id.

\(^12\) “It is the policy of Southern Illinois University at Carbondale to provide equal employment and education opportunities for all qualified persons without regard to race, color, religion, sex, national origin, age, disability, status as a disabled veteran or a veteran of the Vietnam era, sexual orientation, or marital status.” Christian Legal Soc’y Chapter at S. Ill. Univ. Sch. of Law v. Walker, No. 05-4070-GPM, 2005 WL 1606448, at *2 (S.D. Ill Jul. 5, 2005)

\(^13\) “No student constituency body or recognized student organization shall be authorized unless it adheres to all appropriate federal or state laws concerning nondiscrimination and equal opportunity.” Id.
people peaceably to assemble.”14 Although the First Amendment does not explicitly grant a right to associate, the Supreme Court recognized that group association “undeniably enhance[s]” the rights to free speech, freedom of religion, and free assembly.15 The freedom of an individual “to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.”16 As such, the Court has held that the First Amendment implicitly grants the freedom “to associate with others in a wide variety of political, social, economic, educational, religious, and cultural ends.”17

The Court’s early freedom of association jurisprudence developed in cases arising from outwardly expressive groups, like the NAACP and political parties.18 For members of minority groups or individuals with dissident opinions, the right to freedom of expression was enhanced by the ability to gather together with like-minded individuals to make their ideas visible to a greater audience.19 Underlying the reasoning in these cases was the concern for privacy of association, which the Court considered often “indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.”20 For members of political parties, the ability to associate

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14 U.S. CONST. amend. I.


16 Roberts, 468 U.S. at 622 (1984); see also NAACP, 357 U.S. at 460-61 (“state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny”).

17 Roberts, 468 U.S. at 622.


19 Roberts, 468 U.S. at 622.

20 NAACP, 357 U.S. at 462.
with one another free from state interference was essential to the party’s ability to successfully promote its political beliefs.\(^{21}\)

In \textit{Healy v. James}, the Supreme Court held that the right to freedom of association extended to student groups on college and university campuses because students did not “‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’”\(^{22}\) The Court acknowledged that school officials could proscribe certain conduct to maintain order on college campuses, but that “First Amendment protections should apply with \[the same\] force on college campuses \[as\] in the community at large.”\(^{23}\) In \textit{Healy}, Central Connecticut State College (“CCSC”) students wishing to form a local chapter of Students for a Democratic Society (“SDS”) were denied official recognition by the CCSC’s president because the national SDS organization had been involved in violent demonstrations at other colleges.\(^{24}\) However, the connections between the local chapter and the national organization, beyond their shared name, was limited; the CCSC chapter proclaimed independence from the national organization, and expressed disagreement with certain of the national organization’s statements.\(^{25}\) Because the CCSC SDS was in violation of no rule issued by the school, the Court held that it had been denied official recognition merely on the basis of the president’s disagreement with the philosophy of the CCSC SDS.\(^{26}\) So long as the viewpoints expressed by CCSC were not aimed at “‘inciting or producing imminent lawless action and . . . likely to incite or produce such action,’”\(^{27}\) CCSC SDS could not be denied official

\(^{21}\) \textit{Brown}, 459 U.S. at 91-92.


\(^{23}\) \textit{Healy}, 408 U.S. at 180.

\(^{24}\) \textit{Id.} at 171-72.

\(^{25}\) \textit{Id.} at 186-87.

\(^{26}\) \textit{Id.} at 187.

\(^{27}\) \textit{Id.} at 188 (quoting \textit{Brandenburg v. Ohio}, 395 U.S. 444, 447 (1969)).
recognition without also being denied its fundamental First Amendment right to associate.28

After the Court had established that there existed a constitutional right to associate for First Amendment purposes, it recognized a corresponding right to define the boundaries of that association: that freedom of association “plainly presupposes a freedom not to associate.”29 For example, in a case involving a conflict between the national Democratic Party and a Wisconsin election law requiring open primaries,30 the Supreme Court sided with the national party, holding that, for the purposes of the national party convention, the national party had a First Amendment right to decide the method in which its members were selected so they would best promote the national party’s message.31 The Court noted that an essential function of a political party is to express viewpoints on issues important to its members and to make collective decisions concordant with those viewpoints.32 The inclusion of persons with viewpoints opposed to those of the party’s members could distort this collective decision-making and substantially interfere with the party’s ability to collectively advance its members’ interests.33 Following this reasoning, the Court held that the Wisconsin open primaries law violated the Democratic Party’s right to exclude certain individuals from its political association.34

The Court realized that the right to exclude, if exercised injudiciously, could be used as a tool to perpetuate discrimination, since “the very exercise of the freedom to associate by some may

28 Healy, 408 U.S. at 187-88.
30 In an “open” party primary, voters may vote for a party’s candidates without being members of that party. Democratic Party of U.S. v. Wis. ex rel. La Follette, 450 U.S. 107, 111-12 (1981). According to the invalidated Wisconsin law, delegates at a party’s national convention were required to cast their votes in accordance with the outcome of the open primary election. Id. at 112.
31 Id. at 122.
32 Id.
33 Id.
34 Id. at 125-26.
serve to infringe that freedom for others."\(^{35}\) This language predicted the Court’s later decisions in *Roberts v. United States Jaycees* and *Rotary International v. Rotary Club of Duarte*, where the Court denied the United States Jaycees’ and the Rotary Club’s attempts to dress up their discrimination against women in First Amendment clothing.\(^{36}\) In *Roberts*, the Court held that the right to expressive association may be limited by “regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”\(^{37}\) The Court applied this test to the challenged state public accommodations statutes in both cases, and twice held that preventing discrimination against women was a compelling state interest unrelated to the suppression of ideas.\(^{38}\) Before reaching that conclusion, however, the Court also noted in both cases that any impairment of the associations’ abilities to express their chosen messages by the challenged statutes was slight.\(^{39}\)

This check on the scope of the right to expressive association was short-lived, however. In 1995, the Court held that a Massachusetts public accommodations statute could not compel the organizers of the Boston Saint Patrick’s Day parade to allow a gay, lesbian, and bisexual group to march in the parade over the organizers’ objections.\(^{40}\) However, the Court did not analyze *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* as it had prior expressive association cases, primarily because it involved a parade.\(^{41}\) Because a


\(^{37}\) *Roberts*, 468 U.S. at 623.

\(^{38}\) *Rotary*, 481 U.S. at 549; *Roberts*, 468 U.S. at 628-29.

\(^{39}\) Admitting women would not require Rotary to abandon its various civil-service activities. *Rotary*, 481 U.S. at 548. Any diminution of the Jaycees’ message resulting from the admission of women was “attenuated at best.” *Roberts*, 468 U.S. at 627.


\(^{41}\) Id. at 568-70.
parade is inherently and quintessentially expressive, and each group marching expresses a message, the Court reasoned that selection of those groups marching in the parade is entitled to the same First Amendment protections given to cable operators or newspaper editors. Thus, the organizers of the Saint Patrick’s Day parade could prevent a group from marching if the parade organizers disagreed with the message of the group.

Five years later, the Court decided *Boy Scouts of America v. Dale*, currently the leading case on both the doctrine of expressive association, and the use of that doctrine by public groups to discriminate against homosexuals. In that case, the Boy Scouts were held by the New Jersey Supreme Court to be a place of public accommodation and were therefore compelled by New Jersey’s public accommodations statute to reinstate James Dale, a scoutmaster whom the Scouts had expelled because he was homosexual. The Supreme Court reversed the decision of the New Jersey Supreme Court and held that the New Jersey statute unconstitutionally infringed the expressive association rights of the Boy Scouts because the presence of Dale within its ranks caused the Scouts to express a message that was contrary to the message that the Scouts wished to express, namely, that homosexuality is acceptable.

Distilling its prior expressive association jurisprudence, the Supreme Court articulated a three-element test for expressive association claims in *Dale*: a state action violates a particular group’s First Amendment right to expressive association when (1) that group is an “expressive association,” (2) that group’s ability to advocate

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42 Id. at 568-69; see also Edwards v. South Carolina, 372 U.S. 229, 235 (1963) (A peaceful protest march is “an exercise of [First Amendment] rights in their most pristine and classic form.”).
44 *Hurley*, 515 U.S. at 575.
46 Id. at 644-47.
47 Id. at 653.
48 Id. at 648.
“public or private viewpoints” is significantly impacted by the state action at issue, and (3) the interest furthered by the state action at issue does not justify the burden on the group’s expressive association. The Court appeared to give credence to the concern it voiced in *Gilmore v. City of Montgomery*, that the freedom of association should not be used as a means to uphold invidious discrimination, when it noted that an expressive association cannot “erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message.” However, the Court undermined that statement just a few lines before making it when it held that it was required to give substantial deference to an association’s view of what would impair its expression. The Court held that the Boy Scouts had sufficiently demonstrated that promotion of homosexuality as a “‘legitimate form of behavior’” was contrary to the message they wished to express, and that retaining Dale as a scoutmaster would force them to express that message to the Boy Scouts’ membership as well as the community at large.

What began as a recognition of the right for small, politically unpopular groups to assemble and make their viewpoints heard has become a means of judicially-enforced discrimination against the politically unpopular minority of gay Americans.

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49 *Id.* at 650.
50 *Id.* at 658-59.
53 *Id.*
54 *Id.* at 654.
II. CHRISTIAN LEGAL SOCIETY V. WALKER

A. Factual and Procedural Background

The Christian Legal Society (“CLS”) is a national organization of lawyers and law students dedicated to practicing law in a manner consistent with the teachings of the Bible. The Christian Legal Society has chapters at law schools across the country, including the law school at Southern Illinois University at Carbondale (“SIU” or the “University”). CLS requires members and officers to affirm a statement of faith, and CLS members must agree to follow a strict

57 453 F.3d 853 (7th Cir. 2006).
58 CLS’s mission is “[t]o be the national grassroots network of lawyers and law students, associated with others, committed to proclaiming, loving and serving Jesus Christ, through all we do and say in the practice of law, and advocating biblical conflict reconciliation, legal assistance for the poor and the needy, religious freedom and the sanctity of human life.” Christian Legal Society, Vision and Mission, http://www.clsnet.org/clsPages/vision.php (last visited Dec. 2, 2006). CLS describes its purpose as “[t]ransforming the legal profession for good one heart and mind at a time by enlisting lawyers and law students everywhere to faithfully serve Jesus Christ in the diligent study and ethical practice of law by ministering to the poor, reconciling people in conflict, defending life and protecting the religious liberties of all people.” Id.
60 The statement of faith reads as follows: 
  Trusting in Jesus Christ as my Savior, I believe in:
  * One God, eternally existent in three persons, Father, Son and Holy Spirit.
  * God the Father Almighty, Maker of heaven and earth.
  * The Deity of our Lord, Jesus Christ, God’s only Son, conceived of the Holy Spirit, born of the virgin Mary; His vicarious death for our sins through which we receive eternal life; His bodily resurrection and personal return.
  * The presence and power of the Holy Spirit in the work of regeneration.
  * The Bible as the inspired Word of God.

interpretation of Christian dogma, which proscribes homosexual conduct as immoral.61

The CLS chapter at SIU62 was recognized as an official student organization, and as a result of this recognition, CLS received various benefits.63 These benefits included access to the law school’s bulletin boards, private meeting space within the law school, access to the law school’s website and publications, access to the school’s email lists, eligibility for funding through the law school, and the right to use the SIU name.64 On March 25, 2005, CLS was notified by the Dean of SIU Law School that, because homosexuals were not allowed to be members, it was in violation of the EEO Policy and the Unlawful Discrimination Policy, and its status as an officially recognized student organization was revoked.65

CLS filed suit in the United States District Court for the Southern District of Illinois seeking an injunction restoring its status as an officially recognized student organization alleging, inter alia, that SIU’s actions had violated CLS’s First Amendment rights to freedom of speech and freedom of expressive association.66 The district court noted that a school does not run afoul of the First Amendment when it denies official recognition to a student group “that reserves the right to violate any valid campus rules with which it disagrees,”67 and found the EEO Policy to be facially neutral and otherwise valid.68 Because of the early stage of the case, the court could not yet determine whether the EEO Policy had been applied neutrally to CLS.69 As such, the district court denied CLS’s motion for a preliminary injunction, finding that CLS had failed to demonstrate the necessary likelihood of

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62 For the remainder of this Note, “CLS” will refer to the SIU chapter.
63 Id.
64 Id.
65 Id. at *2.
66 Id.
67 Id. (citing Healy v. James, 408 U.S. 169, 193-94 (1972)).
69 Id. at *2 n.2.
success on its First Amendment claims, calling it, “at best … a close question.”\textsuperscript{70} CLS appealed and filed a motion for an injunction pending appeal, which was granted by the seventh circuit.\textsuperscript{71}

\textit{B. The Seventh Circuit Decision}

A divided panel of the seventh circuit reversed the district court’s denial of CLS’s motion for a preliminary injunction and remanded the case to the district court with direction to enter a preliminary injunction on behalf of CLS.\textsuperscript{72} Writing for the majority, Judge Sykes, joined by Judge Kanne, held that CLS had demonstrated a likelihood of success on the merits of both of its First Amendment claims: expressive association and the denial of access to a public forum.\textsuperscript{73} Judge Wood, in dissent, argued that CLS had not met its burden of proof and that the record was too incomplete to hold that the district court’s findings were an abuse of discretion.\textsuperscript{74}

The majority first questioned whether the district court was correct in finding that CLS had, in fact, violated any stated SIU policy.\textsuperscript{75} There was no indication in the record or on oral argument that CLS had violated any state or federal antidiscrimination laws, so CLS could not have violated the Unlawful Discrimination Policy.\textsuperscript{76} The majority also questioned whether the EEO Policy applied to CLS, as CLS did not employ anyone, nor was CLS a “mouthpiece[]” of SIU.\textsuperscript{77} Judge Wood responded in her dissent that the EEO Policy applied to CLS because it requires that the University grant all “educational opportunities” without discrimination.\textsuperscript{78} Because participation in student organizations can be central to the educational experience in

\begin{itemize}
  \item \textsuperscript{70} \textit{Id.} at *3.
  \item \textsuperscript{72} \textit{Id.} at 867.
  \item \textsuperscript{73} \textit{Id.}
  \item \textsuperscript{74} \textit{Id.} at 876 (Wood, J. dissenting).
  \item \textsuperscript{75} \textit{Id.} at 860.
  \item \textsuperscript{76} \textit{Id.}
  \item \textsuperscript{77} \textit{Id.} at 860-61.
  \item \textsuperscript{78} \textit{Id.} at 872 (Wood, J. dissenting).
\end{itemize}
universities, SIU would have to provide equal access to all student organizations to give effect to the EEO Policy. Regardless, the majority doubted that CLS had violated the EEO Policy because CLS did not discriminate based on sexual orientation, but rather excluded individuals from membership based upon their “belief and behavior.” This argument was moot, according to the dissent, since the record was silent regarding whether CLS had ever admitted as a member an individual who had repented past homosexual behavior. Further, given the liberty interest in private sexual autonomy recognized by the Supreme Court in *Lawrence v. Texas*, Judge Wood argued that SIU could validly interpret the EEO Policy to apply to discrimination based on homosexual conduct as well as status.

Next, the court addressed CLS’s expressive association claim. Relying heavily on *Dale, Roberts*, and *Healy*, the majority concluded that SIU’s application of the EEO Policy forced CLS to accept homosexuals as members, and therefore significantly affected CLS’s ability to express its viewpoint that homosexuality is immoral. The dissent disagreed, arguing that SIU merely decided to withdraw certain benefits from CLS because CLS was not in compliance with the EEO Policy.

The court then determined that SIU had violated CLS’s free speech right by revoking CLS’s right to enter a public forum it was

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81 *Id.* at 860. According to CLS, a person who was homosexual, but repented past homosexual conduct and agreed not to engage in homosexual conduct in the future, could be admitted as a member. *Id.* at 858.
82 *Id.* at 873 (Wood, J. dissenting).
83 539 U.S. 558 (2003). The Supreme Court, holding invalid a Texas statute criminalizing homosexual sodomy, noted that homosexual couples have the same autonomy to choose private, intimate relationships as do heterosexual couples. *Id.* at 574.
84 *Christian Legal Soc’y*, 453 F.3d at 873 (Wood, J. dissenting).
85 *Id.* at 863.
86 *Id.* at 873-74 (Wood, J. dissenting).
entitled to access. Although the record was too incomplete to address the proper level of scrutiny under which to evaluate the forum created by SIU, the majority nonetheless concluded that under any level of scrutiny, SIU had violated CLS’s free speech rights because it had applied the EEO Policy to CLS in a viewpoint-discriminatory fashion. The dissent reasoned that if the record was insufficiently developed to decide on the level of scrutiny, it was likewise insufficiently developed to determine that SIU had unfairly applied the EEO Policy.

III. ANALYSIS

A. The Seventh Circuit misapplied the Supreme Court’s expressive association jurisprudence, extending First Amendment protection beyond the sorts of activities typically covered

In reaching its decision regarding CLS’s expressive association claim, the majority relied extensively on the Supreme Court’s expressive association cases, specifically Dale, Hurley, Roberts, and Healy. However, the cases relied upon by the majority are distinguishable in three important respects: first, CLS was not compelled to associate with anyone, nor was CLS forced to modify the content of its expression; second, SIU did not prevent CLS from associating on or around the SIU campus; and finally, SIU has a compelling interest in eliminating invidious discrimination within its educational community. Based on the first two facts, the Seventh Circuit should have held that SIU’s enforcement of the EEO Policy did not significantly impair CLS’s associational rights. The third fact

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87 Id. at 867.
88 Id.
91 Id. at 874-75 (Wood, J. dissenting).
92 Id. at 861-64.
should have led the Seventh Circuit to the conclusion that any violation of CLS’s associational rights was justified. The majority’s misapplication of the Supreme Court’s expressive association jurisprudence overextended the protections properly granted to expressive associations to the potential detriment of all state antidiscrimination policies.93

1. CLS’s claim was distinguishable from prior expressive association cases because CLS was not compelled to admit anyone as a member.

To succeed in an expressive association claim, a group must first show that it is expressive association.94 The group must then demonstrate that its “ability to advocate public or private viewpoints” has been significantly impacted by government action.95 In Roberts, the Supreme Court recognized that “forc[ing] [a] group to accept members it does not desire” may violate the group’s associational freedom because it significantly interferes with the internal structure and affairs of the group.96 Although the Jaycees were forced to include women by the public accommodations statute at issue in Roberts, the Supreme Court nonetheless held the statute to be valid because the state’s interest in ending discrimination against women was important,97 and the Jaycees’ associational freedoms were not significantly impaired.98 The Supreme Court’s subsequent expressive association decisions also involved compelled association: the Boy Scouts were required under a New Jersey public accommodations law to reinstate Mr. Dale as an assistant scoutmaster,99 and the organizers

95 Dale, 530 U.S. at 650.
97 Id. at 625.
98 Id. at 627.
99 Dale, 530 U.S. at 646.
of Boston’s St. Patrick’s Day Parade were forced to allow a group of gay and lesbian individuals to march in their parade. In a recent case addressing an expressive association claim, the Court held there was no violation of expressive association rights caused by granting military recruiters mandatory access to a law school campus because military recruiters did not “become members of the school’s expressive association.”

Nowhere in its complaint did CLS allege that it had been compelled by SIU to admit anyone, and the district court found no such compulsion. Although the majority acknowledged that there was no actual compulsion, it held SIU’s withdrawal of recognition was constitutionally equivalent to a compelled association, and therefore violated CLS’s expressive association rights. The majority relied on Healy to reach the conclusion that SIU could not use the threat of derecognition to force CLS to accept openly gay students as members and officers. However, the majority’s reliance on Healy for this proposition was puzzling, as the facts in Healy did not involve a student association compelled to admit members, but rather a student association prevented from associating at all.

While the majority correctly noted that First Amendment rights are protected from indirect as well as direct interference, a state may make certain value judgments and implement those judgments through

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105 Id.
107 Christian Legal Soc’y, 453 F.3d at 864 (citing Healy, 408 U.S. at 183).
the allocation of public resources.\textsuperscript{108} In addition, the Supreme Court has repeatedly held that Congress may attach conditions to the receipt of federal funds, even when those conditions intrude upon the exercise of certain fundamental rights.\textsuperscript{109} Although a state may not withhold a benefit to compel individuals to forgo First Amendment rights, a state may, within broad limits, appropriate public funds to establish a program and then define the limits of that program.\textsuperscript{110}

SIU created a program of recognized student organizations, and established criteria, including meeting the EEO Policy, for becoming a recognized student organization.\textsuperscript{111} Because CLS refused to admit homosexuals as members, SIU informed CLS that it had violated the EEO Policy, and CLS was therefore no longer allowed to participate in the program of recognized student organizations.\textsuperscript{112} The majority asked what purpose was served by “forcing CLS to accept members whose activities violate its creed other than eradicating or neutralizing particular beliefs contained in that creed.”\textsuperscript{113} However, nowhere in the record before the Seventh Circuit was there any indication that SIU

\textsuperscript{108} Cf. Maher v. Roe, 432 U.S. 464, 474 (1977) (holding that, despite a woman’s fundamental right to choose to terminate a pregnancy, Connecticut is under no obligation to use public funds to subsidize abortions for indigent women).

\textsuperscript{109} See United States v. Am. Library Ass’n, Inc., 539 U.S. 194 (2003) (plurality) (mandated use of Internet filters on library computers where Internet access was procured with federal assistance did not violate library patrons’ First Amendment rights); Rust v. Sullivan, 500 U.S. 173 (1991) (prevention of family-planning funds from being used by programs mentioning abortion did not violate either free speech rights of doctors or patients’ rights to choose to terminate pregnancy); Grove City College v. Bell, 465 U.S. 555, 575-76 (1984) (forbidding a college receiving federal funding from discriminating on the basis of gender did not violate that college’s First Amendment rights); see also Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 126 S. Ct. 1297, 1306-07 (2006) (although the Court held that Congress could directly compel law schools to accept military recruiters, it noted that the law schools were “free to decline the federal funds”).

\textsuperscript{110} Am. Library Ass’n, 539 U.S. at 210-11.

\textsuperscript{111} Brief of Defendants-Appellees at 4, Christian Legal Soc’y, 453 F.3d 853 (No. 05-3239).

\textsuperscript{112} Christian Legal Soc’y, 453 F.3d at 858.

\textsuperscript{113} Id. at 863.
created the EEO Policy to force student groups like CLS to include members with which those groups did not wish to associate. Like virtually all law schools across the country,114 SIU had a preexisting antidiscrimination policy, generally applied, that precluded discrimination on the basis of “race, color, religion, sex, national origin, age, disability, . . . sexual orientation, or marital status,”115 and required that all recognized student groups comply with that policy.116 SIU found that CLS was in violation of this policy and revoked its recognized status.

Because SIU did not force CLS to admit anyone, the majority’s reliance on Dale and Hurley is misplaced. Rather, as in Rumsfeld v. Forum for Academic and Institutional Rights, CLS “has attempted to stretch [the] . . . First Amendment doctrine[ ]” of expressive association “well beyond the sort of activities” protected by that doctrine,117 and the majority should not have extended First Amendment protection to CLS. Because Dale significantly weakened a state’s ability to enforce antidiscrimination laws against certain groups, courts should be wary of extending the holding of Dale.118 By shielding CLS from the enforcement of SIU’s EEO Policy despite the fact that CLS wished to avail itself of the benefits attendant to official recognition by SIU, the majority of the panel did just that. This overextension of Dale could potentially lead to the invalidation of any antidiscrimination policy protecting homosexuals, and it calls into question the validity of antidiscrimination policies generally.

115 Christian Legal Soc’y, 453 F.3d at 858.
116 Brief of Defendants-Appellees, supra note 111, at 4.
117 126 S. Ct. at 1313.
118 Cf. Jed Rubenfeld, The First Amendment’s Purpose, 53 Stan. L. Rev. 767, 810 n.96 (2001) (taken to its logical conclusion, the holding in Dale could allow a Christian homeowners’ association, wishing to exclude African-Americans, Jews, homosexuals, or anyone else on the basis of religious belief, to demand that any law challenging their discrimination be subjected to strict scrutiny).
2. Although SIU withdrew from CLS the benefits conferred to officially recognized student groups, SIU did not prevent CLS from associating on or around the SIU campus.

The majority argued that the facts before it were similar to the facts in Healy in “all material respects.” However, the facts in Healy are readily distinguishable, as Judge Wood noted in her dissent. Not only did the president of the college in Healy refuse to confer recognized status to the student group (“SDS”) in that case, he denied SDS the ability to meet on campus and took the “extraordinary step of refusing to let students meet (i.e. sit together) in the campus coffee shop!” SIU did nothing so drastic to CLS. CLS was still able to meet on campus, and, as recognized by the district court, its abilities to “assemble, evangelize, and proselytize [were] not impaired.” Although CLS’s access to physical bulletin-board space at SIU was restricted when it was derecognized, CLS was still free to distribute flyers on campus.

In addition, as recognized by the dissent, the importance of physical bulletin-board space on modern campuses has diminished markedly in the years since Healy was decided: “[m]ost universities and colleges, and most college-aged students, communicate through email, websites, and hosts like MySpace®.” All of these avenues remained available to CLS, so CLS had substantial means to get its message out to the SIU community, unlike the students in Healy.

Not only are the facts in Healy materially distinguishable from this case, the majority overlooked an important holding in Healy. The Healy Court held that SDS’s associational rights were violated when the college refused, without justification, to grant it official

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119 Christian Legal Soc’y, 453 F.3d at 864.
120 Id. at 874 (Wood, J. dissenting).
121 Id. (citing Healy v. James, 408 U.S. 169, 181 (1972)).
123 Brief of Defendants-Appellees, supra note 111, at 11.
125 Id.
recognition. The Court further held that “the benefits of participation in the internal life of the college community may be denied to any group that reserves the right to violate any valid campus rules with which it disagrees.” This is directly analogous to the case before the Seventh Circuit: CLS sought “the benefits of participation” as a recognized student group at SIU, but also wished to violate SIU’s EEO Policy. Under the correct interpretation of Healy, SIU had every right to derecognize CLS. The majority recognized SIU’s “interest in maintaining order and enforcing reasonable campus rules,” but stated that SIU could not apply the EEO Policy to CLS because it was aimed at CLS’s “advocacy or philosophy.” Although CLS alleged that SIU had singled it out for enforcement of the EEO Policy, the record before the Seventh Circuit was undeveloped. As noted in the dissent, SIU had not yet submitted any evidence to counter CLS’s assertion that the EEO Policy had been applied to it unfairly. Yet, the majority nevertheless held that SIU had no purpose in enforcing its antidiscrimination policy other than “neutralizing particular beliefs” of CLS. As addressed in greater detail below, SIU’s purpose in enforcing its EEO Policy was not to disadvantage CLS, but to further the compelling goal of eliminating discrimination within student organizations.

3. SIU has a compelling interest in eliminating invidious discrimination within its educational community.

The final element of the Supreme Court’s expressive association test is the balancing of interests. Even if a group shows that a regulation has significantly impaired its ability to associate, the regulation may still be valid if it “serve[s] compelling state interests, 408 U.S. at 181.

Id. at 193-94.

Christian Legal Soc’y, 453 F.3d at 864.

Verified Complaint, supra note 102, at ¶ 4.11.

Christian Legal Soc’y, 453 F.3d at 869 (Wood, J. dissenting).

Id. at 863.

unrelated to the suppression of ideas,” and is narrowly-tailored to meet those interests.\footnote{Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984).} Not only did SIU not significantly impair CLS’s ability to associate, the majority misapplied the balancing test by declining to recognize SIU’s compelling interest in eliminating discrimination in the educational opportunities provided to students. In Roberts, the Supreme Court held that Minnesota’s antidiscrimination law “clearly further[ed] compelling state interests” by ensuring equal access to women,\footnote{Id. at 626.} and that a state’s interest in ensuring equal access to all of its citizens was unrelated to the suppression of ideas.\footnote{Id. at 624.}

Most law schools have, since at least 1990, advanced antidiscrimination policies identifying sexual orientation as a protected class.\footnote{Forum for Academic and Institutional Rights, Inc. v. Rumsfeld, 291 F. Supp. 2d 269, 280 (D.N.J. 2003), rev’d, 390 F.3d 219 (3d Cir. 2004), rev’d and remanded, 126 S. Ct. 1297 (2006).} These policies arose, at least in part, as a response to the discrimination to which gay people in America have been subjected.\footnote{See Romer v. Evans, 517 U.S. 620, 631 (1996) (Colorado constitutional amendment denied to homosexual individuals the sort of protections against exclusion from ordinary life in society that heterosexual individuals take for granted).} In addition, the Supreme Court has long held elimination of discrimination in education to be a compelling interest.\footnote{Cf. Norwood v. Harrison, 413 U.S. 455, 469 (1973) (‘discriminatory treatment exerts a pervasive influence on the entire educational process’).} More recently, the Supreme Court has recognized that diversity among a law school’s student body is a compelling interest that withstands strict scrutiny.\footnote{Grutter v. Bollinger, 539 U.S. 306, 328 (2003).} The Court further held that when a university’s “proper institutional mission” is at issue, "‘good faith’ on the part of [the] university is ‘presumed’ absent ‘a showing to the contrary.’”\footnote{Id. at 329 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 318-19 (1978)).}
So long as SIU applied the EEO Policy in furtherance of its “institutional mission,” it is therefore presumed to have acted in good faith. The Supreme Court has noted that a university can further its educational mission by promoting participation in student groups and other extracurricular activities.141 SIU’s determination that its educational mission would be furthered by eliminating discrimination in access to student groups was thus entitled to substantial deference from the Seventh Circuit. Rather than granting SIU this deference however, the majority casually referred to the state’s general interest in eliminating discriminatory conduct, and then insisted, despite the limited record before it, that SIU had enforced the EEO Policy not to promote equality of opportunities, but rather to suppress CLS’s ability to express its beliefs.142 Precisely because the record was so limited, Judge Wood had no reason to believe that SIU would behave in such a capricious manner: “I am unwilling to indulge in the presumption that a body that is legally part of the State of Illinois is violating the federal and state constitutions.”143

B. The Seventh Circuit should not have reversed the district court, because the record was too incomplete to rule on CLS’s public-forum exclusion claim.

Even though the record on appeal was admittedly thin, Judge Sykes nonetheless held that SIU had violated CLS’s right to participate in the public forum of officially recognized student organizations.144 Judge Wood noted in her dissent that SIU had not yet presented any evidence because of the case’s early procedural posture.145 It is therefore unsurprising that, in the majority’s words, “every part of [the record] . . . point[ed] to success for CLS.”146 The majority noted that

141 See Bd. of Regents of Univ. of Wis. v. Southworth, 529 U.S. 217, 222-23 (2000).
143 Id. at 874-75.
144 Id. at 867.
145 Id. at 869 (Wood, J. dissenting).
146 Id. at 867.
SIU had created a some sort of public forum by choosing to grant official recognition to certain student groups, but acknowledged that the record was insufficiently developed to determine the exact type of public forum present, and therefore the proper level of scrutiny under which to analyze CLS’s alleged expulsion from the forum. The majority argued that, regardless of the level of scrutiny it applied, SIU had enforced the EEO Policy against CLS in a viewpoint discriminatory way. CLS alleged in its complaint that SIU had singled it out for derecognition, and provided the constitutions of a few other student groups which it claimed discriminated in their membership yet remained officially recognized. However, the district court noted that “at this stage in the case, the Court need not, and indeed cannot, decide whether the [EEO] Policy has been neutrally applied.” If the record was too incomplete for the district court to determine whether SIU had singled out CLS for enforcement of the EEO Policy, the majority was unwise to grant a preliminary injunction on the basis of that record.

CONCLUSION

In its expressive association jurisprudence, the Supreme Court has struck a balance between protecting the important First Amendment rights promoted by group association and protecting the rights of individuals to freely access publicly available goods and services. The Seventh Circuit’s holding in Christian Legal Society v. Walker tipped this delicate balance too far in favor of groups wishing to exclude, because Christian Legal Society’s associational rights were not significantly impaired in the same fashion as groups in prior expressive association cases. The Supreme Court’s present First Amendment rights promoted by group association and protecting the rights of individuals to freely access publicly available goods and services. The Seventh Circuit’s holding in Christian Legal Society v. Walker tipped this delicate balance too far in favor of groups wishing to exclude, because Christian Legal Society’s associational rights were not significantly impaired in the same fashion as groups in prior expressive association cases. The Supreme Court’s present First Amendment rights promoted by group association and protecting the rights of individuals to freely access publicly available goods and services. The Seventh Circuit’s holding in Christian Legal Society v. Walker tipped this delicate balance too far in favor of groups wishing to exclude, because Christian Legal Society’s associational rights were not significantly impaired in the same fashion as groups in prior expressive association cases. The Supreme Court’s present First

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147 Id. at 865.

148 Id. at 866.

149 Id.

150 Verified Complaint, supra note 102, at ¶ 4.11.

151 Christian Legal Soc’y, 453 F.3d at 870 (Wood, J. dissenting).

Amendment jurisprudence allows colleges and universities, as part of their educational mission, to prevent discrimination within student organizations, so long as any antidiscrimination policy is enforced in a viewpoint-neutral manner. Because there was insufficient evidence before the Seventh Circuit that Southern Illinois University had discriminated in the application of its antidiscrimination policy to revoke Christian Legal Society’s status as an officially recognized student organization, the Seventh Circuit should not have reversed the district court’s decision.
THE SEVENTH CIRCUIT’S STATUTORY INTERPRETATION MISFIRES, WOUNDING THE ALREADY FRAGILE FREEDOM OF INFORMATION ACT

LAYLA AMIRYAGHOOBI


INTRODUCTION

In a time like the present, when political turmoil and allegations of government corruption dominate our news, the Freedom of Information Act (“FOIA”) should be on the forefront of every American’s mind. FOIA was enacted in 1966 to provide the American public with the right to access information about certain government activities, thereby minimizing the risk of government secrecy and corruption. The United States Supreme Court has stated that the “basic purpose of the FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”

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Under FOIA, accessibility to information is based upon the fundamental principle that the American people have a “right to know,” rather than determined based on their “need to know.” Thus, FOIA requires government agencies to disclose information and records upon request and without question. While government agencies are still permitted to withhold from disclosure certain information that falls within one of FOIA’s nine exemptions, these exemptions are to be narrowly construed so as to promote the statute’s broad disclosure policy. Furthermore, federal courts may review an agency’s denial of a FOIA request to determine whether the information was improperly withheld.

In 2002, the United States Court of Appeals for the Seventh Circuit was faced with such a review in City of Chicago v. United States Department of Treasury, Bureau of Alcohol, Tobacco and Firearms (“ATF”), the first of what was to become a series of three cases decided by the court regarding the City of Chicago’s (the “City”) FOIA request from ATF. Pursuant to FOIA, the City had requested data contained in two ATF databases regarding the tracing and sale of firearms, and ATF had repeatedly refused to disclose all of the requested information to the City, claiming that various exemptions warranted its refusal.

In its first two opinions, the Seventh Circuit was a champion for public disclosure of the trace and multiple sales data, arguing

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4 See S. 394 § 2.
7 See NLRB, 437 U.S. at 236; In re Wade, 969 F.2d 241, 246 (7th Cir. 1992).
9 See City of Chicago v. ATF (“Chicago III”), 423 F.3d 777 (7th Cir. 2005); City of Chicago v. ATF (“Chicago II”), 384 F.3d 429 (7th Cir. 2004); City of Chicago v. ATF (“Chicago I”), 287 F.3d 628 (7th Cir. 2002).
10 See Chicago III, 423 F.3d 777; Chicago II, 384 F.3d 429; Chicago I, 287 F.3d 628.

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incessantly that the public interest in the disclosure of this information far outweighed any private interest or other government justification for its withholding.\(^{11}\) However, in September 2005, the Seventh Circuit radically switched roles from a FOIA advocate to a FOIA foe in the court’s third and final \textit{City of Chicago} opinion.\(^{12}\) In this final opinion, the Seventh Circuit held that Congress effectively changed the substantive law under FOIA, and completely banned the disclosure of this information to the public, by inserting a rider in the Consolidated Appropriations Act of 2005 (“2005 rider”),\(^{13}\) granting the information in question immunity from legal process.\(^{14}\) In doing so, the court gave a significant and misplaced amount of weight to the apparent intent of Congress to ban the information from disclosure and quickly set aside established principles of statutory interpretation and construction to reach a convenient but faulty conclusion.\(^{15}\)

Part I of this Note sets out the factual and procedural background of the three \textit{City of Chicago} decisions and details the reasoning and holding of each decision. Part II discusses the Seventh Circuit’s faulty interpretation of the 2005 rider in greater detail. Part III describes the United States District Court for the Eastern District of New York’s more logical interpretation of the same statutory text. Finally, Part IV compares the two interpretations and examines more specifically the flaws and possible impact of the Seventh Circuit’s interpretation.

\section*{I. BACKGROUND OF THE \textit{CITY OF CHICAGO} LITIGATION}

Since late 1998, the City of Chicago has attempted, unsuccessfully, to gain access to firearms sales and trace records

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\(^{11}\) See \textit{Chicago II}, 384 F.3d at 435-36; \textit{Chicago I}, 287 F.3d at 637-38.
\(^{12}\) See \textit{Chicago III}, 423 F.3d at 784.
\(^{14}\) \textit{Chicago III}, 423 F.3d at 782.
\(^{15}\) See \textit{id.} at 780-82.
\end{flushleft}
contained in two databases compiled and maintained by ATF. The City’s long and documented struggle to retrieve these records began in response to a separate action it brought against certain manufacturers, distributors, and dealers of firearms, who the City claimed created a public nuisance by intentionally marketing firearms to Chicago residents and other residents likely to use or possess the weapons in Chicago. The City alleged that the defendants’ conduct interfered with the City’s ability to enforce its gun control ordinances. Therefore, pursuant to FOIA, the City requested specific information from ATF’s Multiple Sales and Trace Databases (“Trace Data”) in an effort to determine the distribution practices of these gun manufacturers and establish liability.

ATF is a law enforcement agency within the United States Department of Justice which, among other things, is responsible for the enforcement of federal criminal laws and the regulation of the firearms industry. The Seventh Circuit stated that “ATF has acknowledged that its missions include analysis of firearm distribution and trafficking patterns, aiding local governments to enforce their own gun control laws and informing the public of the nature and extent of

17 See City of Chicago v. ATF ("Chicago I"), 287 F.3d 628, 631 (7th Cir. 2002); City of Chicago, 2001 WL 34088619, at *1; see generally City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1148 (Ill. 2004) (holding in favor of the defendant by refusing to extend the law of nuisance to apply to the state and federally regulated firearms industry and stating that the regulation of the manufacture, distribution and sale of firearms should be left to the legislature, not the courts).
18 See Chicago I, 287 F.3d at 631.
19 Id.
20 6 U.S.C. § 531-33 (transferring ATF from the Department of Treasury to the Department of Justice, with the exception of ATF’s administration and revenue collection functions, and establishing an explosives training and research facility with the Bureau. ATF is now known as the Bureau of Alcohol, Tobacco, Firearms and Explosives).
illegal gun trafficking. These gun control laws include the Gun Control Act ("GCA"), which requires firearms manufacturers, importers, dealers and collectors to disclose certain information to ATF. As part of its duties, ATF then compiles and maintains the information in comprehensive databases. During the last decade, ATF has refused to disclose and has fiercely fought to prevent the disclosure of the content of these databases to cities, including the City of Chicago, and private organizations around the country.

The first database at issue in the City of Chicago litigation was the “Trace Database,” which as its name suggests contains information regarding the manufacture, distribution and purchase history of a particular weapon recovered by a law enforcement agency in connection with a crime. The second database, the “Multiple Sales Database,” contains information submitted to ATF by dealers on any non-licensed individuals who purchased two or more firearms from the same dealer within a five-day period. Despite the City’s repeated requests, ATF failed to provide the city with all of the requested Trace Data, citing numerous reasons why the information was exempt from disclosure. This four-year court battle in the Seventh Circuit ensued.

A. Chicago I - The Applicability of Exemptions 6, 7(A) and 7(C) of FOIA

The Seventh Circuit first became involved in the City of Chicago litigation in 2002, after the United States District Court for the Northern District of Illinois granted the City’s summary judgment

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22 Chicago I, 287 F.3d at 637.
24 See Chicago I, 287 F.3d at 631-32.
26 See Chicago I, 287 F.3d at 631-32.
27 Id.
28 Id. at 632 (noting that ATF provided the City with some of the requested information, but withheld a significant portion).
motion and ATF appealed. The issues at both the district court level and the initial appellate review were whether certain FOIA exemptions, namely Exemption 6, Exemption 7(A), and Exemption 7 (C), permitted ATF to withhold this information from the City.

Relying on the long established rule that exemptions to FOIA are to be narrowly construed, the Seventh Circuit reviewed each exemption and held that neither of the exemptions was applicable to the requested information. At the end of its analysis, the court firmly stated:

Inherent in the City’s request for records is the public’s interest in ATF’s performance of its statutory duties of tracking, investigating and prosecuting illegal gun

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29 See id. at 631; City of Chicago v. ATF, 2001 WL 34088619, at *6 (N.D. Ill. Mar. 8, 2001).
30 Exemption 6 exempts from disclosure “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy.” 5 U.S.C. § 552(b)(6).
31 Exemption 7(A) provides that records “compiled for law enforcement purposes” are exempt from disclosure, “but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with law enforcement proceedings.” 5 U.S.C. § 552(b)(7)(A).
32 Under Exemption 7(C), “records or information compiled for law enforcement purposes” may be withheld “to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C).
33 City of Chicago v. ATF (“Chicago I”), 287 F.3d 628, 632 (7th Cir. 2002); City of Chicago, 2001 WL 34088619, at *2.
34 Chicago I, 287 F.3d at 636. The Seventh Circuit held that the names and addresses of individuals who purchased firearms were not of “such a sensitive nature that their disclosure would harm or embarrass the individual,” and so, Exemption 6 did not apply. Id. The court also held that Exemption 7(C) does not apply to any of the requested information, and noted that the purchase of a firearm does not raise any legitimate privacy concerns as it is not a private transaction and purchasers are on notice that their names and addresses will be reported to the proper authorities. Id. at 637. Finally, the court found that disclosure of the information in question would not interfere with enforcement proceedings “within the meaning of Exemption 7(A) of FOIA.” Id. at 635; see also City of Chicago v. ATF, 297 F.3d 672 (7th Cir. 2002) (amending portions of the Chicago I opinion relating to FOIA Exemption 7(A)).
trafficking, as well as determining whether stricter regulation of firearms is necessary. There is a strong public policy in facilitating the analysis of national patterns of gun trafficking and enabling the City to enforce it criminal ordinances. Disclosure of the records sought by the City will shed light on ATF’s efficiency in performing its duties and directly serve FOIA’s purpose in keeping the activities of government agencies open to the sharp eye of public scrutiny.35

The court then affirmed the district court’s decision ordering ATF to disclose the requested information to the City.36

ATF appealed the Seventh Circuit’s 2002 decision and the Supreme Court granted certiorari.37 However, while the case was pending, Congress passed the Consolidated Appropriations Resolution of 2003, which contained a rider (“2003 rider”) that prohibited the use of appropriated funds “to take any action based upon any provision of [FOIA] with respect to records collected or maintained pursuant to [certain sections of the GCA],” including the information in question.38 Thus, the Supreme Court vacated the Seventh Circuit’s judgment and remanded the case back to the court to determine “what effect, if any, this rider had on the case.”39

B. Chicago II – Interpreting the 2003 and 2004 Riders

In September 2004, the Seventh Circuit rendered its second opinion regarding the City of Chicago’s FOIA request in light of the 2003 rider and a rider contained in the Consolidated Appropriations

35 Chicago I, 287 F.3d at 637.
36 Id. at 638.
39 City of Chicago, 537 U.S. at 1229.
Act of 2004 (“2004 rider”). Both riders expressly precluded the use of federal funds to disclose the Trace Data, and impliedly, as ATF argued, prohibited the disclosure of the data to the public. This second opinion also introduced a fourth potential exemption to the controversy, Exemption 3, which permitted government agencies to withhold information that was specifically exempt from disclosure by another statute. Therefore, the court’s task was to interpret the 2003 and 2004 riders to determine whether the funding restrictions in effect exempted the requested data from disclosure and amounted to a substantive change in FOIA.

Relying once again on FOIA’s underlying policy “to establish a general philosophy of full agency disclosure,” the court stated that there is a “strong presumption in favor of disclosure” and that exemptions to FOIA are to be interpreted narrowly. The court then diligently began its interpretation of the 2003 and 2004 riders by first reviewing the express language of the two acts. After finding no express language in either rider exempting the information from disclosure, the issue then became whether Congress intended to exempt the Trace Data from disclosure, even though it did not

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40 Pub. L. No. 108-199, 118 Stat. 3, 53 (2004); see City of Chicago v. ATF (“Chicago II”), 384 F.3d 429, 432 (7th Cir. 2004) (noting that the Consolidated Appropriations Act of 2004 was passed after the remand by the Supreme Court but before the Seventh Circuit reheard the case).

41 Chicago II, 384 F.3d at 432.

42 Exemption 3 permits withholding of information that is “specifically exempted from disclosure by statute (other than [FOIA]), provided that such statute (A) requires that the matter be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.” 5 U.S.C. § 552(b)(3).

43 Chicago II, 384 F.3d at 432.

44 Id.

45 Id.

46 Id. at 432-33 (noting that only direct language had been used to create substantive FOIA exemptions in the past, such as language expressly indicating that certain information “may be withheld from the public in response to a FOIA request.”).
explicitly indicate such intent. This congressional practice is referred to as “repeal by implication.” As the court noted, repeals by implication are a disfavored practice, especially when the repeal is to have occurred through an appropriations measure. While appropriations acts are permitted to change substantive law, “there is a strong presumption that they do not.” Further, in the event that appropriations legislation conflicts with a substantive statute, the court is to narrowly construe the appropriations legislation.

The Seventh Circuit outlined the two instances where repeal by implication may be found: (1) where one act is “clearly intended as a substitute” for the other or (2) where the two statutes are in “irreconcilable conflict.” The court quickly dismissed the idea that either rider was a clearly intended substitute for portions of FOIA. It, however, gave a great deal of consideration to whether FOIA and the funding restrictions imposed by the riders were in irreconcilable conflict. The court eventually came to the conclusion that there was “no irreconcilable conflict between prohibiting the use of federal funds to process the request and granting the City access to the databases.”

47 Id. at 433-34.
48 Id. at 433.
49 Chicago II, 384 F.3d at 433 (citing Tenn. Valley Authority v. Hill, 437 U.S. 153, 189-90 (1978) (stating that “the policy [that repeals by implication are disfavored] applies with even greater force when the claimed repeal rests solely on an Appropriations Act, and that [the Court] recognizes that both substantive enactments and appropriations measures are “Acts of Congress,” but the latter have the limited and specific purpose of providing funds for authorized programs.”)).
50 Chicago II, 384 F.3d at 433.; see generally Jack M. Beermann, Congressional Administration, 43 SAN DIEGO L. REV. 61, 84-90 (2006) (briefly discussing the controversy surrounding use of appropriations riders, and noting that one main criticism is the ability of riders to “fly below the political radar,” by being “placed in a bill by a few connected members of Congress and voted on by members who may not even be aware of their presence in the bill.”).
51 Chicago II, 384 F.3d at 433.
52 Id.
53 Id. at 433-34.
54 Id. at 434-35.
55 Id. at 435.
The Seventh Circuit reasoned that FOIA is mainly focused on ensuring that the public has access to agency information, and it “only peripherally deals with the allocation of funds.” Where appropriations legislation had changed substantive law in the past, the substantive statutes in most cases had only dealt with the transfer of funds; thus, “by making the funds in question unavailable Congress was able to squarely defeat the purpose of those statutes.”

Therefore, the Seventh Circuit concluded that the funding restrictions imposed by the two riders were merely a procedural obstacle that the City could easily overcome and advocated the City’s suggestion to use a court-appointed special master, paid for by the City, to retrieve the data. The court again affirmed the district court’s decision and ordered ATF to disclose the Trace Data to the City.

C. Chicago III – Interpreting the 2005 Rider

The Seventh Circuit’s third and final City of Chicago opinion stemmed from the passage of a third rider, the 2005 rider, which prompted the rehearing of the case and resulted in the reversal of the district court’s decision. Like the previous two riders, the 2005 rider precluded the use of federal funding to access the databases in question. However, this new rider also contained additional language declaring that “all such data shall be immune from legal process.” The Seventh Circuit’s interpretation of this language, and in particular the phrase “such data,” is the focus of the remainder of this Note and the center of this continuing debate.

56 Id.
57 Chicago II, 384 F.3d at 434.
58 Id. at 436.
59 Id.
60 118 Stat. at 2859-60.
61 City of Chicago v. ATF (“Chicago III“), 423 F.3d 777, 778 (7th Cir. 2005).
62 Id. at 779-80.
63 Id.; 118 Stat. at 2860.
The three-judge panel, consisting of Circuit Judges Bauer, Rovner, and Williams, again heard the case in *Chicago III*. Judge Bauer, delivering the opinion of the court, began by straightforwardly referencing the Seventh Circuit’s history with the case: “For the third time in four years, we consider whether [FOIA] entitles the City of Chicago to information from the [ATF] databases regarding the sale and tracing of firearms.” After a brief description of the court’s prior decisions and the series of riders that were passed by Congress during the pendency of the case, the court set out the language of the 2005 rider and jumped right into a discussion of its meaning.

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64 All three *City of Chicago* decisions were rendered by Judges William Bauer, Ilana Diamond Rovner and Ann Williams, and all three opinions were delivered by Judge Bauer. See *Chicago III*, 423 F.3d at 778; *Chicago II*, 384 F.3d at 431; *City of Chicago v. ATF* (“*Chicago I*”), 287 F.3d 628, 631 (7th Cir. 2002).

65 *Chicago III*, 423 F.3d at 778.

66 The 2005 rider provides:

No funds appropriated under this or any other Act with respect to any fiscal year may be used to disclose part or all of the contents of the Firearms Trace System database maintained by the National Trace Center of the Bureau of Alcohol, Tobacco, Firearms, and Explosives or any information required to be kept by licensees pursuant to section 923(g) of title 18, United States Code, or required to be reported pursuant to paragraphs (3) and (7) of such section 923(g), to anyone other than a Federal, State, or local law enforcement agency or a prosecutor solely in connection with and for use in a bona fide criminal investigation or prosecution and then only such information as pertains to the geographic jurisdiction of the law enforcement agency requesting the disclosure and not for use in any civil action or proceeding other than an action or proceeding commenced by the Bureau of Alcohol, Tobacco, Firearms, and Explosives, or a review of such an action or proceeding, to enforce the provisions of chapter 44 of such title [18 USCS §§ 921 et seq.], and *all such data shall be immune from legal process and shall not be subject to subpoena or other discovery in any civil action in a State or Federal court or in any administrative proceeding other than a proceeding commenced by the Bureau of Alcohol, Tobacco, Firearms, and Explosives to enforce the provisions of that chapter, or a review of such an action or proceeding; except that this proviso shall not be construed to prevent the disclosure of statistical information*.
With little elaboration, the Seventh Circuit agreed with ATF that the 2005 rider dramatically changed the legal landscape since the court’s 2004 opinion.68 The court stated: “Congress’ obvious intention in adding the ‘immune from legal process’ language to the funding restriction that existed under prior riders was to cut off access to the databases for any reason not related to law enforcement.”69 In short, the court interpreted the new rider as prohibiting ATF from acting on any request for disclosure of the Trace Data, and providing the requesting party with no judicial remedy.70 This reading of the 2005 rider also made Chicago II’s court-appointed special master solution untenable, as the court determined that such a court order was unquestionably “legal process” and prohibited under the provisions of the new rider.71 Ultimately, the Seventh Circuit held that the 2005 rider qualified as an Exemption 3 statute and substantively changed FOIA law by exempting from disclosure data to which the public was previously entitled.72 The court reversed the district court’s judgment and released ATF from its obligation to give the City access to the Trace Data.73

118 Stat. at 2859-60 (emphasis added highlighting relevant 2005 additions).
67 Chicago III, 423 F.3d at 779-80.
68 Id. at 780.
69 Id.
70 Id.
71 Id. at 781; see also City of Chicago v. ATF (“Chicago II”), 384 F.3d 429, 436 (7th Cir. 2004) (advocating the use of a court-appointed special master to retrieve the data).
72 Chicago III, 423 F.3d at 782. The court also heard and dismissed the City’s separation of powers and first amendment arguments, which are beyond the scope of this Note.
73 Id. at 784.
II. THE SEVENTH CIRCUIT’S FAULTY INTERPRETATION

Unlike most statutory interpretation cases, the Seventh Circuit did not lay out any rules or guidelines in its opinion by which to interpret the language of the 2005 rider in *Chicago III*. 74 Instead, the court purported to know, from the very beginning, the clear meaning of the language, the structure, and the intent of the 2005 rider. 75 In its analysis, the court repeatedly stated that Congress’ intent to cut off access to the Trace Data was clear and unmistakable, citing both the use of the language “immune from legal process” and the history of the litigation as its reasoning. 76

In fact, throughout the opinion, the Seventh Circuit predominantly focused on the language “immune from legal process,” and only incidentally addressed the immediately preceding language “such data.” 77 Even then, the court reluctantly considered the possibility that the language “such data” limited the application of the rider to the Trace Data in any way. 78 In its only mention of the construction of the rider and the language “such data,” the court noted: “The only data mentioned in the paragraph prior to the reference to “such data” is the tracing data and the data regarding multiple sales, and those data are the clear antecedent to the phrase ‘such data.’” 79 With this statement, the court surprisingly disregarded all of the language contained after the reference to the tracing and multiple sales data and before the reference to “such data.” 80 The court also did not address any other language or structural aspects of the 2005 rider. 81

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74 *See id.* at 778-79.
75 *Id.*
76 *Chicago III*, 423 F.3d. at 780, 782.
77 *Id.* at 780-82.
78 *Id.* at 780-81.
79 *Id.*
80 *See id.* The 2005 rider states, in part:

No funds appropriated under this or any other Act with respect to any fiscal year may be used to disclose part or all of [the Trace Data], to anyone other than a Federal, State, or local law enforcement agency or a prosecutor solely in connection with and
Finally, the court ignored its own language from *Chicago II* regarding the proper treatment and priority accorded appropriations legislation which purported to change substantive law, and quickly dismissed the City’s policy concerns on the matter, citing, yet again, Congress’ clear intent as its reasoning. The court stated: “Even if we shared [the City and various amici’s] concerns . . . we cannot ignore clear expressions of Congressional intent, regardless of whether the end product is an appropriations rider or a statute that has proceeded through the more typical avenues of deliberation.” The court did not address any of FOIA’s policy considerations.

III. A MORE LOGICAL INTERPRETATION OF “SUCH DATA”

A. Background: City of New York v. Beretta U.S.A. Corp.

The Seventh Circuit’s faulty reading of the language “such data” in the 2005 rider is identified and critiqued in the factually

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118 Stat. at 2859-60 (emphasis added highlighting the language disregarded by the court).

81 See *Chicago III*, 423 F.3d at 780-782.

82 See City of Chicago v. ATF (“*Chicago II*”), 384 F.3d 429, 433 (7th Cir. 2004) (noting that there is “a very strong presumption” that appropriations acts do not substantively change existing law, and that when appropriations legislation and a substantive statute are in conflict, the appropriations legislation is to be construed narrowly).

83 *Chicago III*, 423 F.3d at 782.

84 *Id.*

85 *Id.*
similar case of *City of New York v. Beretta U.S.A. Corp.* Like the City of Chicago, the City of New York had brought a nuisance suit against the handgun industry for its use of “improper merchandising methods that create unnecessary hazards to the people in the City [of New York].” During discovery, the City of New York served ATF with a subpoena to compel disclosure of certain trace data. ATF refused to comply and argued that the 2004 rider, the same rider that was reviewed by the Seventh Circuit in *Chicago II*, barred the disclosure of the requested data. Similar to the Seventh Circuit’s holding in *Chicago II*, the magistrate judge at the Eastern District of New York held, and the district court later affirmed, that the 2004 rider only prohibited the use of appropriated funds in making a disclosure, and not the disclosure itself.

After finding no support with the United States Court of Appeals for the Second Circuit, ATF produced some of the requested data to the City of New York, and the City of New York filed a motion to compel the production of the remaining data. By this time, the 2005 rider had gone into effect and ATF cited the new immunity provision of the 2005 rider as grounds for withholding the data. However, rather than interpret the language of the 2005 rider at that time, the magistrate judge held, and the district court affirmed, that “the [2005] rider could not retroactively relieve ATF of a responsibility that [the judge] ordered it to respond to before the rider

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86 429 F.Supp.2d at 529.
87 *Id.* at 519.
88 *Id.*
89 *Id.* at 520-21; see *City of Chicago v. ATF ("Chicago II"), 384 F.3d 429, 436 (7th Cir. 2004).
91 *City of New York, 429 F.Supp.2d at 521.
92 *Id.*
was passed.”93 Thus, ATF was left with no choice but to turn over the data to the City of New York.94

Nonetheless, in April 2006, the District Court for the Eastern District of New York was faced with the task of interpreting a rider located within the Science, State, Justice, Commerce, and Related Agencies Appropriations Act of 2006 (“2006 rider”)95 in City of New York.96 The 2006 rider was identical to the 2005 rider, but also included additional language directly after the 2005 immunity provision making “such data...inadmissible in evidence.”97 Thus, the City of New York court was faced with the task of interpreting the language “such data,” the same language which the Seventh Circuit

94 City of New York, 429 F.Supp.2d at 522.
96 429 F.Supp.2d at 522.
97 Compare 119 Stat. at 2295-96, with 118 Stat. at 2859-60. The 2006 rider provides, in part:

No funds appropriated under this or any other Act with respect to any fiscal year may be used to disclose part or all of the [Trace Data], to anyone other than a Federal, State, or local law enforcement agency or a prosecutor solely in connection with and for use in a bona fide criminal investigation or prosecution and then only such information as pertains to the geographic jurisdiction of the law enforcement agency requesting the disclosure and not for use in any civil action or proceeding other than an action or proceeding commenced by the Bureau of Alcohol, Tobacco, Firearms, and Explosives, or a review of such an action or proceeding, to enforce the provisions of chapter 44 of such title [18 USCS §§ 921 et seq.], and all such data shall be immune from legal process and shall not be subject to subpoena or other discovery, shall be inadmissible in evidence, and shall not be used, relied on, or disclosed in any manner, nor shall testimony or other evidence be permitted based upon such data, in any civil action pending on or filed after the effective date of this Act in any State (including the District of Columbia) or Federal court. 119 Stat. at 2295-96 (emphasis added highlighting relevant 2006 additions).
determined had one and only one possible meaning – all of the Trace Data.98

B. The Eastern District of New York’s Interpretation of “Such Data”

The City of New York court began its analysis of the 2006 rider by setting out the appropriate method of statutory interpretation.99 First, a court should look at the plain language of the statute and consider both the bare meaning of the words and their placement and purpose in the statutory scheme.100 Second, a court may take into account broader congressional policies and “Congress’ awareness of its own responsibility to promote the ends of justice in the federal court system.”101 Finally, if necessary, a court may look at the legislative history of the act.102

The district court then proceeded to conduct a careful review of the entire appropriations act, noting first and foremost that the rider was a budgetary provision enacted as part of a vastly larger federal spending bill.103 After reviewing the entire section of the appropriations act in which the rider appeared, and paying close attention to the context in which the language at issue appeared, the court concluded that the phrase “such data” could only refer to the data to be disclosed to law enforcement agencies, since that was the only data for which the use of federal funds was permitted.104 The court reasoned:

The 2006 rider bars the use of appropriated funds for the future disclosure of ATF trace data to anyone.

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98 City of New York, 429 F.Supp.2d at 523; see City of Chicago v. ATF (“Chicago III”), 423 F.3d 777, 781 (7th Cir. 2005).
100 Id.
101 Id. at 524.
102 Id.
103 Id.
104 Id. at 526.
besides law enforcement recipients and then imposes further restrictions in order to ensure the proper use of data that has been so disclosed. The rider has no application to data that is not to be disclosed through the use of federally appropriated funds.105

The court went on to provide further support for this reading of the phrase “such data” by reviewing the grammatical structure of the rider.106 In this effort, the City of New York court focused on the portion of the rider which states:

No funds appropriated under this or any other Act . . . may be used to disclose part or all of the contents of [the Trace Data] to anyone other than a Federal, State, or local law enforcement agency . . . and then only such information as pertains to the geographic jurisdiction of the law enforcement agency requesting the disclosure.107

Unquestionably, the phrase “such information” can only refer to data that is to be revealed to law enforcement agencies, as indicated by the phrase “the law enforcement agency requesting the disclosure.”108 Therefore, if the phrase “such data” also referred to the data to be disclosed to law enforcement agencies, then the term “such” would have the same meaning throughout the rider.109 Interpreting identical

105 Id.
106 Id.
107 119 Stat. at 2295-96. The 2006 rider is identical in language and structure to the 2005 rider, with the exception of the evidentiary restriction language inserted after the phrase “such data shall be immune from the legal process.” See supra note 97.
109 Id.
words used in different parts of the same act to have the same meaning is the favored practice and the more logical interpretation.\textsuperscript{110}

Moreover, the court highlighted Congress’ use of the phrase “and then only,” which directly precedes “such information” in the passage above, as an indication that Congress intended to impose one restriction, then apply further restrictions to the originally limited subject.\textsuperscript{111} Under this view, the rider would effectively read as follows: “ATF may only use the funds being appropriated to release data to law enforcement recipients ‘and then only’ subject to the restrictions which follow.”\textsuperscript{112} Such a reading of the phrase “and then only” is in line with the common use of the phrase in other statutes.\textsuperscript{113}

Finally, aware of the recent Seventh Circuit decision interpreting the same language in the 2005 rider, the court noted that it “read the decision with interest” and “most respectfully disagree[d] with the conclusion of [the Seventh Circuit] in that case.”\textsuperscript{114} While the court acknowledged that the facts in \textit{Chicago III} differed from the facts in \textit{City of New York},\textsuperscript{115} the court believed that the Seventh Circuit’s interpretation of “such data” was nonetheless erroneous.\textsuperscript{116} The court stated:

Contrary to the Seventh Circuit’s reading, there are in fact two grammatically possible antecedents to the phrase “such data” in both the 2005 and the 2006 riders. “Such data” could, as \textit{Chicago III} concluded,

\begin{itemize}
  \item \textsuperscript{110} Id. (citing United Sav. Ass’n v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988); Sorensen v. Sec’y of the Treasury, 475 U.S. 851, 860 (1986)).
  \item \textsuperscript{111} \textit{City of New York}, 429 F.Supp.2d at 526.
  \item \textsuperscript{112} Id.
  \item \textsuperscript{113} Id.
  \item \textsuperscript{114} Id. at 528.
  \item \textsuperscript{115} Id. at 528-29 (noting that ATF had already disclosed the data in question to the City of New York pursuant to a court order, whereas in \textit{Chicago III}, a significant portion of the data was never disclosed); see City of Chicago v. ATF (“\textit{Chicago III}”), 423 F.3d 777, 778-79 (7th Cir. 2005).
  \item \textsuperscript{116} \textit{City of New York}, 429 F.Supp.2d at 528-29.
\end{itemize}
refer to the more general description of the ATF data in the first few lines of the riders, but, as already noted above, it could also refer to the data to be revealed in future disclosures to law enforcement officials. For the contextual and grammatical reasons already explained, the latter is the more appropriate antecedent to “such data.”

However, in its concluding statements, the court still urged an immediate appeal of the case, noting that there was “substantial ground for disagreement about a controlling issue of law -- the applicability of the 2006 rider to the present litigation.” Whether the termination of this case will continue to turn on the proper reading of the phrase “such data” or on the other congressional policy and evidentiary concerns addressed by this case has yet to be determined.

IV. WHY THE SEVENTH CIRCUIT’S INTERPRETATION MISSED THE MARK

A. Which Interpretation is Correct?

In stark contrast to the Seventh Circuit’s analysis in Chicago III, the City of New York court made no mention of congressional intent in its analysis of the 2006 rider. Instead, the district court focused only on established statutory interpretation and construction principles. Why was there such a drastic disparity in the two interpretations? Surely, no court can deny that with the language “immune from legal process” Congress intended to exempt certain information from disclosure. However, that was not the controlling issue in either case. Rather, the controlling issue was, or should

117 Id. at 529.
118 Id.
121 See Chicago III, 423 F.3d at 780; City of New York, 429 F.Supp.2d at 523.
have been, which category of information Congress intended to exempt or restrict through its use of the phrase “such data.” The Seventh Circuit’s unwavering focus on the former clouded its judgment and interpretation of the latter. The City of New York court, not tied to the “immune from legal process” language, was able to engage in a more logical and correct interpretation of “such data.”

When evaluating issues of statutory interpretation, courts are to “give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive.” Undoubtedly, the Seventh Circuit considered this rule of statutory interpretation during its analysis, even though it did not explicitly state it. However, it is less clear from the opinion whether the court was guided by other established principles of statutory interpretation.

The Seventh Circuit has previously noted that the statute’s text is regarded as the “best evidence of the statute’s purpose.” Therefore, courts must strive to “give effect . . . to every clause and word of a statute.” At the bare minimum, a court interpreting a provision of a statute is to “account for a statute’s full text, language, as well as punctuation, structure, and subject matter.” In a case decided by the Seventh Circuit just months before Chicago III, the court applied such principles to a particular statute and began its

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122 Id.
123 See Chicago III, 423 F.3d at 780-82.
124 See City of New York, 429 F.Supp.2d at 523-26. Although the court in City of New York interpreted the language “such data,” the same language interpreted by the Seventh Circuit, the language “immune from legal process” was not part of or relevant to the district court’s analysis. Id.
125 Lifschultz Fast Freight Corp. v. Medici, 63 F.3d 621, 628 (7th Cir. 1995) (citing Negonsott v. Samuels, 507 U.S. 99, 104 (1993)).
126 See Chicago III, 423 F.3d at 780-82 (focusing much of the analysis on congressional intent).
127 Id.
128 Lifschultz, 63 F.3d at 628.
129 Id.
130 Id.
inquiry with the following question: “whether the language at issue had a plain and unambiguous meaning with regard to the particular dispute in the case.” The court noted that the “plainness or ambiguity of the statutory language is determined by reference to the language itself, the context in which the language is used, and the broader context of the statute as a whole.” If the court determined that the statutory language was unambiguous and the statutory scheme was coherent and consistent, its inquiry would end.

In Chicago III, the Seventh Circuit appears to have ended its inquiry as soon as it determined what it perceived to be the congressional intent, and the actual text and structure of the 2005 rider was merely a backdrop to its analysis. This is particularly evident during the court’s interpretation of the phrase “such data.” In response to the City’s argument that the phrase “such data” only referred to the data requested by law enforcement agencies, the Seventh Circuit stated:

Under the City’s strained construction of the statute, the portion of the databases in law enforcement’s hands would be ‘immune from legal process,’ but the remaining portion of the databases, the extensive data not produced to law enforcement, would be accessible to anyone willing to pay for it. Such a reading would thwart Congress’ intention to bar access to the databases, and we accordingly reject it.

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132 Ioffe, 414 F.3d at 711.
133 Id.
134 See City of Chicago v. ATF (“Chicago III”), 423 F.3d 777, 780-82 (7th Cir. 2005).
135 Id. at 780-81.
136 Id. at 781.
Clearly, rather than using the rider’s text to interpret congressional intent, the court is using its already preconceived notion of congressional intent to interpret the text.\textsuperscript{137} In much the same way, the court overlooked the significant limiting language included between the reference to the Trace Data and the language “such data” in the rider.\textsuperscript{138} As the \textit{City of New York} court so distinctly pointed out, the use of the phrases “such information” and “and then only,” which were a part of that limiting language, were vital to the interpretation of both the meaning of the language “such data” and the rider as a whole.\textsuperscript{139}

More significantly, the Seventh Circuit ignored FOIA’s policy considerations, failing to even mention, as it had in its prior two opinions, that there is a strong presumption in favor of disclosure under FOIA and that its exemptions are to be narrowly construed.\textsuperscript{140} Instead, the Seventh Circuit adopted the broadest reading of the 2005 rider possible.\textsuperscript{141} Although there was no FOIA issue in \textit{City of New York}, as the information had already been disclosed, the 2006 rider also contained an evidentiary restriction, which, like a FOIA exemption, was to be narrowly construed by the court.\textsuperscript{142} Relying on this principle, the \textit{City of New York} court noted that “there [was] no need to construe this budgetary provision more broadly than necessary – a construction requiring the assumption that Congress was acting irrationally and in opposition to its long-standing policy regarding the administration of justice.”\textsuperscript{143} In light of FOIA’s long-standing goals

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{137} Id.
\item \textsuperscript{138} Id. at 780-81
\item \textsuperscript{140} See Chicago III, 423 F.3d at 780-82; City of Chicago v. ATF (“Chicago II”), 384 F.3d 429, 432 (7th Cir. 2004); City of Chicago v. ATF (“Chicago I”), 287 F.3d 628, 633 (7th Cir. 2002).
\item \textsuperscript{141} See Chicago III, 423 F.3d at 781 (holding that the rider refers “generally to the multiple sales and tracing data, rather than to some subset of the data.”).
\item \textsuperscript{142} See City of New York, 429 F.Supp.2d at 528.
\item \textsuperscript{143} Id.
\end{enumerate}
\end{footnotesize}
and policies, the same principle should have guided the court’s interpretation of the 2005 rider in *Chicago III*.145

**B. FOIA is Wounded by the Seventh Circuit’s Decision**

The Seventh Circuit’s decision in *Chicago III* essentially gave a green light to those who wish to exploit Exemption 3 of FOIA and restrict the public’s access to information without debate or question. Exemption 3, which provides that information specifically exempted from disclosure by statute may be withheld, combined with Congress’ increasing use of appropriations riders to change substantive law, widens the potential for government agencies to bypass FOIA’s disclosure requirements.146 In effect, as the *Chicago III* decision demonstrated, a simple rider inserted in a large federal spending bill may create a new exemption and substantively change FOIA law without being subject to the formal legislative procedures typically required for such changes.147 While this problematic use of appropriations riders is not specific to FOIA,148 the importance of addressing it in this context has only escalated under the Bush Administration and its more secretive policies.149 Members of

144 See S. 394 § 2.
145 See 423 F.3d at 781-82.
146 See generally Geoffrey Christopher Rapp, *Low Riding*, 110 YALE L.J. 1089, 1093-95 (2001) (stating that there has been a significant rise in the number of substantive laws passed through appropriations legislation in the last half-century, and calling for modification of this practice and a return to the full and formal legislative process).
147 Id.; 423 F.3d at 782.
148 See Rapp, supra note 146, at 1093-95.
Congress have also expressed their concern on this issue, stating that “new exemptions should not be created lightly,” and that “individual statutory exemptions should be vigorously debated before lawmakers vote in favor of them.”

Notably, the fear of Exemption 3 becoming overly broad and inclusive has been addressed by Congress in the past. In 1976, Congress amended Exemption 3 in direct response to the Supreme Court’s decision in *FAA v. Robertson*, in which the Court held that general statutory language, without further specification of documents to be withheld, was sufficient to qualify as an Exemption 3 statute. In that amendment, Congress set the specific qualifications criteria in effect today in order to narrow the number of statutes which could qualify under the exemption. Federal courts were then left with the task of policing the new standard. Considering the Seventh Circuit’s recent Exemption 3 analysis, and all of the above concerns, the time may again be ripe for a FOIA amendment.

“discouraging agencies from disclosing records if the agency can invoke any technical grounds for withholding them under FOIA.”

150 See Kirtley, supra note 149, at 507-08 (citing Representative Henry Waxman and Senator Patrick Leahy’s comments, respectively, in response to two proposed bills which impact FOIA. One proposed bill provides that “any future legislation to establish a new exemption to [FOIA] be stated explicitly within the text of the bill.”).


152 422 U.S. 255, 265 (1975).

153 See Koch, supra note 151.

154 Id.

155 Id.

156 See City of Chicago v. ATF (“Chicago III”), 423 F.3d 777, 782 (7th Cir. 2005); see also Kirtley, supra note 149, at 507-08 (provides a brief description of two proposed bills to reform FOIA, both by promoting public disclosure and an open government, and both of which may resolve the problems addressed in this Note. Both bills are still awaiting committee review).
CONCLUSION

The Seventh Circuit’s faulty interpretation of the 2005 rider in Chicago III not only resulted in an unwarranted substantive change in FOIA, at least as perceived by the Seventh Circuit, but also exposed a dangerous new loophole in FOIA legislation which could potentially allow government agencies to unquestionably withhold information from the public. FOIA provides a powerful tool for the American people, and is a hallmark of our system of democracy. Until the Seventh Circuit’s decision in 2005, FOIA could have provided the means for the City of Chicago to obtain information with which to combat gun trafficking and shed light on the activities of ATF. However, without proper debate or questioning in Congress, the City of Chicago’s right to this information under FOIA was stripped away.

Congress provided for judicial review of FOIA denials in order to monitor federal agencies’ claims of secrecy and entitlement to exemptions. It did so with the hope that the judicial review, a vital part of our constitutional system of checks and balances, would be more than a mere “judicial sanctioning of agency discretion.” Thus, it is imperative that federal courts continue to thoroughly scrutinize and narrowly construe both new and existing exemptions to FOIA which might further restrict FOIA’s purpose and effectiveness.

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158 See Beermann, supra note 50, at 88-89.
159 Meredith Fuchs, supra note 5, at 144 (noting that “Congress designed FOIA to make democratic participation and citizen oversight a reality.”).
160 Id. at 159.
161 Id.
SEMPER FI? THE INFIDELITY OF THE SEVENTH CIRCUIT IN APPLYING A GOOD MORAL CHARACTER REQUIREMENT TO NATURALIZING WAR VETERANS

JOSHUA P. MONTGOMERY*


INTRODUCTION

O'Sullivan v. United States Citizenship and Immigration Service presented the U.S. Court of Appeals for the Seventh Circuit with a question of first impression.2 That is, whether “aliens who served honorably in the U.S. military in times of war [must make] a showing of good character when applying to become naturalized citizens.”3 Unfortunately for these veterans, the Seventh Circuit incorrectly interpreted the plain language of the naturalization statutes and held that such aliens must show good moral character before becoming citizens.4 Particularly troubling is the reasoning by which the court

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1 Semper Fi is the motto of the Marine Corps and is short for the Latin phrase simper fidelis, which means “always faithful.” http://hqinet001.hqmc.usmc.mil/HD/Historical/Customes_Traditions/Marine%20Corps_Motto.htm.

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2 453 F.3d 809, 814 (7th Cir. 2006).

3 Id. at 812.

4 Id. at 816.
reached its conclusion.\textsuperscript{5} In order to provide aliens with this additional hurdle in the naturalization process, the court misquoted a key statute and employed a logic riddled with contradiction.\textsuperscript{6} Specifically, this Note will contend that the Seventh Circuit erred in \textit{O’Sullivan} when it held that the standard naturalization requirement that aliens prove “good moral character”\textsuperscript{7} also applies to aliens seeking to naturalize through statutory exceptions extended to wartime veterans.\textsuperscript{8} The court should have held that, based on a plain reading of these statutes, a showing of good moral character is not required for wartime veterans to naturalize. Section one of this Note will explain the interaction of the naturalization statutes at issue in \textit{O’Sullivan}. Section two will explain why the court correctly declined to defer to Citizenship and Immigration Services to interpret these statutes. Section three will describe the background and procedural history of \textit{O’Sullivan}. Section four will explain the case law cited by the Seventh Circuit in the \textit{O’Sullivan} decision. Finally, section five will identify errors in the court’s analysis.

I. AN INTRODUCTION TO THE IMMIGRATION STATUTES APPLICABLE TO ALIEN WAR VETERANS SEEKING TO NATURALIZE

Justice Scalia once noted that “administrative law is not for sissies.”\textsuperscript{9} This is particularly true when attempting to elucidate consistent meanings from immigration and naturalization statutes, which have been described as a “labyrinthine . . . maze of hyper-technical statutes and regulations that engender . . . confusion for the

\textsuperscript{5} See id. at 815-16.
\textsuperscript{6} Id. at 815 (misquoting 8 U.S.C.S. § 1427(a) by replacing the word “referred” with the word “mentioned”).
\textsuperscript{7} 8 U.S.C.S. § 1427(a)(3) (LexisNexis 2006).
\textsuperscript{8} 8 U.S.C.S. § 1440(b)(1)-(3) (LexisNexis 2006).
Government and petitioners alike. The problem presented in *O’Sullivan* is particularly difficult: “whether [§] 1440 excuses aliens who served honorably in the U.S. military in times of war from making a showing of good moral character when applying to become naturalized citizens.” The difficulty in answering this question stems from the extensive interplay between 8 U.S.C.S. §§ 1427, 1439, and 1440. To limit confusion in this Note, the plain language of these statutes is provided in pertinent part below, along with a brief overview of how they interact.

**A. 8 U.S.C.S. § 1427(a)**

8 U.S.C.S. § 1427 details the fundamental residency requirements necessary to become a naturalized citizen of the United States, such as the requisite length of time one must be physically present in this country and the different types of absences that are permitted during this period. This statute also includes the good moral character component at issue in *O’Sullivan*. Specifically, in relevant part, § 1427 states:

(a) Residence. No person, except as otherwise provided in this title, shall be naturalized unless such applicant . . . (3) during all the periods referred to in

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11 *O’Sullivan*, 453 F.3d at 812.

12 Boatswain v. Ashcroft, 267 F. Supp. 2d 377, 379 (D.N.Y. 2003) (observing that “[w]ading through the statutory scheme is not a simple task because . . . the immigration laws are a patchwork, containing numerous inconsistencies and vagaries.”) (internal cites omitted).


14 8 U.S.C.S. § 1427(a)-(c) (LexisNexis 2006).

this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.16

The confusion in O’Sullivan “stems from the good character requirement’s placement in the naturalization statute” as a subset of the broader residency requirement.17 The reason this placement is problematic is because the residency requirements of § 1427(a) are not applicable to naturalizing aliens who served in the armed forces during times of war.18 Thus, the question in O’Sullivan is whether the good moral character requirement in § 1427(a)(3), is waived when the broader residency requirements to which it is attached, § 1427(a), are waived.19

B. 8 U.S.C.S. § 1427(e)

In its conclusion that alien wartime veterans are required to make a showing of good moral character, the court relied, in part, on 8 U.S.C.S. § 1427(e).20 This section of the naturalization statute allows the Attorney General, when considering an applicant’s moral character, to consider conduct occurring prior to the five year period21

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16 8 U.S.C.S. § 1427(a) (emphasis added).
17 O’Sullivan, 453 F.3d at 812.
18 8 U.S.C.S. § 1440(b)(2) (LexisNexis 2006) (stating that a “person filing an application under subsection . . . shall comply in all other respects with the requirements of this title, except that . . . no period of residence or specified period of physical presence within the United States or any State or district of the Service in the United States shall be required”).
19 O’Sullivan, 453 F.3d at 813.
20 Id. at 815.
21 8 U.S.C.S. § 1427(a)(1) (stating “immediately preceding the date of filing his application for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his application has been physically present therein for periods totaling at least half of that time and who
preceding the filing of a naturalization application. Specifically, § 1427(e) states:

(e) Determination. In determining whether the applicant has sustained the burden of establishing good moral character and the other qualifications for citizenship specified in subsection (a) of this section, the Attorney General shall not be limited to the applicant’s conduct during the five years preceding the filing of the petition, but may take into consideration as a basis for such determination the applicant’s conduct and acts at any time prior to that period.

The O’Sullivan court found it particularly persuasive that this section of § 1427 distinguished between “good moral character” and “other qualifications for citizenship.”

C. 8 U.S.C.S. § 1440(b)

8 U.S.C.S. § 1440 provides aliens that served in the United States military during times of war a short cut to become naturalized. This short cut is achieved by waiving the standard residency requirements detailed in § 1427(a) that are otherwise necessary to naturalize. Specifically, § 1440(b) provides this exception:

23 Id.
24 O’Sullivan, 453 F.3d at 815.
25 For example, when President George W. Bush issued an executive order that declared “the war against terrorists of global reach” an “armed conflict” it was done “solely in order to provide expedited naturalization for aliens and noncitizen nationals serving in an active-duty status in the Armed Forces of the United States.” Exec. Order No. 13,269, 67 FR 45,287 (July 8, 2002) (emphasis added).
26 O’Sullivan, 453 F.3d at 813.
(b) Exceptions. A person filing an application under subsection (a) of this section shall comply in all other respects with the requirements of this title, except that--

. . . (2) no period of residence or specified period of physical presence within the United States or any State or district of the Service in the United States shall be required;27

This exception is unique to wartime veterans;28 another statute governs the naturalization of veterans that served during times of peace.29

D. 8 U.S.C.S. § 1439

8 U.S.C.S. § 1439 is often viewed as the naturalization statute for alien veterans serving in times of peace.30 While it does govern veteran peacetime naturalization,31 it also applies to any alien that has “served honorably for one year in the military” regardless of whether that service was during a time of conflict.32 Thus, “[m]any service members will now be eligible [to naturalize] under both [§ 1439] and [§ 1440], though their application may only be filed under one provision.”33

27 8 U.S.C.S. § 1440(b) (LexisNexis 2006).
28 8 U.S.C.S. § 1440(a) (requiring that any veteran naturalizing under this statute must have served during a "period which the President by Executive order shall designate as a period in which Armed Forces of the United States are or were engaged in military operations involving armed conflict with a hostile foreign force").
30 See, e.g., O’Sullivan, 453 F.3d at 815 (stating that § 1439 “sets out the naturalization requirements for peacetime veterans”).
31 This Note will follow the lead of the O’Sullivan court and refer to § 1439 as a “peacetime” naturalization statute for the sake of consistency and for the ease of the reader.
32 Major Michael Kent Herring, A Soldier's Road to U.S. Citizenship--Is a Conviction a Speed Bump or a Stop Sign?, Army Law., June 2004, at 20, 23.
33 Id. at n.57.
Like § 1440, § 1439 relaxes the naturalization requirements of § 1427 for alien veterans serving in the military.\textsuperscript{34} This statute, however, only lessens the residency requirements; it does not do away with them entirely.\textsuperscript{35} Significantly, § 1439 also includes an explicit good moral character provision.\textsuperscript{36} This provision requires:

\begin{quote}
(e) Moral character. Any such period or periods of service under honorable conditions, and good moral character, attachment to the principles of the Constitution of the United States, and favorable disposition toward the good order and happiness of the United States, during such service, shall be proved by duly authenticated copies of the records of the executive departments having custody of the records of such service, and such authenticated copies of records shall be accepted in lieu of compliance with the provisions of [8 USCS § 1427(a)].\textsuperscript{37}
\end{quote}

This requirement has no counterpart in 8 U.S.C.S. § 1440.\textsuperscript{38}

\textit{E. 8 C.F.R. § 329.2(d)}

Federal regulations also affect judicial interpretation of these naturalization statutes when deference is afforded to the Immigration and Naturalization Service (“INS”), Citizenship and Immigration

\textsuperscript{34} \textit{Id.} at 23-24.

\textsuperscript{35} 8 U.S.C.S. § 1439(d) (LexisNexis 2006) (stating that an “applicant shall comply with the [residency] requirements of [§1427], if the termination of such service has been more than six months preceding the date of filing the application for naturalization, except that such service within five years immediately preceding the date of filing such application shall be considered as residence and physical presence within the United States”).

\textsuperscript{36} 8 U.S.C.S. § 1439(e).

\textsuperscript{37} \textit{Id.}

\textsuperscript{38} 8 U.S.C.S. § 1440 contains only three sections: “(a) Requirements”; “(b) Exceptions”; and (c) a revocation of citizenship provision.
Services (“CIS”), or other administrative agencies. “Because Congress did not specify the time period during which a qualifying noncitizen veteran should demonstrate good moral character, the [INS] promulgated a regulation” to answer that question. Specifically, that regulation states that an applicant:

(d) Has been, for at least one year prior to filing the application for naturalization, and continues to be, of good moral character, attached to the principles of the Constitution of the United States, and favorably disposed toward the good order and happiness of the United States;

II. CHEVRON DEFERENCE

Although the question of whether § 1440 has an implied good moral character requirement is an issue of first impression, litigation surrounding this requirement is not new. But courts often possess a mechanism to answer difficult questions of statutory interpretation: deference to the administrative agency that is responsible for enforcing the naturalization statutes. This deference, known as *Chevron*

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39 See, e.g., Boatswain v. Gonzales, 414 F.3d 413, 416-17 (2d Cir. 2005); Lopez v. Henley, 416 F.3d 455, 457-58 (5th Cir. 2005); Nolan v. Holmes, 334 F.3d 189, 197-98 (2d Cir. 2003).
40 Santamaria-Ames v. Immigration and Naturalization Serv., 104 F.3d 1127, 1129 (9th Cir. 1996).
41 8 C.F.R. § 329.2(d) (LEXIS 2006).
42 See, e.g., Petitions for Naturalization of F—G-- & E—E—G--, 137 F. Supp. 782 (D.N.Y. 1956) (denying Petitioners’ naturalization because they could not show good moral character as a result of committing adultery during the “five years preceding the filing of their petitions.”); In re Brodie, 394 F. Supp. 1208, 1211 (D. Or. 1975) (holding that homosexuality, while not “conform[ing] to the preferences of the majority” does not preclude a showing of good moral character).
43 See I.N.S. v. Aguirre-Aguirre, 526 U.S. 415, 416 (1999) (stating “that judicial deference to the Executive Branch is especially appropriate in the immigration context”); but see Mei v. Ashcroft, 393 F.3d 737, 739 (7th Cir. 2004) (stating that “[s]ince the Board hasn’t done anything to particularize the meaning of
deference, becomes available when a court is faced with interpreting an ambiguous statute. In that instance, a court cannot “simply impose its own construction . . . ,” but must inquire as to whether the administrating agency has promulgated a relevant interpretation of the statute at issue. If an administrative interpretation exists, then the court must determine if that construction of the statute is reasonable. If it is, then *Chevron* deference applies and the court can rely upon the agency interpretation.

There are circumstances, however, when reliance on *Chevron* deference is inappropriate. For example, if there are certain substantive issues present, such as strong constitutional claims or because of the procedural context of the case generally. In *O'Sullivan*, the Seventh Circuit correctly decided not to defer to CIS, because the judicial review of a claim for citizenship must be made *de

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45 *Id.*
46 *Id.*
47 *Id.*
48 *E.g.*, *Gonzales v. Oregon*, 126 S. Ct. 904, 914-15 (2006) (explaining that “[d]eference in accordance with *Chevron*, however, is warranted only ‘when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.’” (citing *United States v. Mead Corp.*, 533 U.S. 218, 226-227 (2001)).
49 *Whitaker v. Thompson*, 353 F.3d 947, 952 (D.C. Cir. 2004) (acknowledging “that the canon of constitutional avoidance can trump *Chevron*”); see Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568, 575 (1988) (holding that “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress”).
50 *See, e.g.*, 8 U.S.C.S. § 1421(c) (LexisNexis 2006) (stating that a review of a denial of citizenship “shall be de novo, and the court shall make its own findings of fact and conclusions of law”).
Because the court could not use *Chevron* deference to defer to CIS’s interpretation of the naturalization statutes, it follows that it is improper for the court to rely on case law where such deference was given.\(^{52}\)

However, arguably because of a lack of case law on this issue, the court did consider cases from other circuits where *Chevron* deference was given to the CIS (or INS) interpretation of the good moral character requirement.\(^{53}\) In fact, none of the cases to which the court cites addresses whether “§ 1440 entirely excuses qualifying aliens from the good moral character requirement” in a way that is on point with the present case.\(^{54}\) To its credit, the court does not specifically cite to any of these cases when it gives its holding, but it uses them as a backdrop to support the new rule it established in the Seventh Circuit.\(^{55}\)

### III. Background on *O’Sullivan*

When he was twelve, Daniel O’Sullivan moved from Jamaica to the United States.\(^{56}\) After graduating from high school, O’Sullivan

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\(^{51}\) O’Sullivan v. United States Citizenship and Immigration Serv., 453 F.3d 809, 811-12 (7th Cir. 2006) (relying on 8 U.S.C.S. § 1421(c) that states a review of a denial of citizenship “shall be de novo, and the court shall make its own findings of fact and conclusions of law and shall, at the request of the petitioner, conduct a hearing de novo on the application”); see, e.g., Adiemerconwu v. Gonzales, 2005 U.S. Dist. LEXIS 9681, at *11 (D. Tex. 2005) (explaining that “if CIS denies a naturalization application -- and that denial has been confirmed after an administrative appeal, consisting of a hearing before a senior naturalization officer -- the rejected applicant may seek de novo judicial review of the denial in the United States district court for the district in which he resides”).

\(^{52}\) See *O’Sullivan*, 453 F.3d at 812, n.2 (criticizing Boatswain v. Gonzales, 414 F.3d 413 (2d Cir. 2005) for relying on Nolan v. Holmes, 334 F.3d 189 (2d Cir. 2003) and “the petitioner’s concession that the statutory interpretation upheld as reasonable in *Nolan* was binding in this new [de novo] context”).

\(^{53}\) *O’Sullivan*, 453 F.3d at 814-15.

\(^{54}\) *Id.* at 812.

\(^{55}\) *Id.* at 812-16.

\(^{56}\) *Id.* at 810.
entered active military duty in September 1976 where he “served in the Marines and the Air Force during the Vietnam hostilities and was honorably discharged from the military in December 1981.”

After leaving the military O’Sullivan “had children, was consistently employed, and paid taxes.” However, in August, 2000, he was convicted of the aggravated felony of being “party to the crime of manufacture or delivery of less than five grams of cocaine.” After serving his sentence in Wisconsin state prison, O’Sullivan “was immediately transferred to the custody of the Department of Homeland Security which had initiated removal proceedings against him while he was incarcerated.”

In the midst of the removal proceedings, O’Sullivan filed a petition to become a naturalized citizen under 8 U.S.C. § 1440. However, his petition was denied because of an inability to satisfy the good moral character requirement based on his aggravated felony conviction. O’Sullivan appealed, but was denied by CIS, and subsequently denied by a federal district court under the same rationale.

Before the Seventh Circuit, O’Sullivan argued that the good moral character requirement in § 1427(a) refers only to the specific time periods of mandatory residence mentioned in § 1427(a)(1)-(2). Because § 1440(b) removes any obligation to satisfy that residency requirement, there is no time period to which the good moral character requirement could possibly attach. Consequently, O’Sullivan

58 O’Sullivan, 453 F.3d at 810.
59 Id.
60 Id. at 810-11.
61 Id. at 811.
62 Id.; see 8 USCS § 1101 (f) (8) (LexisNexis 2006) (barring anyone “who at any time has been convicted of an aggravated felony” from making a showing of good moral character).
63 O’Sullivan, 453 F.3d at 811.
64 Reply Brief of Petitioner-Appellant, at *2, O’Sullivan, 453 F.3d 809, No. 05-2943, (7th Cir. October 28, 2005), 2005 WL 3738527.
65 Id.
maintains that under a plain reading of § 1440, aliens that qualify for naturalization under this section need not make a showing of good moral character.\textsuperscript{66}

O’Sullivan supported this interpretation by comparing and contrasting the two different statutes under which veterans may naturalize, § 1439 and § 1440.\textsuperscript{67} As stated in Section II, § 1439 relaxes the naturalization requirements of § 1427 for those veterans of the military in times of peace, but nonetheless explicitly includes a good moral character requirement.\textsuperscript{68} A requirement for which there is no equivalent in § 1440.\textsuperscript{69} O’Sullivan urged the court “to find that the express mention of a moral character requirement for peacetime veterans shows that Congress would have expressly required wartime veterans to prove good moral character, if that was Congress’s will.”\textsuperscript{70}

Despite these arguments, on July 6, 2006, a three-judge panel of the Seventh Circuit issued a unanimous decision affirming “the district court’s denial of O’Sullivan’s petition for naturalization.”\textsuperscript{71} This panel, composed of Chief Judge Flaum, who wrote the opinion, and Judges Posner and Kanne,\textsuperscript{72} held that Congress viewed the good moral character and residency requirements separately and thus held that even alien war veterans must make a showing of good moral character.\textsuperscript{73} The court gave four reasons for its holding.\textsuperscript{74} First the court found that good moral character was not a subset of the residency requirements.\textsuperscript{75} Second, the court found that the plain language of § 1427(a) required a showing of good moral character

\begin{footnotesize}
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  \item \textsuperscript{66} Id. at 1.
  \item \textsuperscript{67} Brief of Petitioner-Appellant, at *4, \textit{O’Sullivan}, 453 F.3d 809, No. 05-2943, (7th Cir. August 15, 2005), 2005 WL 3738525.
  \item \textsuperscript{68} 8 U.S.C.S. § 1439(e) (LexisNexis 2006).
  \item \textsuperscript{69} Compare 8 U.S.C.S. § 1440 (LexisNexis 2006), with 8 U.S.C.S. § 1439(e).
  \item \textsuperscript{70} \textit{O’Sullivan}, 453 F.3d at 814.
  \item \textsuperscript{71} Id. at 817.
  \item \textsuperscript{72} Id. at 809.
  \item \textsuperscript{73} Id. at 815.
  \item \textsuperscript{74} Id.
  \item \textsuperscript{75} Id.
\end{itemize}
\end{footnotesize}
“during all periods mentioned” in the statute, regardless of whether the actual residency requirements applied.76 Third, the court concluded that the good moral character requirement was intended to be separate from the residency requirements because it was listed separately in § 1427(e).77 The court also explained that the explicit presence of the good moral character provision in § 1439 is the result of unique concerns applicable only to naturalizing peacetime veterans.78 Consequently, such a provision is not necessary in § 1440.79 The inquiry into the court’s reasoning will be further developed below in Section V.

IV. CASE LAW IN O’SULLIVAN

In O’Sullivan, the Seventh Circuit cites to three “sister circuit” decisions that all held a showing of good moral character is required in order to naturalize under § 1440.80 However, these cases, from the Second, Fifth, and Ninth Circuit Court of Appeals respectively, are distinguishable from O’Sullivan by either the standard of review or by the issue presented.81 These cases are briefly considered below for two purposes: first, to survey the landscape of recent litigation involving § 1440 and the good moral character requirement and second, to illustrate how any reliance on these cases in O’Sullivan is misguided.

A. The Second Circuit: Nolan v. Holmes

The court first considered a Second Circuit case, Nolan v. Holmes.82 There, Nolan was an alien wartime veteran who was

76 Id. (emphasis in original).
77 Id.
78 Id. at 815-16.
79 Id.
80 Id.
81 See id. at 814-15.
82 Id. at 814 (citing Nolan v. Holmes, 334 F.3d 189 (2d Cir. 2003)).
convicted of an aggravated felony.\(^8\) Once deportation proceedings began against him, however, he filed a petition for habeas corpus to terminate these removal actions in order to apply to naturalize under § 1440.\(^4\) Nolan’s petition was dismissed because the district court found that the Board of Immigration Appeals correctly held that he was ineligible to naturalize because of an inability to prove good moral character.\(^5\) Nolan appealed the denial of his petition for habeas corpus to the Second Circuit, arguing that § 1440 lacks “any specific statement requiring that an applicant . . . demonstrate good moral character, or that any particular period of good moral character [be] maintained.”\(^6\)

Before deciding the issue, the Second Circuit conducted a detailed analysis of the statutory language and the legislative history of the naturalization statutes.\(^7\) In its statutory analysis, the court found particularly persuasive the differences between § 1440 and § 1439; specifically that § 1439 included an explicit good moral character requirement which was absent in § 1440.\(^8\) The Nolan court noted that:

In light of the fact that both [§ 1440] and [§ 1439] deal with the naturalization of persons who have served in the Armed Forces (differentiating between persons who served in active-duty status during wartime and those who did not) and the fact that the two sections, enacted together in 1952, contain some clearly parallel provisions, it is difficult to infer that the substantive differences between the sections were not intended. Thus . . . the appropriateness of interpreting [§ 1440] as including [a good moral character] requirement for

\(^8\) Nolan, 334 F.3d at 190.
\(^4\) Id.
\(^5\) Id.
\(^6\) Id.
\(^7\) Brief of Petitioner-Appellant, at *17, Nolan v. Holmes, 334 F.3d 189, No. 01-2608, (2d Cir. November 29, 2001), 2001 WL 34316415.
\(^8\) Nolan, 334 F.3d at 195-202.
\(^8\) Id. at 197.
naturalization is simply not clear from the face of the statute.89

Thus, based on its analysis of the plain language of the statutes the Second Circuit found that “the precise interplay between [§ 1427 and § 1440] is hardly clear.”90

Despite this statutory ambiguity, however, the Nolan court found that the legislative history of the naturalization statues supported a finding that § 1440 possesses an implied good moral character requirement.91 The Second Circuit found particularly relevant a 1968 Senate Report on the differences between § 1440 and § 1439.92 That report described only “three basic differences” between the two statutes:

The peacetime serviceman must have a minimum of 3 years service, the wartime serviceman has no minimum required. The peacetime serviceman must petition while still in the service or within 6 months after its termination, the wartime serviceman has no limitation. The peacetime serviceman needs a lawful admission for permanent residence, while the wartime serviceman can substitute in its stead his induction or enlistment while in the United States.93

Notably lacking in this identification of differences is any mention of the good moral character requirement.94

Because of the ambiguity of the naturalization statutes, the Second Circuit, through the use of Chevron deference, was able to

89 Id.
90 Id.
91 Id. at 198-201.
92 Id. at 200-01.
93 S. REP. No. 90-1292, at 4519-20 (1968) (cited by Nolan, 334 F.3d at 201).
94 Nolan, 334 F.3d at 200-01.
defer to the INS interpretation of § 1440. And the INS interpretation of § 1440 is that alien war veterans are required to show good moral character. Thus, Nolan was required to show good moral character in order to naturalize. However, because the Nolan court deferred to the INS in reaching its holding, it is improper for the O’Sullivan court to rely upon Nolan when the issue before it must be reviewed de novo.

B. The Fifth Circuit: Lopez v. Henley

A second case to which the Seventh Circuit cited was Lopez v. Henley, a Fifth Circuit case that, like Nolan v. Holmes, utilized Chevron deference. Also similar to Nolan, the issue before the Fifth Circuit arose as a petition for a writ of habeas corpus to appeal a deportation order. In a short opinion, the Fifth Circuit found the statutes ambiguous and relied on Nolan to find the INS interpretation reasonable. Specifically, the Lopez court cited a long passage from Nolan and agreed that:

Notwithstanding Congress’s desire to reward aliens who have served the United States in its Armed Forces, it hardly seems unreasonable for the INS to have inferred

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95 Id. at 198.
96 8 C.F.R. § 329.2(d) (LexisNexis 2006).
97 Nolan, 334 F.3d at 195.
98 The procedural posture in O’Sullivan precludes the use of Chevron deference. O’Sullivan v. United States Citizenship and Immigration Serv., 453 F.3d 809, 811-12 (7th Cir. 2006); compare Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) (permitting a court to defer to an administrative agency when a statute is ambiguous and the agency interpretation is reasonable), with 8 U.S.C.S. § 1421(c) (stating that a review of a denial of citizenship “shall be de novo, and the court shall make its own findings of fact and conclusions of law”).
99 O’Sullivan, 453 F.3d at 814 (citing Lopez v. Henley, 416 F.3d 455 (5th Cir. 2005)).
100 Lopez, 416 F.3d 456.
101 Id. at 457-58.
that Congress would not have intended to single out persons trained and/or experienced in physical confrontations for elimination of the requirement of good moral character.  

Because of *Chevron* deference to the INS, the Fifth Circuit required a showing of good moral character by aliens seeking to naturalize under § 1440. Accordingly, because of the exercise of *Chevron* deference, and just as in *Nolan*, any reliance by the Seventh Circuit on *Lopez* is improper.

C. The Ninth Circuit: *Santamaria-Ames v. INS*

The only case that the *O’Sullivan* court cited to that did not rely on *Chevron* deference was *Santamaria-Ames v. INS*. Procedurally, *Santamaria-Ames* is remarkably similar to *O’Sullivan*. *Santamaria-Ames* was born in Peru and entered into the United States Army in 1974. However, after three Article 15 violations and fifteen counseling sessions for disciplinary violations in his first nine months of active duty, Santamaria-Ames was honorably discharged from the Army due to unsuitability. His civilian life was similarly unsuccessful. By 1989, Santamaria-Ames had accumulated “twenty arrests, five felony convictions and twelve misdemeanor convictions.” In 1981 deportation proceedings began against him,

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102 *Id.* at 458; *Nolan*, 334 F.3d at 198.
103 *Lopez*, 416 F.3d at 458.
104 *See supra* note 98.
105 *O’Sullivan v. United States Citizenship and Immigration Serv.*, 453 F.3d 809, 814 (7th Cir. 2006) (citing *Santamaria-Ames v. Immigration and Naturalization Serv.*, 104 F.3d 1127, 1130 (9th Cir. 1996)).
106 Both cases arose from a denied naturalization petition. *See O’Sullivan*, 453 F.3d at 811; *Santamaria-Ames*, 104 F.3d at 1130.
107 *Santamaria-Ames*, 104 F.3d at 1129.
108 *Id.*
109 *Id.*
110 *Id.*
but, after a series of rejected appeals for a waiver of deportability, Santamaria-Ames filed to become a naturalized citizen in 1992.\textsuperscript{111} However, before the Ninth Circuit, Santamaria-Ames did not claim that alien war veterans were exempt from showing good moral character.\textsuperscript{112} Instead, he argued that the “INS is precluded from examining character issues predating the . . . one year period” before his naturalization application to determine if he meets the “good moral character” requirement.\textsuperscript{113} The Ninth Circuit concluded that conduct occurring previous to the one year period before filing could be considered in the naturalization application and the denial of Santamaria-Ames’ application for citizenship was upheld.\textsuperscript{114}

\textit{Santamaria-Ames} does not elucidate any answers for the Seventh Circuit. These two cases are distinguishable because Santamaria-Ames essentially conceded the primary assertion at issue in \textit{O'Sullivan}.\textsuperscript{115} Thus, it would be disingenuous for the \textit{O'Sullivan} court to take an unchallenged assumption from \textit{Santamaria-Ames} (i.e. that alien war veterans must show good moral character in order to naturalize) and use it as precedent to support a holding where that assumption is being challenged.

\textbf{V. ERRORS IN THE \textit{O’SULLIVAN} ANALYSIS}

It is not clear how much the Seventh Circuit actually relied upon the circuit cases it cited in \textit{O’Sullivan}.\textsuperscript{116} Ultimately, however, the

\begin{itemize}
\item \textsuperscript{111} Id. at 1130.
\item \textsuperscript{112} Id.
\item \textsuperscript{113} Id.
\item \textsuperscript{114} Id. at 1131.
\item \textsuperscript{115} Id. at 1130; O’Sullivan v. United States Citizenship and Immigration Serv., 453 F.3d 809, 814 (7th Cir. 2006) (acknowledging that Santamaria-Ames “did not claim, as O’Sullivan does, that the good moral character requirement is waived for wartime veterans”).
\item \textsuperscript{116} While the court announces its holding with the introduction, “[I]ike our sister circuits,” it declined to cite to the cases it previously mentioned in any of its actual analysis. \textit{O’Sullivan}, 453 F.3d at 815.
\end{itemize}
court seemed to base its holding on four arguments. First, that good moral character is not a subset of the residency requirements. Second, the court found that the language of § 1427(a) requires that, in order to become a naturalized citizen, alien wartime veterans must show they are of good moral character “during all periods mentioned in the subsection” including the present. Third, the court found that § 1427(e) indicated that Congress viewed residency requirements different from the “good moral character” requirements, because they were listed separately in that statute. Finally, the court explained that “[a]lthough § 1439 explicitly discusses good moral character, it does so only in contexts that are relevant only to peacetime veterans.” Therefore the absence of this phrase in § 1440 could not support the inference that good moral character does not need to be shown by the wartime alien veteran.

A. First Argument: Good Moral Character is not a Subset of the Residency Requirement

The Seventh Circuit first supports its holding that aliens who naturalize under § 1440 are required to show good moral character by declining to “interpret the good moral character requirement as a subset of the residency requirement.” Unfortunately, little further analysis accompanies this declaration. The court merely adds that the good moral character requirement does not disappear simply “because it is found in a subsection with the heading ‘residence.”

117 Id. at 815-16.
118 Id. at 815.
119 Id. (emphasis in original).
120 Id.
121 Id.
122 Id.
123 Id.
124 Id.
125 Id.
This explanation is not only counterintuitive, but contrary to established principles of statutory interpretation: a subset is not independent of the larger section in which it rests.\footnote{126}

Principles of statutory construction do allow a statute’s structure to inform its text,\footnote{127} but the Seventh Circuit redefined the structure of § 1427(a) in order to change the meaning of the text by holding that § 1427(a)(3) is not a subset of § 1427.\footnote{128} This redefinition transforms the good moral character requirement from being the third prong of a three element test\footnote{129} to an independent test in § 1440 naturalizations.\footnote{130} However, this transformation runs contrary to the “law of statutory construction that, absent ambiguity or irrational result, the literal language of the statute controls.”\footnote{131} Section 1427(a) is not confusing or ambiguous: it is a subsection\footnote{132} entitled “residence” and under which Congress placed three subsets,\footnote{133} one of which is the

\footnote{126} C.f. R. A. V. v. St. Paul, 505 U.S. 377, 401 (1992) (White, Blackmun, O’Conner, JJ, concurring) (“It is inconsistent to hold that the government may proscribe an entire category of speech because the content of that speech is evil, but that the government may not treat a subset of that category differently without violating the First Amendment; the content of the subset is by definition worthless and undeserving of constitutional protection.”)

\footnote{127} See, e.g., Exxon Mobil Corp. v. Allapattah Servs., 125 S. Ct. 2611, 2620 (2005) (stating that because “[o]rdinary principles of statutory construction apply….we must examine the statute’s text in light of context, structure, and related statutory provisions); Harris v. United States, 536 U.S. 545, 553 (2002) (interpreting a criminal statute based upon its structure).

\footnote{128} O’Sullivan, 453 F.3d at 815.

\footnote{129} NORMAN J. SINGER, SOUTHERLAND STATUTORY CONSTRUCTION, vol. 1A, § 21.14, 179, (West Group, 2002) (stating that where “it is the legislative intent that all of the requirements must be fulfilled in order to comply with the statute, the conjunctive ‘and’ should be used”).

\footnote{130} O’Sullivan, 453 F.3d at 815.

\footnote{131} Edwards v. Valdez, 789 F.2d 1477, 1481 (10th Cir. 1986).

\footnote{132} 8 U.S.C.S. § 1427(a) (LexisNexis 2006) is a subsection of 8 U.S.C.S. § 1427. See Miram-Webster Online, http://www.m-w.com/dictionary/subsection (defining a subsection as “a subdivision or a subordinate division of a section”).

\footnote{133} 8 U.S.C.S. § 1427(a)(3) is a subset of 8 U.S.C.S. § 1427(a). See Miram-Webster Online, http://www.m-w.com/dictionary/subset (defining a subset as “a set each of whose elements is an element of an inclusive set”)

good moral character requirement. In the face of plain language, it is simply not in the power of the court to emasculate Congressional legislation by redefining statutory structure.

B. Second Argument: Good Moral Character Must be Shown “during all periods mentioned in the subsection”

Second, the court concludes that § 1427(a) requires that the good moral character requirement must be shown “during all periods mentioned in the subsection.” The court finds it noteworthy that this language was selected by Congress as opposed to language that would mandate a showing of good moral character “during the period of time an alien is required to have lived in the United States before naturalizing.” From this, the court insists that because the five year period is still “mentioned” in § 1427(a) than “good moral character” must be shown even though there is no residency requirement to which it can attach. Additionally, the court finds that § 1427(a) requires an alien to “show that he is still of good moral character” – a requirement that is not conditioned upon residence.

First, the court misquotes § 1427(a)(3) as stating that good moral character must be shown “during all periods mentioned in the subsection.” Rather § 1427(a)(3) properly states that “during all the periods referred to in this subsection [the alien] has been and still is a

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135 See United States v. Ron Pair Enters., 489 U.S. 235, 241 (1989) (explaining that when “the statute’s language is plain, “the sole function of the courts is to enforce it according to its terms””) (citing Caminetti v. United States, 242 U.S. 470, 485 (1917)).
136 O’Sullivan v. United States Citizenship and Immigration Serv., 453 F.3d 809, 815 (7th Cir. 2006) (citing 8 USCS § 1427(a)) (emphasis in original).
137 Id.
138 Id.
139 Id. (emphasis supplied).
person of good moral character.”\footnote{8 U.S.C.S. § 1427(a).} This is a meaningful and significant difference. The word “mention” is defined as “citing or calling attention to someone or something \textit{especially in a casual or incidental manner.}”\footnote{See Miram-Webster Online, http://www.m-w.com/dictionary/mention (emphasis supplied).} Consequently, under the word “mentioned,” no connection is necessary between good moral character and residency in order to make the good moral character element applicable.\footnote{O’Sullivan, 453 F.3d at 815.} The court’s misquotation creates the false impression that § 1427(a)(1) and (2) are not intended to interact with § 1427(a)(3); but the tenuous relationship between these elements is something the court’s analysis creates, and then exploits.\footnote{Id.}

Thus, the Seventh Circuit is essentially presenting a strawman argument, because under the word “referred,” a relationship between good moral character and residency is established.\footnote{See 8 U.S.C.S. § 1427(a).} The word “refer” is defined as “to have relation or connection” or “to direct attention usually by \textit{clear and specific} mention.”\footnote{Miram-Webster Online, http://www.m-w.com/dictionary/refer (emphasis supplied).} By using “referred” instead of “mentioned,” Congress is specifically limiting the application of the good moral character requirement to that time period indicated by the residency requirements.\footnote{Marlowe v. Bottarelli, 938 F.2d 807, 812 (7th Cir. 1991) (stating that courts should “presume that legislatures and agencies mean what they say . . . the ‘plain language’ of a statute or regulation will be the best indicator of the enacting body’s will”).}

This interpretation is not only substantiated by the plain language of the statute, but also by the structure of § 1427(a).\footnote{See 8 U.S.C.S. § 1427(a).} As stated above, the good moral character requirement is, in fact, a subset of a subsection titled “residence.”\footnote{See supra note 134.} Therefore, it is logical to conclude

\footnote{8 U.S.C.S. § 1427(a).}
\footnote{See Miram-Webster Online, http://www.m-w.com/dictionary/mention (emphasis supplied).}
\footnote{O’Sullivan, 453 F.3d at 815.}
\footnote{Id.}
\footnote{See 8 U.S.C.S. § 1427(a).}
\footnote{Miram-Webster Online, http://www.m-w.com/dictionary/refer (emphasis supplied).}
\footnote{Marlowe v. Bottarelli, 938 F.2d 807, 812 (7th Cir. 1991) (stating that courts should “presume that legislatures and agencies mean what they say . . . the ‘plain language’ of a statute or regulation will be the best indicator of the enacting body’s will”).}
\footnote{See 8 U.S.C.S. § 1427(a).}
\footnote{See supra note 134.}
that good moral character has a relationship to residency. Moreover, the nature of this relationship conditions the relevancy of § 1427(a)(3) on the existence of § 1427(a)(1) and (2) such that if the residency requirements represent a time frame of zero then there is no time period to which the good moral character requirement can refer.

Second, the Seventh Circuit’s reasoning that the “still is” portion of § 1427(a)(3) requires aliens to show good moral character regardless of whether the preceding residency requirements apply inherently presumes that Congress is grammatically incompetent. As the Second Circuit acknowledged, albeit inconclusively, in Nolan, “linguistic purists could argue that the precise phrase used in [§ 1427(a)] -- ‘still is . . . of good moral character’ -- connotes continuity, which logically cannot be shown if there is no relevant prior period.” Congress could have simply switched the word “still” with “presently” and in that manner clearly communicated that the good moral character requirement is not limited to the periods of residency expressed in § 1427(a)(1)-(2). However, Congress chose to use “still.” Accordingly, the plain language of § 1427(a)(3) has a specific meaning that, contrary to the Seventh Circuit, ties good moral

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150 Id.
151 See 8 U.S.C.S. § 1427(a) (stating that a naturalizing alien must show good moral character “during all the periods referred to in this subsection”).
153 Reply Brief of Petitioner-Appellant, at *2, O’Sullivan, 453 F.3d 809, No. 05-2943, (7th Cir. October 28, 2005), 2005 WL 3738527 (questioning “how a good moral character requirement that is explicitly tied to a period can still exist when the period requirement is taken away”); see Nolan v. Holmes, 334 F.3d 189, 197 (2d Cir. 2003) (recognizing the possibility that § 1440 “was not intended to compel any showing [of good moral character] that another INA section requires in connection with a period of residence”).
154 Nolan, 334 F.3d at 197.
155 Merriam-Webster Online Dictionary, http://www.m-w.com/dictionary/still (follow “still[3adverb]”) (defining still as “a function word to indicate the continuance of an action or condition”).
character to the residency requirements. Therefore, if the alien naturalizing under § 1440 is exempted from both of the residency requirements in § 1427 then there is nothing to which the good moral character requirement can refer, including the continuous, “still is,” requirement of § 1427(a)(3).

C. Third Argument: § 1427(e) Reveals Congress Views Good Moral Character and Residency as Distinct Requirements

The court’s third argument is that because § 1427(e) separates the good moral character requirement from “other qualifications for citizenship,” including the residency requirements, this indicates that Congress “viewed the two requirements as distinct.” However, the Seventh Circuit neglects to explain the implication of this distinction. While there is no doubt that residency requirements are different from a requirement to show good moral character, the question in O’Sullivan is how these two different requirements are intended to interact with each other.

Unfortunately, § 1427(e) is unable to answer this question because it relates to a different matter entirely. This subsection of § 1427 is

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158 8 U.S.C.S. § 1427(a); O’Sullivan, 453 F.3d at 815.
159 8 U.S.C.S. § 1440(b) (LexisNexis 2006); 8 U.S.C.S. § 1427.
161 O’Sullivan, 453 F.3d at 815.
162 Id.
163 See, e.g., 8 U.S.C.S. § 1427(a) (listing good moral character and residence as two separate requirements).
164 Compare Brief of Petitioner-Appellant, at *7, O’Sullivan, 453 F.3d 809, No. 05-2943, (7th Cir. August 15, 2005), 2005 WL 3738525 (arguing that “a showing of good moral character need only be made for required periods of residency”), with Response of Respondent-Appellee, at *10, O’Sullivan, 453 F.3d 809, No. 05-2943, (7th Cir. October 14, 2005), 2005 WL 3738526 (acknowledging that in § 1440 “Congress clearly recognized . . . that some of the general requirements, such as residency, may be waived, but there is no indication from the text of the statutes that Congress intended to waive a requirement of good moral character for naturalization purposes”).
165 See 8 U.S.C.S. § 1427(e).
solely concerned with the ability of the Attorney General to take into consideration issues of good moral character and residence beyond the scope of the five year period given in § 1427(a)(1). Thus, while § 1427(e) identifies good moral character and residence as separate requirements, such a distinction sheds no light upon the way these two requirements interact in § 1427(a).

D. Fourth Argument: Distinguishing Between § 1439 and § 1440

Finally, the Seventh Circuit erred when it neglected to appreciate the significance of the presence of the good moral character requirement in § 1439 and the absence of this or similar requirement in § 1440. Instead of taking this plain difference at its face, the O’Sullivan court relegated this crucial dissimilarity in the statutes to a difference in the time frames under which veterans may naturalize. According to the court, the purpose for explicitly mentioning the good moral character requirement in the context of § 1439 is to allow peacetime veterans to utilize their military records to meet the requirements of § 1427(a). The court explains this is necessary because aliens naturalizing under § 1439 must do so no later than six months after being honorably discharged and therefore may need to

See Santamaria-Ames v. Immigration and Naturalization Serv., 104 F.3d 1127, 1132 (9th Cir. 1996) (holding that “the pertinent inquiry is whether the petitioner is presently of good moral character and has demonstrated good moral character [during the statutory period] . . . [but] [c]riminal conduct and other behavior prior to [this] period may be examined”); Yuen Jung v. Barber, 184 F.2d 491, 495 (9th Cir. 1950) (holding that the statutory five year period is the only material determiner of good moral character, but prior periods are “circumstantially relevant as bearing upon petitioner’s character”).

O’Sullivan v. United States Citizenship and Immigration Serv., 453 F.3d 809, 815-16 (7th Cir. 2006); 8 U.S.C.S. § 1439(e); 8 U.S.C.S. § 1440.

O’Sullivan, 453 F.3d at 815 (explaining that “[u]nlike wartime veterans, peacetime veterans must serve in the military one full year and apply within six months of discharge, or while still serving in the military”); compare 8 U.S.C.S. § 1439(a), with 8 U.S.C.S. § 1440(a).

O’Sullivan, 453 F.3d at 815.
rely upon military records to establish good moral character.\textsuperscript{171} The court elaborated, that it was not necessary for Congress to include a similar provision in § 1440, because wartime veterans often have shorter lengths of service and may apply for naturalization long after their service has ended.\textsuperscript{172} Therefore, according to the Seventh Circuit, “military records could be significantly less helpful in determining their current moral character. It stands to reason, then, that Congress would not set hard-and-fast rules on the use of military records as a means for wartime aliens to prove good moral character.”\textsuperscript{173}

The court’s explanation does not adequately explain this discrepancy between § 1439 and § 1440 for three reasons. First, while alien wartime veterans may choose to naturalize long after they leave military service as the Seventh Circuit suggests,\textsuperscript{174} they need not do so.\textsuperscript{175} In the event that a wartime veteran opted to naturalize immediately after being discharged or while still in military service, \textit{O’Sullivan} requires that soldier to prove good moral character.\textsuperscript{176} In such circumstances, the alien wartime veteran has same reliance on military records to prove good moral character as an alien serving in a time of peace and naturalizing under § 1439.\textsuperscript{177} Because the reliance on recent military records is the same in both scenarios, the Seventh Circuit’s justification of the presence of the good moral character provision in § 1439 suggests that Congress should have included a

\begin{footnotes}
\item[171] \textit{Id.}  \\
\item[172] \textit{Id.}  \\
\item[173] \textit{Id.} at 815-16.  \\
\item[174] \textit{Id.}  \\
\item[175] Alien wartime veterans can apply to naturalize during their military service. See 8 U.S.C.S. § 1440(c) (stating that the successful naturalization of a soldier can be revoked if they are “separated from the service under other than honorable conditions”).  \\
\item[176] \textit{O’Sullivan}, 453 F.3d at 816 (holding that aliens naturalizing under § 1440 must satisfy the good moral character provision in § 1427(a)).  \\
\item[177] \textit{Cf. O’Sullivan}, 453 F.3d at 815 (explaining that peacetime veterans need the good moral character provision of § 1439(e) in order to prove good moral character through recent military records).
\end{footnotes}
similar provision in § 1440. Just like aliens who naturalize under § 1439, alien wartime veterans naturalizing under § 1440 need a good moral character provision that allows them to “show good moral character during their recent service through military records.” Yet no similar, or any, good moral character provision exists in § 1440. Thus, there are two explanations as to why § 1439 has a good moral character provision and § 1440 does not, either Congress overlooked the possibility that veterans naturalizing under § 1440 might do so immediately or else the court’s analysis on this provision was incomplete.

Second, the Seventh Circuit’s analysis also fails to consider the relevancy of § 1427(e) on the differences between § 1439 and § 1440. Section 1427(e) provides that the Attorney General “may take into consideration as a basis for [determining good moral character] the applicant’s conduct and acts at any time prior to that period.” Accordingly, if an alien naturalizing under § 1440 is subject to the good moral character requirement in § 1427, then the Attorney General may find old military records of significant interest to reach a conclusion concerning an applicant’s good moral character. Yet there is no provision in § 1440 that provides for the use of old military records to prove good moral character, despite the inclusion of such a provision in § 1439.

Finally, nowhere on this issue does the Seventh Circuit in O’Sullivan cite to an applicable and extensive legislative record.
Unfortunately, however, the lack of citation did not prevent the court from asserting what are essentially Congressional intent arguments. Such analysis is particularly troubling when the court is attempting to explain and rationalize why one statute contains a clause that a functionally similar statute does not; especially when both statutes were “enacted together . . . [and] contain some clearly parallel provisions.” The Supreme Court has made this pillar of statutory interpretation clear: “[w]e do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.” This canon of statutory construction is particularly relevant in O’Sullivan, because of the Seventh Circuit’s choice to rely solely on the plain language of the statutes to support its reasoning.

This critique of the Seventh Circuit’s reasoning is further strengthened by legislation that occurred after the O’Sullivan opinion was issued. Just less than three months after the Seventh Circuit decided O’Sullivan, a bill was proposed in the Senate that would add a good moral character requirement to § 1440. Entitled the “Soldiers to Citizens Act,” this bill would amend § 1440 to require an alien wartime veteran to “demonstrate to the military chain of command . . . good moral character.” This proposal by former Senate Majority Leader Bill Frist, serves as an additional indicator that

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187 Id. at 815-16 (explaining the reasons why Congress mentions good moral character in § 1439 but not in § 1440).
188 Nolan v. Holmes, 334 F.3d 189, 197 (2d Cir. 2003).
190 See O’Sullivan, 453 F.3d at 812-16.
192 Id.
193 Id.
the plain language of § 1440 does not currently require naturalizing wartime veterans to prove good moral character.194

CONCLUSION

The O’Sullivan court erred in its holding that alien wartime veterans need to show good moral character in order to naturalize under § 1440. The Seventh Circuit not only failed to properly interpret the plain language of the naturalization statutes, including adequately explaining why § 1439 included a good moral character provision but § 1440 did not, but it also misquoted a relevant part of § 1440 and then relied upon that misquotation to reach its conclusion. Finally, the court did not cite to any legislative history, though it presumed to infer Congressional intent to support an opinion that ran contrary to the plain language of the relevant statutes. Whether based on policy preferences or simply out of a desire not to be the first circuit to break rank on this issue, the O’Sullivan court erred in interpreting § 1427 and § 1440 to require a showing of good moral character from alien wartime veterans.

While this ruling impacts a great many alien veterans serving in the armed forces, the effect of this impact is likely to be slight. If legislation passes that adds an explicit good moral requirement to § 1440 then O’Sullivan will not present any adverse consequences to veterans seeking to naturalize under § 1440. However, until such legislation passes, it is possible that O’Sullivan will discourage aliens from serving in the military, because misconstruing the plain language of § 1440 undermines the certainty and possibility of naturalization.

SAY IT AIN’T SO!:
HOW THE SEVENTH CIRCUIT'S HOLDING IN
EDELSON V. CH’IEN UNNECESSARILY NARROWS
THE SCOPE OF SECTION 13(D)'S IMPLIED
PRIVATE RIGHT OF ACTION

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INTRODUCTION

In 1968, Congress passed the Williams Act as a response to the increased use of cash tender offers as a means for achieving corporate takeovers.1 The purpose of the Williams Act was to ensure that public shareholders were provided adequate information about the qualifications and intentions of third parties making cash tender offers or acquiring large blocks of shares in publicly held companies as a

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means to possibly contest company control. Prior to enactment of the Williams Act, there was a “gap” in federal regulation in that tender offers and acquisitions of substantial amounts of stock having a potential for control were not subject to registration and disclosure requirements as were corporate acquisitions by proxy solicitations or by exchange offers of securities. In particular, Section 13(d) of the Williams Act was largely intended to alert shareholders of a large accumulation of stock by a party that may potentially affect control. Accordingly, any person who acquires more than 5% of a class of registered equity security must send to the issuer and the exchanges on which the security is traded, and file with the Securities and Exchange Commission (“SEC”), a Schedule 13D indicating their intent with regards to such acquisition. Specifically, Section 13(d)(1) requires the disclosure of: (A) the background and identity of the persons filing, (B) the source and amount of funds for any purchases, (C) any potential plans to assert control over the issuer, (D) the number of shares owned and (E) information concerning any arrangements or understandings with any person with respect to any securities of the issuer.

While the Williams Act did not contain an explicit private right of action, courts soon held that such an implied right existed. The existence of an implied right of action under Section 13(d) has not

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3 Ind. Nat’l Corp., 712 F.2d at 1183 (“Whereas corporate acquisitions by proxy solicitations or by exchange offers of securities were subject to registration and disclosure requirements, see 15 U.S.C. §§ 78n, 77e, tender offers or acquisitions of substantial amounts of stock having a potential for control were not subject to similar requirements”).
7 Ind. Nat’l Corp., 712 F.2d at 1183 (Additionally, the Williams Act was modeled after Section 14(a) which contained also contained a private right of action); see Gen. Time Corp. v. Talley Ind., Inc., 403 F.2d 159, 161 (2d Cir. 1968), cert. denied, 393 U.S. 1026 (1969).
been questioned by any court since the enactment of the Williams Act in 1968.\(^8\) In contrast, Section 13(d)’s standing requirements and the context in which such a private right exists have created conflict between courts. In the Seventh Circuit, in particular, there exist two viable, yet divergent holdings relating to the scope of Section 13(d)’s implied cause of action. Accordingly, the issues addressed in this note include: (1) the scope of Section 13(d)’s implied cause of action; (2) whether the Seventh Circuit unnecessarily narrowed Section 13(d)’s implied cause of action through its holding in \textit{Edelson v. Ch’ien}, 405 F.3d 620 (7th Cir. 2005) thereby creating a potential split between circuits; and, (3) the \textit{Edelson} holding’s implications with respect to corporate governance and, in particular, its possible chilling affect on the heightened corporate governance requirements set forth in the Sarbanes-Oxley Act, 15 U.S.C. § 7201 et seq.

Section I of this Note provides background regarding the Williams Act. Section II analyzes and explains \textit{Indiana National Corp. v. Rich}, the Seventh Circuit case decided in 1983 adopting Section 13(d)’s implied cause of action. Section III discusses the recent Seventh Circuit decision, \textit{Edelson v. Ch’ien}, which presented the first time the Seventh Circuit addressed the scope of Section 13(d)’s implied cause of action in more than 20 years.\(^9\) Section IV explains why the \textit{Edelson} Court incorrectly held that the plaintiff did not have standing to assert a private right of action under section 13(d). Section V of this Note explains why the disclosure requirements set forth in Section 13(d) apply beyond the context of a tender offer. Finally, this article cautions that \textit{Edelson} may have the adverse affect of discouraging corporate directors from questioning the propriety and legality of board decisions in conflict with the very purpose of the Sarbanes-Oxley Act, 15 U.S.C. § 7201 et seq. Furthermore, \textit{Edelson} creates a conflict between circuits.

\(^8\) See \textit{Ind. Nat’l Corp.}, 712 F.2d at 1183 (From its inception, Section 13(d) has impliedly had a private cause of action similar to that of Section 14(a), as that Section provided the model upon which Section 13(d) was created).

\(^9\) The \textit{Edelson} holding directly contradicts that of the \textit{Indiana National}. 
I. BACKGROUND ON THE WILLIAMS ACT AND SECTION 13(D)’S PRIVATE RIGHT OF ACTION

Reacting to the increased use of cash tender offers to achieve corporate takeovers, Congress passed the Williams Act in 1968. The impetus behind the Act, as stated by its sponsor Senator Williams, was to “close a significant gap in investor protection under the Federal securities laws by requiring the disclosure of pertinent information to stockholders when persons seek to obtain control of a corporation by a cash tender offer or through open market or privately negotiated purchases of securities.” Prior to the adoption of the Williams Act, tender offers and third-party acquisitions of substantial amounts of stock, such that a potential for control was created, were not subject to substantive registration and disclosure requirements.

In particular, Section 13(d) required any person who acquired more than 5% of a class of securities of a corporation to send to the issuer and file with the SEC a statement (Schedule 13D or 13G) disclosing, among other things, the identities of all persons on whose behalf the purchases had been made, the number of shares acquired, the source and amount of funds used in making the purchase, and the purpose of the purchases in relation to the acquisition of control. Disclosure is of paramount importance, as it enables investors to assess the potential for changes in corporate control and adequately evaluate a company’s worth. Further, disclosure provides for added investor protection by minimizing the asymmetrical access to

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14 Id. (citing 15 U.S.C. § 78m(d)(1)).
information between normal investors and corporate insiders, which goes to the essence of the federal securities laws.

From the time of its enactment in 1968, Section 13(d) was understood by courts and legislators to impliedly contain a private right of action.\textsuperscript{16} Indeed, the Williams Act was patterned upon the protections already available in the proxy rules, Sections 14(a) of the Exchange Act, 15 U.S.C. § 78n, which courts had previously found to contain such an implied right.\textsuperscript{17} Then, in 1971, the Court of Appeals for the Second Circuit explicitly held that a private right of action for issuer corporations must be implied under Section 13(d).\textsuperscript{18} Shortly thereafter, the Supreme Court gave its imprimatur to the Second Circuit’s ruling.\textsuperscript{19} Despite several amendments to the Williams Act, Congress left the remedy intact.\textsuperscript{20}

II. \textbf{INDIANA NATIONAL CORP. V. RICH: AND THE COURT SAID, LET THERE BE SECTION 13(D)}

In 1983, the Seventh Circuit addressed, for the first time, the scope of the implied private remedy under Section 13(d).\textsuperscript{21} Specifically, the issue addressed in \textit{Indiana National Corp. v. Rich} was whether an implied private right of action existed for an issuer corporation to seek injunctive relief under Section 13(d) of the

\textsuperscript{16} \textit{Ind. Nat’l Corp.} 712 F.2d at 1183; see also Statement by former SEC Chairman Manual F. Cohen during Hearing on S. 510 Before the Subcomm. On Securities of the Senate Comm. On Banking and Currency, 90th Cong., 1st Sess. 16 (1967) (“The procedures provided by the bill in the case of contested tender offers are analogous to those now followed when contending factions solicit proxies under the Commission’s proxy rules”).

\textsuperscript{17} \textit{Ind. Nat’l Corp.} 712 F.2d at 1183.

\textsuperscript{18} See \textit{GAF Corp.}, 453 F.2d at 719-720 (2d Cir. 1971).

\textsuperscript{19} \textit{Ind. Nat’l Corp.} 712 F.2d at 1184; see \textit{Rondeau v. Mosinee Paper Corp.}, 422 U.S. 49, 59 n.9 (1975) (The Supreme Court assumed, without directly confronting the issue, that 13(d) provided for a private right of action to issuer corporations with respect to injunctive relief).


\textsuperscript{21} \textit{Ind. Nat’l Corp.} 712 F.2d at 1181.
Securities Exchange Act ("Exchange Act") against a group of investors who had aggregated more than 5% of Indiana National Corporation’s stock. In that case, the plaintiff, Indiana National Corporation ("Indiana National"), was a bank holding company engaged principally in the banking business through its wholly owned subsidiary, Indiana National Bank. Indiana National’s stock was traded in the over-the-counter market, and was registered pursuant to Section 12 of the Exchange Act. The defendants were a group of investors who, during 1981 and 1982, acquired more than 5% of Indiana National’s stock. In accordance with Section 13(d), they filed a Schedule 13D in September of 1981, and subsequently amended it six times between then and August, 1982.

In July, 1982, Indiana National filed a complaint alleging that the defendants’ Schedule 13D contained materially false and misleading information, in that it failed to disclose, among other things, the defendants’ intention to acquire control of Indiana National. The plaintiff sought a court order compelling defendants to file an amended Schedule 13D stating their intention to acquire control of Indiana National, as well as enjoining defendants from acquiring more shares of Indiana National and compelling them to divest themselves of a portion of the shares already held. In response, the defendants filed a motion to dismiss arguing that Indiana National, as the issuer, had no standing to assert a claim under Section 13(d); the district court granted its motions on this ground. On appeal, the Seventh Circuit reversed the district court’s holding, stating

22 Id.
23 Id.
24 Id.
25 Id.
26 Id.
27 Id. at 1182.
28 Id.
29 Id.
unequivocally that “an implied right of action exists in favor of an issuer under Section 13(d).”

In so holding, the court provided an extensive analysis of Section 13(d) standing as it pertains to issuer corporations via incumbent management. While conceding that Section 13(d)’s purpose was the protection of shareholders and not the protection of incumbent management or deterrence of takeover bids, the Indiana National Corp. Court found that it is through incumbent management that shareholders are protected, rendering the distinction between incumbent management and shareholders nominal. “In this sense,” stated the court, “the corporation’s standing to sue is representational.” It continued, the manner in which shareholder protection is provided by Section 13(d) “is by generating a ‘fair fight’ between incumbent management and the persons believed to be seeking to acquire control in order that the shareholders may make an intelligent decision between them when called upon to do so.”

Thus, incumbent management plays a vitally important role in protecting shareholder interests and monitoring the observance of Federal securities laws. Shareholders, by themselves, generally lack the capacity and knowledge to ensure that Section 13(d) is enforced and that a “fair fight” is provided. In this respect, the issuer corporation via incumbent management, acts on the shareholders’ behalf in bringing a suit for injunctive relief until an accurate Schedule 13D is filed. That is not to say that incumbent management represents the interests of the shareholders “in relation to who ultimately wins any potential struggle for control, but only insofar as corporate management acts to ensure the dissemination of accurate information about the identity, background and purpose of the persons

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30 Id.
31 Id. at 1185.
32 Id.
33 Id.
34 Id.
35 Id.
possibly seeking control of the corporation.” As such, a corporation’s standing to sue under Section 13(d) is representational and should be afforded to (incumbent) management in those instances where both the management and shareholders are interested, “realistically” or “theoretically,” in preventing injury to any corporate interest resulting from a takeover by persons who are either incompetent or intent upon plundering the corporate assets.

III. Edelson v. Ch’ien: What the Seventh Circuit Giveth, the Seventh Circuit Taketh Away

More than twenty years after Indiana National, the Seventh Circuit once again addressed the scope of the implied private right of action under Section 13(d). Specifically, the court in Edelson v. Ch’ien addressed whether the failure to disclose an intent to affect change in corporate control in a Schedule 13G disclosure provided a sufficient basis for the plaintiff to state a cause of action under Section 13(d).

In this case, the plaintiff, Harry Edelson (“Mr. Edelson”), was a director and shareholder of defendant Chinadotcom, the issuer, from 1999 until 2003. Individually, the defendants included Peter Yip Hak Yung (“Mr. Yip”), CEO of Chinadotcom and shareholder, Raymond K.F. Ch’ien (“Mr. Ch’ien”), Executive Chairman of Chinadotcom’s board and shareholder, and Chinadotcom.

In early January of 2003, both Mr. Edelson and another outside director openly disagreed with Mr. Yip and Mr. Ch’ien.

36 Id. (emphasis in the original).
37 Id.
38 Edelson v. Ch’ien, 405 F.3d 620, 626 (7th Cir. 2005).
39 Id.
40 Id. at 622. (Chinadotcom was a Cayman Island company, headquartered in Hong Kong whose stock traded on the NASDAQ exchange during all relevant times leading to this dispute).
41 Id. (Through a family corporation Mr. Yip beneficially owned almost 16.5 million shares in Chinadotcom, approximately 19% of the outstanding shares of the company).
concerning various corporate governance issues. In particular, they took issue with the company-sponsored stock buy-back program, which they believed to be ethically improper and possibly illegal. Mr. Edelson questioned both Mr. Yip’s and Mr. Ch’ien’s motives in backing the program, as they stood to reap huge gains from the buy-back. By way of example, Mr. Yip had purchased 4.3 million shares of Chinadotcom stock in a private transaction on January 14, 2003, at a price of $2.50 per share. The stock buy-back program – that Mr. Yip and Mr. Ch’ien so rigorously backed – called for the re-purchase of that stock at $3.75 per share.

Prior to Mr. Yip’s January 14 purchase, he filed a disclosure pursuant to Section 13(d), as he was the beneficial owner of more than 5% of the issued and outstanding shares of Chinadotcom stock. However, Mr. Yip did not file a Schedule 13D; instead, he filed a Schedule 13G. By rule, a shareholder may file a Schedule 13G, a less-onerous disclosure form allowed when the individual submitting the filing “has not acquired the securities with any purpose, or with the effect of changing or influencing the control of the issuer.” In Mr. Yip’s 13G disclosure he certified that (1) the securities he purchased were neither acquired nor held “for the purpose of, or with the effect of changing or influencing control of the issuer of the securities,” and (2) that the securities were neither acquired nor held “in connection with or as a participant in any transaction having that purpose or effect.”

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42 Id.
43 Id.
44 Id.
46 Edelson, 405 F.3d at 622.
47 Id. at 623.
48 Id.
49 Id.; 17 C.F.R. § 240.13d-1(c)(1).
50 Edelson, 405 F.3d at 623.
Meanwhile, Mr. Edelson’s dispute with Mr. Yip and Mr. Ch’ien continued to escalate through the March 18, 2003 Board meeting. On April 16, 2003, Mr. Edelson sent an e-mail correspondence to Mr. Ch’ien alleging that the independent directors on Chinadotcom’s Board were being “bull-dozed” in violation of the Sarbanes-Oxley Act, with the result that good corporate governance was being disregarded. Also during this same time frame, the Board was in the process of nominating a new slate of directors. All three directors who served on the audit committee – Mr. Edelson, Mr. Beese, the other dissenting director, and Thomas Britt – had terms set to expire after the annual shareholder meeting. The annual meeting notice sent to all Chinadotcom stockholders recommended the re-election of all three members, whose nominations were subsequently unopposed and uncontested. Neither Mr. Yip nor Mr. Ch’ien asserted any overt objection whatsoever to Mr. Edelson’s re-elections, and both purported to concur in the Board’s recommendation that Mr. Edelson and the other candidates be elected.

However, on June 17, 2003, at the Chinadotcom Annual Meeting, Mr. Edelson was defeated in an election in which only 48% of the shares were voted. Of the votes cast, 18,766,947 shares were voted in favor of Mr. Edelson’s re-election, 28,264,956 were voted against Mr. Edelson’s re-election, and 800 abstained. All 16,577,905 shares beneficially owned by Mr. Yip were voted against Mr. Edelson, constituting more than two-thirds of the votes cast against him. Moreover, Mr. Yip did not amend his previously filed Schedule 13G

51 Id.
52 Id. at 623-24.
53 Id. at 623.
54 Id.
55 Id.
56 Id. (Mr. Edelson’s complaint alleged that Mr. Yip and Mr. Ch’ien concealed their opposition to his re-election as part of a scheme to vote him off of the Board).
57 Id.
58 Id.
59 Id.
prior to voting all of his shares against Mr. Edelson, leading the Chinadotcom shareholders to believe that the election at the 2003 Annual Meeting would be evenhanded.

In October of 2003, Mr. Edelson filed suit against Chinadotcom, alleging, among other things, violations of Section 13(d), and sought an order declaring the June 2003 election null and void, and ordering a new election. The gravamen of Mr. Edelson’s complaint was that Mr. Yip violated Section 13(d) by not disclosing his plan to influence the control of Chinadotcom’s existing board. Specifically, Mr. Edelson contended that Mr. Yip’s Schedule 13G, filed after his January purchase of 4.3 million shares, certified that the shares would not be held for the purpose of or with the effect of changing or influencing control of the issuer. Mr. Edelson argued further that once Mr. Yip decided to vote against him, as well as the other dissenting outside director, Mr. Yip could no longer make such a certification and was thereby required to file a Schedule 13D or amend his Schedule 13G, which he did not do. Mr. Yip argued that the fact that a shareholder intends to vote shares in favor or against a director does not mean that the shareholder has “the purpose or effect of changing or influencing the control of the issuer of the securities.”

The district court denied Mr. Edelson’s request for injunctive relief and dismissed his claim finding that he lacked standing to bring a Section 13(d) action. The court reasoned that Congress did not intend Section 13(d) to serve as a mechanism for “ex-directors to settle old feuds.” In support of this argument, the district court acknowledged that Indiana National authorized a private right of action under Section 13(d), but relied on two district court decisions – one from Louisiana and the other from Maryland – holding that former

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60 Id.
61 Id.
62 Id.
63 Id. at 623.
64 Id. at 624.
65 Id.
66 Id.
directors of a corporation could not bring suit under Section 13(d).67 “If there is a spectrum of shareholder sophistication,” said the court, “with unsuspecting investors on one end, and well-informed members of management who can adequately protect their own interests on the other, then Edelson certainly lies closer to management than to the common shareholder.”68 Thus, the court concluded that Mr. Edelson, as a director, was neither the appropriate representative of his interest as a shareholder nor those of other shareholders.69

On appeal, the Seventh Circuit affirmed, but on grounds other than those relied upon by the district court.70 Rather than focusing on Mr. Edelson’s status as an ex-director, the Seventh Circuit reasoned that he lacked any viable Section 13(d) claim in his capacity as a Chinadotcom shareholder.71 Specifically, the court held that Mr. Yip’s failure to disclose his intent under the circumstances of this case did not provide Mr. Edelson, as a shareholder, with a sufficient basis to state a cause of action.72 The court further concluded that Congress intended to recognize a private cause of action under Section 13(d) only in the context of a tender offer or other contest for control; therefore, Mr. Yip’s action in voting against Mr. Edelson fell outside of the scope of Section 13(d).73 In support of its holding, the court proffered a characterization oft-repeated by courts that have addressed Section 13(d) claims:

Our review of the legislative history convinces us that the overriding purpose of Congress was to protect the individual investor when substantial shareholders or

68 Edelson, 405 F.3d at 625.
69 Id.
70 Id.
71 Id.
72 Id.
73 Id.
management undertake to acquire shares in a corporation for the purpose of solidifying their own position in a contest over how or by whom the operation should be managed.  

Section 13(d), in the court’s own words, “was designed to provide information to the investor when faced with a tender offer or other accumulation or aggregation of stock that could affect corporate control.” In sum, despite Mr. Yip’s accumulation of 19% of Chinadotcom’s stock and questionable disclosure, Mr. Edelson’s status as a shareholder and director charged with protecting common shareholders, Seventh Circuit case law favoring Mr. Edelson, and the complete absence of language in Section 13(d) limiting its scope to tender offers, the Seventh Circuit affirmed the district court’s judgment against Mr. Edelson.

IV. THE DISTRICT COURT’S STANDING ANALYSIS

The Seventh Circuit should have reversed the district court’s finding that Mr. Edelson did not have standing to assert a private right of action under Section 13(d) for three reasons. First, by focusing on Mr. Edelson’s position as a former board member, as opposed to his status as owner of several hundred thousand Chinadotcom shares, the district court concluded that he was not within the class of people that Section 13(d) was enacted to protect. Second, while claiming to embrace the Indiana National reasoning, the district court came to a conclusion directly contrary to its primary contention regarding Section 13(d) standing. Finally, not only did the court of appeals

74 Id. at 631; see, e.g., Bath Indus., Inc. v. Blot, 427 F.2d 97 (7th Cir. 1970).
75 Edelson, 405 F.3d at 631 (emphasis added).
76 See id. at 625. (“If there is a spectrum of shareholder sophistication . . . Edelson certainly lies closer to management than to the common shareholder”).
77 See Ind. Nat’l Corp. v. Rich, 712 F.2d 1180, 1185 (7th Cir. 1983) (A corporation’s standing to sue under Section 13(d) is representational and should be afforded to (incumbent) management in those instances where both the management and shareholders are interested, “realistically” or “theoretically,” in preventing injury
uphold the district court’s ruling for which extra-district (district court) case law was relied upon despite the existence of Seventh Circuit authority, the cases relied upon were inapposite. In doing so, the court created a potential conflict among the circuits as the Second Circuit reached an inapposite result in *GAF Corp. v. Milstein.* Each of these points is further elucidated below.

**A. Mr. Edelson was a Shareholder**

Both Mr. Edelson and the Chinadotcom defendants agreed that the purpose of Section 13(d) was to protect shareholders, and further, that it provided a private right of action for injunctive relief in favor of shareholders. Courts have uniformly found a private right of action on behalf of shareholders under Section 13(d) for claims involving injunctive relief. Indeed, the Supreme Court has stated that the Williams Act’s central thrust was to provide shareholders with more extensive protection under the Federal securities laws. The theme of investor protection was emphasized by Senator Williams on the day the Senate passed the Williams Act:

\[
\text{to any corporate interest resulting from a takeover by persons who are either incompetent or intent upon plundering the corporate assets).}
\]


79 *See Edelson*, 405 F.3d at 631.


81 *See Piper v. Chris-Craft Ind. Inc.*, 430 U.S. 1, 33-34 (1977); *see also* *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975).
[The Federal securities laws] provide protections for millions of American investors by requiring full disclosure of information in connection with the public offering and trading of securities. These laws have worked well in providing the public with adequate information on which to base intelligent investment decisions. There are, however, some areas still remaining where the full disclosure is necessary for investor protection but not required by present law. One such area is the purchase by direct acquisition or by tender offers of substantial blocks of securities of publicly held companies. [The Williams Act] provides for investor protection in these areas.82

Mr. Edelson was the investor in, and shareholder of, several hundred thousand Chinadotcom shares.83 Despite his status as a shareholder, the district court found that Mr. Edelson was not entitled to seek injunctive relief under Section 13(d).84 The court of appeals accepted, out of hand, the district court’s reasoning that, because a majority of the injuries alleged by Mr. Edelson concerned his position as a member of the board as opposed to his position as a shareholder, he was not entitled to protection as a shareholder under Section 13(d).85 This reasoning, however, is contradictory. By admitting that even one of Mr. Edelson’s claims arose by virtue of his status as a shareholder, the court is then forced to acknowledge that he has those rights afforded all other shareholders, to wit, standing to sue under Section 13(d). Moreover, Mr. Edelson alleged that he, as a shareholder, was not informed by Mr. Yip and Mr. Ch’ien about their plans to change the composition of the Board.86 If taken as true, there is no

83 See Edelson, 405 F.3d at 622.
84 Id. at 625.
85 Id. at 623, 625.
86 Id. at 625.
question that Mr. Yip and Mr. Ch’ien would have been required to
disclose their intent pursuant to Section 13(d). The extension of
management’s control over a company to the exclusion of dissenting
parties is just the type of event that Section 13(d)’s disclosure
requirement was intended to reveal to shareholders.87 In addition,
Schedule 13D itself includes the requirement that a filer must disclose
any plan or intent to change the composition of corporate boards.88
Yet, the court chose not to address any of these arguments.89

Despite ultimately deciding against Mr. Edelson by reasoning
that Section 13(d)’s implied cause of action applies only in the context
of a tender offer or other contest for control,90 the court’s decision
would presumably have been different if another shareholder brought
the action. The Edelson Court approvingly cited to various language in
the district court’s holding admonishing Mr. Edelson for bringing suit.
“Congress did not intend Section 13(d) to be a mechanism for ex-
directors to settle old feuds.”91 “This Court declines” to grant a “cause
of action under Section 13(d) for former directors whom management
has ousted . . . . Congress did not intend former directors to wield
Section 13(d) on their own behalf.”92 This argument is not without
merit. However, the fact remains that Mr. Edelson was a shareholder
despite his role as director. All shareholders are afforded rights under
the federal securities laws, and justice is not served by vitiating those
rights for shareholders who also happen to be corporate directors and
officers of the company in which they own shares.

While the use of Section 13(d) as a mechanism for ex-
directors to “settle old feuds” may be a nuisance to the court, it is

87 See Bath Indus., Inc. v. Blot, 427 F.2d 97,109 (7th Cir. 1970); see also
Amicus Brief by the Securities and Exchange Commission in Support of Plaintiff
(Mr. Edelson), 2004 WL 3760475, at *22 (7th Cir. Dec.15, 2004).
89 See Edelson, 405 F.3d at 625. (The court refused to address the issue of
whether Mr. Edelson should be afforded those rights guaranteed general
shareholders by Section 13(d)).
90 Id. at 634.
91 Id. at 624.
92 Id. at 625.
worth the cost. Corporate insiders are the gate-keepers for common shareholders and are in the best position to identify and bring to light corporate foul play. Common shareholders are often too far removed from the inner workings of the company they own to effectively prevent potential violations of federal securities laws.\textsuperscript{93} As such, ex-director-shareholders may actually be the best plaintiffs in a Section 13(d) suit. They are privy to the inner workings of the company yet still share the concerns of all other common shareholders – such as, the prudent and impartial management of the company for the benefit of all shareholders, not just the few in control. To preclude corporate insiders, and specifically ex-directors, from bringing suit under Section 13(d) because of their dual status as management and shareholder would constitute a setback in our federal securities law jurisprudence. Indeed, as stated by Justice Learned Hand, “it is one of the surest indexes of mature and developed jurisprudence . . . to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.”\textsuperscript{94} To read director-shareholders out of Section 13(d)’s implied private right of action would run directly contrary to this notion.

The court further accepted the Chinadotcom defendants’ argument that if Mr. Edelson was correct, Rule 13d-1(e)(1),\textsuperscript{95} “taken to

\textsuperscript{93}GAF Corp. v. Milstein, 453 F.2d 709, 721 (2d Cir. 1971).
\textsuperscript{94}Id. at 716 (citing Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945)).
\textsuperscript{95} Rule 13d-1(e)(1):
Notwithstanding paragraphs (b) and (c) of this section and Rule 13d-2(b), a person that has reported that it is the beneficial owner of more than five percent of a class of equity securities in a statement on Schedule 13G pursuant to paragraph (b) or (c) of this section, or is required to report the acquisition but has not yet filed the schedule, shall immediately become subject to Rule 13d-1(a) and Rule 13d-2(a) and shall file a statement on Schedule 13D within 10 days if, and shall remain subject to those requirements for so long as, the person:
(1)Has acquired or holds the securities with a purpose or effect of changing or influencing control of the issuer, or in connection with
its logical conclusion, would mean that no Schedule 13G filer would ever be able to vote its securities in a board election . . . without first filing a Schedule 13D because the mere voting of its securities is . . . equivalent to changing or influencing control of the issuer.” 96 This argument is misplaced. Section 13(d), as stated above, was intended to protect shareholders by requiring honest disclosure of one’s intent in accumulating large amounts of stock in a publicly held corporations. The argument was not that Mr. Yip would have been precluded from voting his shares without filing a Schedule 13D regardless of the manner in which he chose to vote. 97 Instead, Mr. Edelson argued that once Mr. Yip, as the beneficial owner of a significant block of Chinadotcom shares, decided to use the voting power associated with that block in an effort to change the composition of Chinadotcom’s Board, and thereby alter control over Chinadotcom, it was incumbent on him to disclose his intentions to do so. 98 In the absence of such a disclosure, the 2003 Chinadotcom annual meeting seemed, to all outward appearances, to be a mere corporate formality, at which the composition of the company’s Board would remain unchanged and the stewardship of the company would be in the hands of the same people who had been guiding its affairs.

Thus, if Mr. Yip had disclosed his opposition to Mr. Edelson, presumably more than 48% of the voting shares would have been voted at the meeting, and likely would have been in favor of Mr. Edelson’s re-instatement, as his election was uncontested. 99 In short, had Mr. Yip filed an honest disclosure, more shareholders would have voted, and Mr. Yip would have needed more than his 19% ownership in Chinadotcom to hand Mr. Edelson his defeat. In the court’s own words, Section 13(d) “was designed to provide information to the

96 See Edelson, 405 F.3d at 624.
97 Id. at 623.
98 Id.
99 Id.
investor when faced with a tender offer or other accumulation or aggregation of stock that could affect corporate control."100 Ironically, the approach actually taken by the court led to the opposite conclusion.

Moreover, neither Indiana National Corp. nor any of the other circuit decisions recognizing a private right of action under Section 13(d) had ever before imposed a requirement that private actions under Section 13(d) were limited to situations involving tender offers or other accumulations of stock for the purpose of affecting corporate control. Instead, prior to the Edelson decision, the Seventh Circuit and other federal appellate courts had uniformly held that an issuer itself may sue on behalf of its shareholders when attempting to obtain injunctive relief compelling the disclosures that are required under Section 13(d).101

B. Indiana National Provided a Basis for Standing

Had the court followed its own precedent set in Indiana National Corp., Mr. Edelson would have easily met the standing requirement, as his standing would have been akin to that of an issuer bringing suit on behalf of all shareholders.102 While the Indiana National Court makes clear that Section 13(d) was enacted solely for the protection of shareholders and was not intended to protect incumbent management or discourage takeover bids, it goes on to explain that incumbent management is often the vehicle by which shareholders’ rights are protected.103

The manner in which [Section 13(d)] protection is to be provided . . . is by generating a “fair fight” between the incumbent management and the persons believed to be

100 Id. at 632.
103 Id. at 1185-86.
seeking control in order that the shareholders may make an intelligent decision between them when called upon to do so. Yet the shareholders have neither the knowledge nor the capacity to ensure that Section 13(d) is enforced and a “fair fight” thus provided. In this respect, and for this limited purpose . . . the issuer corporation acts on the shareholders’ behalf in bringing a suit for injunctive relief until an accurate Schedule 13D is filed. Without question, the incumbent management does not represent the shareholders with respect to who ultimately wins any potential struggle for control but only insofar as corporate management acts to ensure the dissemination of accurate information about the identity, background and purpose of the persons possibly seeking control of the corporation. In this sense, the corporation’s standing to sue under Section 13(d) is representational. Of course, presumably there are many circumstances where both the management and the shareholders are interested sometimes quite realistically and sometimes only theoretically, in preventing the injury to the corporate interest which would result from a takeover by persons who are either incompetent or intent upon plundering the corporate assets.104

The analysis, based on the Indiana National Court’s reasoning is straightforward. The Chinadotcom shareholders had neither the knowledge nor the capacity to ensure Mr. Yip’s and Mr. Ch’ien’s compliance with Section 13(d), as they were not privy to the conflict between the Mr. Edelson and the Chinadotcom defendants. Nor were the shareholders privy to the possible corporate governance issues arising from Mr. Yip’s and Mr. Ch’ien’s behavior – that is, the aggregation of power between two board members giving them the ability to plunder corporate assets and to make decisions for their sole

104 Id. at 1185.
benefit. Mr. Edelson, therefore, in attempting to invalidate the election and require Mr. Yip to file an accurate Schedule 13D was functioning as the issuer bringing suit on behalf of the shareholders. In short, it was through Mr. Edelson that a “fair fight” was to ensue.\(^{105}\) Representative standing is appropriate where management and shareholders’ interests are either theoretically or realistically aligned.\(^{106}\) Accordingly, Mr. Edelson should have been granted standing.

C. Second Circuit Authority Supported Standing

Finally, the conclusion that Mr. Edelson should have had standing in this case is further supported by the Second Circuit’s decision in *GAF Corp. v. Milstein*.\(^{107}\) The court stated:

> The history and language of Section 13(d) make it clear that the statute was primarily concerned with disclosure of potential changes in control resulting from new aggregations of stockholdings and was not intended to be restricted to only individual stockholders who made

\(^{105}\) The fact that Mr. Edelson was a director as opposed to a manager is also insignificant, as the *Edelson* Court itself characterizes his position as akin to a “well-informed member[] of management.” *See Edelson*, 405 F.3d at 625.

\(^{106}\) *Ind. Nat’l Corp.*, 712 F.2d at 1186.

\(^{107}\) Notably, at least four other circuits have explicitly followed the holding in *GAF Corp.* recognizing that issuers have a cause of action for injunctive relief. *See* Chevron Corp. v. Pennzoil Co., 974 F.2d 1156, 1158 (9th Cir. 1992); Gearhart Ind., Inc. v. Smith Int’l, Inc., 741 F.2d 707, 714 (5th Cir. 1984); *Ind. Nat’l Corp.*, 712 F.2d at 1184; Dan River, Inc. v. Unitex Ltd., 624 F.2d 1216, 1224 (4th Cir. 1980); *see also* CNW Corp. v. Japonica Partners, 874 F.2d 193 (3d Cir. 1989)(implicitly assuming the existence of a cause of action for injunctive relief without discussion); Chromalloy Am. Corp. v. Sun Chem. Corp., 611 F.2d 240 (8th Cir. 1979)(same); Gen. Aircraft Corp. v. Lampert, 556 F.2d 90, 94 n. 5 (1st Cir. 1977)(explicitly assuming the existence of such a cause of action without deciding); *but see* Liberty Nat’l Ins. Holding Co. v. Charter Co., 734 F.2d 545, 555-59 (11th Cir. 1984) (holding that issuers have no cause of action for injunctive relief under Section 13(d)).
future purchases and whose actions were, therefore, more apparent. .. It hardly can be questioned that a group holding sufficient shares can effect a takeover without purchasing a single additional share of stock.\textsuperscript{108}

Specifically, the court in \textit{GAF Corp. v. Milstein} addressed whether the plaintiff-corporation had standing under Section 13(d) to seek an injunction against allegedly false and misleading filings by a group of shareholders.\textsuperscript{109} The court also addressed the meaning of the term “acquire” as used in Section 13(d) and whether the change in beneficial interest of a number of shares constituted an “acquisition” despite the fact that the defendants did not actually acquire additional shares.\textsuperscript{110}

The defendants were shareholders who collectively owned more than 10\% of the shares in plaintiff GAF Corporation, and who allegedly conspired to affect change in the company’s management without disclosing their intent pursuant to Section 13(d).\textsuperscript{111} The court held that, for purposes of Section 13(d), the conspiracy equated to an “acquisition” of shares by those individuals involved in the conspiracy, despite the fact that no additional shares were purchased.\textsuperscript{112} A shareholder’s intent to shift the “loci of corporate power and influence” is an acquisition for purposes of Section 13(d).\textsuperscript{113} Such acquisitions are “hardly dependent on an actual transfer of legal title to shares.”\textsuperscript{114} Section 13(d) is “primarily concerned with disclosure of potential changes in control” and was not meant to be restricted to

\begin{itemize}
    \item \textsuperscript{108} \textit{GAF Corp. v. Milstein}, 453 F.2d 709, 718 (2d Cir. 1971).
    \item \textsuperscript{109} \textit{Id.} at 720.
    \item \textsuperscript{110} \textit{Id.} at 715.
    \item \textsuperscript{111} \textit{Id.} at 713.
    \item \textsuperscript{112} \textit{Id.} at 717-18.
    \item \textsuperscript{113} \textit{Id.} at 718.
    \item \textsuperscript{114} \textit{Id.} (“The alleged conspiracy on the part of the [plaintiffs] is one clearly intended to be encompassed within the reach of Section 13(d)”).
\end{itemize}
transparent attempts by shareholders to assert control over a company.\footnote{115}

In the event that a shareholder files a false and misleading Section 13(d) filing, the GAF Court was equally clear on who has standing to sue. Whether it be the SEC\footnote{116} issuer, management, or shareholder, the person in the “best position to enforce Section 13(d)” should have standing to sue under the statute.\footnote{117} Indeed the issuer, or a representative of the issuer such as Mr. Edelson, “in the course of constantly monitoring transactions in its stock” will regularly be in the best position to know when there has been a failure to file or if a filing is false and misleading.\footnote{118} “Moreover, the issuer [via management] has not only resources, but the self-interest so vital to maintaining an injunctive action.”\footnote{119} While this approach may play upon management’s self interest, this danger can be adequately countered by the court’s careful scrutiny of claims so as to ensure that investors’ interests are being protected.\footnote{120}

According to GAF Corp., Mr. Edelson’s claim against Chinadotcom should have fit squarely within the realm of Section 13(d) protection. Mr. Yip, as owner of 19% of Chinadotcom’s shares, had a duty to disclose that he sought to use those shares to effect change in Chinadotcom’s governing body. Had he properly disclosed his intent, all of Chinadotcom’s shareholders would have been put on notice that a potential change in control would result from the 2003 election and more shareholders probably would have voted.

In response to the query whether Mr. Edelson should have had standing to seek injunctive relief it is inadequate to argue simply

\footnote{115} Id.\footnote{116} The SEC has brought suit against shareholders for violating Section 13(d). See SEC v. Amster & Co., 762 F.Supp. 604 (S.D.N.Y. 1991); SEC v. Savoy Indus., Inc., 587 F.2d 1149 (D.C. Cir. 1978); SEC v. First City Financial Corp., Ltd., 890 F.2d 1215 (D.C. Cir. 1989).\footnote{117} GAF Corp., 453 F.2d at 719.\footnote{118} Id. at 719-21.\footnote{119} Id. at 719.\footnote{120} Id. at 719-20.
that the SEC can proceed under penal provisions. The issuer, through its officers and directors, are the only parties which can “promptly and effectively police Schedule 13D filings, for it is fair to assume that it carefully scrutinizes changes in its stock-ownership – particularly of the sort which can initiate control.” Even if the SEC had the requisite manpower to delve into the details of each filing pursuant to Section 13(d), it does not have the issuer’s day-to-day familiarity with the facts which would enable it to accurately appraise the statements in such disclosures. Certainly, “[a]n already overburdened Commission staff, taxed with reviewing increased filings under the securities acts, [will] welcome a ‘necessary supplement’ to its action.”

Nor is it realistic to expect shareholders to deter persons from filing inaccurate statements by resort to the antifraud provisions. “Stockholders are generally unaware of the necessary background information to judge the truth or falsity of the statements.” Moreover, since federal securities laws do not require the filings pursuant to Section 13(d) to be disseminated to the shareholders, they are not immediately put on notice that new company filings have occurred. In contrast, officers and directors are given immediate notice as filings are required to be disseminated to them under the federal securities laws. Additionally, “there may be instances where no shareholder has purchased or sold shares in reliance on the statements. In that event, even if the shareholders had standing there would be little incentive to maintain and action” because the recoverable damages would amount to a fraction of the cost incurred

121 Id. at 721.
122 Id.
123 Id.
124 Id.
125 Id.
126 Id.
127 Id.
128 Id.
to bring suit.\textsuperscript{129} The onus then falls completely on the shoulders of officers and directors to ensure compliance with federal securities laws and to adequately protect the collective interests of passive shareholders.

While the advent of EDGAR provides for increased shareholder access to filings, it would be unreasonable to require passive shareholders to police all executive decisions by themselves without the assistance of insiders who have an affirmative duty to such shareholders and are privy to information providing context to questionable executive decisions. In sum, corporate directors should be encouraged to monitor the legality of executive decisions and should further be encouraged to bring suit when false and deceptive filings are made by executive officers. Doing so provides for the complete and adequate protection of shareholders as contemplated by the federal securities laws.

V. Context is Everything: Section 13(d)’s Private Right of Action Was Meant to Apply Broadly

Ultimately, the death knell in Mr. Edelson’s case was the court’s unprecedented holding that section 13(d) applies only in the context of a tender offer or other contest for control.\textsuperscript{130} The plain language and legislative history of Section 13(d) provide for a much broader range of cases. Further, the rules adopted by the SEC pursuant to Section 13(d) extend well beyond the tender offer context.\textsuperscript{131}

To determine the scope of Section 13(d), we must first look to the statute’s plain language.\textsuperscript{132} Section 13(d) broadly states that “[a]ny person [who, after acquiring a class of securities registered under Section 12 is] directly or indirectly the beneficial owner of more than 5 per centum of such a class” is required to make certain

\textsuperscript{129} Id.
\textsuperscript{130} Edelson v. Ch’ien, 405 F.3d 620, 634 (7th Cir. 2005).
\textsuperscript{131} SEC Amicus Brief, 2004 WL 3760475, at *30.
\textsuperscript{132} Edelson, 405 F.2d at 632.
disclosures. In fact, as the Edelson Court concedes, Congress did not use the term “tender offer” anywhere in Section 13(d). Therefore, by simply looking at the plain language of the statute, there is no sound basis for concluding that it applies only to a situation which it does not even mention. The court goes on, however, to look at Section 13(d)’s triggering requirements and interprets Congress’ intent to restrict it to tender offer’s by focusing on the word “acquiring” as used in 15 U.S.C. § 78m(d)(1), which states that disclosure is required where an individual “acquir[es] directly or indirectly the beneficial ownership” of five percent of any class of security.

There are several problems with Seventh Circuit’s approach. First, this argument does not address the obvious lack of the term “tender offer” in the statute. Second, as discussed above, the GAF Court already determined that “aggregation” and “acquisition” are synonymous for purposes of Section 13(d). In view of the finding in GAF, the Edelson Court’s emphasis on the term “acquiring” was unsubstantiated. Mr. Yip accumulated (or aggregated) a 19% ownership interest in Chinadotcom, which is well beyond the 5% threshold set forth in Section 13(d)’s triggering requirements. As beneficial owner of more than 5% of the stock, Mr. Yip was required

133 See Securities Exchange Act § 13(d); see also SEC Amicus Brief, 2004 WL 376075, at *27. (“While the increase in cash tender offers was the genesis of the Williams Act, [the] assertion that Section 13(d) only applies to tender offers or contests for control of the issuer is nonsense. The Williams Act’s coverage is very broad”).
134 Edelson, 405 F.2d at 632; See also Section 13(d).
135 See SEC Amicus Brief, 2004 WL 376075, at *29 (“The statute . . . expressly requires disclosure even where there is no control-purpose or contest for control. The statute requires ‘any person’ who accumulates 5 percent of a class of stock of an issuer to make the appropriate filings and include the disclosure required by the form”).
136 Edelson, 405 F.2d at 632.
137 See GAF Corp. v. Milstein, 453 F.2d 709, 718 (2d Cir. 1971) (It should also be noted that Congress has not taken any action to vitiate the GAF Court’s analysis, which has stood now for 35 years).
138 See Edelson, 405 F.2d at 622-23.
to honestly disclose his intent with regards to the stock so as to inform the shareholders and the market of a potential change in control.\textsuperscript{139}

Finally, Section 14(d)(1) of the Exchange Act speaks directly, and exclusively, to tender offers.\textsuperscript{140} Notably, that section sets forth the specific procedure to be used in the context of tender offers and it

\textsuperscript{139} See \textit{GAF Corp.}, 453 F.2d at 717 (The goal of section 13(d) “is to alert the market place to every large, rapid aggregation or accumulation of securities, regardless of the technique employed, which might represent a potential shift in corporate control.”); \textit{see also} Treadway Companies, Inc. v. Care Corp., 638 F.2d 357, 380 (2d Cir. 1980); \textit{Gearhart Ind. Inc. v. Smith Int'l, Inc.}, 741 F.2d 707, 715 (5th Cir. 1984); \textit{SEC Amicus Brief}, 2004 WL 376075, at *29.

\textsuperscript{140} Securities Exchange Act § 14(d)(1):

\begin{quote}
It shall be unlawful for any person, directly or indirectly, by use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, to make a tender offer for, or a request or invitation for tenders of, any class of any equity security which is registered pursuant to Section 12 of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in Section 12(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, if, after consummation thereof, such person would, directly or indirectly, be the beneficial owner of more than 5 per centum of such class, unless at the time copies of the offer or request or invitation are first published or sent or given to security holders such person has filed with the Commission a statement containing such of the information specified in Section 13(d) of this title, and such additional information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors. All requests or invitations for tenders or advertisements making a tender offer or requesting or inviting tenders of such a security shall be filed as a part of such statement and shall contain such of the information contained in such statement as the Commission may by rules and regulations prescribe. Copies of any additional material soliciting or requesting such tender offers subsequent to the initial solicitation or request shall contain such information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors.
\end{quote}
makes reference to Section 13(d)’s disclosure requirements as the
method by which disclosure should be made in the tender offer
context. To read Section 13(d) so narrowly as to apply only in the
context of a tender offer, or other similar contest for control, would be
to render it a redundancy in the federal securities laws regime, as
Section 14(d) already covers the field. Certainly, the drafters of the
Williams Act and, specifically, Section 13(d) did not intend for it to be
a redundancy as they were specifically filling the “gap” remaining in
securities law regime in existence at the time.

Further evidence of Section 13(d)’s broad scope is found in
the statute’s legislative history. Manual Cohen, SEC Chairman in
1967, informed Congress that the Williams Act was to deal with stock
acquisitions in three contexts: first, in the context of any acquisition of
stock by means of a cash tender offer of more than 5% (10% at the
time of enactment) of any class of stock of a publicly held company;
second, in the context of other acquisitions, outside of cash tender
offers, by any person or group of more than 5% of any class of stock
of a publicly held company; and third, in the context of an issuer’s
repurchase of its own outstanding shares. Congress enacted the
Williams Act with the understanding that it would require disclosure
of “the material facts concerning the identity, background, and plans of
the person or group making a tender offer or acquiring a substantial
amount of securities.”

With respect to Section 13(d)’s plain language and legislative
history, there is an absence of support for the contention that it applies
only to the tender offer context (or in the context of other similar

141 Id.
142 Id.
143 See supra note 11 and accompanying text.
144 Full Disclosure of Corporate Equity Ownership and in Corporate Takeover
Bids: Hearings Before the Subcommittee on Securities of the Committee on Banking
and Currency, 90th Cong. 1st Sess. 16, 33 (1967); see also SEC Amicus Brief, 2004
WL 376075, at *27.
145 S. Rep. No. 550, 90th Cong., 1st Sess. 4 (1967); see also SEC Amicus Brief,
contests for control). The SEC, in support of Mr. Edelson, put it most aptly:

[N]othing in Section 13(d) limits its coverage to rapid accumulations. While this may have been the typical scenario with which the section was concerned, it requires filing and disclosure, subject to certain exceptions not applicable [in Edelson v. Ch’ien], whenever and however the 5 percent threshold is crossed. Material changes in the facts set forth in the disclosure schedules, such as the acquisition or disposition of one percent or more of the subject security, must also be reported in the amended filing irrespective of whether such changes occur in the context of a tender offer or control contest.146

In sum, “[t]he disclosures required of ‘any person’ by section 13(d) . . . apply regardless of whether a tender offer or any other effort to change or influence control is contemplated or pursued.147 The Williams Act, and specifically Section 13(d), was enacted to provide investors with broad protection.148 “Any judicial impetus to cut back on the seeming thrust of the statute must be scrutinized in light of . . . the amendment which broadened the impact of Section 13(d) by reducing the threshold triggering of the statute from 10% holdings to 5%.”149 Further, “the statute cannot be faulted” if, “as a by-product, management . . . becomes aware of those seeking to seize control of the corporation” and, consequently, files suit.150

146 SEC Amicus Brief, 2004 WL 376075, at *29 n.17.
147 V Loss & Seligman, Securities Regulation 2176; see Chromalloy Am. Corp. v. Sun Chem. Corp., 611 F.2d 240, 245 (8th Cir. 1979) (“[A] securities purchaser is required to disclose the purpose of the purchase . . . regardless of whether the underlying purpose is to acquire control of the issuer”); see also SEC Amicus Brief, 2004 WL 376075, at *28-29.
149 GAF Corp. v. Milstein, 453 F.2d 709, 719 n. 19 (2d Cir. 1971).
150 Id.
The *Edelson* Court rejected Mr. Edelson’s and the SEC’s final argument that the implementing regulations further elucidate the broad scope of the statute.\textsuperscript{151} The court summarily rejected the argument without citing to any definitive language in Section 13(d) to support the court’s contention that the statute applies only in the context of a tender offer.\textsuperscript{152} Nor did the court provide any substantive legislative history to support its contention.\textsuperscript{153} There is no doubt that the language of the statute controls and the rules adopted pursuant thereto can provide only moderate interpretive authority.\textsuperscript{154} However, as argued above, the statutory language is very broad and the legislative history further supports a broad reading of it. The implementing regulations simply provide a final means of interpreting the scope of the statute. According to the Rules adopted by the SEC pursuant to Section 13(d), any person unable to certify that an acquisition of stock was made without an underlying intent to affect control must file a Schedule 13D, even if a Schedule 13G had previously been filed.\textsuperscript{155} Like the statute itself and its legislative history, the rules allow for the broad application of section 13(d)’s private cause of action and disclosure requirements, an application extending well beyond tender offers and other contests for control.

Finally, despite the court’s unprecedented formulation of Section 13(d)’s implied private right of action, Mr. Edelson’s claim still fit within the new parameters set by the court. The circumstances leading up to Mr. Edelson’s claim included the accumulation of stock by Messrs. Yip and Ch’ien directly before the election of Chinadotcom’s Board was to take place\textsuperscript{156} and the use of those newly

\textsuperscript{151} Edelson v. Ch’ien, 405 F.3d 620, 633 (7th Cir. 2005) (“[W]e cannot look at the implementing regulations with the same authority as we do statutory language and legislative history in discerning whether Congress intended to recognize a private cause of action”).

\textsuperscript{152} Id.

\textsuperscript{153} Id.


\textsuperscript{155} See Rules 13d- (c); 13d-1(e)(1); See also SEC Amicus Brief, 2004 WL 376075, at *30-31.

\textsuperscript{156} Edelson, 405 F.3d at 622.
acquired shares to oust Mr. Edelson from the Board\textsuperscript{157} without disclosing such intent to the shareholders.\textsuperscript{158} Obviously, the accumulation of stock by Messrs. Yip and Ch’ien was one that could affect corporate control. In fact, such accumulation did affect corporate control.

VI. THE BIG CHILL: THE EDELSON HOLDING AND THE SARBANES-OXLEY ACT’S HEIGHTENED CORPORATE GOVERNANCE REQUIREMENTS

Directors and officers of corporations are charged with a fiduciary duty of care,\textsuperscript{159} “which often manifests itself in the form of a monitoring function.”\textsuperscript{160} As a director, this monitoring function stems from the principle that all corporate affairs must be managed under the direction of the board of directors.\textsuperscript{161} “Courts and commentators interpret this monitoring duty to mean that directors, individually and as a group, have an oversight function.”\textsuperscript{162} Additionally, the Sarbanes-Oxley Act, 15 U.S.C. § 7201 et seq., has codified a number of requirements there. By way of example, under Sections 301 and 302 of that Act, corporate executives are required to implement and maintain internal controls, and provide an annual report speaking to

\textsuperscript{157} Id. at 623.
\textsuperscript{158} Id.
\textsuperscript{159} See, e.g., Smith v. Van Gorkom, 488 A.2d 858, 872-73 (Del. 1985).
\textsuperscript{160} Lisa M. Fairfax: \textit{The Sarbanes-Oxley Act as Confirmation of Recent Trends in Director and Officer Fiduciary Obligations}, 76 St. John’s L. Rev. 953, 955 (2002).
\textsuperscript{161} Id.; see Model Bus. Corp. Act § 8.01(b) (“All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors…..”); \textit{see also} §§ 8.30(a) and 8.42(a) (corporate directors must act in good faith and in a manner believed to be in the best interest of the corporation).
\textsuperscript{162} 76 St. John’s L. Rev. at 955; see Model Bus. Corp. Act. § 8.30 (b) (directors must devote their attention to their oversight function); Briggs v. Spaulding, 141 U.S. 132, 147 (1891) (directors have a duty to supervise and manage corporate affairs); Graham v. Allis-Chalmers Mfg. Co., 188 A.2d 125, 130 (Del. 1963) (directors have a duty to actively supervise and manage corporate affairs).
the viability and efficiency of that system. Further, Section 403 amended the title of Section 16 of the Exchange Act to read “Disclosures of Transactions Involving Management and Principal Stockholders.” Presumably, this was done to specify the broad scope of disclosures that should be monitored by corporate executives. The need for corporate directors to actively monitor and seek information pertaining to corporate conduct has not been lost on the SEC either. The SEC, after investigating several directors, concluded that their general lack of knowledge apropos important company events “demonstrate[d] the need for adequate regularized procedures under the overall supervision of the Board to ensure that proper disclosures are being made.”

Mr. Edelson was simply ensuring that proper disclosures were being made. He did so with an eye towards adequately performing his heightened monitoring duty as a corporate director. While Edelson did not directly address the Sarbanes-Oxley Act, its holding will likely have a negative impact on the heightened duty of Board members to oversee and monitor disclosures made by corporate executives and large shareholders. At the very least, it sends the message to Board members that monitoring disclosures and addressing probable inadequacies in certain disclosure may cost them their positions – a disincentive to scrutinize disclosures.

The Edelson holding has further negative implications with regard to the Sarbanes-Oxley Act, 15 U.S.C. §7201 et seq. Under Section 406(c)(1)-(3) of that Act, senior financial officers, i.e. Mr. Yip and Mr. Ch’ien, are required to ethically and honestly conduct their business affairs, “including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships”

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164 See Sarbanes-Oxley § 403.
and full “compliance with applicable governmental rules and regulations.” A serious inconsistency arises then between the *Edelson* holding and Sarbanes-Oxley. By virtue of *Edelson*, senior financial officers of publicly held companies are encouraged to handle personal conflicts by accumulating large stakes in their company and ousting their foes, despite what may be in the best interest of the company and without the requirement that they disclose their plan to affect corporate control. This conduct can hardly be called ethical, but taken to its logical next step, the *Edelson* holding encourages such behavior.

There is yet another conflict between this holding and Sarbanes-Oxley, specifically, section 1514A. That section encourages employees of publicly held companies to question the propriety and legality of decisions made by corporate executives by offering protection against any retaliatory action taken against them as a result of their inquiring. Mr. Edelson was presumably ousted for questioning the propriety of Mr. Yip’s buy-back plan, and the court took no steps to protect Mr. Edelson. The message this case sends to corporate directors is to stay quiet in the face of potential federal securities laws violations as corporate officers who bring up these issues will be ousted. The unfortunate result is that good corporate governance will be disregarded in favor of job security, and the heightened corporate governance requirements set forth in the Sarbanes-Oxley Act will be eroded by the cases that follow the precedent set by *Edelson*.

**CONCLUSION**

In deciding *Edelson v. Ch’ien*, the Seventh Circuit Court of Appeals should have reversed the district court’s finding that Mr. Edelson did not have standing to assert a private right of action under Section 13(d). Mr. Edelson had standing to sue both in his capacity as a shareholder and director. Further, the court erred in limiting the scope of Section 13(d) to issues arising solely in the context of a tender offer or other contest for control. The statute itself, as well as its legislative history and the rules adopted pursuant to it, lead to the conclusion that the disclosure requirements of Section 13(d) extend beyond the tender offer context. By limiting Section 13(d)’s remedy to
those actions arising out of tender offers, the court in *Edelson v. Ch’ien* unnecessarily narrowed the statute’s broad scope. Under the
court’s construction of section 13(d)’s private cause of action,
executive-stockholders of publicly held companies are all but
couraged to conceal their intent to affect change in a company’s
management by filing a schedule 13G disclaiming an intent to affect
control, vote their shares despite having concealed their actual intent,
affect change in the company management, and walk away knowing
that the manager or director that they effectively ousted has no
standing to sue. Moreover, the holding in *Edelson* may have a chilling
effect on the Board’s heightened oversight and monitoring functions as
set forth in the Sarbanes-Oxley Act and creates serious potential for
conflict between circuits.
A DOMESTIC DISTURBANCE: 
THE SEVENTH CIRCUIT ENCROACHES ON 
FOREIGN RELATED PARTY TRANSACTIONS

ERICA S. KHALILI


INTRODUCTION

When does deference to administrative regulation, that seeks to prevent corporate fraud, cross the line from protecting the investor to adversely impacting capital markets and the US economy? On February 13, 2006, the U.S. Court of Appeals for the Seventh Circuit, in a case of first impression for this circuit, addressed and upheld the validity of a treasury regulation that requires taxpayers to use the cash basis method of accounting when claiming deductions for interest payments made to foreign related parties.1 The only other circuit court of appeals to address this issue was a similarly-minded Third Circuit.2 However, the reasoning and rationale of both the Seventh and Third Circuits marks a departure from the interpretation advocated by the lower Tax Court in Tate & Lyle.3 These appellate decisions evidence a continued trend of deference toward administrative regulation; all in

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1 Square D Co. v. Comm’r of the Internal Revenue Serv., 438 F.3d 739 (7th Cir. 2006).
2 Tate & Lyle v. Comm’r of Internal Revenue Serv., 87 F.3d 99 (3d Cir. 1996).
3 Tate & Lyle v. Comm’r of Internal Revenue Serv., 103 T.C. 656 (1994).
an effort for prevention of fraud and deceit in corporate America and protection of U.S. tax revenue.\(^4\)

In \textit{Square D Co. and Subsidiaries v. Commissioner of the Internal Revenue Service}, the Seventh Circuit upheld the validity of Treasury Regulation § 1.267(a)(3) (the “Regulation”) which requires U.S. corporations to utilize the cash basis method of accounting when deducting interest payments made to foreign related parties.\(^5\) This interpretation of the Regulation, given the potential for abuse and manipulation of the underlying transactions, places a necessary burden on U.S. companies who seek to globalize and engage in transactions with foreign parents or subsidiaries.\(^6\) Although the Seventh Circuit’s interpretation is correct, the reasoning supporting its decision is lacking. Practically, the level of deference shown in this decision marks the potential for a descent down a slippery slope in the regulation of U.S. companies with related foreign parties. The broad reach of the power of the Secretary, upheld by the Seventh Circuit, leaves open the question of how far U.S. companies can and should be regulated via administrative regulation. As an extreme example, if the Treasury Secretary can require companies to use cash basis accounting for these transactions, it does not seem to be outside the realm of possibility that the Secretary could issue a regulation disallowing interest deductions when such transactions are with foreign related parties. This wave of regulation is on the cusp of over regulation and, in light of increasing deference by courts, could result in discouraging U.S. participation in global finance leading to an adverse economic impact on the American companies and investors.

The first section of this Note provides background on the differences between cash basis and accrual accounting methods and relevant reasons for utilizing each. The second section of this Note details the context of corporate regulation and its effect on American companies in a global market place. The third section of this Note contains an analysis of rationale for the Seventh Circuit’s

\(^4\) See, e.g., \textit{Tate & Lyle}, 87 F.3d 99.

\(^5\) \textit{Square D}, 438 F.3d at 747.

\(^6\) See id.
interpretation of Treasury Regulation § 1.267(a)-(3) in *Square D Company v. Commissioner of the Internal Revenue Service*, and the relevant arguments against the Seventh Circuit’s interpretation. Finally, the last section of this Note concludes that although the Seventh Circuit’s decision was correct, based on the language and legislative history of the Code, the decision ignored several compelling arguments and should not be interpreted broadly to indicate that courts need not aim a critical eye toward administrative regulations aimed at preventing fraud.

I. BACKGROUND

The Internal Revenue Code (the “Code”) § 163(a) permits a taxpayer to take a deduction on all interest paid, and in certain circumstances on all interest accrued on indebtedness, within a taxable year. However, other provisions of the Code determine which of these two alternatives is applicable. Special rules govern deductions taken based on transactions with related parties. There are certain types of payments to related parties, for example interest payments, where a taxpayer can claim a deduction. The Code grants the Secretary of the Treasury the power to enact regulations regarding payments to foreign related parties and generally requires the cash basis method of accounting to be utilized when claiming a deduction based on a transaction with a foreign related party. Yet, there are a limited number of exceptions for certain types of payments to foreign related parties that do not have to utilize the cash basis method of accounting.

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8 I.R.C. § 448 (a), (b)(3) (2002).
9 I.R.C. § 267 (2004) (noting in § 267 (a)(1) that generally, a taxpayer cannot take a deduction for a loss from a sale or exchange of property with a related person).
10 I.R.C. § 267.
11 See, e.g., I.R.C. § 267(a)(3).
The accrual method of accounting differs from the cash basis method in many notable respects. For example, under the “all events test” of the accrual method, a corporation must include “income and deductions in the taxable year in which the income or liability is fixed and can be determined with ‘reasonable accuracy.’” This differs from the cash basis method, which requires a corporation to include all income and deductions for the year in which the expenses are actually paid or received. In other words, cash basis and accrual accounting use different standards and criteria to determine when revenues and expenses must be recognized and recorded. Under the cash basis method, income and expenses are never counted until money comes in or goes out. Under the accrual method because transactions are counted when the event occurs, a company does not have to wait until the money is actually paid or received to record the transaction. The only meaningful difference between these two methods of accounting is in the timing of when transactions are accounted for or recorded.

A number of factors often determine the decision of whether a company will utilize the cash basis or accrual method of accounting. Initially, some corporations are required by the Code to utilize a

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13 See Square D v. Comm’r of the Internal Revenue Serv., 438 F.3d 739, 741-42 (7th Cir. 2006).
14 Id. (citing Treas. Reg. § 1.446-1(c)(ii) (2006)).
15 I.R.C. § 446(c)(1), (2) (2006); Treas. Reg. § 1.446-1(c)(i).
16 See Tate & Lyle, Inc. v. Comm’r of Internal Revenue, 103 T.C. 656, 668-69 (1994).
17 Id.
18 Id. For example, if a corporation makes a purchase on credit, and takes the purchase in 2006, but does not pay for it until 2007 the way in which the expense is recorded varies between the cash basis and accrual methods of accounting. Using the cash basis method, you would record the expense in the 2007, the year when you actually paid for the purchase. However, under the accrual method, you would record the expense in 2006, when you take the purchase and incur the obligation to pay for it.
19 The substance of this Note deals only with recording and reporting of transactions for purposes of taxation. It should be noted that many large companies record transactions, depreciation, etc. differently for purposes of management and make adjustments for purposes of taxation.
specific method of accounting. Businesses are required to use the accrual method in several instances: if the business has inventory; if the business is a C corporation; or if gross annual sales exceed five million dollars, with certain exceptions for personal service companies, sole proprietorships, farming business, and a few others.

However, accrual accounting can be more costly to maintain, because it requires the recording of more transactions. Cash basis accounting is easier for smaller, simpler companies that do not have a great deal of transactions or credit involved in their business models. In deciding which method to utilize, corporations should consider the opinions and interests of their creditors, shareholders, and the reporting authorities including the Internal Revenue Service (“IRS”). Generally, for large corporations and complex entities, cash basis may be inadequate because it not only fails to project future cash flows anticipated in the subsequent years by the corporation, but it also does not provide a proper analysis of the economics of the organization, thus hindering management decision making.

Critics of allowing accrual accounting for tax purposes cite the ease of manipulation in order to justify the imposition of a mandatory cash basis method. Because under the accrual method, cash basis is not tracked, it is easier for related parties to concoct situations where transactions are made strictly to avoid tax liability. For example, a parent corporation could make a loan to its subsidiary. The subsidiary could then deduct its interest payments every year as they accrue, but never actually pay that interest to the related party. This scenario is of

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20 See, e.g., I.R.C. §§ 446, 448.
21 See, e.g., I.R.C. § 448.
22 See 26 C.F.R. § 1.446-1
23 Id.
24 Id.
25 Id.
26 See I.R.C. § 448
27 Karl S. Coplan, Protecting the Public Fisc: Fighting Accrual Abuse with Section 446 Discretion, 83 Colum. L. Rev. 378 (March, 1983) (discussing the various ways that accrual accounting can be manipulated).
all the more concern when the parent corporation is foreign because the IRS has no way to substantiate or confirm the eventual payment of the interest expense.28 Because the interest income is never taxed by the United States, as it would have been had the parent been a domestic corporation, it is difficult for the IRS to confirm that these transactions are anything more than shams to avoid tax liability.29

In light of the concerns regarding manipulation and fraud based upon the difference between accrual and cash basis accounting methods, special rules and regulations have been promulgated to govern situations involving deductions based on transactions with a “related person or corporation.”30 Generally, a taxpayer is not

28 Tate & Lyle, Inc. v. Comm’r of Internal Revenue, 103 T.C. 656, 660 (1994) (citing Metzger Trust v. Comm’r, 76 T.C. 75-76 (1981), aff’d. 693 F.2d 459 (5th Cir. 1982)).
29 Tate & Lyle, 103 T.C. at 660.
30 The Code § 267(b) sets forth those relationships that qualify taxpayers as related parties.

The relevant relationships include: (1) Members of a family; (2) An individual and a corporation more than 50 percent in value of the outstanding stock of which is owned, directly or indirectly, by or for such individual; (3) Two corporations which are members of the same controlled group (as defined in subsection (f)); (4) A grantor and a fiduciary of any trust; (5) a fiduciary of a trust and a fiduciary of another trust, if the same person is a grantor of both trusts; (6) a fiduciary of a trust and a beneficiary of such trust; (7) a fiduciary of a trust and a beneficiary of another trust, if the same person is a grantor of both trusts; (8) A fiduciary of a trust and a corporation more than 50 percent in value of the outstanding stock of which is owned, directly or indirectly, by or for the trust or by or for a person who is a grantor of the trust; (9) A person and an organization to which section 501 (relating to certain educational and charitable organizations which are exempt from tax) applies and which is controlled directly or indirectly by such person or (if such person is an individual) by members of the family of such individual; (10) A corporation and a partnership if the same persons own – (A) more than 50 percent in value of the outstanding stock of the corporation; and (B) more than 50 percent of the capital interest, or the profits interest, in the partnership; (11) An S corporation and another S corporation if the same
permitted to take a deduction from its tax liability based on a loss from a sale of property when the parties are related.\(^{31}\) This provision does not stand as a bright-line rule barring all deductions on transactions with related parties.\(^ {32}\) Code § 267(a)(2) permits deductions for payments made to related parties, but qualifies the deductions when the parties calculate tax liability based on different accounting systems.\(^ {33}\) If the parties use different systems of accounting, the party seeking to utilize the deduction may only apply the deduction to its tax liability in the same year that the related party recognizes the income.\(^ {34}\) Practically, this code provision requires the related parties to “[m]atch[!]” one another’s systems of accounting.\(^ {35}\) For example, if the related payee is on the cash basis, the taxpayer will only be able to claim the deduction when the money is actually paid, irrespective of whether or not the taxpayer generally reports on an accrual.\(^ {36}\) Conversely, if the related payee reports on an accrual, the taxpayer can only claim the deduction when the deduction accrues even if generally a cash basis reporter.\(^ {37}\)

When one of the related parties is a foreign entity, the Code includes additional regulations to govern this relationship.\(^ {38}\) In this field of regulation, the Secretary of the Treasury (the “Secretary”) is charged with promulgating and enacting regulations.\(^ {39}\) Specifically, the Secretary shall be charged with disseminating regulations to apply the

\(^{31}\) I.R.C. § 267(a)(1).

\(^{32}\) See I.R.C. § 267(a)(2).

\(^{33}\) Id.

\(^{34}\) Id.

\(^{35}\) Id.

\(^{36}\) Square D v. Comm’r of the Internal Revenue Serv., 438 F.3d 739, 741-42 (7th Cir. 2006).

\(^{37}\) Id. at 741.

\(^{38}\) See, e.g., I.R.C §§ 163(e)(3); 267.

\(^{39}\) I.R.C. § 267(a)(3).
“‘matching principle of § 267 (a)(2)] in cases in which the person to whom the payment is made is not a United States person.’”40 Under this delegation of authority, the Secretary set forth a directive (the Regulation) that requires the use of the cash basis method of accounting, with certain carve-out exemptions, when a party seeks to claim deductions to a related foreign person.41 For example, the aforementioned regulation exemption “‘applies to any amount that is income of a related foreign person with respect to which the related foreign person is exempt from United States taxation on the amount owed pursuant to a treaty obligation of the United States,’ except for interest.”42 When a related foreign person accrues interest not effectively connected with the income generated43 by the foreign party, that interest is not exempt and is governed by the Regulations and thus, the cash basis method.44

II. CONTEXT OF OTHER LAWS AND REGULATIONS

U.S. corporations with foreign parent companies or foreign companies with substantial U.S. operations are a highly regulated group.45 Within the tax context, the early 1990’s began a wave of regulations applying to these foreign related parties, with a strict eye

40 Square D v. Comm’r of the Internal Revenue Serv., 438 F.3d 739, 742 (7th Cir. 2006) (quoting I.R.C. § 267(a)(3)) (alteration in original).
42 Square D, 438 F.3d at 742 (quoting Treas. Reg. § 1.267(a)-3(c)(2)).
43 See, e.g., J.C. Lewenhaupt, 20 TC 151 (1953); A foreign corporation generally will not be subject to direct U.S. taxation unless it is “engaged in a trade or business in the United States.” Although the Code does no explicitly define the phrase “trade or business” the case law has been interpreted to suggest that activity will not constitute a “trade or business” unless it is “considerable, continuous, and regular.” Gregg D. Lemein, John D. McDonald, and Stewart R. Lipeles, Twists and Turns in the U.S. – Source Rules, Sep. 12, 2005, available at http://vcexperts.com/vce/news/buzz/archive.
45 See, e.g., I.R.C §§ 163; 237.
toward their purported tax liability.\textsuperscript{46} Several studies, commissioned by the IRS have indicated that foreign owned businesses operating in the U.S. have manipulated the tax structure to their advantage, to the tune of several billion dollars.\textsuperscript{47} Many legislators are advocates of stricter regulatory provisions on this subject because in terms of the American economy, specifically the tax structure, these corporations represent a giant “potential cash cow.”\textsuperscript{48} For example, where an interest payment is never taxed as income, the IRS is essentially losing whatever interest expense is deducted, because there is no corresponding tax liability from an increase in the payee’s gross income.\textsuperscript{49}

The regulations governing transfer pricing are perhaps the greatest examples of regulations that are aimed at preventing abuse and fraud by foreign related parties. Transfer pricing refers to the pricing of goods and services within a single organization.\textsuperscript{50} Serious tax issues arise when cross-border transactions are involved.\textsuperscript{51} For example, goods may be sold from one division to another, from one subsidiary to another, or from a parent to a subsidiary where the decisions as to the price affect the distribution of profits and losses amongst the different legal entities within the same organization.\textsuperscript{52} Although the use of transfer pricing in global corporations often has an honest and important purpose, it is particularly subject to abuse.\textsuperscript{53} Often it is in the best interest of the organization to arbitrarily select a price where the

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\textsuperscript{47} Id.

\textsuperscript{48} Id.

\textsuperscript{49} See id.


\textsuperscript{51} See I.R.C. § 482.

\textsuperscript{52} Id.

\textsuperscript{53} Id.
highest profit margin occurs in a country with the most favorable tax structure.\textsuperscript{54} These types of transactions have led to the rise of transfer pricing regulations because governments seek to stem the flow of taxation revenue overseas.\textsuperscript{55} 

For the purposes of U.S. tax liability, § 482 of the Code governs transfer pricing.\textsuperscript{56} Section 482 provides\textsuperscript{57}:

\textit{In any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Secretary may distribute, apportion, or allocate gross income, deductions, credits or allowances between or among such organizations, trades or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly reflect the income of any such organizations, trades, or businesses.}

In certain cases, such as between special related parties “no deduction shall be allowed in respect of any loss from the sale or exchange of property, directly or indirectly, between persons” when the transactions occur between parties with certain relationships.\textsuperscript{58} These relationships include, among other, those between family members,

\textsuperscript{55} See generally I.R.C § 482.
\textsuperscript{56} Section 482 of the Code authorizes the IRS to adjust the income, deductions, credits, or allowances of commonly controlled taxpayers to prevent evasion of taxes or to clearly reflect their income. The regulations under § 482 generally provide that prices charged by one affiliate to another, in an inter-company transaction involving the transfer of goods, services, or intangibles, yield results that are consistent with the results that would have been realized if uncontrolled taxpayers had engaged in the same transaction under the same circumstances.
\textsuperscript{57} I.R.C. § 482 (emphasis added).
\textsuperscript{58} I.R.C. § 267.
individuals and the corporations they control, the grantors or beneficiaries of a trust and its fiduciaries, and *two corporations which are members of the same controlled group.*[^59]

The basis for these regulations stems from the ease of manipulation and the possibility for fraudulent transfers that would cause the financials of a company to look more favorable than they are.[^60] For example, if one wants to generate a loss to offset tax liability, by selling to one’s parent company for $80 stock purchased for $100, § 267(a)(1) will preclude the deduction of the loss because of the nature of the relationship.[^61] This limitation on deductions for transfers between related parties protects against “sham transactions” and manipulations without economic substance.[^62] However, it should be noted that “there are often honest and important non-tax reasons for sales between related parties, so it [is] important to fairness to preserve [these transactions and] the pre-sale basis where loss on the sale itself is [not] recognized for tax purposes.”[^63]

“A variant of this scheme applies to ‘controlled groups,’ that is, corporations with interlocking ownership as specified by statute.[^64] Instead of being disallowed under § 267(a)(1), the loss is ‘deferred’ under § 267(f)(2) until one of two conditions pertains either: (1) until the property is transferred outside such controlled group and there would be recognition of loss under consolidated return principles; or (2) until such other time as may be prescribed in regulations.”[^65] These regulations, although preventing fraud and abuse, place a burden on American companies that are attempting to use related party transactions to compete in a global marketplace.

Another example of the strict regulation of foreign related party transactions is the stringent requirements that corporations must

[^59]: I.R.C. 267(a)(1), (b).
[^61]: Unionbancal Corp. v. Comm’r of Internal Revenue, 305 F.3d 976, 978 (9th Cir. 2002).
[^62]: See McWilliams, 331 U.S. at 700-701.
[^63]: Unionbancal, 305 F.3d at 978-79.
[^64]: Id. at 979 (citing I.R.C §§ 267(b)(3), 267(f)(1), 1563).
[^65]: Unionbancal, 305 F.3d at 978-79.
adhere to if engaged in these types of transactions. Specifically, § 6038(a) governs the reporting requirements on transactions with foreign related parties.66 This provision was enacted to impose a higher standard of reporting requirements on foreign controlled U.S. corporations and branches of foreign corporations.67 Section 6038(a) requires domestic corporations that are 25% foreign owned to furnish records to the IRS to justify transactions with foreign shareholders.68 The penalties associated with non-compliance are extremely harsh, such that a corporation has no option but to comply with the requirements, even if in order to substantiate the transaction the company must produce books from all over the world.69 Companies are then forced to justify the expenses and transactions under the IRS’ “profitability” standard which determines the amount of tax that should be imposed based on a number of questions including: “would the financial and commercial arrangements have been the same”; if the entities had not been related, would the transaction have occurred; etc.70 This Code provision essentially grants the Secretary the broad authority to seek any information, even that tangentially related to a transaction, under the justification of preventing fraud and deceit. The ultimate purpose of the legislation is to provide the IRS with sufficient information to compute accurate transfer prices based on its economic model. However, the IRS can then replace the recorded book figures for transactions between related parties with the amounts that it chooses and in the case of insufficient records, it can choose almost any figure.71

70 Id.
71 Id.
There are several legitimate reasons to use interrelated transactions, such as accounting for time spent from the home office consulting with other divisions, transfers of materials, and services such as research and development. This level of regulation is a great burden on corporations, and requires extreme diligence (and expense) to fully comply. Foreign companies may see this regulation, in the context of the other regulations that impact corporate conduct as a deterrent to U.S. market entry or current U.S. market position. This amount of discretion and broad authority granted to the Secretary could have unforeseen consequences as corporations looking to streamline, decrease costs, and improve efficiency may take a close look or have a second thought before they enter or remain in the U.S. marketplace.

III. THE VALIDITY OF REGULATION 1.267(A)-3.

In *Square D*, the Seventh Circuit upheld the validity of Reg. 1.267(a)-3, which requires a taxpayer to use the cash basis method of accounting with respect to the deduction of interest owed to a related foreign party. This issue was a matter of first impression for the Seventh Circuit. In both its reasoning and decision, the Seventh Circuit relied heavily on the analysis presented by the Third Circuit, which decided a factually analogous case. The Seventh Circuit has reasoned that as a general matter, “[r]espect for the decisions of other circuit courts is especially important in tax cases due to the importance of uniformity, and the decision of the Court of Appeals of another circuit

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72 *Id.*
73 *Id.* (noting that this new tax regime will have several costs associated with it including: the costs of the disruptions by IRS investigations; time spent reviewing records and obtaining additional information from old or international records; and costs of professional, legal and accounting advice will likely be significant as there may be a lot of transactions that could be characterized in many different ways).
74 *Square D Co. v. Comm’r of the Internal Revenue Serv.*, 438 F.3d 739 (7th Cir. 2006).
75 *Tate & Lyle, Inc. v. Comm’r of the Internal Revenue Serv.*, 87 F.3d 99 (3d Cir. 1996)
should be followed unless it is shown to be incorrect.”  

“Although we are not bound by them, we ‘carefully and respectfully consider’ the opinions of our sister circuits.”

A. Square D

Square D, an accrual taxpayer, was acquired by Schneider S.A., a French Corporation, in 1991. As a result of the acquisition, Square D borrowed additional funds and ended up with a four hundred million dollar debt to Schneider. It accrued interest to Schneider in 1991 and 1992 but it did not deduct these amounts in its tax returns for those years. Square D paid the accrued interest on these loans in 1995 and 1996. Since Schneider was a resident of France, the interest paid to it by Square D was exempt from U.S. tax under the United States-France income tax treaty. However, after an audit of Square D’s financials, the Internal Revenue Service charged Square D for the deficiencies evidenced in its 1991 and 1992 tax returns. Square D informally requested that it be permitted to deduct the accrued amounts in order to offset the deficiency. The Tax Court denied the allowance of a deduction based on the interest expense accrued and upheld the

76 Bell Fed. Sav. & Loan Ass’n v. Comm’r of the Internal Revenue Serv., 40 F.3d 224, 226-27 (7th Cir. 1994) (quoting Fed. Life Ins. Co. v. United States, 527 F.2d 1096, 1098-99 (7th Cir. 1975)).

77 330 W. Hubbard Rest. Corp. v. United States, 203 F.3d 990, 994 (7th Cir. 2000).

78 Id. (noting that Schneider acquired Square D by means of a hostile takeover, initially acquiring Square D through a special purpose entity that was later merged into the Schneider corporation).

79 Id.

80 Id.

81 Id.


84 Id.
validity of the Regulation.\textsuperscript{85} It is these deficiencies that are the subject of this analysis as Square D challenged the deficiencies and argued that it should be allowed to deduct the interest accrued to Schneider in 1991 and 1992, thus eliminating any deficiency.\textsuperscript{86}

The first challenge that Square D presented was to the validity of Regulation 1.267(a)-3, arguing that this regulation was unreasonable given the clear meaning of the language of § 267(a)(2)-(3).\textsuperscript{87} Square D argued that the language of § 267(a)(3) limited the power of the Secretary to only promulgate a regulation that applied the “matching principle” articulated in § 267(a)(2) in the context of foreign related parties.\textsuperscript{88} Square D’s French parent company, Schneider, was not subject to U.S. tax liability and had no U.S. tax liability or method of accounting for tax liability to match against.\textsuperscript{89} Square D argued that the Secretary’s regulation, mandating use of the cash basis method of accounting, was beyond the scope of authority granted to the Secretary under the plain language of the Code.\textsuperscript{90}

The issue presented involved the Seventh Circuit’s determination of the validity of a regulation; hence, the analysis of the court was governed by a two-step \textit{Chevron U.S.A, Inc. v. Natural Resources Defense Council, Inc.} inquiry.\textsuperscript{91} First, a determination whether the

\begin{footnotesize}
\textsuperscript{85} Id.
\textsuperscript{86} Square D v. Comm’r of the Internal Revenue Serv., 438 F.3d 739, 742-43 (7th Cir. 2006)
\textsuperscript{87} Id.
\textsuperscript{88} Id. (noting that section 267(a)(2) generally provides that in the case of certain related parties, if the person to whom the amount is owed, as a result of that person’s method of accounting, is not required to include that item in income (unless actually paid), then the person who owed the amount cannot deduct it from their income tax liability until it is includable by the recipient of the income).
\textsuperscript{89} See id.
\textsuperscript{90} Id. at 743.
\textsuperscript{91} 467 U.S. 837, 842-43 (1984). A \textit{Chevron} analysis requires a court to first ask “whether Congress has directly spoken to the precise question at issue” and if Congress’ intent is clear from the plain language of the statute the inquiry must cease. However, if the court concludes that Congress has not directly addressed the issue or that the statute is ambiguous, then the court must determine whether the agency’s interpretation “is based on a permissible construction of the statute.” Id.
\end{footnotesize}
plain meaning of the relevant Code provisions clearly support or oppose the validity of the regulation; and second, if the plain meaning is either silent or unclear the Court must evaluate the reasonableness of the regulation in light of the language, overall structure, intent and purpose of the statute. However, under Chevron, “when reviewing an agency’s regulatory implementation of a statute, [the court] look[s] first to the intent of Congress” and only if that intent is unclear is it the duty of the court to determine if the regulation is a reasonable interpretation, while giving deference to the Commissioner’s interpretation.

1. Plain Language of the Statute

The Seventh Circuit, acting under a Chevron analysis, determined that the Code supported the Regulation. The court declined to look at the Code provisions in a vacuum, rather reading the provisions together in order to ascertain the plain meaning. One of the fundamental canons of statutory construction is that a statute should be construed to give meaning to all provisions and that on the whole no clause or word should be rendered void, insignificant or redundant. Under Chevron, all words should be read in context. Therefore, if, § 267(a)(3) merely authorized the Secretary to mechanically implement, with no modifications or alterations, the provisions of § 267(a)(2) to foreign related parties it would be redundant given that

92 See id. at 843.
93 Square D, 118 T.C. at 307 (citing Chevron, 467 U.S. at 842-43).
94 Square D, 438 F.3d at 745
95 Id. When ascertaining the plain meaning of a statute, the court must look to the statutory language at issue, as well as the language and design of the statute as a whole. See, e.g., Food & Drug Admin. v. Brown and Williamson Tobacco Corp., 529 U.S. 120, 132-33 (2000); K-Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988).
§ 267(a)(2) plainly does not distinguish between domestic and foreign related parties and thus logically applies to both.\textsuperscript{98} Section 267(a)(2) already applied to both foreign and domestic parties, rendering § 267(a)(3) “surplusage” unless it extends the meaning articulated in § 267(a)(2).\textsuperscript{99} Moreover, § 267(a)(2) was enacted two years before § 267(a)(3), which can be interpreted as shaping the provisions already included in the Code.\textsuperscript{100} The inclusion of the provision, given the statutory scheme as a whole, suggests that § 267(a)(3) has a distinct meaning which is ambiguous and dictates a further analysis.\textsuperscript{101}

2. Legislative History

In \textit{Square D}, because the provisions were ambiguous, in order to determine the validity of the regulation the Court looked to whether the interpretation set forth by the Secretary was a reasonable one.\textsuperscript{102} With regard to the legislative history surrounding § 267(a)(2) the Court noted that the Congressional climate was focused on attempting to restrain fraud and abuse in related party transactions as these types of transactions were easily manipulated by parties to shield profits and avoid tax liability.\textsuperscript{103} Under the precursor to I.R.C. § 267(a)(2), Congress imposed an extremely strict limitation on interest

\textsuperscript{98} \textit{Square D}, 438 F.3d at 745 (explaining that § 267(a)(3) grants the Secretary the discretion to issue regulations to apply the matching principle in cases where the person to whom the payment is made is not a United States person).

\textsuperscript{99} \textit{Id}.

\textsuperscript{100} \textit{See id.} at 746.

\textsuperscript{101} \textit{Id.} at 745.

\textsuperscript{102} In cases where “Congress has made an express delegation of authority to enact regulations, ‘[s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.’” \textit{Id.} (citing \textit{Chevron}, 467 U.S. at 844).

\textsuperscript{103} \textit{Square D}, 438 F.3d at 746 (citing I.R.C § 267(a)(2) (previously Revenue Act of 1937, Pub. L. No. 75-377 §301(c) which became § 267(a)(2) in 1954)).
transactions between related parties.\textsuperscript{104} The initial enactment of § 267(a)(2) “permanently disallowed deductions for . . . interest accrued during the taxable year but not paid within two and one-half months after the close of the year if the payee was related to the taxpayer and, because of the payee’s method of accounting, the payee did not include the accrued interest in its income.”\textsuperscript{105} However, Congress amended § 267(a)(2) to include the “matching principle” to remedy the unduly harsh results that occurred as a result of the permanent disallowance of deduction.\textsuperscript{106} When related taxpayers attempt to deduct interest, especially under different accounting methods, it is nearly impossible to monitor when payments are actually made if the interest is accrued and the actual payments are not made until several years later.\textsuperscript{107} This makes the job of the IRS practically impossible and allows for companies to deduct for interest payments that potentially are never paid.\textsuperscript{108}

The legislative history also indicates that not only was Congress concerned with the monitoring and compliance nightmare that could easily ensue, but also with the ease with which taxpayers could engage in “phantom transactions” that led to deductions for payments that were either never made or manipulated in order to minimize liability in a high tax year.\textsuperscript{109} The general purpose of the present § 267(a)(2) was clear: it was intended “to prevent the allowance of a deduction

\begin{footnotes}
\item[104] Under the 1937 law, Congress refused to allow a deduction for accruing an interest obligation to a related party; rather in order to apply the deduction, the payor had to actually pay the interest within approximately the same year as the accrual. \textit{Id.}\
\item[105] \textit{Id.}; Brief for the Appellant at 3, \textit{Tate \& Lyle, In. v. Comm’r of Internal Revenue Serv.}, No. 95-7523 (3d Cir. Sep. 1995)) (citing H. Rep. No. 75-1546, \textit{reprinted in} 1939-1 C.B. (Pt. 2) 704, 724-25) (noting that “the rule was adopted because Congress found that some accrual taxpayers were claiming deductions for amounts owed to related parties as accrued, but thereafter never paid the amounts so accrued).\
\item[106] Brief for the Appellant at 18-19, \textit{Tate \& Lyle, Inc. v. Comm’r of Internal Revenue Serv.}, No. 95-7523 (3d Cir. Sep. 1995).\
\item[107] H.R. Rep. No. 75-1546 (1937), \textit{reprinted in} 1939-1 C.B. (Pt. 2) 704, 724-25.\
\item[108] See \textit{id.}\
\item[109] \textit{Id.}\
\end{footnotes}
without the corresponding inclusion in income.”

When Congress revisited this subject two years later it promulgated § 267(a)(3) which requires the Secretary to “apply the matching principle of [I.R.C. § 267(a)(2)] in cases in which the person to whom the payment is made is not a United States person.”

In its decision, the Seventh Circuit followed the reasoning articulated by the Third Circuit in *Tate & Lyle*, indicating that Congress envisioned this provision to cover circumstances beyond an accounting method mismatch, and to cover circumstances where the foreign related party was not subject to U.S. tax liability. The Seventh Circuit was persuaded by the Committee Reports that Congress clearly intended and anticipated that the Code would cover situations in which the cash basis accounting method would govern even when there was no mismatch in accounting systems because the foreign related party is not subject to U.S. tax liability. In light of the legislative history, the Seventh Circuit’s determination was based on whether the Regulation was reasonable in light of the overall structure and purpose of the Code. Based on the Committee notes, and in light of the overall fraud-prevention purpose of the provisions, the Seventh Circuit held that the Commissioner’s decision to enact the Regulation was reasonable despite the fact that it extended beyond situations involving an accounting mismatch and included transactions

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111 I.R.C. § 267(a)(3).

112 *Tate & Lyle v. Comm’r of the Internal Revenue Serv.*, 87 F.3d 99, 105 (3d Cir. 1996); *see also* H.R. Rep. 99-426 at 939 (1985) *reprinted in* 1986-3 C.B. (Vol. 2) at 959; S. Rep. No. 99-313 at 959 (1986), *reprinted in* 1986-3 (Vol. 3) at 959 (articulating a situation where the foreign parent was not subject to U.S. tax liability but provided services to a U.S. company and thus the U.S. company was required to use cash basis accounting).


114 *Square D*, 438 F.3d at 747.
where the foreign related party was not subject to U.S. tax liability.\textsuperscript{115}
Further, given the history of manipulation of interest payments
between related parties, the Seventh Circuit determined that the
Commissioner’s decision to treat interest differently was well within
his purview and consistent with congressional intent.\textsuperscript{116}

\textbf{B. Tate & Lyle and the Tax Court’s Holding of the Invalidity of
Treasury Regulation 1.267(a)-(3)}

Although the only circuits to address this issue have subscribed to
the interpretation articulated by the Seventh Circuit, the Tax Court in
\textit{Tate & Lyle} held that the Regulation was an invalid exercise of the
authority granted by § 267(a)(3) of the Code.\textsuperscript{117} The foundation for
this holding is based in the plain language of the Code.\textsuperscript{118}

The Tax Court recognized that it must “ordinarily defer to the
regulation if it implements the congressional mandate in some
reasonable manner.”\textsuperscript{119} Section 267(a)(2) of the Code provides
generally that a taxpayer may not deduct any amount owed to a related
party until it is includible in the payee’s gross income \textit{if the
mismatching occurs because the parties use different methods of
accounting}.\textsuperscript{120} Although the Code does not explicitly define the term
“method of accounting” that term has the common usage to indicate
the cash basis method, the accrual method, or some combination of the
methods.\textsuperscript{121} Following this logic, a method of accounting is only
applicable to determine when an item is includable in gross income;
consequently, if the item is excluded from the entity’s gross income

\begin{itemize}
  \item \textsuperscript{115} \textit{Id.}
  \item \textsuperscript{116} \textit{Id.}
  \item \textsuperscript{117} \textit{Tate & Lyle v. Comm’r of the Internal Revenue Serv.}, 103 T.C. 656, 666
  (1994).
  \item \textsuperscript{118} \textit{Id.}
  \item \textsuperscript{119} \textit{Id.} (citing United States v. Correll, 389 U.S. 299, 307 (1967)).
  \item \textsuperscript{120} \textit{Tate & Lyle}, 103 T.C. at 666. (emphasis added).
  \item \textsuperscript{121} \textit{Id.}
\end{itemize}
altogether, there is no method of accounting of which to speak.\textsuperscript{122} When the interest owed is not includable in gross income because, for example, it was excluded from tax liability, such as in the case of a treaty, then there is no method of accounting and the regulations are not applicable to it.\textsuperscript{123} The plain language of the code is clear; the statutory mandate in § 267(a)(3) is that it “applies the matching principle of paragraph (2).”\textsuperscript{124} There is no reason to go beyond the language of the statute and engage in an exploration of the legislative history because the language clearly does not permit the Secretary to promulgate Regulations that exceed the scope of the “matching principle” to accounting methods as is articulated in § 267(a)(2).\textsuperscript{125} The Secretary is not permitted to promulgate regulations that would alter the clear statutory scheme of the Code.\textsuperscript{126} Rather, the authority of the Secretary is limited in scope to filling gaps in the Code and setting forth regulations that clarify the implementation of the Code.\textsuperscript{127} The Regulation as issued, which does not allow a taxpayer to accrue and deduct interest owed to a foreign related party, is beyond the mandate of the statutory authority, and is thus, invalid.\textsuperscript{128}

The Tax Court addresses the argument that the Secretary’s justification is based on an attempt to analogize to provisions governing the original issue discount (“OID”).\textsuperscript{129} The Court hypothesizes that the goal of the Regulation was to treat interest deduction in the same way that deductions attributable to the original

\textsuperscript{122} \textit{Id.} at 669.
\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{Id.}
\textsuperscript{125} \textit{Id.} at 670.
\textsuperscript{126} \textit{See, e.g.,} Chevron U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S 837, 843-44 (1984); \textit{Correll}, 389 U.S. 299, 307 (1967) (noting that the deference given to Treasury Regulation is based in the fact that Congress has delegated the task of administering tax laws to the Secretary and thus the choice among reasonable alternatives is his).
\textsuperscript{127} \textit{Id.}
\textsuperscript{128} \textit{Tate & Lyle}, 103 T.C. 656, 672 (1994).
\textsuperscript{129} \textit{Id.} at 671.
issue discount are treated. However, the Tax Court adheres to the plain language and distinguishes the treatment of OID because there is no language or provision that requires for the expansion of the reach of the regulations beyond the matching principle articulated in § 267(a)(2) interpretation. The administrative authority conferred on the Secretary is only to fill gaps; therefore, the Regulation as issued is beyond the scope of that authority and contrary to the plain language of the Code. Although not addressed by the Tax Court, the Regulation could be seen to place accrual taxpayers that engage in transactions with related foreign parties at a disadvantage vis-à-vis taxpayers in similar situations but dealing with a domestic related party. The primary justification for the “matching principle” is so that there is a balance between the deduction taken on interest paid and additional tax liability recognized on interest income. However, when the income is not included in payee’s gross income, the concerns from the IRS of balancing tax liability seems to diminish because the income will never generate U.S. tax revenue.

IV. THE SEVENTH CIRCUIT DECISION WAS CORRECT AND SHOULD BE FOLLOWED BY OTHER COURTS

The Seventh Circuit’s decision to uphold the validity of the Regulation is correct and should be followed by other jurisdictions. However, from the absence of many key arguments and the limited rationale expounded by the Seventh Circuit, the basis for the decision involved too much deference to the Third Circuit decision and the authority of the Secretary.

130 Id.; I.R.C. § 163(e)(3).
131 Internal Revenue Code § 163(e)(3) provides that no deduction for original issue discount on a debt instrument held by a related foreign person shall be allowed until paid.
132 Tate & Lyle, 103 T.C. at 660-61.
133 See id.
The tax context is unique, and admittedly has the need for uniformity. Although deference is an important factor to consider, it is not controlling and the Seventh Circuit must reason its decision based on the arguments presented as opposed to merely following a like interpretation from another circuit. Yet, despite the deficiencies in the court’s reasoning and rationale, the decision was substantively correct.

The Tax Court in *Tate & Lyle* read the definition of “matching principle” too narrowly. The Tax Court seems to confuse the “matching principle” with the specified reason or cause for a mismatch.134 Practically, § 267(a)(2) triggers the correction contemplated by § 267.135 The provision articulated in § 267 is logically read to indicate that mismatches in federal income tax reporting, including accounting for interest expense and income are to be avoided.136 The language of the provision indicates that it is not aimed at remedying the reason that the mismatch occurred, but rather remedying the effects of the mismatch.137 In terms of the domestic taxpayers contemplated under § 267(a)(2)(A), given that both taxpayers are domestic related parties it is obvious that the only way that a mismatch could occur is because of different accounting methods, as both parties are subject to the U.S. tax liability and governed by the Code, meaning that they must utilize an approved accounting method.138 However, the “specified reason or cause for a mismatch (namely, a difference in accounting method) that triggers corrections under § 267(a)(2) is not a part of the ‘matching principle.’”139 Rather, the mismatch represents the “trigger” for the

135 *Id.*
136 See I.R.C § 267; *e.g.*, Albertson’s Inc. v. Comm’r of Internal Revenue, 42 F.3d 537, 543 (9th Cir. 1994) (noting that generally the point of the “matching principle” as used in § 404 is to prevent one party from taking a deduction for payment until the other party includes the payment in its income, and is therefore taxed on it).
137 See I.R.C § 267; *Tate & Lyle*, 103 T.C. at 680-81 (Swift, J. dissenting).
138 See *Tate & Lyle*, 103 T.C. at 680-81 (Swift, J. dissenting).
139 *Id.*
matching principle that would result in a correction.\textsuperscript{140} Congress, in 1986, added § 267(a)(3) in recognition of the fact that when domestic and foreign parties are involved in a transaction, mismatches occur for reasons other than a difference in accounting systems.\textsuperscript{141} Congress added § 267(a)(3) to remedy the effects of mismatches that are triggered by circumstances other than a difference in accounting methods.\textsuperscript{142} For example, a treaty would be a reason or cause for a mismatch and would be within the authority of the Secretary to determine the appropriate remedy and action.\textsuperscript{143} Applications of treaties, such as the U.S.-France tax treaty, were entered into to prevent double taxation (that is taxation on the same transaction by two governments). In this case, the interest income will be taxed by the country of France. In effect, the U.S. has acquiesced to the loss of certain tax revenues in exchange for a more efficient allocation of global resources and the influx of foreign capital. In order to give credence to this treaty, it should be treated as a “trigger” causing a mismatch and therefore, the matching principle should apply to transactions between domestic corporations and foreign corporations existing under a tax treaty.

An argument ignored by the Seventh Circuit is that Congress did not relieve taxpayers from the requirements of § 267 where one of the related parties is tax-exempt, as in the case of a charitable organization, under § 501.\textsuperscript{144} It is inequitable that § 267 would apply to domestic parties engaged in transactions with tax exempt parties, but would not apply to domestic parties engaged with foreign tax

\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{142} Id. (noting that Congress directed in § 267(a)(3) that the Commissioner, by means of legislative regulations, provide other causes of mismatches between domestic and foreign related parties to trigger the provisions of § 267); Brief for the Appellant, \textit{supra} note 106, at 10.
\textsuperscript{143} Brief for the Appellant, \textit{supra} note 106, at 10 (stating that Judge Swift considered the treaty-mandated an accounting method in and of itself).
\textsuperscript{144} See I.R.C. § 267(b)(9).
exempt parties.\textsuperscript{145} In both cases the payee will never be including the payment in its gross income, and will never be subject to U.S. tax liability. From a policy perspective, there is no justification that the reason why income is not taxed should make any difference.\textsuperscript{146} Whether income is “tax-exempt” as in the case of a charitable organization or is exempt by reason of a tax treaty is irrelevant.\textsuperscript{147} The “matching principle” is triggered wherever there is a mismatch, and the reason why the mismatch occurs is irrelevant to the ability of the Secretary to issue regulations. It naturally follows that the same standards should apply to these groups because the scenarios are far more analogous than two domestic corporations with different accounting systems.

Another issue ignored by the Seventh Circuit, but that argues in favor of its decision, is the parallel interpretation between the Regulation and § 163(e)(3) with respect to original issue discount.\textsuperscript{148} Section 163(e)(3) requires a taxpayer to use the cash basis method of accounting for deductions of original issue discount\textsuperscript{149} on debt instruments held by foreign related parties.\textsuperscript{150} These provisions were enacted to remedy the exact concerns that led Congress to enact § 267.\textsuperscript{151} Both provisions were aimed at preventing abuse by taking tax deductions for payments never made.\textsuperscript{152} Further, the “definition of foreign related person” in § 163(e)(3) contains a direct reference to

\begin{itemize}
  \item \textsuperscript{145} \textit{Tate & Lyle v. Comm’r of Internal Revenue Serv.}, 103 T.C. 656, 679 (1994) (Halpern, J. dissenting) (noting that it is difficult to see any reason why one tax exemption should be treated differently from another).
  \item \textsuperscript{146} Brief for the Appellant, \textit{supra} note 106, at 37.
  \item \textsuperscript{147} \textit{Id}.
  \item \textsuperscript{148} I.R.C. § 163 (e)(3); Treas. Reg. § 1.267(a)-3.
  \item \textsuperscript{149} “Original issue discount” is defined as the excess, if any, of the stated redemption price of a debt instrument at maturity over the issue price of the instrument. I.R.C. § 1273 (a)(1).
  \item \textsuperscript{150} \textit{Id}. Note: this article will not address the validity of § 163(e)(3) or its accompanying Treasury Regulations. This article will only address this issue in relation to parallels and similarities with § 267.
  \item \textsuperscript{151} Brief for the Appellant, \textit{supra} note 106, at 39.
  \item \textsuperscript{152} \textit{See id}.
\end{itemize}
§ 267(b). By defining related parties in this fashion, it can be reasonably inferred that Congress envisioned in § 163(e)(3) and § 267 a natural overlap in application and interpretation between these two provisions. One might argue that the absence of any reference to § 163(e)(3) in the legislative history of § 267 indicated that Congress did not intend the provisions to parallel one another. The absence of a reference in no way indicates that Congress intended to prohibit the Secretary from issuing a similarly aimed regulation; it merely demonstrates that Congress did not intend to require such a rule.

Square D did not raise, and the Seventh Circuit did not address, the impact that the level of deference to administration regulation could have on the future viability of transactions with foreign related parties. Although Square D made a non-discrimination claim, which was quickly dismissed by the Seventh Circuit, it never raised the

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153 Id. (citing I.R.C. § 163(e)(3)).
154 Brief for the Appellant, supra note 106, at 39.
155 Tate & Lyle v. Comm’r of Internal Revenue Serv., 103 T.C. 656, 671 (1994).
156 Brief for the Appellant, supra note 106, at 41.
157 Square D argued in the alternative that Reg. 1.267(a)-3 conflicted with the Tax Treaty between the United States and France because it requires a U.S. taxpayer, owned by a foreign [French] corporation to use the cash basis method of accounting to deduct interest payment to its parent, rather than the more advantageous accrual method. The Seventh Circuit reasoned that this argument failed because the type of discrimination sought to be prevented was discrimination based solely on the foreign ownership of the foreign-owned person. However, in this case, the regulation did not dictate the use of the cash basis method based on the French ownership of Square D. Rather, the dictate was based upon the fact that the interest payments were rendered to a foreign party. Therefore, had Square D been owned by a domestic corporation, any interest payment to a foreign related party would still be subject to the rule putting Square D’s deduction on the cash basis method. The Seventh Circuit reasoned that in order to violate the nondiscrimination clause in the treaty, the additional burden levied must be directed at a nationality. Hence, since all companies who engaged in transactions with foreign related parties resulting in payment of interest were equally subject to this provision, whether owned by a foreign or domestic parent company, there was no discrimination. Therefore, there was no violation by the Reg. 1.267(a)-3 of the non-discrimination clause of the Treaty. Square D, 438 F.3d at 747-48.
question of where the foreseeable scope of these regulations might end. In the Seventh Circuit’s holding, it indicated its propensity to defer to administrative regulation, without a full exploration of the arguments, under the justification of prevention of fraud. For example, in an effort to prevent fraud and ease the burden of tracking deductions, the next step might be to eliminate the ability of a taxpayer to take advantage of the interest deduction when the payee is any foreign party. Although this is an extreme example, given the current distrust of corporate America and prevalence of scandal, without an adequate check on administrative regulation, these regulations could easily exceed their intended scope. Reviewing courts are charged with conducting a thorough analysis to ensure that administrative regulation is reasonable. Absent such an analysis it is possible that the Secretary will exceed the scope of its authority and do more harm than good for American Corporations.

However, in light of the much stricter regulations upheld affecting transactions with foreign related parties, the interpretation of the Regulation at issue in *Square D* is consistent with the deference applied to other similarly aimed regulations. Although the subject matter of these laws varies quite broadly over a spectrum of topics, they all share one common goal: to prevent fraud and abuse by corporations. Given the serious nature and consequences of these regulations, courts must hesitate before granting broad deference and latitude to the agencies charged with ensuring compliance. It is a very fine line between reasonable enforcement of these provisions as initially intended and allowing these regulations to be carried to illogical extremes, impairing American corporations by placing them on unequal footing in a global marketplace. Therefore, it is critical that reviewing courts engage in a thorough analysis of any administrative

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158 Id.
159 See id. at 747 (stating that although the use of the cash basis method may seem “counter-intuitive” it is justified by the potential to prevent “fraud and abuse by taxpayers).  
160 See, e.g., Boeing Co v. United States, 537 U.S. 437 (2003); Tate & Lyle v. Comm’r of Internal Revenue Serv., 87 F.3d 99 (3d Cir. 1996).  
161 See, e.g., I.R.C. §§ 163, 267, 446
regulation aimed at preventing fraud in taxation before granting deference to an administrative regulation.

CONCLUSION

There is no debate that adequate regulation of corporate transactions is important. Proof of this fact has never been more evident than in the past few years when the effects of corporate wrongdoing have been recognized at the greatest level. For the purposes of tax liability, related party transactions are one of the most commonly abused vehicles.

Both the Seventh and Third Circuit have upheld the validity of the Regulation requiring a taxpayer to use the cash basis method of accounting to deduct interest payments to foreign related persons. This decision represents a trend toward greater regulation and discretion for the agencies charged with promulgating these regulations. Although these decisions should be narrowly construed and not used as precedent for sweeping deference to administrative regulation they were correctly decided. The burden that this regulation imposes is both necessary and mild in light of the context of other similarly aimed regulations. As such, the decision of the Seventh Circuit in *Square D* is correct and all other circuits addressing this narrow issue should follow the decision. However, the absence of extensive reasoning by the Seventh Circuit should not be read to indicate that, in the context of administrative regulation under the Code, all regulation is good regulation.