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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
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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 GATEKEEPERS KEEP CHANGING THE LOCKS: SWANSON V. CITIBANK AND THE KEY TO STATING A PLAUSIBLE CLAIM IN THE SEVENTH CIRCUIT FOLLOWING TWOMBLY AND IQBAL

GREGORY L. GRATAN

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INTRODUCTION

In June 2009, less than a month after the Supreme Court decided Ashcroft v. Iqbal,1 Justice Ruth Bader Ginsburg told her audience at the Second Circuit Judicial Conference that, in her opinion, “the Court’s majority messed up the Federal Rules.”2 Justice Ginsburg’s comment was a sign of the federal courts’ growing struggle with Bell Atlantic Corp. v. Twombly3 and Ashcroft v. Iqbal, two cases that transformed the requirements for pleadings in all civil cases under the

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Federal Rules of Civil Procedure. In *Twombly*, a complex anti-trust case, the Supreme Court introduced plausibility as a new requirement for pleadings. The Court in *Twombly* held that a complaint must state “a claim to relief that is plausible on its face” to meet the requirements of Rule 8(a)(2) and to survive a Rule 12(b)(6) motion to dismiss. Two years later in *Iqbal*, a less complex discrimination case, the Court confirmed that the new plausibility requirement applies to “all civil actions.”

*Swanson v. Citibank*, a case that the Court of Appeals for the Seventh Circuit decided on July 30, 2010, reveals just how “messed up” things have become. In *Swanson*, a pro se plaintiff sued Citibank, a real estate appraisal company, and the appraisal company’s employee for racial discrimination in connection with Citibank’s denial of her application for a home equity loan. The district court dismissed the complaint under Rule 12(b)(6) for failure to state a plausible claim, but the court of appeals reversed. Writing for the majority, Judge Diane Wood interpreted *Twombly* and *Iqbal* to mean that a complaint must include sufficient factual detail to “present a story that holds together.” In dissent, Judge Posner strongly criticized the majority’s liberal reading of *Twombly* and *Iqbal* and

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4 The Supreme Court in *Iqbal* transformed the pleading requirements by confirming that the “plausibility” requirement from *Twombly*, 550 U.S. at 570, applied to “all civil actions.” *Iqbal*, 129 S. Ct. at 1953.
5 *Twombly*, 550 U.S. at 548.
6 FED. R. CIV. P. 8(a)(2) (“[a] pleading that states a claim for relief must contain: . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief”).
7 FED. R. CIV. P. 12(b)(6) (“a party may assert the following defenses by motion: . . . (6) failure to state a claim upon which relief can be granted”).
8 *Twombly*, 550 U.S. at 570.
9 *Iqbal*, 129 S. Ct. at 1953.
10 614 F.3d 400 (7th Cir. 2010).
11 Id. at 402.
12 Id.
13 Id. at 407.
14 Id. at 404.
interpreted the two cases to mean that a complaint must contain sufficient factual allegations to override any “obvious alternative explanation” for the plaintiff’s injury. While the majority held that the plaintiff’s relatively minimalist complaint was sufficient to state a plausible claim, Judge Poser thought that “error” was the more obvious and natural explanation for the defendants’ denial of the plaintiff’s home equity loan application. Judge Posner argued that the court should have relied on its “judicial experience and common sense” to reach this conclusion, and that the district court’s dismissal should have been affirmed.

The majority and dissenting opinions in Swanson reveal the strong disagreement in the Seventh Circuit over how courts should interpret and apply Twombly and Iqbal’s plausibility requirement. This Note will examine this disagreement and will ultimately argue that Judge Diane Wood’s majority opinion provides the correct approach. After providing a history of pleading in general and of pleading in the Seventh Circuit in particular, this Note will argue that, in deciding Rule 12(b)(6) motions to dismiss, judges must be careful to not overly rely on their “judicial experience and common sense” such that they effectively turn a motion to dismiss into a motion for summary judgment. Instead, as the court held in Swanson, the question judges must ask themselves when deciding whether a complaint presents a claim that is “plausible on its face” is whether the factual allegations, taken as true, “present a story that holds together” and upon which the plaintiff could recover. In assessing this, a judge should look to his

16 Id. at 405.
17 Id. at 408.
18 Id. at 407–09.
19 See Suja A. Thomas, The New Summary Judgment Motion: The Motion to Dismiss Under Twombly and Iqbal, 14 LEWIS & CLARK L. REV. 15, 17 (2010). This Note will heavily rely on the arguments of Professor Suja A. Thomas, who has argued that Twombly and Iqbal have effectively turned the Rule 12(b)(6) motion to dismiss into the “new summary judgment motion.” Id.
20 Swanson, 614 F.3d at 404.
or her “judicial experience and common sense” only for an objective standard, not as a source for facts or considerations beyond the allegations of the complaint upon which to base inferences that favor the party moving for dismissal. In the end, this Note argues that the Court of Appeals for the Seventh Circuit reached the correct result in Swanson.

I. HISTORY OF PLEADING RULES

Professors Kevin M. Clermont and Stephen C. Yeazell have called pleading “the gatekeeper for civil litigation.” If pleading is the gatekeeper, then prior to the adoption of the Federal Rules of Civil Procedure in 1938, judges were quick to close the gates on plaintiffs’ claims because they followed technical pleading rules. For the second half of the twentieth century, on the other hand, federal judges held the gates open because they followed the liberal notice pleading standard that the Supreme Court introduced in Conley v. Gibson.

21 See infra Part IV.
22 Kevin M. Clermont & Stephen C. Yeazell, Inventing Tests, Destabilizing Systems, 95 IOWA L. REV. 821, 824 (2010) (“Pleading serves as the gatekeeper for civil litigation.”); see also CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202 (2004 ed. & 2009 supp.) (describing the four functions traditionally served by pleadings, one of which was to provide “a means for speedy disposition of sham claims and insubstantial defenses”).
23 See WRIGHT & MILLER, supra note 22 (“At common law there was a generally held belief in the efficacy of pleadings. The whole grand scheme was premised on the assumption that by proceeding through a maze of rigid, and often numerous, stages of denial, avoidance, or demurrer, eventually the dispute would be reduced to a single issue of law or fact that would dispose of the case.”); see also David M. Roberts, Fact Pleading, Notice Pleading, and Standing, 65 CORNELL L. REV. 390, 395 (1980) (describing the Field Code as a “scheme [that] placed considerable emphasis on hypertechnical artifices of pleading . . . [under which] any gains in precise issue-identification came at the expense of many otherwise valid claims that were dismissed for inadequate pleadings”).
24 355 U.S. 41, 45–46 (1957) (holding that a complaint need only contain “’a short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests”) (quoting Fed. R.
Very recently, the gatekeeper has become selective again. According to Clermont and Yeazell, the Supreme Court in \textit{Twombly} and \textit{Iqbal} developed “a robust gatekeeping regime” to replace liberal notice pleading.\textsuperscript{25} To understand how pleading rules have evolved in this manner, it is necessary to give a brief overview of the history of pleading rules.

\textbf{A. 1848 to 1938: The Field Code}\textsuperscript{26}

The Field Code was the first major departure from common law pleading in the United States.\textsuperscript{27} David Dudley Field developed the Field Code during the mid-nineteenth century to reform the New York courts’ approach to pleading.\textsuperscript{28} The Field Code provided that a complaint should contain “[a] statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.”\textsuperscript{29} Plaintiffs were required to plead the “dry, naked, actual facts” giving rise to a cause of action.\textsuperscript{30} During its time,
the Field Code was the rule of procedure in effect in many federal courts because, from 1872 to 1938, the Conformity Act provided that each federal court was to employ the pleading rules of the state in which it was located.31

Although the Field Code aimed for simplicity, states that adopted it ultimately developed a complicated system that distinguished between “legal conclusions,” “ultimate facts,” and “evidentiary facts.”32 Pleading of legal conclusions and evidentiary facts was impermissible, while pleading of ultimate facts was desired.33 Cases were often dismissed based upon technical distinctions between legal conclusions and ultimate facts, rather than on the merits.34 A widespread criticism of the Field Code’s distinction between legal conclusions and ultimate facts was that there was no logical distinction to be made; because the difference was one of degree only, rather than of kind, the distinction was arbitrary.35

B. 1938 to 2007: Federal Rule of Civil Procedure 8(a)(2) and Liberal Notice Pleading

The drafters of the Federal Rules of Civil Procedure sought to avoid the confusing distinction between “legal conclusions,” “ultimate facts,” and “evidentiary facts” that had mired pleadings under the Field Code.36 Charles E. Clark and the drafters of the Federal Rules advocated a liberal approach to pleading.37 Accordingly, the Federal

31 WRIGHT & MILLER, supra note 22, at n.4.
32 Roberts, supra note 23, at 395; see also Marcus, supra note 26, at 438.
33 Roberts, supra note 23, at 395.
34 Id. at 395–96.
35 WRIGHT & MILLER, supra note 22; see also CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 38 at 301 (2d ed. 1947) (“[T]he attempted distinction between facts, law, and evidence, viewed as anything other than a convenient distinction of degree, seems philosophically and logically unsound.”).
36 Marcus, supra note 26, at 438–39.
37 Id. at 439.
Rules, adopted in 1938, substantially narrowed the function served by pleadings. Federal Rule of Civil Procedure 8(a)(2) provides that a complaint need only provide “a short and plain statement of the claim showing that the pleader is entitled to relief.” The other functions that pleadings historically served—stating the facts, narrowing the issues, and “providing a means for speedy disposition of sham claims and insubstantial defenses”—were left to devices other than pleadings, including discovery, pretrial conferences, and summary judgment.

The Federal Rules’ liberal approach to pleading became known as “notice pleading” following the Supreme Court’s 1957 decision in Conley v. Gibson. In Conley, several African-American union members brought an action for declaratory judgment and injunction against their union representative. The plaintiffs alleged that the representative, as their collective bargaining agent, had failed to protect the African-American union members from discriminatory discharge in favor of white employees, in violation of the Railway Labor Act. The district court dismissed the complaint, and the court of appeals affirmed.

The Supreme Court reversed the district court’s dismissal of the plaintiffs’ complaint. The Supreme Court famously held that a

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38 WRIGHT & MILLER, supra note 22 (“Because the only function left exclusively to the pleadings by the federal rules is that of giving notice, federal courts have frequently said that the rules have adopted a system of ‘notice pleading.’”).
39 FED. R. CIV. P. 8(a)(2).
40 WRIGHT & MILLER, supra note 22.
41 355 U.S. 41 (1957). A similarly high water mark came in Dioguardi v. Durning, where Justice Charles E. Clark, former head of the drafting committee of the Federal Rules, reversed the dismissal of a pro se complaint because, although “obviously home drawn” and “however inarticulately they may be stated, the plaintiff has disclosed his claims . . . [and the court does] not see how the plaintiff may properly be deprived of his day in court to show what he obviously so firmly believes.” 139 F.2d 774, 774–75 (2d Cir. 1944).
42 Conley, 355 U.S. at 42–43.
43 Id. at 43.
44 Id.
45 Id. at 44.
complaint should not be dismissed under Rule 8(a)(2) “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.”46 This sentence has become known as Conley’s “no set of facts” language.47 The Conley Court went on to hold that the Federal Rules do not require plaintiffs to fill their complaints with detailed factual allegations, but instead require only “a short and plain statement of the claim” that is sufficient to give the opposing party “fair notice” of the claim and “the grounds upon which it rests.”48 The Court’s holding in Conley became the precedent for a half-century of liberal notice pleading in federal courts.49

The Supreme Court reaffirmed Conley’s liberal notice pleading standard as recently as 2002.50 In Swierkiewicz v. Sorema, the plaintiff alleged that his employer had demoted and fired him based on his national origin and age.51 The district court dismissed the complaint on grounds that the plaintiff had not alleged sufficient facts to establish a discrimination claim.52 The court of appeals affirmed, reasoning that a discrimination claim in the Second Circuit must contain more than mere “naked assertions” to state a claim upon which relief can be granted.53 The Supreme Court reversed, holding that the Second Circuit’s heightened pleading requirement did not comport with the liberal notice pleading standard of Rule 8(a)(2).54 Although the Supreme Court reaffirmed liberal notice pleading as recently as Swierkiewicz, the Court has since changed course.

46 Id. at 45–46.
48 Conley, 355 U.S. at 47 (quoting FED. R. CIV. P. 8(a)(2)).
49 Conley’s liberal notice pleading standard remained in full force until the Supreme Court retired Conley’s “no set of facts” language in Bell Atlantic Corp. v. Twombly, 550 U.S. at 561.
51 Id. at 508–09.
52 Id. at 509.
54 Swierkiewicz, 534 U.S. at 512.
C. 2007 to the Present: A Trio of Cases that Transformed Pleading (or that “Messed up the Federal Rules”)

In *Bell Atlantic Corp. v. Twombly* and in *Ashcroft v. Iqbal*, the Supreme Court fundamentally altered its interpretation of what Rule 8(a)(2) requires of pleadings. In *Twombly*, the Court retired Conley’s “no set of facts” language and held that Rule 8(a)(2) requires that a complaint contain sufficient factual allegations to state “a claim to relief that is plausible on its face.” In *Iqbal*, the Court held that this new plausibility requirement applies to “all civil actions.” Yet, between its decisions in *Twombly* and *Iqbal*, the Court issued a per curiam opinion in *Erickson v. Pardus*, in which it held that Conley’s “notice pleading” language was still good law following *Twombly*.

1. *Bell Atlantic Corp. v. Twombly*

The Court first introduced plausibility as a new requirement for pleadings in *Bell Atlantic Corp. v. Twombly*. The plaintiffs in *Twombly* were the class of all individuals who had subscribed to telephone service since 1996 from the Baby Bells, which were the local telephone service providers that survived after the break-up of AT&T in 1984. The plaintiffs alleged that several of the Baby Bells had engaged in parallel conduct in violation of § 1 of the Sherman Act, which proscribes any “contract, combination . . . or conspiracy, in restraint of trade or commerce.” The district court dismissed the plaintiffs’ complaint, holding that it alleged parallel conduct but did not allege the existence of a contract, combination, or conspiracy in

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58 Id. at 93.
59 550 U.S. at 570.
60 Id. at 550.
61 Id. at 548 (quoting 15 U.S.C. § 1).
restraint of trade. The Second Circuit reversed, relying on Conley to hold that dismissal was improper because the defendants had not proven that there was “no set of facts” that could entitle the plaintiffs to relief.

The Supreme Court reversed the Second Circuit, holding that the plaintiffs’ complaint did not state a claim upon which relief could be granted. In so doing, the Court departed from a half-century of permitting lower courts to apply a “focused and literal reading” of Conley’s “no set of facts” language. The Court stated that it no longer sufficed for a complaint to merely reveal “the theory of the claim.” Instead, the Court interpreted Rule 8(a)(2) to require that a complaint contain sufficient allegations “to state a claim to relief that is plausible on its face.” Although the Court noted that a complaint still need not contain specific facts beyond those necessary to state a claim and give fair notice of the claim and the grounds upon which it rests, the Court held that a complaint must contain sufficient facts to move the claim “across the line from conceivable to plausible.” Filling a complaint with “labels and conclusions” or “a formulaic recitation of the elements of a cause of action” will not get the claim over the line.

The Supreme Court went on to hold that Conley’s “no set of facts” language had earned its retirement. The Court criticized the “focused and literal reading” of Conley that permitted conclusory

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62 Id. at 552.
63 Id. at 553.
64 Id. at 570.
65 Cf. id. at 561–63. The Court in Twombly discussed and criticized the Court of Appeals’ “focused and literal reading of Conley’s ‘no set of facts’” language, id. at 561–62, but recognized that “we have not previously explained the circumstances and rejected the literal interpretation of the [‘no set of facts’] passage,” id. at 563 n.8.
66 Id. at 561.
67 Id. at 570.
68 Id. at 555.
69 Id. at 570.
70 Id. at 555.
71 Id. at 563.
claims to survive a Rule 12(b)(6) motion to dismiss.\textsuperscript{72} Under that reading, a complaint would survive as long as there was some chance that the plaintiff could later prove some previously undisclosed facts to support his or her claim.\textsuperscript{73} The Court said that courts taking this approach had misinterpreted the long-accepted rule that “once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.”\textsuperscript{74} This long-held rule was meant to describe “the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint.”\textsuperscript{75}

The Court in \textit{Twombly} held that the plaintiffs’ complaint did not state a plausible claim.\textsuperscript{76} The Court reasoned that the “natural explanation” for the defendants’ alleged parallel conduct was not that the defendants had entered into an illegal anti-competitive agreement.\textsuperscript{77} Rather, the Court reasoned that the more natural explanation was that the local telephone service providers had merely continued their monopolistic behavior in their respective markets after the government had ordered the AT&T Company broken up in 1984.\textsuperscript{78} Because the allegations did nothing to override this more natural explanation, the Court held that the complaint did not “state a claim to relief that is plausible on its face” and should have been dismissed.\textsuperscript{79}

2. \textit{Erickson v. Pardus}

Two weeks after the Supreme Court retired \textit{Conley}’s “no set of facts” language and ushered in plausibility as a new requirement for pleadings, the Court issued a per curiam opinion that cast significant

\textsuperscript{72} \textit{Id.} at 561.
\textsuperscript{73} \textit{Id.}
\textsuperscript{74} \textit{Id.} at 563.
\textsuperscript{75} \textit{Id.}
\textsuperscript{76} \textit{Id.} at 570.
\textsuperscript{77} \textit{Id.} at 564.
\textsuperscript{78} \textit{Id.} at 568.
\textsuperscript{79} \textit{Id.} at 570.
doubt on the transformative nature of Twombly. In Erickson v. Pardus, a prisoner filed a pro se suit against several prison officials for terminating his treatment program for hepatitis C in violation of the Eighth Amendment’s prohibition against cruel and unusual punishment. The district court dismissed his complaint, holding that it contained only conclusory allegations that the plaintiff had suffered an “independent cognizable harm” as a result of the defendants’ termination of his treatment. The Court of Appeals for the Tenth Circuit affirmed.

The Supreme Court reversed, holding that the court of appeals erred when it held that the plaintiff’s allegations “were too conclusory” to state a claim to relief. In reaching its holding, the Court made no mention of Twombly’s plausibility requirement. Rather, the Court reiterated that Rule 8(a)(2) imposes a “liberal pleading standard.” The Court cited Twombly (which was citing Conley) for the rule that, under Rule 8(a)(2), a complaint need only give the defendant fair notice of the claim and the grounds upon which it rests. Thus, despite overruling Conley’s “no set of facts” language two weeks earlier, the Court held that Conley’s “notice pleading” language was still good law. Following the Court’s decision in Erickson, many courts interpreted it to mean that Twombly’s plausibility requirement was limited to complex anti-trust cases.

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81 Id. at 89–90.
82 Id. at 92–93.
83 Id. at 92–93.
84 Id. at 93.
85 See id. at 89–95.
86 Id. at 94.
88 Twombly, 550 U.S. at 563.
89 Erickson, 551 U.S. at 93.
90 See, e.g., Doss v. Clearwater Title Co., 551 F.3d 634, 639 (7th Cir. 2008) (“The Supreme Court’s decision in Erickson v. Pardus . . . put to rest any concern that Twombly signaled an end to notice pleading in the federal courts.”).
3. Ashcroft v. Iqbal

The next development came in *Ashcroft v. Iqbal*, in which the Supreme Court dispelled everyone’s doubts concerning the scope of *Twombly*’s holding and held that the plausibility requirement applies to “all civil actions.”91 In *Iqbal*, the plaintiff, who was a Pakistani and a Muslim, sued former U.S. Attorney General John Ashcroft and FBI Director Robert Mueller for adopting a discriminatory policy of detaining Arab Muslim men in the aftermath of the September 11 attacks.92 Following the September 11 attacks, Iqbal had been detained on charges of identification fraud and conspiracy to defraud the United States.93 He had been deemed to be “of high interest” to the investigation into the attacks and had been held in a maximum-security prison.94 The plaintiff alleged that Ashcroft’s and Mueller’s policies led to him being confined on account of his race, religion, or national origin.95

The defendants in *Iqbal* filed their Rule 12(b)(6) motion to dismiss before the Supreme Court decided *Twombly*.96 As a result, the district court denied the defendant’s motion, relying on *Conley*’s “no set of facts” language.97 The defendants appealed, and the Supreme Court decided *Twombly* while the appeal was pending.98 The Court of Appeals for the Second Circuit discussed *Twombly* but held that its plausibility requirement applied only to complex cases in which additional detail would prove helpful.99 The court of appeals did not

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92 Id. at 1942.
93 Id. at 1943.
94 Id.
95 Id.
96 Id. at 1944.
97 Id.
98 Id.
99 Id. (quoting Iqbal v. Hasty, 490 F.3d 143, 157–58 (2d Cir. 2007)).
consider *Iqbal* to be such a case, so it affirmed the district court’s ruling.100

The Supreme Court granted certiorari and reversed.101 First, the Court held that the plausibility requirement from *Twombly* applies to “all civil actions.”102 Next, the Court described the plausibility requirement as a two-pronged test for deciding a Rule 12(b)(6) motion to dismiss.103 The first prong is to disregard legal conclusions, or “[t]hreadbare recitals of the elements of a cause of action.”104 The Court explained that, although Rule 8(a)(2) was a major departure from the technical requirements of the code-pleading era, “it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”105 The second prong is to presume all remaining well-pleaded facts to be true and to dismiss any complaint that does not “state a plausible claim for relief.”106 The Court said that the task of determining whether a claim is plausible requires the court “to draw on its judicial experience and common sense.”107

Applying the first prong to the complaint in *Iqbal*, the Court disregarded two allegations because they were legal conclusions. First, the Court disregarded the allegation that Attorney General John Ashcroft and FBI Director Dan Mueller knowingly, willfully, and maliciously agreed to detain Iqbal on account of his religion, race, or national origin “as a matter of policy . . . and for no legitimate penological interest.”108 Second, the Court disregarded the allegation that Attorney General Ashcroft was the “principal architect” of the policy and that FBI Director Mueller was “instrumental” in adopting

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100 *Id.*
101 *Id.* at 1945.
102 *Id.* at 1953 (quoting FED. R. CIV. P. 1) (stating that Rule 8 “governs the pleading standard ‘in all civil actions in the United States district courts’”).
103 *Id.* at 1949–50.
104 *Id.* at 1949.
105 *Id.* at 1950.
106 *Id.*
107 *Id.*
108 *Id.* at 1951.
and executing it. The Court considered these allegations to be “formulaic recitation[s] of the elements” of a constitutional discrimination claim. The Court assumed to be true the plaintiff’s factual allegations that FBI Director Mueller directed the FBI to arrest and detain “thousands of Arab Muslim men” during its investigation into the September 11 attacks and that the policy of detaining these men “in highly restrictive conditions” was approved by Attorney General Ashcroft and FBI director Mueller. The Court held that, even taking these allegations to be true, the plaintiff failed to state a plausible claim for relief. The Court reasoned that the allegations had an “obvious alternative explanation,” namely, that the arrests were lawful and were motivated by a “nondiscriminatory intent” to hold in custody persons who may have had connections to the Al Qaeda members who committed the September 11 attacks. Just as it had in Twombly, the Court considered the plaintiff’s claim to be implausible in light of this more obvious explanation.

II. SEVENTH CIRCUIT DECISIONS BEFORE AND AFTER TWOMBY AND IQBAL

A. Seventh Circuit Cases Prior to Twombly

Prior to Twombly, the Court of Appeals for the Seventh Circuit was a strict devotee of Conley’s liberal notice pleading standard.
The case of *Vincent v. City Colleges of Chicago* exemplifies the Seventh Circuit’s pre-*Twombly* approach. In *Vincent*, the author of a book on buying foreclosures sued the City Colleges of Chicago and the publisher of the book for alleged violations of the federal copyright and trademark laws. The City Colleges of Chicago had offered a course under the same name as the book’s title, and the publisher had continued publishing the book without the author’s permission and without paying her royalties. The district court dismissed most of the complaint under Rule 12(b)(6), finding defective, among other things, the complaint’s failure to include the plaintiff’s registered U.S. Patent and Trademark numbers.

The Court of Appeals for the Seventh Circuit reversed. Writing for the court, Judge Easterbrook provided a terse and strongly worded summary of the Seventh Circuit’s approach to notice pleading under Federal Rule of Civil Procedure 8(a)(2):

> [A] judicial order dismissing a complaint because the plaintiff did not plead facts has a short half-life. “Any decision declaring ‘this complaint is deficient because it does not allege X’ is a candidate for summary reversal . . . . Civil Rule 8 calls for a short and plain statement; the plaintiff pleads claims, not facts or legal theories. . . . Factual detail comes later—perhaps in a motion for a more definite statement, . . . perhaps in response to a motion for summary judgment. Until then, the possibility that facts to be adduced later, and consistent with the complaint, could prove the claim, is enough for the litigation to move forward.”

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116 485 F.3d 919 (7th Cir. 2007).
117 *Id.* at 921.
118 *Id.*
119 *Id.* at 922–24.
120 *Id.* at 926.
121 *Id.* at 923 (citations omitted).
Judge Easterbrook went on to reason that, although a plaintiff must ultimately prove some fact at trial, the plaintiff does not have to allege that fact in his or her complaint.\textsuperscript{122} After noting that Rule 8(a)(2) was adopted in 1938 and that \textit{Conley v. Gibson} emphasized that the Rule does not impose a strong fact-pleading requirement,\textsuperscript{123} judge Easterbrook reprimanded the district judge for granting the defendant’s motion to dismiss: “It is disappointing to see a federal district judge dismiss a complaint for failure to adhere to a fact-pleading model that federal practice abrogated almost 70 years ago.”\textsuperscript{124}

There were numerous other cases prior to \textit{Twombly} in which the Court of Appeals for the Seventh Circuit reversed the district court’s dismissal of a complaint for failure to state a claim under Rule 12(b)(6).\textsuperscript{125} Just two weeks after Judge Easterbrook handed down his decision in \textit{Vincent}, however, the Supreme Court decided \textit{Bell Atlantic Corp. v. Twombly}.

\textsuperscript{122} \textit{Id.} at 923–24.
\textsuperscript{123} \textit{Id.} at 924.
\textsuperscript{124} \textit{Id.}
\textsuperscript{125} \textit{See, e.g., id.} at n.† (citing twelve cases in the year prior to \textit{Vincent} in which the Seventh Circuit Court of Appeals reversed decisions that had dismissed complaints for failure to state a claim: Christensen v. Boone County, 483 F.3d 454, 465–66 (7th Cir. 2007); Miller v. Fisher, 2007 WL 755187 (7th Cir. Mar. 12, 2007); Edwards v. Snyder, 478 F.3d 827 (7th Cir. 2007); Thomas v. Kalu, 2007 WL 648312 (7th Cir. 2007); Argonaut Ins. Co. v. Broadspire Servs., Inc., 209 F. App’x 573 (7th Cir. 2006); Tompkins v. The Women’s Cnty., Inc., 203 F. App’x 743 (7th Cir. 2006); McCann v. Neilsen, 466 F.3d 619 (7th Cir. 2006); Hefferman v. Bass, 467 F.3d 596 (7th Cir. 2006); Pratt v. Tarr, 464 F.3d 730 (7th Cir. 2006); Floyd v. Aden, 184 F. App’x. 575 (7th Cir. 2006); Simpson v. Nickel, 450 F.3d 303 (7th Cir. 2006); Marshall v. Knight, 445 F.3d 965 (7th Cir. 2006)).
B. Seventh Circuit Cases Following Twombly but Preceding Iqbal

The Court of Appeals for the Seventh Circuit took a narrow view of *Twombly* prior to *Iqbal*. In many instances, the court relied on *Erickson v. Pardus* to support its narrow reading. The court’s interpretation of *Twombly* in *Airborne Beepers & Video v. AT&T Mobility* provides a good example of this. In *Airborne*, the plaintiff sued a cell phone service provider for breach of an “authorized dealer agreement” after the provider stopped paying commissions on activations of new cell phone plans. After the district court dismissed the plaintiff’s complaint four times over the course of three years, the court denied the plaintiff’s motion for leave to file a fourth amended complaint. On appeal, the Court of Appeals for the Seventh Circuit affirmed.

Writing for the court in *Airborne*, Judge Diane Wood addressed the standard for pleadings under Rule 8(a)(2) following *Twombly*. Judge Wood noted that the Supreme Court in *Twombly* held that a complaint must not contain merely “labels and conclusions” or “a formulaic recitation of the elements of a cause of action.” But Judge Wood went on to say that the Court’s decision in *Erickson*, decided two weeks after *Twombly*, confirmed that liberal notice pleading had

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126 Riley v. Vilsack, 665 F. Supp. 2d 994, 1000–01 (W.D. Wis. 2009) (“The court of appeals acknowledged that *Twombly* ‘retooled federal pleading standards,’ . . . but in most cases the court declined to revisit previous holdings in light of the new case, adhering to the view that Rule 8 required nothing more than ‘fair notice.’”).

127 E.g., Doss v. Clearwater Title Co., 551 F.3d 634 (7th Cir. 2008) (“The Supreme Court’s decision in *Erickson v. Pardus* . . . put to rest any concern that *Twombly* signaled an end to notice pleading in the federal courts.”).

128 499 F.3d 663, 667 (7th Cir. 2007).

129 *Id.* at 664.

130 *Id.* at 664–66.

131 *Id.* at 668.

132 *Id.* at 667.

133 *Id.* (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).
not been replaced by a fact-pleading regime.\textsuperscript{134} Thus, in Judge Wood’s view, lack of plausibility under \textit{Twombly} merely equated to a complaint that was “so sketchy” as to provide insufficient notice of the nature of the claim and the grounds upon which it rests.\textsuperscript{135} Because the appellant did not raise this issue on appeal, however, Judge Wood affirmed the district court on other grounds.\textsuperscript{136}

\textit{EEOC v. Concentra Health Services, Inc.}\textsuperscript{137} is another interesting post-\textit{Twombly} case; however, in \textit{Concentra}, the complaint failed to meet the liberal notice pleading standard despite the Seventh Circuit’s narrow reading of \textit{Twombly}.\textsuperscript{138} In \textit{Concentra}, an employee had filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging that Concentra fired him in retaliation for reporting two co-workers’ sexual affair.\textsuperscript{139} The EEOC subsequently filed suit against Concentra for retaliatory discharge in violation of Title VII of the Civil Rights Act.\textsuperscript{140} The district court dismissed the original complaint because it held that the employee’s report of the affair was not protected under Title VII.\textsuperscript{141} The EEOC subsequently filed an amended complaint, which was “markedly less detailed” and that did not include the specific facts contained in the employee’s report to the EEOC.\textsuperscript{142} The district court dismissed the amended complaint for failure to state a claim upon which relief could be granted, and the

\begin{footnotes}
\item 134 \textit{Id.}
\item 135 Judge Wood concluded as follows: “Taking \textit{Erickson} and \textit{Twombly} together, we understand the Court to be saying only that at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8.” \textit{Id.}
\item 136 \textit{Id.}
\item 137 496 F.3d 773 (7th Cir. 2007).
\item 138 \textit{Id.} at 781.
\item 139 \textit{Id.} at 775.
\item 140 \textit{Id.}
\item 141 \textit{Id.}
\item 142 \textit{Id.}
\end{footnotes}
EEOC appealed. Judge Cudahy wrote the majority opinion and held that the complaint failed to provide the notice required under Rule 8(a)(2). Judge Cudahy read *Twombly* “to impose two easy-to-clear hurdles.”

The first hurdle is to meet *Conley*’s requirement of giving the defendant fair notice of the claim and the grounds upon which it rests. The second hurdle is to plead factual allegations that bring the plaintiff’s claim beyond the “speculative” level to the level of “plausible.”

Applying this standard to the plaintiff’s complaint in *Concentra*, Judge Cudahy addressed the second hurdle first. Surprisingly, Judge Cudahy suggested that the EEOC had not failed to state a plausible claim even with its barebones complaint. Instead, Judge Cudahy reasoned that plausibility was a low threshold. Referring to the facts of *Erickson v. Pardus*, Judge Cudahy reasoned that the plaintiff’s retaliation claim seemed “no less plausible than that a prison doctor might improperly withhold desperately needed medication.” Thus, just like Judge Wood in *Airborne*, Judge Cudahy relied on *Erickson v. Pardus* to support a narrow reading of *Twombly*.

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143 Id.
144 Id.
145 Id. at 781.
146 Id. at 776.
147 Id. (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).
148 Id. (quoting *Twombly*, 550 U.S. at 555).
149 Id. at 777.
150 See id. at 777–79. This was in part because “Concentra does not contend that the bare allegations of the amended complaints’ seventh paragraph fail to plausibly suggest a right to relief.” Id. at 777.
151 Id. at 777 n.1.
153 *Airborne Beepers & Video v. AT&T Mobility*, 499 F.3d 663, 667 (7th Cir. 2007).
154 *Concentra*, 496 F.3d at 777 n.1.
Returning to the first hurdle, Judge Cudahy then wrote that a complaint must contain “very minimal” factual detail to satisfy the notice requirements of Rule 8(a)(2). Judge Cudahy held that the EEOC’s complaint was too minimal to provide fair notice, however. He pointed out that, after the EEOC’s original complaint had been dismissed for failure to state a claim, the EEOC had merely deleted information from its complaint to “disguise the nature of the claim before the court.” Judge Cudahy wrote that this practice of “obfuscation” was inconsistent with the principles of notice pleading, and, therefore, the complaint was properly dismissed.

While the court’s holding in Concentra that the EEOC’s complaint did not provide sufficient notice because it was too vague and obfuscated seems correct, Concentra says a lot about the Seventh Circuit’s view of plausibility following Twombly. Judge Cudahy suggested that the EEOC’s barebones complaint stated a plausible claim even though the complaint was too vague to provide fair notice. This suggests that, even though Judge Cudahy saw the two “hurdles” facing pleadings to be “easy to clear,” he may have considered providing fair notice to be a higher hurdle than stating a

155 Id. at 779 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)) (stating that the “classic verbal formulation” of Rule 8(a)(2)’s requirements is that the complaint “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests”).
156 Id. at 781.
157 Id. at 780.
158 Id. at 780–81.
159 Id. at 780 (“The claim itself was set forth in less than a page and the critical details were contained in a single eight-line paragraph, the very paragraph targeted for excision in the amended complaint.”).
160 Id. at 777 n.1.
161 Id. at 781.
plausible claim.162 This is contrary to the widely held view that the Supreme Court raised the bar when it decided *Twombly*.163

In one last post-*Twombly*, pre-*Iqbal* case, Judge Posner adhered to a fairly narrow reading of *Twombly* but held that it applied to a complex case brought under the Racketeer Influenced and Corrupt Organizations Act (RICO).164 The court’s holding in *Limestone Development Corp. v. Village of Lemont, Illinois* comports with the view—which was widely held prior to *Iqbal*—that *Twombly*’s holding applied only to complex cases. In *Limestone*, the plaintiff sued a number of defendants, including the village in which his property was located, the mayor of the village, and the local park district, for acting in concert to prevent the plaintiff from developing his property, which resulted in the sale of the property at a loss.165 The plaintiff alleged that the defendants’ coordinated conduct violated RICO.166 The district court dismissed the complaint for failure to state a claim, and the court of appeals affirmed.167

Judge Posner reasoned that, although *Twombly* “must not be over-read,” the principle underlying its holding is that defendants “should not be forced to undergo costly discovery” unless a complaint shows “that the plaintiff has a substantial case.”168 Judge Posner held that this principle is applicable to a RICO case, which is complex like the antitrust case that was the subject of *Twombly*.169 Judge Posner held that dismissal of the complaint was proper because the plaintiff’s allegations were “threadbare” and contained no indication of “a

162 See id. at 776–77, 777 n.1, 780–81.
163 See e.g., Swanson v. Citibank, 614 F.3d 400, 404 (7th Cir. 2010) (“[t]he question with which courts are still struggling is how much higher the Supreme Court meant to set the bar”).
164 *Limestone Dev. Corp. v. Vill. of Lemont, Ill.*, 520 F.3d 797, 799 (7th Cir. 2008).
165 Id.
166 Id.
167 Id. at 802–05.
168 Id. at 802–03.
169 Id. at 803.
structure of any kind,” which is necessary to state a claim under RICO.170

C. Seventh Circuit Cases Following Iqbal

After the Supreme Court held in Ashcroft v. Iqbal that Twombly’s plausibility requirement applies “to all civil actions,”171 one would imagine that courts would stop reading Twombly narrowly. However, in Smith v. Duffey, one of the first Seventh Circuit cases decided following Iqbal, Judge Posner continued to take a narrow view of Twombly and declined to apply either Twombly or Iqbal to the facts of the case.172 In Smith, the plaintiff sued his former employer for fraud in connection with cancellation of stock options in the employer’s Chapter 11 bankruptcy reorganization.173 Prior to his employer’s bankruptcy, the plaintiff had signed a termination agreement and received a $1.4 million severance.174 After he discovered that his stock options were extinguished in the reorganization, the employee sued.175 He alleged that, had the defendants told him that his stock options were to be extinguished in the bankruptcy, he would have demanded a higher severance.176 The district court dismissed the complaint for failure to state a claim, and the court of appeals affirmed.177

Writing for the majority, Judge Posner held that the plaintiff had not stated a claim for fraud where he was in a weak bargaining position and where it would have been highly unlikely that he could have demanded a higher severance in exchange for his stock

170 Id. at 803–05.
172 See Smith v. Duffey, 576 F.3d 336, 340 (7th Cir. 2009) (“So maybe neither Bell Atlantic nor Iqbal governs here. It doesn’t matter.”).
173 Id. at 336–37.
174 Id.
175 Id. at 337.
176 Id.
177 Id. at 336, 339.
Judge Posner reasoned that the stock options were valueless at the time the plaintiff received his severance and that any reasonable businessperson would have known this. Judge Posner did not rely on *Twombly* or *Iqbal*, but instead reasoned that it was apparent from the plaintiff’s complaint and arguments alone “that his case has no merit.”

Even if the inadequacy of the plaintiff’s complaint was apparent, *Smith* is significant because of Judge Posner’s proposed narrow reading of *Twombly* and *Iqbal*. In declining to apply either *Twombly* or *Iqbal* to the facts of *Smith*, Judge Posner suggested that *Twombly* was limited to complex litigation cases and that *Iqbal* was limited to cases in which the defendant had pleaded a defense of official immunity. This reading is consistent with the court’s trend pre-*Iqbal* of reading *Twombly* narrowly.

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178 *Id.* at 338–39.
179 *Id.*
180 *Id.* at 339–40.
181 See, e.g., Boroff v. Alza Corp., 685 F. Supp. 2d 704, 707 (N.D. Ohio 2010) (citing *Smith*, 576 F.3d at 339–40) (“Questions as to the scope of the *Iqbal* and *Twombly* pleading standards have generated much discussion among lawyers and judges of late. . . . Judge Posner’s proposed (narrow) reading of *Iqbal* and *Twombly* holds obvious appeal to lawyers and judges familiar with the venerable *Conley* pleading standard. But it cannot be reconciled with the clear statement in *Iqbal* that the *Twombly* standard applies to ‘all civil actions’”).
182 *Smith*, 576 F.3d at 339–340 (“In our initial thinking about the case, however, we were reluctant to endorse the district court’s citation of the Supreme Court’s decision in [Twombly], fast becoming the citation du jour in Rule 12(b)(6) cases, as authority for the dismissal of this suit. The Court held that in complex litigation . . . the defendant is not to be put to the cost of pretrial discovery . . . unless the complaint says enough about the case to permit an inference that it may have real merit. The present case, however, is not complex.”).
183 *Id.* at 340 (noting that *Iqbal* had extended the holding of *Twombly* to all civil cases, but that, nonetheless, “*Iqbal* is special in its own way, because the defendants had pleaded a defense of official immunity and the Court said that the promise of minimally intrusive discovery ‘provides especially cold comfort in this pleading context’”) (emphasis in original).
By the time the Court of Appeals for the Seventh Circuit decided *Cooney v. Rossiter*, Judge Posner had become slightly more willing to rely upon *Twombly* and *Iqbal*. In *Cooney*, after the plaintiff lost custody of her two children in a state court child custody proceeding, she brought a § 1983 action pro se against the state court judge who presided over the proceeding, against the court-appointed children’s representative, and against the court-appointed children’s psychiatrist. During the child custody proceeding, the state court judge had found that the plaintiff suffered from Munchausen syndrome by proxy, which is a disorder in which “an individual produces or feigns physical or emotional symptoms in another person under his or her care.” Based upon this finding, the judge had granted custody to the children’s father. In her subsequent federal case, the mother alleged that the defendants had conspired together to deprive her of numerous constitutional rights. The district court dismissed the complaint for failure to state a claim, and the plaintiff appealed.

Judge Posner wrote for the court and affirmed the district court’s dismissal of the complaint. In reaching his holding, Judge Posner took a slightly less narrow reading of *Twombly* and *Iqbal* than he had in *Smith v. Duffey*. However, even though Judge Posner acknowledged that *Iqbal* extended *Twombly*’s plausibility requirement

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184 583 F.3d 967 (7th Cir. 2009).
185 See id. at 971 (applying *Twombly* and *Iqbal* to a complaint alleging civil conspiracy).
186 Id. at 969.
187 Id.
188 Id.
189 Id. at 970.
190 Id. at 969.
191 Id. at 972.
192 Compare Smith v. Duffey, 576 F.3d 336, 340 (7th Cir. 2009) (limiting *Twombly* to complex cases and *Iqbal* to cases involving the defense of official immunity), with *Cooney*, 583 F.3d at 971 (holding that the decision whether to apply *Twombly* and *Iqbal* “is relative to the circumstances” and is not strictly limited to those two situations).
“to litigation in general,” he did not take this to mean that the same level of plausibility applies to all civil cases. Instead, Judge Posner reasoned that “the height of the pleading requirement is relative to the circumstances.”

Under the circumstances of Cooney, Judge Posner felt that a high standard of plausibility was warranted. Judge Posner saw Cooney as a case in which a “paranoid pro se” alleged that the parties involved in a contentious child custody battle were guilty of a “vast [and] encompassing conspiracy.” Judge Posner held that, under these circumstances, the complaint did not meet the requisite level of plausibility and, therefore, was properly dismissed.

Finally, in Brooks v. Ross, the Court of Appeals for the Seventh Circuit continued to take a fairly narrow reading of Twombly and Iqbal but affirmed the district court’s dismissal of a complaint. In Brooks, the plaintiff brought a § 1983 action against members of the Illinois Prison Review Board (PRB) and other state officials for malicious prosecution, civil conspiracy, and other claims. The plaintiff alleged that the defendants had conspired to indict him on charges of official misconduct and wire fraud in connection with a 2002 PRB hearing, of which the plaintiff was later acquitted. The district court dismissed the complaint for failure to state a claim, and the court of appeals affirmed.

The opinion that Judge Diane Wood wrote for the court in Brooks was reminiscent of her pre-Iqbal opinions. Judge Wood held that the plaintiff’s allegations of conspiracy and malicious prosecution did not

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193 Cooney, 583 F.3d at 971.
194 Id.
195 Id.
196 Id.
197 Id.
198 Id. at 972.
199 578 F.3d 574 (7th Cir. 2009).
200 Id. at 577–78.
201 Id.
202 Id. at 578, 582.
state a claim upon which relief could be granted.\(^{203}\) In reaching this holding, Judge Wood reasoned that the allegations were too conclusory and formulaic to give the defendants fair notice of the plaintiff’s claims and the grounds upon which they rested.\(^{204}\) Judge Wood’s emphasis on the notice pleading aspect of *Twombly* and *Iqbal* was similar to her approach in prior cases in which she interpreted *Twombly*’s plausibility requirement to mean that some allegations may be “so sketchy or implausible” that they fail to give sufficient notice.\(^{205}\)

### III. The Debate Heats Up: *Swanson v. Citibank*

Until recently, the differing interpretations of *Twombly* and *Iqbal* espoused by the judges on the Court of Appeals for the Seventh Circuit had not directly clashed. But that changed in *Swanson v. Citibank*, where the plaintiff sued Citibank, a real estate appraisal company, and the appraisal company’s employee for discrimination in violation of the Fair Housing Act\(^{206}\) after Citibank denied her application for a home-equity loan.\(^{207}\) The pro se plaintiff alleged that the defendants had discriminated against her on the basis of race by under-appraising her home for the purpose of denying her loan application.\(^{208}\) The district court granted the defendants’ Rule 12(b)(6)

\(^{203}\) Id. at 581–82.

\(^{204}\) Id.

\(^{205}\) See Airborne Beepers & Video v. AT&T Mobility, 499 F.3d 663, 667 (7th Cir. 2007) (“Taking Erickson and *Twombly* together, we understand the Court to be saying only that at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8.”); see also Doss v. Clearwater Title Co., 551 F.3d 634, 639 (7th Cir. 2008) (“The Supreme Court’s decision in *Erickson v. Pardus* . . . put to rest any concern that *Twombly* signaled an end to notice pleading in the federal courts.”).


\(^{207}\) Swanson v. Citibank, 614 F.3d 400, 402 (7th Cir. 2010).

\(^{208}\) Id.
motion to dismiss, and the court of appeals reversed.209 The court of appeals held that, under *Twombly* and *Iqbal*, the plaintiff’s complaint sufficiently stated a plausible claim upon which relief could be granted.210

Judge Diane Wood wrote for the majority in *Swanson* and read *Twombly* and *Iqbal* very liberally.211 Although Judge Wood’s reading of *Twombly* and *Iqbal* did not change significantly from prior cases, she stated her position more strongly than she had before. First, Judge Wood began by acknowledging that courts are still struggling to determine “how much higher the Supreme Court meant to set the bar” when it decided *Twombly* and *Iqbal*.212 She then repeated her oft-stated position that, following the trio of *Twombly*, *Erickson*, and *Iqbal*, notice pleading is still the applicable standard in federal courts.213

Next, she reasoned that notice pleading “is the light in which” *Twombly* and *Iqbal*’s plausibility requirement must be read.214 Judge Wood held that, reading *Twombly* and *Iqbal* in this light, a complaint must only include sufficient factual detail “to present a story that holds together.”215 Judge Wood explained that, in assessing this, judges should ask themselves “could these things have happened, not did they happen.”216

Judge Wood further supported her liberal reading of *Twombly* and *Iqbal* by reasoning that “[t]he Supreme Court’s explicit decision to reaffirm the validity of *Swierkiewicz v. Sorema*, which was cited with approval in *Twombly*, indicates that in many straightforward cases, it will not be any more difficult today for a plaintiff to meet [the

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209 Id. at 402, 407.
210 Id. at 402–07. The court affirmed the district court’s dismissal of the plaintiff’s common-law fraud claims because her complaint failed to plead facts with the particularity required under Federal Rule of Civil Procedure 9. Id. at 406.
211 See id. at 402–07.
212 Id. at 403 (citations omitted).
213 Id. at 404.
214 Id.
215 Id.
216 Id.

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requirements of notice pleading] . . . than it was before the Court’s recent decisions."\textsuperscript{217} This may not be true in complex cases, Judge Wood acknowledged, because complex cases “require more detail, both to give the opposing party notice of what the case is all about and to show how, in the plaintiff’s mind at least, the dots should be connected.”\textsuperscript{218}

Applying her liberal reading of \textit{Twombly} and \textit{Iqbal} to the facts of \textit{Swanson}, Judge Wood held that the plaintiff’s complaint was sufficiently detailed.\textsuperscript{219} Judge Wood reasoned that the plaintiff’s complaint, which identified the type of discrimination, who was responsible for it, and when it occurred, included all it needed to give the defendants fair notice of the claim and, thus, to survive a motion to dismiss.\textsuperscript{220}

In dissent, Judge Richard Posner criticized the majority’s reading of \textit{Twombly} and \textit{Iqbal} and, in a departure from prior cases, advocated for a broader application of \textit{Twombly} and \textit{Iqbal}.\textsuperscript{221} Instead of following the narrow reading of \textit{Iqbal} that he formulated in \textit{Smith v. Duffy}\textsuperscript{222} and promulgated in \textit{Cooney v. Rossiter},\textsuperscript{223} Judge Posner seemed to agree this time that \textit{Iqbal} was not limited to cases involving the defense of qualified immunity, reasoning that the language of the \textit{Iqbal} opinion suggests that \textit{Iqbal} was “a strong case for application of the \textit{Twombly} standard, rather than . . . the only type of discrimination case to which the standard applies.”\textsuperscript{224}

Next, Judge Posner criticized the majority’s liberal reading of \textit{Twombly} and \textit{Iqbal}. Judge Posner wrote that the majority’s reading suggests “that discrimination cases are outside the scope of \textit{Iqbal},

\textsuperscript{217} \textit{Id.} (citations omitted)
\textsuperscript{218} \textit{Id.} at 405.
\textsuperscript{219} \textit{Id.}
\textsuperscript{220} \textit{Id.}
\textsuperscript{221} \textit{Id.} at 407–12 (Posner, J., dissenting).
\textsuperscript{222} 576 F.3d 336, 340 (7th Cir. 2009).
\textsuperscript{223} 583 F.3d 967, 971 (7th Cir. 2009).
\textsuperscript{224} \textit{Swanson}, 614 F.3d at 407 (Posner, J., dissenting).
itself a discrimination case.” Judge Posner pointed out that the majority’s opinion distinguished between simple discrimination cases, of which the majority required minimal allegations to survive a motion to dismiss, and complex cases, of which the majority required more detailed allegations. Judge Posner agreed that requiring more detail for the complex cases made sense, because Twombly itself was a complex case. But Judge Posner suggested that it was illogical to lower the bar for even straightforward discrimination claims, because Iqbal was a discrimination case, and it “was not especially complex.”

Judge Posner went on to offer his own interpretation of Twombly and Iqbal’s plausibility requirement. He read Twombly and Iqbal to mean that a complaint must contain sufficient allegations to defeat any “obvious alternative explanation” for the plaintiff’s injury. In this case, Judge Posner saw error to be an obvious alternative explanation for the defendant’s denial of the plaintiff’s loan application. He reasoned that “errors in appraising houses are common because ‘real estate appraisal is not an exact science.’” Therefore, Judge Posner concluded that the allegation of discrimination was not plausible and that the district court’s dismissal should have been affirmed.

Based on Judge Posner’s dissent in Swanson, it is clear that his interpretation of Twombly and Iqbal’s plausibility requirement has continued to evolve. In Smith v. Duffy, Judge Posner seemed unwilling to apply Iqbal outside of the qualified immunity context at all. In Cooney v. Rossiter, Judge Posner held that a heightened plausibility

225 Id.
226 Id.
227 Id. at 407–08.
228 Id. at 408.
229 Id. (quoting Iqbal, 129 S. Ct. at 1951–52).
230 Id. at 408–09.
231 Id. at 408 (quoting Latimore v. Citibank Fed. Sav. Bank, 151 F.3d 712, 715 (7th Cir. 1998)).
232 Id. at 407–12.
233 576 F.3d 336, 340 (7th Cir. 2009).
standard made sense in the case of a “paranoid pro se” whose lawsuit threatened multiple defendants with costly discovery.234 But in Swanson, Judge Posner’s dissent suggested that a heightened plausibility requirement should be imposed in even the simplest of discrimination cases.235 No longer is Judge Posner advocating for a narrow reading of Twombly and Iqbal.236 Instead, the reading that Judge Posner advocates in Swanson is reminiscent of the “robust gatekeeping regime” that Professors Clermont and Yeazell warn us about237—if the plaintiff’s complaint does not contain sufficient factual allegations to override any other natural, legal explanation for the plaintiff’s injury, the complaint will be dismissed and the gates closed.238

IV. SETTLING THE SEVENTH CIRCUIT’S DEBATE OVER THE PLAUSIBILITY REQUIREMENT

In 1928, Judge Charles E. Clark said that “[i]n pleading, an eternal dilemma presents itself: How shall we make procedural rules definite enough to work and yet flexible enough to do justice?”239 Judge Clark’s observation has stood the test of time, because the United States Supreme Court is clearly still grappling with that dilemma. In 2007, the Supreme Court thought that the standard for pleading had become too flexible, because in Bell Atlantic Corp. v. Twombly, it raised the bar by jettisoning Conley v. Gibson’s “no set of facts” language240 and replacing it with a heightened plausibility requirement.241 But, as Seventh Circuit Judge Diane Wood recently pointed out in Swanson v. Citibank, “courts are still struggling [with]...

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234 583 F.3d 967, 971 (7th Cir. 2009).
235 Swanson, 614 F.3d at 407–12 (Posner, J., dissenting).
236 Id. at 407.
237 See Clermont & Yeazell, supra note 22, at 823
238 Swanson, 614 F.3d at 408 (Posner, J., dissenting).
239 CLARK, supra note 35, at vii.
how much higher the Supreme Court meant to set the bar.” According to Judge Wood’s majority opinion in Swanson, the Court did not raise the bar very much. According to Judge Richard Posner’s dissent in the same case, however, the Court raised the bar significantly. Which view is a better one—the one that gives pleading rules more bite, or the one that keeps them flexible? Put another way, should federal courts keep the gates relatively wide open, or should they lock them up?

A. The Two Competing Interpretations: Judge Wood’s “Could this Have Happened?” View Versus Judge Posner’s “Obvious Alternative Explanation” View

The disagreement between the majority and dissenting opinions in Swanson v. Citibank can be characterized as a debate over which one of two views should prevail. One view, adopted by Judge Wood in Swanson, interprets Twombly and Iqbal’s plausibility requirement to mean that the allegations contained in a complaint must set forth a scenario that could have happened (i.e., the claim to relief is plausible because the scenario alleged in the complaint could have occurred). The other view, adopted by Judge Posner in his dissent in Swanson, interprets Twombly and Iqbal’s plausibility requirement to mean that a complaint’s allegations must contain sufficient factual detail to override any “obvious alternative explanation” for the defendant’s conduct (i.e., the claim to relief is plausible because there is not a more

242 Swanson, 614 F.3d at 403.
243 See id. at 404 (“As we understand it, the Court is saying that the plaintiff must give enough details about the subject-matter of the case to present a story that holds together.”).
244 See id. at 408 (Posner, J., dissenting) (“The Supreme Court would consider error the plausible inference in this case, rather than discrimination, for it said in Iqbal that ‘as between that ‘obvious alternative explanation’ for the [injury of which the plaintiff is complaining] and the purposeful, invidious discrimination [the plaintiff] asks us to infer, discrimination is not a plausible conclusion.’”).
245 Id. at 404.
natural, lawful explanation for the plaintiff’s injury). Thus, the central debate concerns whether Judge Wood’s “could this have happened?” view or Judge Posner’s “obvious alternative explanation” view should prevail.

Providing a framework that helps to harmonize these competing views, Professor Allan Ides has broken down the principles underlying Federal Rule of Civil Procedure 8(a)(2) into three separate requirements. The first principle, “transactional sufficiency,” is the idea that a complaint must include sufficient factual detail to move the claim beyond an “abstract assertion of a right” to a claim that is “premised on an actual, identifiable event.” The second principle, “procedural sufficiency,” is the idea that a complaint should include sufficient factual detail to give the opposing party fair notice of the claim and the grounds upon which it rests (this is Conley v. Gibson’s notice requirement). The third and final principle, “substantive sufficiency,” is the idea that the complaint’s factual allegations should be sufficient to give rise to a recognized legal claim.

Using Ides’s framework, Judge Diane Wood’s “could this have happened?” view and Judge Richard Posner’s “obvious alternative explanation” view differ significantly in the level of emphasis that they place on “transactional sufficiency,” “procedural sufficiency,” and “substantive sufficiency.” Judge Wood’s view emphasizes “transactional sufficiency” and “procedural sufficiency.” When Judge Wood writes that Twombly and Iqbal’s plausibility requirement means that a complaint must provide enough factual detail “to present a story that holds together,” she asks for a minimal indication that the complaint’s claim to relief is “premised on an actual, identifiable

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246 Id. at 408 (Posner, J., dissenting).
248 Id.
249 Id.
250 Id.
251 Swanson, 614 F.3d at 404.
event.”\footnote{Ides, supra note 247, at 607.} Under this approach, if it appears from the complaint’s factual allegations that the underlying event \textit{could} have happened, then the complaint is sufficient.\footnote{Swanson, 614 F.3d at 404.}

But Judge Wood’s view of the requisite “transactional sufficiency” must be interpreted in light of \textit{Twombly} and \textit{Iqbal}’s holdings. Although the Court in \textit{Iqbal} said that the “plausibility standard is not akin to a ‘probability requirement,’”\footnote{Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).} and although the Court in \textit{Twombly} said that “a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable”\footnote{Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007).}—both of which support Judge Wood’s liberal reading of the cases—the Court in \textit{Iqbal} went on to say that plausibility “asks for more than a sheer possibility that a defendant has acted unlawfully.”\footnote{Id.} So, in order to read Judge Wood’s majority opinion in harmony with \textit{Twombly} and \textit{Iqbal}, one must read it as requiring more than sheer possibility. One must read her inquiry—“\textit{could} this have happened?”—as referring to the line that divides sheer possibility from plausibility. Judge Wood premised her holding in \textit{Swanson} by stating that “[i]t is by now well established that a plaintiff must do better than putting a few words on paper that, in the hands of an imaginative reader, \textit{might} suggest that something has happened to her that \textit{might} be redressed by the law.”\footnote{Swanson, 614 F.3d at 403.} Thus, we can interpret Judge Wood as equating the term “\textit{might}” with sheer plausibility, which is insufficient to state a plausible claim, and equating the term “\textit{could}” with plausibility, which is sufficient.

Additionally, as mentioned several times already, Judge Wood’s reading of \textit{Twombly} and \textit{Iqbal} places much emphasis on the principle of “procedural sufficiency.” In nearly every one of her post-\textit{Twombly} cases, Judge Wood has focused her interpretation of “plausibility” on whether the plaintiff’s complaint provides sufficient factual detail to

\begin{footnotesize}
\begin{enumerate}
\item Ides, supra note 247, at 607.
\item Swanson, 614 F.3d at 404.
\item Id.
\item Swanson, 614 F.3d at 403.
\end{enumerate}
\end{footnotesize}
give the defendant fair notice of the claim and the grounds upon which it rests.258

Judge Posner’s “obvious alternative explanation” view, on the other hand, focuses more on “substantive sufficiency” than “transactional sufficiency” or “procedural sufficiency.” For example, Judge Posner described his view of the line dividing sheer possibility and plausibility this way:

In statistics the range of probabilities is from 0 to 1, and therefore encompasses “sheer possibility” along with “plausibility.” It seems . . . what the Court was driving at was that even if the district judge doesn’t think a plaintiff’s case is more likely than not to be a winner (that is, doesn’t think $p > .5$), as long as it is substantially justified that’s enough to avert dismissal.259

But what does Judge Posner mean by “substantially justified”? We must read this in context with his view that Twombly and Iqbal require courts to dismiss as implausible any claim to relief that is based upon an injury that has an “obvious alternative explanation.”260 So, in Judge Posner’s view, it is not sufficient for a complaint to merely give an indication that the plaintiff’s claim is “premised on an actual, identifiable event” or to give the defendant notice of the claim and the grounds upon which it rests.261 Instead, the complaint’s factual allegations must be sufficiently detailed to override any more natural,

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258 See Airborne Beepers & Video v. AT&T Mobility, 499 F.3d 663, 667 (7th Cir. 2007) (“Taking Erickson and Twombly together, we understand the Court to be saying only that at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8.”); see also Doss v. Clearwater Title Co., 551 F.3d 634, 639 (7th Cir. 2008) (“The Supreme Court’s decision in Erickson v. Pardus . . . put to rest any concern that Twombly signaled an end to notice pleading in the federal courts.”).

259 Swanson, 614 F.3d at 411 (Posner, J., dissenting).

260 See id. at 408.

261 See Ides, supra note 247, at 607.
legal explanation for the plaintiff’s injury. Because a plaintiff’s injury that has an obvious natural explanation that does not involve wrongful conduct would not give rise to a recognized legal claim, one can see that Judge Posner’s “obvious alternative explanation” view places most of its emphasis on “substantive sufficiency.” Notably, Judge Wood directly disagreed with Judge Posner’s emphasis on heightened substantive sufficiency: She wrote that plausibility “does not imply that the district court should decide whose version to believe, or which version is more likely than not.”

B. The Problem with “Judicial Experience and Common Sense”

Professor Suja A. Thomas has argued that, following Twombly and Iqbal, the Rule 12(b)(6) motion to dismiss has become the “new summary judgment motion.” Professor Thomas bases her argument, in part, on judges’ tendency following Twombly and Iqbal to rely on their own opinions of the sufficiency of the evidence to decide motions to dismiss. The language from Iqbal that courts must look to their “judicial experience and common sense” to decide a motion to dismiss encourages judges to look beyond allegations of a complaint to decide whether the claim is plausible. This practice, which is apparent in Judge Posner’s dissent in Swanson, is problematic because it tends to transform a motion to dismiss into a

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262 Swanson, 614 F.3d at 408.
263 See Ides, supra note 247, at 607. Substantive sufficiency requires that the complaint “allege facts sufficient to show that the pleader is entitled to relief.” Id.
264 Swanson, 614 F.3d at 404.
265 Thomas, supra note 19, at 17.
266 Id. at 31, 41.
267 Iqbal, 129 S. Ct. at 1950.
268 Thomas, supra note 19, at 31 (“This language in Iqbal seems to permit judges to use their own opinions to assess the sufficiency of facts to decide motions to dismiss similar to what we see judges do in deciding summary judgment.”).
motion for summary judgment, thus giving judges too much power over the parties at an early stage in the litigation.\footnote{Thomas, supra note 19, at 31.}

1. Comparison of Rule 12(b)(6) and Rule 56

On their faces, the standards for a Rule 12(b)(6) motion to dismiss and for a Rule 56 motion for summary judgment are very different.\footnote{Id. at 28.} Rule 12(b)(6) provides that a court may dismiss a complaint on motion for “failure to state a claim upon which relief can be granted.”\footnote{FED. R. CIV. P. 12(b)(6).} Rule 56 provides that summary judgment “should be rendered if . . . there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law.”\footnote{FED. R. CIV. P. 56(c)(2).} Rule 12(b)(6) focuses on defects on the face of a pleading, while Rule 56 focuses on the lack of disputed material facts underlying a controversy.\footnote{FED. R. CIV. P. 12(b)(6); FED. R. CIV. P. 56(c)(2).}

Judges are also to consider different things when deciding the motions.\footnote{Thomas, supra note 19, at 28.} Traditionally, when deciding a Rule 12(b)(6) motion to dismiss, judges are to look only to the allegations contained within the four corners of the complaint.\footnote{Karagiannis v. Allcare Dental Mgmt., LLC, No. 10-2085, 2010 WL 3724767, at *1 (C.D. Ill. Aug. 26, 2010) (citing Venture Assocs. Corp. v. Zenith Data Sys. Corp., 987 F.2d 429, 431 (7th Cir. 1993)) (“When considering a motion to dismiss for failure to state a claim, the Court is limited to the allegations contained in the pleadings.”); see also FED. R. CIV. P. 12(d) (“If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.”).} The court is to assume as true all well-pleaded facts, although not legal conclusions,\footnote{Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949–50 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)) (holding that, “[a]lthough for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we ‘are not bound to accept as true a legal conclusion couched as a factual allegation’”).} and then to
determine if those facts “state a claim upon which relief can be granted.”278 If the parties present facts outside of the pleadings in support of or in opposition to a Rule 12(b)(6) motion to dismiss, the court is to treat the motion as one for summary judgment.279

When deciding a motion for summary judgment under Rule 56, on the other hand, a court is to look to “the pleadings, the discovery and disclosure materials on file, and any affidavits.”280 Judges are not limited to the four corners of the complaint but are to examine all of the evidence that has been developed through discovery.281 If these materials reveal a “genuine issue of material fact,” then summary judgment is improper.282 A genuine issue of material fact exists “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.”283

2. Convergence of Motion to Dismiss and Motion for Summary Judgment

Professor Thomas argues that Twombly and Iqbal threaten to convert the Rule 12(b)(6) motion to dismiss into the new motion for summary judgment.284 She provides three similarities between the motion to dismiss following Twombly and Iqbal and the motion for summary judgment.285 First, following Twombly and Iqbal, a complaint must state a claim that is plausible,286 which is also a standard that the Supreme Court has used in deciding summary

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278 FED. R. CIV. P. 12(b)(6).
279 FED. R. CIV. P. 12(d).
280 FED. R. CIV. P. 56(c)(2).
281 Id.
282 Id.
284 Thomas, supra note 19, at 17.
285 Id. at 29–31.
judgment motions.\textsuperscript{287} Professor Thomas points out that, in \textit{Bell Atlantic Corp. v. Twombly}, the Supreme Court cited one of its seminal summary judgment opinions, \textit{Matsushita Electric Industrial Co. v. Zenith Radio Corp.},\textsuperscript{288} as support for its new plausibility requirement.\textsuperscript{289} In \textit{Matsushita}, the Supreme Court held, in part, that summary judgment was proper and that there was no genuine issue of material fact concerning the plaintiff’s allegations of antitrust conspiracy where it was “equally plausible” based on the evidence presented that the defendants’ conduct was entirely legal.\textsuperscript{290}

The second similarity is that judges tend to draw inferences in favor of both the moving and the non-moving parties when deciding both motions to dismiss and motions for summary judgment.\textsuperscript{291} Professor Thomas points to the Court’s decision in \textit{Matsushita}, in which it held that, although a court must view “the inferences to be drawn from the underlying facts . . . in the light most favorable” to the non-moving party, it must view these inferences “in light of the competing inferences.”\textsuperscript{292} Professor Thomas also points to the Court’s decisions in \textit{Twombly} and \textit{Iqbal}, in which the Court drew inferences in favor of the parties moving for dismissal as well as the non-moving parties.\textsuperscript{293} In \textit{Twombly}, the Court drew the inference in favor of the moving party that the defendants’ conduct was consistent with uncoordinated monopolistic behavior.\textsuperscript{294} In \textit{Iqbal}, the Court drew the inference in favor of the moving party that the defendants’ policy of arresting Arab-Americans was consistent with a “nondiscriminatory intent” to detain aliens who were illegally in the United States and

\textsuperscript{287} Thomas, \textit{supra} note 19, at 29 (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)).

\textsuperscript{288} 475 U.S. 574.

\textsuperscript{289} Thomas, \textit{supra} note 19, at 25 (citing \textit{Twombly}, 550 U.S. at 561 n.7).

\textsuperscript{290} \textit{id.} at 20 (citing \textit{Matsushita}, 475 U.S. at 588).

\textsuperscript{291} \textit{id.} at 30.

\textsuperscript{292} \textit{id.} at 20 (quoting \textit{Matsushita}, 475 U.S. at 587–88).

\textsuperscript{293} \textit{id.} at 25, 27 (citing \textit{Twombly}, 550 U.S. at 567–69 n.13; Ashcroft v. \textit{Iqbal}, 129 S. Ct. 1937, 1949–50 (2009)).

\textsuperscript{294} See 550 U.S. at 568–70.
who had potential connections to the September 11 terrorist attacks.\footnote{See 129 S. Ct. at 1951.}

The Court in \textit{Iqbal} held that judges must use their “judicial experience and common sense” to draw these inferences and that a claim is plausible only when “the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”\footnote{Thomas, supra note 19, at 27 (quoting \textit{Iqbal}, 129 S. Ct. at 1949–50).}

The third similarity between the motion to dismiss following \textit{Twombly} and \textit{Iqbal} and the motion for summary judgment is judges’ reliance on their own opinions of the sufficiency of the evidence to decide the motions.\footnote{Id. at 31.} Professor Thomas argues that judges deciding motions for summary judgment rely on their own opinions of the sufficiency of the evidence—judges use phrases like “a reasonable jury could find” but nonetheless often disagree over whether summary judgment is proper.\footnote{Id.} Regarding motions to dismiss, on the other hand, the Supreme Court in \textit{Iqbal} expressly stated that judges are to rely on their “judicial experience and common sense” to decide such motions.\footnote{\textit{Iqbal}, 129 S. Ct. at 1950.} Professor Thomas quotes one commentator who criticized this language because “it obviously licenses highly subjective judgments . . . [t]his is a blank check for federal judges to get rid of cases they disfavor.”\footnote{Thomas, supra note 19, at 32 (quoting Adam Liptak, \textit{Case About 9/11 Could Lead to a Broad Shift on Civil Lawsuits}, N.Y.TIMES, July 20, 2009, at A10).} As discussed below, the invitation for judges to look to their “judicial experience and common sense” to decide motions to dismiss gives them too much power over parties at an early stage in litigation.\footnote{Id. at 41.}
3. The Problem with Converting the Motion to Dismiss into a Motion for Summary Judgment

As Professor Thomas argues, one important problem with converting the motion to dismiss into the “new summary judgment motion”\(^\text{302}\) is that the parties have not had the opportunity to develop evidence through discovery at the motion-to-dismiss stage.\(^\text{303}\) A judge deciding a motion for summary judgment examines all of the evidence that the parties have uncovered through discovery to determine whether there are any genuine issues of material fact and whether a “reasonable jury” could find for the non-movant.\(^\text{304}\) At this stage, the parties have had the opportunity to develop evidence through discovery and to present it to the judge in a persuasive manner.\(^\text{305}\)

At the motion-to-dismiss stage, on the other hand, the parties have not had the opportunity to develop evidence through discovery.\(^\text{306}\) The judge is limited to those factual allegations contained in the complaint.\(^\text{307}\) Asking a judge to determine whether those factual allegations present a plausible claim is akin to asking the judge to decide whether the evidence before him on a motion for summary judgment presents a genuine issue of material fact, but without the benefit of having fully-developed evidence before him.\(^\text{308}\) Therefore, when a judge is permitted to look to his or her “judicial experience and common sense” to determine plausibility, the judge is given great power over the parties.\(^\text{309}\) The judge is granted the power to draw inferences in favor of the defendant moving for dismissal based upon his or her opinion of the sufficiency of the scant allegations in the

\(^{302}\) Id. at 17.
\(^{303}\) Id. at 41.
\(^{305}\) Thomas, supra note 19, at 41.
\(^{306}\) Id.
\(^{307}\) Id.
\(^{308}\) Id.
\(^{309}\) Id.
The risk is that judges will dismiss cases that would have been plausible had the parties had the opportunity to develop evidence through discovery and present it to the judge.

C. An Argument for Judge Wood’s Interpretation of the Plausibility Requirement

Analyzing the majority and dissenting opinions in Swanson using Professor Thomas’s “new summary judgment motion” argument and Professor Ides’s Rule 8(a)(2) framework leads to two conclusions. First, Judge Posner’s “obvious alternative explanation” view of Twombly and Iqbal’s plausibility requirement gives judges too much power to rely on their own opinions of what is plausible and focuses too heavily on determinations of substantive sufficiency at the motion-to-dismiss stage. Second, Judge Wood’s “could this have happened” view is better because it limits a court’s power to draw inferences in favor of the moving party and requires only a minimal, yet appropriate, amount of transactional and substantive sufficiency at the motion-to-dismiss stage.

1. Judge Posner’s Interpretation Gives Judges Too Much Power over Parties at the Motion-to-Dismiss Stage

Judge Posner’s interpretation of Twombly and Iqbal’s plausibility requirement places too much power in the hands of judges when deciding motions to dismiss. In his dissent in Swanson, Judge Posner did exactly what Professor Thomas warns us about: He delved into an extensive discussion of matters beyond the allegations of the complaint to conclude that the plaintiff’s claim of discrimination was not plausible. Judge Posner looked to the frequency of errors in real estate appraisals and to the difficulty of obtaining credit as a result of

310 Id. at 29–31, 41.
311 Id. at 39.
the housing crisis. These are considerations that went beyond the complaint’s allegations and that would have been more properly considered in deciding a motion for summary judgment than a motion to dismiss.

Judge Posner also drew inferences in favor of the defendants moving for dismissal in *Swanson*. Although Judge Posner agreed that the court must assume to be true the plaintiff’s allegation that the defendants’ low appraisal of her home was a mistake, he immediately countered that assumption by drawing an inference in favor of the defendants. Judge Posner wrote that, although “[w]e must assume that the appraisal was a mistake, and the house is worth considerably more, . . . errors in appraising a house are common because ‘real estate is not an exact science,’” but why is error the more obvious inference in this case? Why does error so strongly outweigh discrimination as a plausible explanation for the defendants’ low appraisal of Gloria Swanson’s home? Judge Posner says that “real estate appraisal is not an exact science,” but does that necessarily mean that it is implausible that a real estate appraiser could discriminate on the basis of race? Did Gloria Swanson’s complaint present only a “sheer possibility” of racial discrimination because “real estate appraisal is not an exact science”? Judge Posner ignored these questions and, without explanation, jumped to the conclusion that “[t]he Supreme Court would consider error the plausible inference in this case, rather than discrimination.” But why was error conclusively more plausible than discrimination?

The problem with Judge Posner’s approach is that it gives a judge too much power to look to his or her “judicial experience and common sense” to decide a motion to dismiss. The judge’s experience and

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313 Id.
315 *Swanson*, 614 F.3d at 408.
316 Id. (quoting Latimore v. Citibank Fed. Sav. Bank, 151 F.3d 712, 715 (7th Cir. 1998)).
317 Id.
318 Id.
common sense should be sources for an objective standard, not sources for extrajudicial facts or considerations upon which to base inferences of plausibility. In Swanson, Judge Posner went beyond the allegations of the complaint to look toward the frequency of error in real estate appraisals and the difficulty of obtaining credit following the housing crisis. But the parties had not had the opportunity to conduct discovery or to present evidence that would counter Judge Posner’s findings. At this early motion-to-dismiss stage, the parties would have been powerless to counter Judge Posner’s conclusion that error was a more plausible inference than discrimination.

2. Judge Wood’s Interpretation of the Plausibility Requirement Requires the Appropriate Level of Transactional and Substantive Sufficiency

Judge Wood’s interpretation of Twombly and Iqbal’s plausibility requirement, on the other hand, exhibits restraint and is fairer to the parties at the early motion-to-dismiss stage. Under Judge Wood’s approach, a court is not to “draw on its judicial experience and common sense” such that it draws inferences in favor of the movant based upon considerations beyond the allegations of the complaint. In fact, Judge Wood warned against this: “‘Plausibility’ in this context does not imply that the district court should decide whose version to believe, or which version is more likely than not.” Judge Wood also warned against granting a motion to dismiss based solely upon inferences favoring the movant: “[I]t is not necessary to stack up inferences side by side and allow the case to go forward only if the plaintiff’s inferences seem more compelling than the opposing inferences.” Instead, Judge Wood directed courts to draw on their “judicial experience and common sense” only to ask if the plaintiff has

319 See Thomas, supra note 19, at 31, 41.
320 See Swanson, 614 F.3d at 408–09.
321 See id. at 402–07.
322 Id. at 404.
323 Id.
given “enough details about the subject-matter of the case to present a story that holds together.”324 The central question for Judge Wood is “could these things have happened?”325 In answering this question, there is no room for judges to look towards facts or considerations beyond the complaint to draw inferences in favor of the defendant; a judge assessing whether a complaint’s “story” could have happened will not respond with discussions of the frequency of errors in real estate appraisals or the difficulty of obtaining credit in a bad housing market. Instead, the judge will look solely to the factual allegations contained in the complaint and ask whether, based upon his or her experience and common sense, there is enough to present a plausible claim of discrimination—is there enough to present a story of discrimination that “holds together”? Is there more than a “sheer possibility” of discrimination?

CONCLUSION

Judge Diane Wood’s majority opinion in Swanson v. Citibank provides a fair approach to interpreting and applying Twombly and Iqbal’s plausibility requirement. It is consistent with the traditional function of pleadings in the federal courts, which is to provide “a short and plain statement of the claim showing that the pleader is entitled to relief”326 and to “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.”327 After all, the Supreme Court’s trio of Twombly, Erickson, and Iqbal did not “cast any doubt on the validity of Rule 8.”328 The approach for which Judge Posner advocated in his dissent, on the other hand, would give judges too much power over the parties at a very early stage in litigation.329 By

324 Id.
325 Id.
326 FED. R. CIV. P. 8(a)(2).
328 Swanson, 614 F.3d at 403.
329 See Thomas, supra note 19, at 41.
permitting judges to look to their “judicial experience and common sense” for facts and considerations that support inferences that favor the party moving for dismissal, Judge Posner’s approach would become the “robust gatekeeping regime” that scholars have warned against. Judge Wood’s inquiry into “could this have happened?” and “does the story hold together?” provides an approach to pleadings that is “definite enough to work and yet flexible enough to do justice.”

330 See Clermont & Yezell, supra note 22, at 823.

331 See CLARK, supra note 35, at vii.
UNITED STATES V. BLAGOJEVICH: A STANDARD BAIT AND SWITCH

TIMOTHY J. LETIZIA*


INTRODUCTION

“How do you all like your first year of law school?” asked the man with the perfectly groomed hair. The response from the students at Chicago-Kent College of Law was mixed: some smiled, others shrugged, and the rest were too mesmerized by the hair and shiny suit to respond. “Well, I didn’t do so great in law school, but look at me now; I’m the Governor of Illinois.”

Less than four months after that brief visit to Chicago-Kent, news of the Governor’s arrest was splashed across headlines throughout Illinois, the United States, and even the world: “Illinois Gov. Rod Blagojevich arrested on federal charges.”

Not surprisingly, Blagojevich’s arrest, impeachment, and subsequent removal from office—most notably for his attempt to sell President Barack Obama’s vacated United States Senate seat—


garnered massive amounts of attention from the public and the media. For those interested in following his downfall and subsequent expulsion from public office, there was a nearly endless stream of sources from which to obtain information, including online sources such as blogs, Twitter, and Facebook. Even those members of the public who wished to avoid the media frenzy surrounding Rod Blagojevich were hard-pressed to avoid daily updates; this was especially true when Blagojevich’s federal trial date was announced.

Following the announcement of the trial date, the District Court for the Northern District of Illinois (Judge James B. Zagel presiding) began to receive e-mails and letters from members of the general public containing advice as to how he should rule. In light of the great public interest surrounding the trial, Judge Zagel stated in a public status hearing that he had “given some consideration to public anonymity of the jurors at [least] until the trial is over.” Judge Zagel considered deferring disclosure of the jurors’ names in order to prevent members of the public from contacting the jurors.

On May 17, 2010, Judge Zagel held an informal and off-the-record meeting with members of the media to discuss his intention to keep the names of the jurors anonymous until a verdict was reached.

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4 http://twitter.com/governorrod.
7 Brief and Short Appendix of Intervenor-Appellants at 6, United States v. Blagojevich, 612 F.3d 558 (7th Cir. 2010) (No. 10-2359).
8 Brief & Appendix of the United States at 4, United States v. Blagojevich, 612 F.3d 558 (7th Cir. 2010) (No. 10-2359).
9 Id.
rendered. Two weeks after this meeting and two days before jury selection was set to begin, The Chicago Tribune, The New York Times, and three media groups (hereinafter “Press Intervenors”) filed a motion to intervene and for immediate public access to the names of jurors. The Press Intervenors brought this motion in order to object to an anonymous jury. The Press Intervenors were interested in publishing human-interest stories and determining whether the jurors were “suitable decision-makers.”

Before holding a hearing on the Press Intervenors’ motion, Judge Zagel assured the potential jurors that their names would not be disclosed until the conclusion of the trial. Judge Zagel then held a hearing and denied the Press Intervenors’ motion on the basis that it was untimely and there was “a legitimate reason for sealing the names during trial.” Judge Zagel anticipated “that the substantial attention being devoted to the criminal charges against a former Governor of Illinois would lead the press and public to bombard jurors with email and instant messages that could undermine their impartiality (and perhaps their equanimity).” Further bolstering Judge Zagel’s decision was the fear that public knowledge of the jurors’ identities “would discourage others from agreeing to serve in future trials.” It is important to note, however, that the parties and their counsel would be given access to the names of the jurors; Judge Zagel’s ruling related only to the delayed release of the jurors’ names to the public.

10 Id. at *5.
12 Id.
13 United States v. Blagojevich (Blagojevich I), 612 F.3d 558, 561 (7th Cir. 2010).
14 Brief & Appendix of the United States, supra note 8, at 8.
15 Brief and Short Appendix of Intervenor-Appellants, supra note 7, at 4–5.
16 Blagojevich I, 612 F.3d at 559.
17 Id. at 562.
18 Id. at 559.
Determined to obtain the jurors’ names, the Press Intervenors appealed to the Seventh Circuit, contending that the press has an unqualified right of access to jurors’ names under the First Amendment. The Seventh Circuit did not agree that the press has an unqualified right of access to the names; instead, the court stated that there is a rebuttable presumption in favor of disclosure of jurors’ names. In its analysis of whether this presumption had been rebutted, the Seventh Circuit explicitly refused to rely on the First Amendment; instead, the court used statutes and the common law. Importantly, the First Amendment, common law, and statutory law each carries its own distinct standard by which the presumption can be rebutted. Notably, the First Amendment standard carries a more rigorous burden for rebutting the presumption than the common law and statutory standards. However, instead of applying the common law and statutory standards to its common law and statutory analysis, the Seventh Circuit applied the more rigorous First Amendment standard to its analysis. Ultimately, the court held that the presumption in favor of disclosure had not been rebutted. The court vacated Judge Zagel’s deferred-disclosure order and remanded the case with instructions to grant the Motion to Intervene and hold proceedings consistent with its opinion.

19 Id. at 561.
20 Id.
21 Id. at 563.
22 Id.
24 See Rushford, 846 F.2d at 253.
25 Blagojevich I, 612 F.3d at 564.
26 Id. at 563.
27 Id.
This Note considers whether the Seventh Circuit applied the correct standard when it analyzed the issue of whether the jurors’ names should be kept from the public until verdict was rendered in Blagojevich’s case. Part I of this Note provides a background as to when jurors’ names can be withheld from the public. Part II provides a background of the Seventh Circuit case, United States v. Blagojevich. Part III argues that the panel incorrectly applied a First Amendment standard to its common law and statutory analysis of whether the jurors’ names should be kept secret, and thereby erased the distinction among First Amendment, common law, and statutory analyses of this issue in the Seventh Circuit. Finally, Part IV argues that this distinction should be revived because if a court is unable to use the common law standard—which carries a lower burden than the First Amendment standard—in the future, it may result in the release of jurors’ names when they otherwise would have been protected from the public and the media.

I. PUBLIC ACCESS TO JURORS’ NAMES PRIOR TO VERDICT IS NOT AN ABSOLUTE RIGHT

A. A Presumption of Openness

In the United States of America, “a presumption of openness inheres in the very nature of a criminal trial under our system of justice.”28 This presumption stems in part from the fact that “[o]ur system of jurisprudence abhors the ancient star chamber inquisitions,” in which accused Englishmen were subjected to secret trials and deprived of their rights.29 Consequently, the presumption of openness extends to most aspects of a criminal trial, including the identities of jurors.30 This presumption of openness with regard to jurors’ identities

stems from three distinct sources: (1) The First Amendment, (2) common law, and (3) and statutory law.

In Press-Enterprise Co. v. Superior Court (Press-Enterprise II), the Supreme Court created the Experience and Logic Test in order “[t]o determine what aspects of a criminal trial are subject to a presumptive right of public access under the First Amendment.” The Experience and Logic Test requires courts to evaluate two complementary considerations to determine whether information is subject to the right of access. The “experience” prong is used to determine “whether the place and process have historically been open to the press and general public,” and the “logic” prong is used to consider “whether public access plays a significant positive role in the functioning of the particular process in question.” In United States v. Wecht, the Third Circuit employed the Experience and Logic Test and concluded that there is a presumptive First Amendment right of access to jurors’ identities. Notably, in United States v. Blagojevich, the Seventh Circuit explicitly refused to rely “on the [F]irst [A]mendment as the means of obtaining the [juror] information.” Instead, the Seventh Circuit relied on the two other sources mentioned above: the common law and statutes.

In Nixon v. Warner Communications, Inc., the Supreme Court stated that there is a “common-law right of access to judicial records.” The “long-recognized presumption in favor of public access to judicial records” gives the public the right “to monitor the functioning of our courts, thereby insuring quality, honesty and respect

31 478 U.S. at 9.
32 United States v. Wecht, 537 F.3d 222, 234 (3d Cir. 2008).
33 Press-Enterprise II, 478 U.S. at 8.
34 Id.
35 537 F.3d at 239.
36 Blagojevich I, 612 F.3d 558, 563 (7th Cir. 2010).
37 Id.
for our legal system.”39 This right of access includes a right to inspect and copy both public and judicial records and documents.40 This right has also been extended to include the disclosure of juror names; for example, in United States v. Blagojevich, the Seventh Circuit found that the presumption in favor of disclosure of jurors’ names finds its roots in the common-law tradition of open litigation.41

In addition, the presumption in favor of disclosure of jurors’ names can stem from the Jury Selection and Service Act, which provides that each plan for jury selection must “fix the time when the names drawn from the qualified jury wheel shall be disclosed to the parties and to the public.”42 As acknowledged by the Seventh Circuit, “[t]he answers ‘never’ or ‘after trial’ are possible under this language but constitute an exception to the norm of disclosure, an exception that needs justification.”43 Importantly, the presumption that jurors’ names will be disclosed under any one of these three sources is not absolute.44 Each source carries its own distinct standard by which the presumption of openness can be rebutted.45

1. First Amendment Standard

A district court can attempt to rebut the presumption in favor of disclosure using a First Amendment standard. The controlling standard

39 In re Continental Ill. Sec. Litigation, 732 F.2d 1302, 1308 (7th Cir. 1984).
40 Nixon, 435 U.S. at 597.
41 Blagojevich I, 612 F.3d at 563.
43 Blagojevich I, 612 F.3d at 563.
44 Id. at 561.
is found in *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, a case in which the Supreme Court found that the First Amendment makes the jury selection process presumptively open to the public.\(^{46}\)

As stated in *Press-Enterprise I*, under the First Amendment:

> The presumption of openness may be overcome only by an *overriding* interest based on findings that closure is essential to preserve higher values and is *narrowly tailored* to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.\(^{47}\)

The Supreme Court reiterated this standard in *Waller v. Georgia*, where the Court held that the closure of a suppression hearing over the objections of the accused must meet the standards set out in *Press-Enterprise I*:

> Under *Press-Enterprise*, the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.\(^{48}\)

The First Amendment standard was also applied in the context of juror name disclosure in *United States v. Wecht*.\(^{49}\) In *Wecht*, the Third Circuit held that there is a presumptive First Amendment right of access to obtain the names of both trial jurors and prospective jurors

\(^{46}\) 464 U.S. 501.

\(^{47}\) *Id.* at 510 (emphasis added).


\(^{49}\) 537 F.3d 222 (3d Cir. 2008).
prior to empanelment of the jury, and that the district court failed to rebut this presumption under the First Amendment standard.50

2. Common Law Standard

Instead of using a First Amendment standard, a district court can attempt to rebut the presumption in favor of disclosure via a common law standard. As stated in Rushford v. New Yorker Magazine, Inc., the presumption of access “can be rebutted if countervailing interests heavily outweigh the public interests in access.”51 Additionally, the trial court may weigh “the interests advanced by the parties in light of the public interests and the duty of the courts.”52

A comparison of the common law standard against the First Amendment standard makes it clear that “[t]he common law does not afford as much substantive protection to the interests of the press and the public as does the First Amendment.”53 While the common law simply calls for “countervailing interests,”54 the First Amendment requires an “overriding interest.”55 Furthermore, while the First Amendment requires that closure be “narrowly tailored,”56 the common law only requires a weighing of countervailing interests to determine if they heavily outweigh the presumption of access.57

The ability of a court to rebut this presumption under the common law finds its roots in the court’s inherent power to control the proceedings in front of it.58 This implied judicial power is “governed

50 Id. at 240 (finding that the district court’s reasons for rebutting the presumption were “conclusory and generic” and lacked the specificity required by the First Amendment standard).
52 Id. (citing Nixon v. Warner Commc’ns, Inc., 435 U.S. 589, 597 (1978)).
53 Id.
54 Id.
56 Id.
57 Rushford, 846 F.2d at 253.
not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." According to Ballentine’s Law Dictionary, “inherent power” is defined as:

A power essential to the very existence of the court or its ability to function in dispensing justice . . . A power included within the scope of a court’s jurisdiction which a court possesses irrespective of specific grant by constitution or legislation; a power which can neither be taken away nor abridged by the legislature.

In the context of disclosure of juror names, some courts have concluded that a trial court’s inherent power to control courtroom proceedings includes the power to control the release of juror names. In *Gannett Co. v. State*, the court stated: “Indeed other courts have noted that the theory of the jury at common law supports an historical tradition of judicial discretion as to disclosure of juror names.” Similarly, Judge Posner argued in his dissent from the denial of rehearing en banc of *United States v. Blagojevich* that the question of whether to release juror names “call[s] for an exercise of judgment” on the part of the trial judge, based on the judge’s experience and common sense.

Furthermore, in the context of high-publicity cases, the Supreme Court has acknowledged the right of a trial court to manage the courtroom and courthouse premises, and even restrict the release of information by counsel, witnesses, newspeople, and court staff. In *Sheppard v. Maxwell*, the Supreme Court recognized the

59 Id. at 43.
60 BALLENTINE’S LAW DICTIONARY (3d ed. 1969).
61 Gannett Co. v. State, 571 A.2d 735, 746 (Del. 1989).
62 Id.
63 Id.
“pervasiveness of modern communications” and the potentially prejudicial impact that it can have on jurors. In light of this fact, the court stated that trial judges must use their power to “ensure that the balance is never weighed against the accused.”66 The court further advised that “the cure lies in those remedial measures that will prevent the prejudice at its inception”;67 one such remedial measure is deferring disclosure of jurors’ names before trial because it cuts off the possibility of prejudicial impact.

3. Statutory Standard

Instead of using the First Amendment or the common law, a district court can also attempt to rebut the presumption in favor of disclosure by using a statutory standard. The Jury Selection and Service Act provides express statutory authority to abridge the presumption in favor of disclosure “if the interests of justice so require.”68

The Jury Selection and Service Act requires each district court to adopt a jury-selection plan, which must:

[F]ix the time when the names drawn from the qualified jury wheel shall be disclosed to parties and to the public. If the plan permits these names to be made public, it may nevertheless permit the chief judge of the district court, or such other district court judge as the plan may provide, to keep these names confidential in any case where the interests of justice so require.69

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65 Id. at 362.
66 Id.
67 Id. at 363.
This section of the Act—particularly the sentence on “the interests of justice”—gives district courts discretion to overcome the presumption of openness and withhold juror names from the public.\(^\text{70}\) According to the Act’s legislative history, the Act “permits the present diversity of practice to continue. Some district courts keep juror names confidential for fear of jury tampering. Other district courts routinely publicize the names.”\(^\text{71}\) If a trial court withholds juror information under the Jury Selection and Service Act, a showing of arbitrariness is required to reverse the decision.\(^\text{72}\)

In addition, the Jury Selection and Service Plan adopted by the United States District Court for the Northern District of Illinois states that:

No person shall make public or disclose to any person, unless so ordered by a judge of this Court, the names drawn from the Qualified Jury Wheel to serve in this Court until the first day of the jurors’ term of service. Any judge of this Court may order that the names of jurors involved in a trial presided over by that judge remain confidential if the interests of justice so require.\(^\text{73}\)

This plan, like the Jury Selection and Service Act, provides that a judge may keep juror names confidential “if the interests of justice so require.”\(^\text{74}\) Relying on the Supreme Court’s reasoning in *Nixon v. Warner Communications* that “the decision as to access is one best left to the sound discretion of the trial court,” Judge Posner argued that the


\(^\text{71}\) *Blagojevich II*, 614 F.3d 287, 297 (7th Cir. 2010) (citing H.R. REP. No. 1076, at 11 (1968)).

\(^\text{72}\) United States v. Tucker, 526 F.2d 279, 283 (5th Cir. 1976).


\(^\text{74}\) *Id.*
plan does not require the judge to hold a hearing to determine whether the names of jurors shall remain confidential. 75

4. Anonymity, Deferred-Disclosure, Sequestration, Special Instruction

If a court is successful in overcoming the presumption of openness using one of the three standards above, the court can then use an anonymous jury, 76 deferred-disclosure, 77 sequestration, or special instruction to keep the jurors’ names from the public. 78

When a judge decides to withhold identifying information regarding jurors—particularly their names—the jury is considered an “anonymous jury.” 79 With a full-fledged anonymous jury, the jurors’ names will never be revealed to the public; on the other hand, when a judge decides to temporarily withhold the names of the jurors, the term used is “deferred-disclosure.” 80

As an alternative to anonymity or deferred-disclosure, a judge can make a special instruction to the jury to prevent any risks associated with disclosure. 81 For example, a judge can “instruct jurors not to answer calls, listen to voice mails, or open e-mails and letters from numbers and addresses they do not recognize.” 82 Finally, the most extreme option for keeping jurors out of the public eye is called “sequestration”; if a judge sequesters a jury, the jurors will be isolated from members of the general public during trial. 83

75 Blagojevich II, 614 F.3d at 297 (citing Nixon v. Warner Commc’ns, Inc., 435 U.S. 589, 599 (1978)).

76 See United States v. Crockett, 979 F.2d 1204, 1217 (7th Cir. 1992).


78 United States v. Blagojevich (Blagojevich III), No. 08 CR 888-1, 6, 2010 WL 2934476, at *6 (N.D. Ill. July 26, 2010).

79 United States v. Crockett, 979 F.2d 1204, 1215 (7th Cir. 1992).


82 Id.

83 Blagojevich II, 614 F.3d 287, 289 (7th Cir. 2010).
5. Reasons for Restricting Access to Jurors’ Names

In most cases, the parties and the public know the names and other identifying information of jurors. However, in certain criminal trials, “special precautions must be taken in order to protect jurors from harassment, intimidation, anxiety, and a host of other disruptive influences.” Indeed, as stated in United States v. Ochoa-Vasquez, some combination of the following factors may support the empanelment of an anonymous jury: (1) the defendant’s involvement in organized crime, (2) the defendant’s participation in a group with the capacity to harm jurors, (3) the defendant’s past attempts to interfere with the judicial process, (4) the potential that, if convicted, the defendant will suffer a lengthy incarceration and substantial monetary penalties, and (5) extensive publicity that could enhance the possibility that jurors’ names would become public and expose them to intimidation and harassment.

In Ochoa-Vasquez, the court held that all five factors were present. The defendant was linked “to an organized criminal organization with a history of violence and obstruction of justice,” he faced a lengthy sentence if convicted, and “his prior connections to [a Colombian drug] cartel promised to make [it] a high-profile trial.” While the use of an anonymous jury typically arises in an organized crime trial like Ochoa-Vasquez, where juror safety or intimidation is a primary concern, it can also be useful in the context of high-profile cases.

84 United States v. Crockett, 979 F.2d 1204, 1215 (7th Cir. 1992).
85 Id. at 1215 n.10.
86 428 F.3d 1015, 1034 (11th Cir. 2005).
87 Id. at 1034.
88 Id. at 1034–35.
89 See United States v. Edwards, 303 F.3d 606, 613 (5th Cir. 2002).
For instance, *Sheppard v. Maxwell* was a high-profile case in which the defendant was a young doctor who was accused of bludgeoning his pregnant wife to death.\(^90\) The trial attracted a “swarm” of reporters, photographers, and television and radio personnel,\(^91\) leading the Supreme Court to comment that the publicity created a “carnival atmosphere.”\(^92\) In *Sheppard*, the Supreme Court addressed the question of whether the defendant “was deprived of a fair trial . . . because of the trial judge’s failure to protect [him] sufficiently from the massive, pervasive and prejudicial publicity that attended his prosecution.”\(^93\) In answering this question in the affirmative, the Supreme Court was concerned not only with the defendant’s due process rights, but with the jurors’ privacy rights as well.\(^94\) The Court stated:

Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.\(^95\)

Due to advances in technology, the pervasiveness of modern communications that the Supreme Court was concerned about when *Sheppard* was decided in 1966 has only increased since that time.\(^96\) As a result, some courts have taken strong measures, including the

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\(^90\) 384 U.S. 333, 335 (1966).
\(^91\) *Id.* at 339.
\(^92\) *Id.* at 357.
\(^93\) *Id.* at 335.
\(^94\) *Id.* at 353–62.
\(^95\) *Id.* at 362.
\(^96\) *See id.*

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empanelment of anonymous juries or deferred disclosure of jurors’ names in high-profile cases.\(^97\)

As noted above, in *Sheppard*, the Supreme Court was also concerned with protecting the jurors’ privacy interests:

[T]he jurors were thrust into the role of celebrities by the judge’s failure to insulate them from reporters and photographers. The numerous pictures of the jurors, with their addresses, which appeared in the newspapers before and during the trial itself exposed them to expressions of opinion from both cranks and friends. The fact that anonymous letters had been received by prospective jurors should have made the judge aware that this publicity seriously threatened the jurors’ privacy.\(^98\)

A judge can protect jurors’ privacy interests from this type of publicity in high-profile trials by restricting access to the jurors’ names and other identifying information.\(^99\) Without access to the jurors’ names, the press will have a more difficult time “transform[ing] jurors’ personal lives into public news.”\(^100\)

Support for the notion that some high-profile cases warrant restricting access to jurors’ names can also be found in *United States v. Edwards*, decided by the Fifth Circuit in 2002.\(^101\) *Edwards* is strikingly similar to the *Blagojevich* case: one of the defendants, a former Governor of the State of Louisiana, was convicted of exploiting his apparent ability to influence Louisiana’s riverboat gambling license process.\(^102\) The governor’s trial attracted intense


\(^{98}\) *Sheppard*, 384 U.S. at 353 (citations omitted).

\(^{99}\) See *Black*, 483 F. Supp. 2d 618.

\(^{100}\) Id. at 630.

\(^{101}\) See 303 F.3d 606 (5th Cir. 2002).

\(^{102}\) Id. at 610.
media interest, involved a defendant who was a polarizing figure in Louisiana politics, and generated “highly charged emotional and political fervor.”103 While acknowledging that restricting access to juror information typically occurs in organized crime trials, the Fifth Circuit stated that this measure may be appropriate in a case that “attracts unusually large media attention and arouses deep passions in the community.”104 The Fifth Circuit thus held that the district court’s decision to withhold juror information was appropriate in this high-profile case.105

II. United States v. Blagojevich

A. Factual Background

Former Governor Rod Blagojevich was arrested on federal corruption charges on December 9, 2008.106 The charges alleged that he conspired to sell President Barack Obama’s vacated United States Senate seat, engaged in “pay-to-play” schemes, and misused state funding to fire Chicago Tribune editorial writers.107

The Illinois House of Representatives impeached Blagojevich by a 114–1 vote on January 8, 2009.108 This was the first time in Illinois’ “190-year history that a governor has been impeached.”109 In late

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103 Id. at 614.
104 Id. at 613.
105 Id. at 617.
107 Id.
109 Id.
January, 2009, Blagojevich went on a media blitz proclaiming his innocence, going so far as to schedule eleven interviews in one day.\footnote{110}{Alex Koppelman, \textit{Rod Blagojevich Has Only Just Begun to Fight}, THE SALON (Jan 27, 2009), http://www.salon.com/news/politics/war_room/2009/01/27/blago/index.html.} On January 29, 2009, the Illinois Senate removed Blagojevich from office by a 59–0 vote, convicting him on an article of impeachment.\footnote{111}{Malcolm Gay & Susan Saulny, \textit{Blagojevich Ousted by Illinois State Senate}, THE NEW YORK TIMES (Jan. 29, 2009), http://www.nytimes.com/2009/01/30/us/illinois.html.} The Senate also voted 59–0 to bar Blagojevich from ever holding public office again in the State of Illinois.\footnote{112}{Id.} United States district Judge James Zagel set a trial date for June 3, 2010.\footnote{113}{Jeff Coen, \textit{Corruption Trial for Blagojevich Set for June 3, 2010}, CHICAGO BREAKING NEWS CENTER (June 25, 2009), http://www.chicagobreakingnews.com/2009/06/corruption-trial-for-blagojevich-set-for-june-3.html.} While Blagojevich was ultimately convicted by a federal jury on one count of lying to the FBI, his conviction is not the focus of this Note.\footnote{114}{Jeff Coen, John Chase, Bob Secter, Stacy St. Clair & Kristen Mack, \textit{Guilty on Just 1 Count, Blago Taunts U.S. Attorney}, CHICAGO BREAKING NEWS CENTER (Aug. 17, 2010), http://www.chicagobreakingnews.com/2010/08/14th-day-for-blagojevich-jury.html. The jury deadlocked on the other twenty-three counts against Blagojevich, and a mistrial was ordered on those counts. \textit{Id.} A new trial is set to take place 2011 on those remaining counts. \textit{Id.}} Instead, this Note will focus on the events leading up to the start of Blagojevich’s federal trial—specifically, the hearings and meetings held by Judge Zagel relating to the issue of disclosure of the names of the jurors who would ultimately decide Blagojevich’s fate.

\textbf{B. \textit{Press Intervenors’ Argument}}

On June 1, 2010, the Press Intervenors moved to intervene and for immediate public access to the names of the jurors.\footnote{115}{Press Intervenors’ Motion to Intervene and for Immediate Public Access to Names of Jurors, supra note 11, at 1.} The Press Intervenors made this motion for the limited purpose of objecting to an
anonymous jury and seeking immediate public access to the jurors’ names.\textsuperscript{116} In their motion, the Press Intervenors argued that there was no valid reason to keep the jurors’ names anonymous and that sealing the names would be contrary to the tradition of open trials and right of access guaranteed by the First Amendment and the common law.\textsuperscript{117}

The Press Intervenors argued that juror names are presumptively open to the public absent extraordinary circumstances and that this presumption of access is mandated by both the First Amendment and common law.\textsuperscript{118} In support of their argument, the Press Intervenors reasoned that “[k]nowledge of juror identities allows the public to verify the impartiality of key participants in the administration of justice.”\textsuperscript{119} The Press Intervenors also argued that Judge Zagel’s concern—“that revealing jurors’ names in a high-profile case would tempt ‘bloggers’ to contact them during trial”—could be eliminated by the tools that the court has at its disposal.\textsuperscript{120}

The Press Intervenors then argued that the Experience and Logic Test from \textit{Press-Enterprises II} confirms that the constitutional right of access has specific application to juror names.\textsuperscript{121} Analyzing the “experience” prong, the Press Intervenors cited three cases suggesting that there has been a well-established tradition of access to juror names.\textsuperscript{122} Analyzing the “logic” prong, the Press Intervenors cited three additional cases suggesting that public access to juror names “plays a significant and positive role” because it allows the public to verify the impartiality of jurors and educates the public on the judicial system.\textsuperscript{123}

\textsuperscript{116} Id.
\textsuperscript{117} Id. at 2.
\textsuperscript{118} Memorandum in Support of Press Intervenors’ Motion to Intervene and for Immediate Public Access to Names of Jurors at 1, United States v. Blagojevich, 2010 WL 2934476 (N.D. Ill. 2010) (No. 08 CR 888).
\textsuperscript{119} Id. at 2 (citing United States v. Wecht, 537 F.3d 222 (3d Cir. 2008)).
\textsuperscript{120} Id.
\textsuperscript{121} Id. at 4.
\textsuperscript{122} Id. at 5.
\textsuperscript{123} Id. at 6 (citing \textit{In re Globe Newspaper Co.}, 920 F.2d 88 (1st Cir. 1990)).
The Press Intervenors then argued that, in Blagojevich’s case, there was no justification for an anonymous jury that could overcome the constitutional presumption of openness.\textsuperscript{124} The Press Intervenors argued that the presumption had not been overcome because neither the court nor the parties had shown “any threats, jury tampering or ‘other evils affecting the administration of justice’ that justify withholding jurors’ identities from the media.”\textsuperscript{125} Rather, the Press Intervenors argued that the “heavy, First Amendment-freighted burden cannot be sustained by a generalized belief that it would be better for jurors to remain anonymous, lest they be beset by bloggers.”\textsuperscript{126}

Finally, the Press Intervenors attached an affidavit of Matt O’Connor, a Chicago Tribune editor, in support of their motion. In the affidavit, Matt O’Connor stated that based on his personal experience and research there is a tradition of openness in the jury selection process which includes public access to the jurors’ names in high profile cases.\textsuperscript{127} While stating that the rare exceptions to public access typically involve cases where jury safety is at issue, he acknowledged that there have also been “notable exceptions” in high-profile cases such as the trial of Conrad Black.\textsuperscript{128}

\textbf{C. District Court’s Hearing on Press Intervenors’ Motion}

On June 3, 2010, Judge Zagel held a hearing on the Press Intervenors’ motion.\textsuperscript{129} The motion was denied for the reasons stated

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{124} Id. at 8.
\item \textsuperscript{125} Id.
\item \textsuperscript{126} Id. at 10.
\item \textsuperscript{127} Affidavit of Matt O’Connor in Support of Motion to Intervene and for Immediate Public Access to Names of Jurors at 2, United States v. Blagojevich, 2010 WL 2934476 (N.D. Ill. 2010) (No. 08 CR 888).
\item \textsuperscript{128} Id. at 3; see United States v. Black, 483 F. Supp. 2d 618, 620 (N.D. Ill. 2007) (denying motion to disclose final jury list for the case of Conrad Black, a Canadian businessman whose trial for fraud “generated intense international media interest”).
\item \textsuperscript{129} Notification of Docket Entry at 1, United States v. Cellini (N.D. Ill. June 3, 2010) (No. 08 CR 888).
\end{enumerate}
\end{footnotesize}
in open court.130 Displeased with Judge Zagel’s denial of their motion, the Press Intervenors appealed to the United States Court of Appeals for the Seventh Circuit.131 However, before analyzing the appeal, it is important to understand why Judge Zagel denied the Press Intervenors’ motion; a portion of Judge Zagel’s reasoning is revealed in the Press Intervenors’ appellate brief.132

As described in the Press Intervenors’ appellate brief, Judge Zagel began the hearing by addressing the timeliness of the Press Intervenors’ motion to intervene. Judge Zagel stated that the Press Intervenors’ motion was “untimely” and should have been filed much earlier.133 Importantly, Judge Zagel ruled that even if the Press Intervenors’ motion were timely, he would still deny the motion on the merits, because he “concluded that there was a legitimate reason for sealing the names during trial.”134

Judge Zagel stated that the Blagojevich case was “different” because it had attracted “enormous public attention, an enormous expression of views.”135 Judge Zagel was also concerned about improper contact with jurors by “bloggers” and others via the Internet: “[I]t strikes me that there has been extraordinary attention paid to this case, that [leads] not only to the expression of opinions, but to people seeing an opportunity to get noticed, and one way to get yourself noticed is to do something in connection with this particular case.”136 Judge Zagel was also concerned with the fact that members of the public can use e-mail to communicate secretly with jurors, and stated that this must be avoided.137

Importantly, the Press Intervenors acknowledged that Judge Zagel’s concerns were not merely hypothetical because he had

130 Id.
131 Brief and Short Appendix of Intervenor-Appellants, supra note 7, at 1.
132 See id. at 4–6.
133 Id. at 4.
134 Id. at 4–5.
135 Id. at 5.
136 Id.
137 Id. at 5–6.
received e-mails and letters from members of the public containing advice as to how he should rule.138 Furthermore, although the Press Intervenors argued that Judge Zagel rejected out of hand the alternatives to juror anonymity that they suggested, they acknowledged that Judge Zagel thought it would be unfair to prohibit members of the jury from reading unsolicited e-mails.139

D. Government’s Argument

The Government provided two arguments in its appellate brief. First, the Government argued that it was not an abuse of discretion to deem the motion to intervene untimely.140 The Government noted that a full year before trial, the Press Intervenors were on notice that Judge Zagel was considering deferring disclosure of juror names.141 Instead of intervening then, the Press Intervenors waited “until the eve of trial.”142 Furthermore, once Judge Zagel definitively decided to defer disclosure, the Press Intervenors waited two weeks to move to intervene, and noticed their motion for hearing “on the very day jury selection was set to begin.”143 The Government argued that the “appellants’ delays deprived the district court and the parties of an opportunity for due deliberation,” which justified Judge Zagel’s decision to deny the Press Intervenors’ motion.144 Further bolstering the Government’s argument was the fact that Judge Zagel already told the jurors that they would not be identified by name.145

Second, the Government argued that it was not an abuse of discretion for Judge Zagel to defer disclosure of the jurors’ names to

138 Id. at 6.
139 Id.
140 Brief & Appendix of the United States, supra note 8, at 12.
141 Id.
142 Id.
143 Id.
144 Id.
145 Id. at 8.
the public until verdict.\textsuperscript{146} The Government argued that the Press Intervenors “failed to establish that access to juror names prior to verdict is a right guaranteed to them by the First Amendment or the common law, rather than a matter of discretion traditionally and appropriately vested in the district court.”\textsuperscript{147} The Government argued that even if a qualified right to juror names prior to verdict exists, the circumstances of this case—including the “unprecedented” amount of public attention and substantial risk that “seated jurors would become the targets of unsolicited, and presumptively prejudicial, contacts”—warranted deferred disclosure.\textsuperscript{148}

Like the Press Intervenors, the Government embarked on an analysis of the Experience and Logic Test to determine if the First Amendment provides a qualified right of access to juror names.\textsuperscript{149} Based on an analysis of statutes and case law, the Government concluded that it did not.\textsuperscript{150} The Government concluded by requesting that the Seventh Circuit affirm Judge Zagel’s denial of the Press Intervenors’ motion to intervene.\textsuperscript{151}

\textbf{E. The Seventh Circuit’s Opinion}

Chief Judge Easterbrook wrote the Seventh Circuit opinion, which was issued on July 2, 2010.\textsuperscript{152} That same day, a member of the court asked for a vote on whether to rehear the case en banc.\textsuperscript{153} “After the

\textsuperscript{146} Id. at 13.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} Id. at 19.
\textsuperscript{150} Id. at 20.
\textsuperscript{151} Id. at 40. In their reply brief, the Press Intervenors criticized the Government’s brief as “reflect[ing] a cramped conception of the press’s and public’s right of access to criminal proceedings that is fundamentally at odds with the Supreme Court’s First Amendment jurisprudence.” Reply Brief of Intervenor-Appellants at 1, United States v. Blagojevich, 612 F.3d 558 (7th Cir. 2010) (No. 10-2359).
\textsuperscript{152} Blagojevich I, 612 F.3d 558, 558 (7th Cir. 2010).
\textsuperscript{153} Blagojevich II, 614 F.3d 287, 287 (7th Cir. 2010).
judges exchanged comments, but before the voting on whether to grant rehearing en banc was complete, the panel decided to alter its opinion to meet some of the concerns expressed in the exchange of comments. Ultimately, a majority of the judges voted against hearing the appeal en banc. On July 12, 2010, the panel issued its amended opinion, which is the subject of this section. In the amended opinion, the Seventh Circuit held that the motion to intervene was timely and that the presumption in favor of disclosure of jurors’ names had not been rebutted. The Seventh Circuit vacated Judge Zagel’s deferred-disclosure order and remanded the case with instructions to grant the motion to intervene and hold proceedings consistent with its opinion.

The panel began by addressing the timeliness of the motion to intervene and concluded that it was an abuse of discretion to deem the motion untimely. While the panel acknowledged that Judge Zagel had assured the jurors that their names would not be revealed during trial, the panel correctly stated that this assurance occurred after the motion to intervene had been filed. As a result, the court refused to make Judge Zagel’s “declaration a self-fulfilling prophecy.” The panel acknowledged that the Press Intervenors were adequately notified that Judge Zagel was considering deferred-disclosure of juror names in mid-2009, and that they had to recognize that it was a possibility in this case because “[t]wo years earlier a district judge had deferred the release of jurors’ names in another high-profile criminal

154 Id. at 288 (Posner, J., dissenting).
155 Id. at 287 (majority opinion).
156 Blagojevich I, 612 F.3d at 561 (7th Cir. 2010).
157 Id.
158 Id. at 563.
159 Id. at 565.
160 Id. at 560.
161 See id.
162 Id.
prosecution in the Northern District of Illinois."163 However, the panel stated that Judge Zagel likely would have rejected a motion to intervene in mid-2009 as "premature."164 The panel ultimately held that the Press Intervenors’ motion to intervene was not untimely as "[t]here was never a public announcement identifying an issue and specifying a schedule for its resolution."165

The panel then proceeded to address the merits of the appeal. The panel rejected the Press Intervenors’ contention that the press has an unqualified right of access to jurors’ names during trial, stating that "no one contends (or should contend) that jurors’ names always must be released."166 Rather, the panel was concerned with the justification behind a judge’s decision to defer release of jurors’ names—or to not release them at all.167 The panel acknowledged that Judge Zagel had a legitimate interest in deferring disclosure and that the Press Intervenors had a legitimate interest in requesting that the names be released.168

Although the panel accepted that both sides had legitimate interests in this matter, it refused to analyze the matter through the lens of the First Amendment, as the Press Intervenors and Government had in their briefs.169 The court gave three main reasons for this refusal: (1) "there is no general constitutional ‘right of access’ to information that a governmental official knows but has not released to the public,"170 (2) the jurors’ names were not revealed during voir dire "not because of the judge’s decision but because of § 10(a) of the district court’s plan for implementing the Jury Selection and Service

163 Id. (citing United States v. Black, 483 F. Supp. 2d 618, 625 (N.D. Ill. 2007)).
164 Id. at 560–61.
165 Id. at 561.
166 Id. (emphasis in original).
167 Id.
168 Id. at 562.
169 Id. at 563
170 Id. at 562.
Act,”171 and (3) “[a] court should never begin with the Constitution.”172 Rather than use the First Amendment, the panel analyzed this matter via statutes and the common law, arguing that the public has a common-law right of access to information that affects the resolution of federal suits.173

The panel derived a presumption in favor of disclosure of juror names from both the common law tradition of open litigation and the Jury Selection and Service Act.174 The panel also provided a standard for rebutting this presumption, which was stated in the opinion as follows:

[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.175

The panel determined that under this standard, the presumption in favor of disclosure of jurors’ names had not been overcome because Judge Zagel did not make any findings of fact and did not provide an opportunity to present evidence.176 Furthermore, the panel argued that this presumption was not rebutted because “no evidence was taken, no argument entertained, no alternatives considered, and no findings made before this decision was announced to the jurors.”177 The panel also analyzed the language of the Jury Selection and Service Act and the jury plan adopted by the Northern District of Illinois, and asserted

171 Id. at 562–63.
172 Id. at 563.
173 Id.
175 Blagojevich I, 612 F.3d at 564 (quoting Waller v. Georgia, 467 U.S. 39, 48 (1984)).
176 Id. at 563.
177 Id. at 564.
that any exceptions to the norm of disclosure required “justification” and “some procedure to make the necessary finding.”

Notably, however, the panel stated that the justification required for deferred disclosure of juror names is less than the justification required for empanelling an anonymous jury. Furthermore, the panel determined that the evidence a judge must consider “depends on what the parties submit.” Indeed, the panel cited to United States v. Black, in which the parties presented no evidence, and the court decided whether the jurors’ names should be disclosed based on “the parties’ arguments and the judge’s experience with jurors’ concerns and behavior.” In comparison, the court stated that Judge Zagel “has referred elliptically to efforts to contact him by email and in other ways” and suggested that Judge Zagel put details on the record to help demonstrate some of the potential effects of releasing the jurors’ names.

Ultimately, the court stated that “[w]hat is essential—what occurred in Black but not so far in this case—is an opportunity for the parties (including the intervenors) to make their views known in detail, followed by a considered decision that includes an explanation why alternatives to delayed release of the jurors’ names would be unsatisfactory.” Rather than deciding outright when it is appropriate to delay the release of jurors’ names, the Seventh Circuit required a new, and more complete, hearing. The court remanded the case with instructions to grant the motion to intervene and to hold a hearing consistent with its opinion.

178 Id.
179 Id.
180 Id. at 565.
181 Id.
182 Id.
183 Id.
184 Id.
185 Id.
F. Judge Posner’s Dissent

Although Judge Posner’s dissent is from the denial of rehearing en banc, the crux of his analysis focuses on Judge Easterbrook’s opinion and Judge Zagel’s decision to defer disclosure of the jurors’ names.186

Judge Posner began by endorsing Judge Zagel’s handling of this matter: “An experienced trial judge made a reasonable determination that the release of jurors’ names before the end of trial would expose the jurors to the widespread mischief that is a daily if not hourly occurrence on the Internet.”187 Judge Posner reiterated the important fact that the jury was not anonymous; rather, the parties knew the jurors’ names, and the public would know them after the trial ended.188 Judge Posner argued that in light of this fact, and “[g]iven the extremely high profile of this case nationwide as well as in Illinois, and the unusual attention-getting conduct of the principal defendant and his wife, there is no good argument for releasing the jurors’ names before the trial ends.”189

Next, Judge Posner criticized the panel’s decision for not recognizing how serious the repercussions could be if Judge Zagel were forced to renege on his promise to defer release of juror names.190 Though the panel acknowledged that it would be “regrettable to disappoint jurors’ legitimate expectations,”191 it failed to recognize that “jurors may well be upset, concerned for their privacy, fearful of the prospect of harassment . . . and angry at having been induced by false pretenses to agree to take months out of their life to perform jury service.”192

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187 Id. at 287.
188 Id.
189 Id. at 287–88.
190 Id. at 288.
191 See Blagojevich I, 612 F.3d 558, 560 (7th Cir. 2010).
192 Blagojevich II, 614 F.3d at 288 (Posner, J., dissenting).
Judge Posner then criticized the panel’s argument that, unlike the parties in the *Black* case, the parties and intervenors here did not have an opportunity “to make their views known in detail.” Judge Posner argued that the parties and intervenors had this opportunity, but failed to present any evidence of consequence. Indeed, he noted that Judge Zagel, unlike Judge St. Eve in *Black*, “actually had a bit of trial-type evidence before him,” which was the affidavit from *The Chicago Tribune* editor. Therefore, Judge Posner concluded that “the media have submitted evidence, that evidence was before Judge Zagel when he ruled, and the media do not argue that they were prevented from submitting more evidence.” He further argued that the media did not submit additional evidence because of their belief that the First Amendment gives them the right to the jurors’ names unless there are threats made against the jurors.

Judge Posner also criticized the panel’s reliance on “trial-type” evidence, stating “trial-type evidence is neither required for, nor likely to be helpful in, the judge’s exercise of discretion to withhold jurors’ names from the public until the trial ends.” Rather, Judge Posner posited that a trial judge should decide whether to defer disclosure of juror names based on experience, common sense, and judgment.

Next, Judge Posner argued that the jurors’ interest in their privacy during a lengthy high-profile trial trumps the public’s interest in learning the jurors’ identities prior to verdict. Importantly, Judge Posner did not have to address the parties’ interests because Blagojevich did not object to Judge Zagel’s deferred-disclosure order, and the Government’s interest was in line with the jurors’ interest.

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193 *Id.* at 290.
194 *Id.*
195 *Id.* at 294; *see supra* Part II.B. (describing affidavit in detail).
196 *Blagojevich II*, 614 F.3d at 294 (Posner, J., dissenting).
197 *Id.*
198 *Id.* at 290.
199 *Id.*
200 *Id.* at 292.
201 *Id.*
Citing to a number of law review articles, Judge Posner presented a number of benefits to juror anonymity; he also endorsed Judge St. Eve’s approach in United States v. Black:

In a case like this that has garnered intense national and international media attention, releasing juror names during the pendency of trial threatens the integrity of the jurors’ ability to absorb the evidence and later to render a verdict based only on that evidence. This is the case because disclosure increases the risk of third-party contact by the press or by non-parties who are monitoring these proceedings through the vast media attention this case has gathered.\(^{202}\)

Judge Posner opined that because the prosecution of Rod Blagojevich was of an even higher-profile than that of the defendant in Black, Judge Zagel’s decision to defer disclosure should have been upheld without a new hearing.\(^{203}\) Judge Posner then argued that the Press Intervenors’ decision not to ask for a hearing was a forfeiture that the court neglected to enforce.\(^{204}\) He noted that the Press Intervenors did not ask for a hearing in their motion to intervene or in their appellate briefs.\(^{205}\) Rather, they simply asked for the jurors’ names in the district court, and asked that Judge Zagel be ordered to release the names on appeal.\(^{206}\)

Finally, Judge Posner criticized the panel for “overrul[ing] Judge St. Eve’s sensible ruling rejecting any presumption in favor of disclosure of jurors’ names before verdict.”\(^{207}\) Judge Posner was critical of the grounds on which the panel overruled Judge St. Eve—namely, the “common-law right of access by the public to information

\(^{202}\) Id. at 293 (citing United States v. Black, 483 F. Supp. 2d 618, 628 (N.D. Ill. 2007)).
\(^{203}\) Id. at 295.
\(^{204}\) Id.
\(^{205}\) Id.
\(^{206}\) Id.
\(^{207}\) Id. at 296.
that affects the resolution of federal suits.” He rejected the notion that access to juror names falls within a presumption in favor of public access to judicial records based on the fact that jurors’ names are not judicial records. Furthermore, even assuming that there is a federal common-law right of access to juror names, Judge Posner argued that it has been supplanted by legislation—specifically, the Jury Selection and Service Act and the jury plan for the Northern District of Illinois. Judge Posner argued that these two pieces of legislation allowed Judge Zagel to use his discretion and withhold juror names until verdict.

III. ANALYSIS

In United States v. Blagojevich, the Seventh Circuit recognized three bases by which judicial proceeding information is made available to the press and public: (1) the First Amendment right of access, (2) the common-law presumption of openness, and (3) the Jury Selection and Service Act. While each of these bases functions primarily to make information available to the press and public, each basis also carries its own distinct standard by which the presumption of openness can be rebutted.

Under the First Amendment, the presumption of openness can only be rebutted by an “overriding interest” with closure “narrowly tailored” to serve that interest. Under the common law, the presumption of openness can be rebutted if “countervailing interests”

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208 Id.
209 Id.
210 Id. at 297; see supra Part I.A.
211 Blagojevich II, 614 F.3d at 297 (Posner, J., dissenting).
heavily outweigh the public interests;216 furthermore, the trial court may weigh “the interests advanced by the parties in light of the public interest and the duty of the courts.”217 Notably, “[t]he common law does not afford as much substantive protection to the interests of the press and the public as does the First Amendment.”218 Finally, under the Jury Selection and Service Act, the presumption can be rebutted if the “interests of justice so require.”219

The Seventh Circuit recognized the aforementioned distinctions and explicitly refused to use the First Amendment as a vehicle to analyze whether the district court had overcome the presumption in favor of disclosure of jurors’ names.220 Instead, the panel decided to use “statutes and the common law.”221 However, the panel failed to apply the appropriate standard when it analyzed the issue.222 Rather than applying the common law and statutory standards to its common law and statutory analysis, the panel—without explanation or announcement—incorrectly applied the heavier-burdened First Amendment standard to its analysis.223

In its opinion, the Seventh Circuit, quoting Waller v. Georgia, applied the following standard to orders providing for anonymity of jurors:

[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternative to closing the

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216 Rushford, 846 F.2d at 253.
217 Id. (citing Nixon v. Warner Commc’ns, Inc., 435 U.S. 589, 597 (1978)).
218 Id.
220 Blagojevich I, 612 F.3d 558, 563 (7th Cir. 2010).
221 Id.
222 Id. at 564.
223 Id.
proceeding, and it must make findings adequate to support the closure.224

However, the Seventh Circuit did not quote the standard in full—it failed to include two crucial words: “Under Press-Enterprise.”225 The full quote from Waller v. Georgia reads as follows:

Under Press-Enterprise, the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternative to closing the proceeding, and it must make findings adequate to support the closure.226

Inclusion of the words “Under Press-Enterprise” is crucial because Press-Enterprise—as the Seventh Circuit explicitly acknowledged at the outset of its opinion—is a First Amendment case.227 Without these words, it is not clear that a First Amendment standard is being applied; with them, the truth is revealed.

Therefore, it is clear that although the Seventh Circuit recognized a distinction among the First Amendment, common law, and statutory law, it effectively erased the distinction by applying a First Amendment standard to its analysis of statutory and common law. As a result of this opinion, there is serious question as to whether the distinction remains because the First Amendment standard is applied regardless of the basis by which the issue is analyzed. This distinction should be revived because if a court is unable to use the common law standard—which carries a lower burden than the First Amendment standard—in the future, it may result in the release of jurors’ names

224 Id. (quoting Waller v. Georgia, 467 U.S. 39, 48 (1984)). The Seventh Circuit stated that this standard was “also true of orders providing for the anonymity of jurors.” Id.
225 See Waller, 467 U.S. at 48.
226 Id.
227 See Blagojevich I, 612 F.3d at 561.
when they otherwise would have been protected from the public and the media. Finally, it is clear that the Seventh Circuit has broken ranks by not maintaining the distinction among the First Amendment, common law, and statutory law. Other circuits have retained the aforementioned distinction, recognizing that a common law right of access analysis is distinct from the constitutional analysis in various contexts.228

IV. CONCLUSION

In United States v. Blagojevich, District Judge James Zagel recognized that the jurors’ names should not be disclosed until the conclusion of the trial.229 The Press Intervenors seeking access to these names appealed to the Seventh Circuit, claiming that “the press has an unqualified right of access to jurors’ names while the trial proceeds.”230 This claim was based principally on two First Amendment cases, Press-Enterprise Co. v. Superior Court, and United States v. Wecht.231

On appeal, the Seventh Circuit explicitly refused to analyze the issue under the First Amendment, and instead decided to follow common law and statutory law.232 However, the panel incorrectly

229 Brief and Short Appendix of Intervenor-Appellants, supra note 7, at 4–5.
230 Blagojevich I, 612 F.3d at 561.
231 Id.; see Press-Enterprise I, 464 U.S. 501, 510 (1984) (concluding that the First Amendment makes voir dire presumptively open to the public); United States v. Wecht, 537 F.3d 222, 234 (3d Cir. 2008) (extending this approach to jurors’ names even when not mentioned during voir dire).
232 Blagojevich I, 612 F.3d at 563. The Seventh Circuit made it clear that a judge could not make a decision to defer disclosure of jurors’ names simply on the basis of inherent judicial power. Id. at 564.
applied a First Amendment standard to its common law and statutory analysis. Furthermore, the panel did so without stating that the genesis of the standard was First Amendment case law.

In its opinion, the panel established a distinction among First Amendment, common law, and statutory analyses of rebutting the presumption of openness. However, the panel eliminated this distinction by applying a First Amendment standard to its common law and statutory analysis of whether jurors’ names should be disclosed. The panel incorrectly erased this historic distinction and thus created a significant risk for the future; it is now possible that a court will be unable to apply a common law standard, which may result in the improper release of jurors’ names.

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236 See Blagojevich I, 612 F.3d at 564.
237 Id. Ultimately, on remand, Judge Zagel made the correct decision to defer disclosure of jurors’ names until the end of trial. See Blagojevich III, No. 08 CR 888-1, 6, 2010 WL 2934476, at *11 (N.D. Ill. July 26, 2010) However, he applied the wrong standard from the Seventh Circuit. See id. at *5.
TWO-THIRDS OF AN EVIDENTIARY REQUIREMENT: ARE COURTS TOO STRICT IN CONSTRUING THE TWO-THIRDS CITIZENSHIP REQUIREMENT OF THE CAFA HOME-STATE EXCEPTION?

JOHN P. ORELLANA *


INTRODUCTION

On February 18, 2005, Congress enacted the Class Action Fairness Act (CAFA), which expanded federal jurisdiction over class actions of national and interstate interest.¹ CAFA essentially loosened the requirements for federal diversity jurisdiction under 28 U.S.C. § 1332 for class actions, requiring defendants to only show that (1) the class consists of at least 100 members, (2) a single member of the class


¹ Class Action Fairness Act, Pub. L. No. 109-2, 119 Stat. 4 (“The purposes of this Act are to . . . restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction.”); Hart v. FedEx Ground Package Sys., Inc., 457 F.3d 675, 681 (7th Cir. 2006) (“The [Senate Judiciary] Committee report said ‘[a]lthough, [CAFA] is intended to expand substantially federal court jurisdiction over class actions. Its provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant.’”).

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is a citizen of a state or foreign country different from any defendant (minimal diversity), and (3) the aggregated amount in controversy is at least $5,000,000. This differs from the ordinary basis of jurisdiction, requiring every plaintiff to be of different citizenship from every defendant (complete diversity) and further requiring every plaintiff to plead a good faith claim of at least $75,000. CAFA further eliminated removal requirements that mandate unanimous consent among defendants and place a one-year deadline to take such action. Moreover, CAFA does not apply retroactively to cases filed before its enactment, effectively making it a substantive, rather than a procedural, measure.

Despite the increased jurisdictional flexibility provided by CAFA, the Act has been touted as a measure of class action reform to prevent abuses, such as forum shopping by plaintiffs to maximize state bias against out-of-state defendants. Other concerns addressed by CAFA are adverse effects on interstate commerce resulting from states

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4 See Strawbridge v. Curtiss, 7 U.S. 267, 267–68 (1806) (“The court understands [federal diversity jurisdiction] to mean that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts.”).
5 Mas v. Perry, 489 F.2d 1396, 1400 (5th Cir. 1974).
7 Knudsen v. Liberty Mutual Ins. Co., 411 F.3d 805, 807–08 (7th Cir. 2005) (CAFA jurisdiction requirements did not apply to case filed before enactment, even where plaintiffs amended the class definition after enactment); see also Meghan J. Dolan, Seventh Circuit Moves to the Head of the Class: Recent Decisions Provide a Broad Interpretation of Federal Jurisdiction Under CAFA, 1 SEVENTH CIRCUIT REV. 1 (2006), at http://www.kentlaw.edu/7cr/v1-1/dolan.pdf.
8 In re Hannaford Bros. Co. Consumer Data Sec. Breach Litig., 564 F.3d 75, 80–81 (1st Cir. 2009) (“According to Congress, these abusive practices included forum shopping to take advantage of potential state court biases against foreign defendants.”).
imposing their laws on citizens of other states by adjudicating suits of national significance.9

I. BACKGROUND

A. Exceptions to CAFA Jurisdiction

However, plaintiffs seeking to keep their suit in state court are not without remedy: under the home-state and local controversy exceptions, a federal district court must decline jurisdiction.10 The home-state exception provides that a federal district court must decline jurisdiction where (1) “two-thirds or more of the members of all proposed plaintiff classes in the aggregate and (2) the primary defendants, are citizens of the State in which the action was originally filed.”11

Under the local controversy exception, a federal district court must decline jurisdiction where “greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed” and there is at least one defendant “[1] from whom significant relief is sought . . . ; [2] whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and [3] who is a citizen of the State in which the action was originally filed.”12 In addition, the

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9 Id. at 81 (“Congress in enacting CAFA was concerned that state courts were ‘making judgments that impose their view of the law on other States and bind the rights of the residents of those states.’”); Pub. L. No. 109-2, 119 Stat. 4 (“[Congress finds that] [a]buses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are—(A) keeping cases of national importance out of Federal court; (B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and (C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.”).


11 Id. § 1332(d)(4)(B).

12 Id. § 1332(d)(4)(A).
principal injuries of the plaintiff class must have occurred in the State, and there must have been no other class action asserting similar factual allegations filed against the defendants within the preceding three years.13

Additionally, a federal district court may, *at its discretion*, choose to decline jurisdiction where “greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed” and where remand to state court would serve the interests of justice under the totality of the circumstances.14 However, this exception is not discussed in this article.

**B. Burden of Proof and Evidentiary Standard for Establishing Two-Thirds State Citizenship**

For purposes of diversity jurisdiction, a party who establishes his or her domicile in a state simultaneously establishes his or her state citizenship.15 An individual originally establishes his or her place of birth as his or her domicile, and this domicile presumptively continues until the individual establishes (1) a new residence and (2) an intention to remain there.16

For purposes of evaluating the two-thirds state citizenship requirement, most federal circuits have held that plaintiffs seeking to keep their case in state court under the home-state or local controversy

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13 Id.
14 Id. § 1332(d)(3).
15 Stine v. Moore, 213 F.2d 446, 448 (5th Cir. 1954) (“With respect to the diversity jurisdiction of the federal courts, citizenship has the same meaning as domicile. It imports permanent residence in a particular state with the intention of remaining, and is not dependent on birth. Residence alone is not the equivalent of citizenship, although the place of residence is prima facie the domicile; and citizenship is not necessarily lost by protected absence from home, where the intention to return remains.”).
16 Palazzo v. Corio, 232 F.3d 38, 42 (2d Cir. 2000).
exceptions bear the burden of proof. Indeed, this approach is consistent with the Supreme Court’s general view on removal jurisdiction, allocating the burden to the party claiming an exception from jurisdiction.

Moreover, plaintiffs’ burden of proof is met by a preponderance of the evidence showing that two-thirds of the class members are individuals domiciled or corporations organized in the state. However, plaintiffs are not burdened with the gargantuan task of showing the citizenship of every individual class member. Rather, judicial economy dictates that this evidentiary standard is based on “practicality and reasonableness.” This burden of proof and

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17 Hart v. FedEx Ground Package Sys., Inc., 457 F.3d 675, 680 (7th Cir. 2006) (following the Senate Judiciary Committee report, which states: “[I]t is the intent of the Committee that the named plaintiff(s) should bear the burden of demonstrating that a case should be remanded to state court (e.g., the burden of demonstrating that more than two-thirds of the proposed class members are citizens of the forum state). Allocating the burden in this manner is important to ensure that the named plaintiffs will not be able to evade federal jurisdiction with vague class definitions or other efforts to obscure the citizenship of class members.”); In re Hannaford Bros. Co. Consumer Data Sec. Breach Litig., 564 F.3d 75, 77 (1st Cir. 2009); Kaufman v. Allstate N.J. Ins. Co., 561 F.3d 144, 153 (3d Cir. 2009); Preston v. Tenet Healthsystem Mem’l Med. Ctr., Inc. (Preston II), 485 F.3d 804, 813 (5th Cir. 2007); Serrano v. 180 Connect, Inc., 478 F.3d 1018, 1024 (9th Cir. 2007); Evans v. Walter Indus., Inc., 449 F.3d 1159, 1165 (11th Cir. 2006).

18 Breuer v. Jim’s Concrete of Brevard, Inc., 538 U.S. 691, 698 (2003) (“[W]henever the subject matter of an action qualifies it for removal, the burden is on a plaintiff to find an express exception.”).

19 28 U.S.C. § 1332(a), (c); In re Sprint Nextel Corp., 593 F.3d 669, 673 (7th Cir. 2010) (“[T]he plaintiffs had to establish by a preponderance of the evidence that two-thirds of their proposed class members are Kansas citizens”); Preston II, 485 F.3d at 813–14 (“[T]he party moving for remand under the CAFA exceptions to federal jurisdiction must prove the citizenship requirement by a preponderance of the evidence.”).

20 Preston II, 485 F.3d at 816 (“From a practical standpoint, class action lawsuits may become ‘totally unworkable in a diversity case if the citizenship of all members of the class, many of them unknown, had to be considered.’”) (citations omitted).

21 Id.
II. THE SEVENTH CIRCUIT’S APPROACH

Recently, in In re Sprint Nextel Corporation, the plaintiffs brought suit for themselves and on behalf of the class of all Kansas residents who purchased text messaging services from the defendant, Sprint Nextel, over a three-year period. The plaintiffs alleged that Sprint Nextel “conspired with other cell phone providers to impose artificially high prices for text messaging service.” The plaintiffs specifically limited the class to those Kansas residents who (1) had a Kansas cell phone number and (2) received their cell phone bills at a Kansas mailing address.

The defendant removed the action to the United States District Court for the District of Kansas under CAFA, providing evidence of five non-Kansan class members meeting the plaintiffs’ criteria, i.e., national corporations lacking state citizenship but subscribing to Kansas cell phone service and receiving their bills at Kansas mailing addresses. The Multi-District Litigation panel subsequently transferred this and over a dozen similar cases to the Northern District of Illinois. Thereafter, the plaintiffs successfully remanded the case to Kansas state court under the home-state exception of CAFA. The district court found that, despite providing no evidence of citizenship, the plaintiffs had narrowly “defined the putative class in such a way as

22 Id. at 812.
23 Nextel Corp., 593 F.3d at 671.
24 Id.
25 Id. The plaintiffs presented a third limiting class factor as those who paid a long distance Kansas “USF fee,” but the court found this factor irrelevant. Id.
26 Id.
27 Id.
28 Id.
to leave little doubt that at least two-thirds of the class members are Kansas citizens.”

On the defendant’s appeal, the Seventh Circuit reversed and rejected the contention that the plaintiffs’ proposed class met the two-thirds citizenship requirement of the home-state exception. Although the court agreed that in-state cell phone numbers and mailing addresses provided evidence of an extended stay in Kansas by class members, it was questionable whether all such individuals actually intended to remain in the state as citizens because many of those individuals were potentially out-of-state college students or military personnel. Indeed, being a resident of a state is not equivalent to being a domiciliary.

Yet, despite its ruling, the court acknowledged the appeal of drawing the inference that a class of individuals maintaining in-state cell phone numbers and mailing addresses are citizens of the state, particularly noting that the largest military base and largest university in Kansas contained only 10,000 members each, as compared to Kansas’s total population of 2.8 million:

[O]ne would think that the vast majority of individual Kansas cell phone users do in fact live in that state and that the vast majority of them view it as their true home. True, some of those residents are college

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29 Id.; see In re Text Messaging Antitrust Litig., Nos. 08 C 7082, 09 C 2192, 2009 WL 2488301, at *3 (N.D. Ill. Aug. 13, 2009), vacated by Nextel Corp. 593 F.3d 669 (“Though undoubtably some members of the putative class are individuals who, since January 2005, have moved away from Kansas or are out-of-state college students who do not intend to reside in Kansas permanently, those facts do not alter the reality that plaintiffs have defined the putative class in such a way as to leave little doubt that at least two-thirds of the class members are Kansas citizens.”).

30 Nextel Corp., 593 F.3d at 674.

31 Id. at 673–74.

32 Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 48 (1989) (“Domicile is not necessarily synonymous with residence, and one can reside in one place, but be domiciled in another.”) (citations and quotations omitted).

33 Nextel Corp., 593 F.3d at 674.
students from other states or others, such as soldiers, who come to Kansas without the intent to remain indefinitely. But it’s hard to believe that those nondomiciliaries are collectively more than a drop in the bucket when it comes to class composition. The population of Kansas is approximately 2.8 million people, . . . but the state’s biggest military base, Fort Leavenworth, is home to only 10,000 soldiers and family members, . . . and the out-of-state population of the University of Kansas, the state’s biggest school is under 10,000 . . . 34

The court also considered it unlikely that a substantial number of businesses providing Kansas cell phone numbers to their employees and receiving the bills in Kansas would be out-of-state companies; a business would presumably have billing items sent to the “administrative head,” a strong candidate for the company’s principal place of business. 35

Nonetheless, the court found the plaintiffs’ class definition insufficient to show by a preponderance of the evidence that two-thirds of class members were Kansas citizens, broadly stating, “we agree with the majority of district courts that a court may not draw conclusions about the citizenship of class members based on things like their phone numbers and mailing addresses.” 36 In so holding, the Seventh Circuit has substantially hampered plaintiffs’ ability to remain in state court, removing the common sense approach that several other courts have taken by requiring additional evidence of citizenship.

34 Id. at 673–74 (citations omitted).
35 Id. at 674.
36 Id.
III. SEVENTH CIRCUIT’S SOLUTIONS

A. Tailoring Class Definitions

Other courts have held that plaintiffs may freely tailor their class definitions to fit within a CAFA exception and avoid federal jurisdiction, at least under CAFA’s home-state and local controversy exceptions.37

In re Hannaford Brothers Company Consumer Data Security Breach Litigation specifically addressed the rationale behind allowing plaintiffs to carve out definitions defeating CAFA jurisdiction.39 First, by defining class members as state citizens, or “narrowing their pleadings” to fit within an in-state exception, plaintiffs potentially decrease the size of their class and consequently, total damages and settlement leverage.40 Second, by keeping their suit in state court, plaintiffs also potentially sacrifice claims and legal theories that are exclusively available in federal courts.41 Third, the home-state exception (which requires the primary defendants to be state citizens) and the local controversy exception (which requires that one defendant be a state citizen from whom significant relief is sought) minimize the potential out-of-state bias against defendants by requiring defendants to have significant presence in the state.42 Likewise, the requirement

38 In re Hannaford Bros. Co. Customer Data Sec. Breach Litig., 592 F. Supp. 2d 146, 148 n.3 (D. Me. 2008) (“There is one section of CAFA that encourages the court in some instances to prevent a plaintiff from circumventing federal jurisdiction (instructing the federal court to consider ‘whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction,’ 28 U.S.C. § 1332(d)(3)(C), but it does not apply to subsection (4), the provision applicable here.”).
39 In re Hannaford Bros., 564 F.3d at 80–81.
40 Id. at 80.
41 Id.
42 See id. at 80–81 (“According to Congress, these abusive practices included forum shopping to take advantage of potential state court biases against foreign defendants. But where, as here, the defendant is also a citizen of the forum state, the concern for bias simply does not arise.”) (citations omitted).
of both the home-state and local controversy exceptions, that two-thirds of class members are citizens of the state, reduces the concern that state courts “mak[e] judgments that impose their view of the law on other States and bind the rights of the residents of those States,” because potentially only one-third of class members are citizens of other states. Lastly, Congress is free to amend or create legislation if class definition tailoring to the home-state and local controversy exceptions creates an “undesirable loophole.”

However, courts in the Sixth Circuit have disallowed complaint tailoring to defeat CAFA jurisdiction where they found “no colorable basis . . . other than to frustrate CAFA.” For instance, in Freeman v. Blue Ridge Paper Products, Inc., the plaintiffs sought to undercut CAFA’s $5 million amount in controversy requirement and avoid federal jurisdiction by splitting their claims for injury into five separate suits covering five sequential time periods, each suit claiming only $4.9 million in damages. The Sixth Circuit held that the plaintiffs could not arbitrarily split their claims by time period in order to remain below the $5 million amount in controversy requirement of CAFA while retaining the practical benefit of an aggregated claim of $24.5 million. In so holding, the court laid down the general rule that “where recovery is expanded, rather than limited, by virtue of splintering of lawsuits for no colorable reason, the total of such identical splintered lawsuits may be aggregated.”

Similarly, in Proffit v. Abbott Laboratories, the plaintiffs sought to circumvent federal jurisdiction by splitting their antitrust claims into eleven suits, each claiming $4,999,000 in damages and

43 Id.
44 Id. at 80.
46 Freeman, 551 F.3d at 406.
47 Id.
48 Id.
covering different time periods.\textsuperscript{49} The District Court for the Eastern District of Tennessee found the plaintiffs’ division of the suits an arbitrary exercise for avoiding federal jurisdiction by undercutting CAFA’s amount in controversy requirement, while retaining an aggregate potential damages award of $54,989,000.\textsuperscript{50} In finding that the plaintiffs’ efforts were motivated purely by avoiding federal jurisdiction, the court noted that the named plaintiff and defendant were the same in each suit, and that each of the eleven complaints contained allegations concerning the entire scope of defendant’s conspiracy.\textsuperscript{51}

By contrast, in \textit{Tanoh v. Dow Chemical Co.},\textsuperscript{52} the Ninth Circuit rejected aggregation of seven separate state tort claims against one manufacturer into a “mass action”\textsuperscript{53} as a basis for removal to federal court where each suit contained less than 100 class members, thereby undercutting CAFA’s numerosity requirement.\textsuperscript{54} The court expressly distinguished \textit{Freeman} and \textit{Proffitt} on the basis that in those cases, class members overlapped among the separated suits, and such overlapping members (\textit{i.e.}, members who were part of more than one suit) stood to gain in excess of the amount in controversy required under CAFA.\textsuperscript{55}

\textsuperscript{49} \textit{Proffitt}, 2008 WL 4401367, at *1–2.
\textsuperscript{50} See id. at *2.
\textsuperscript{51} \textit{Id.} (“The only difference among the eleven lawsuits filed by plaintiff is the time period each is alleged to cover. The plaintiff and defendant are the same in each case, and it is clear to the court that the allegations cover one antitrust conspiracy concerning the same drug, TriCor. . . . [E]ach complaint contains allegations concerning the entire scope of the alleged conspiracy during various time periods throughout the full decade. . . . Other than the difficulty of making a damages disclaimer to avoid the CAFA, there appears no reason for selecting the one-year divisions and creating eleven lawsuits to litigate one conspiracy that involves one defendant and one drug.”).
\textsuperscript{52} 561 F.3d 945 (9th Cir. 2009).
\textsuperscript{54} \textit{Tanoh}, 561 F.3d at 956.
\textsuperscript{55} \textit{Id.} at 955 (“The concerns animating \textit{Freeman} and \textit{Proffitt} simply are not present in this case, as none of the seven groups of plaintiffs has divided its claims into separate lawsuits to expand recovery. To the contrary, each of the seven state
Alternatively, rather than splitting claims arbitrarily by time, as in *Freeman* and *Proffitt*, plaintiffs might have simply claimed an amount less than $5,000,000. However, defendants could have rebutted such a claim to remove to federal court by showing that plaintiffs’ claims were “more likely than not” to meet CAFA’s minimum amount in controversy.

These cases indicate that, if the practical results are that plaintiffs retain the benefit of claiming an award surpassing CAFA’s $5 million amount in controversy requirement, they may not tailor their complaints to avoid federal jurisdiction. However, plaintiffs have had success defining their class to include members with other indications of citizenship. Several options for circumscribing class definitions are available as courts consider a multitude of factors in determining domicile including “[1] voting registration and practices; [2] location of personal and real property; [3] location of brokerage and bank accounts; [4] location of spouse and family; [5] membership in unions and other organizations; [6] place of employment or business; [7] driver’s license and automobile registration; and [8] payment of taxes.”

court actions was brought on behalf of a different set of plaintiffs, meaning that none of the plaintiff groups stands to recover in excess of CAFA’s $5 million threshold between the seven suits.” (emphasis in original).

56 *See* Smith v. Nationwide Prop. & Cas. Ins. Co., 505 F.3d 401, 407 (6th Cir. 2007) (“A disclaimer in a complaint regarding the amount of recoverable damages does not preclude a defendant from removing the matter to federal court upon a demonstration that damages are ‘more likely than not’ to ‘meet the amount in controversy requirement,’ but it can be sufficient absent adequate proof from defendant that potential damages actually exceed the jurisdictional threshold.”).

57 *Id.*


1. Defining Class by Citizenship

To cure the plaintiffs’ evidentiary woes, the Nextel court suggested that the plaintiffs simply define their class as all Kansas citizens who subscribed to the cell phone service of Nextel and received their bills in Kansas. Indeed, such a class description requires, by definition, no evidence at all to establish the requisite proportion of citizenship. At least two other circuits have allowed plaintiffs to define their members as citizens to defeat CAFA jurisdiction.

However, the drawback to plaintiffs is that such a class definition reduces the total pool of members and consequently, recoverable damages from the suit. Although such a class definition establishes with 100% certainty that all members of the class are citizens of the state, attorneys would be hesitant to limit their recoverable pool to this level when they could obtain a larger fee recovery by certifying a class potentially composed of one-third non-citizens.

2. Defining Class Members by Residence

Pennsylvania courts have adopted reasoning similar to that of the Seventh Circuit. In Schwartz v. Comcast Corp., the district court

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60 In re Sprint Nextel Corp., 593 F.3d 669, 676 (7th Cir. 2010).
61 See Johnson v. Advance Am., 549 F.3d 932, 937-38 (4th Cir. 2008); see also In re Hannaford Bros. Co. Customer Data Sec. Breach Litig., 592 F. Supp. 2d 146, 148 n.2 (D. Me. 2008) (“Since the class by definition is limited to citizens of Florida, there is no need for evidence as to what percentage of the class is Florida citizenry.”).
62 See In re Hannaford Bros. Co. Customer Data Sec. Breach Litig., 564 F.3d 75, 77 (affirming district court decision that class defined to include only Florida citizens established that two-thirds of the class members were citizens of the state); Johnson, 549 F.3d at 937.
63 Sprint Nextel Corp., 593 F.3d at 676.
64 Id. (“The tradeoff is that this definition would have limited the pool of potential class members, something that plaintiffs and their lawyers are apparently unwilling to do.”).

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rejected the reasoning that residence is sufficient to establish that two-thirds of a putative class are domiciliaries of the state.65 The plaintiffs’ class was defined as “[a]ll persons and entities residing or doing business in the Commonwealth of Pennsylvania who subscribed to Comcast’s high-speed internet service” over an approximately one-year period.66 Solely addressing the residential subscribers,67 the court found that a subscription to Internet service is not indicative of an intent to remain in the state, providing the example of college students who attend Pennsylvania colleges intermittently.68 The court reasoned that Internet service is merely a “standard necessity” in homes and does not indicate domiciliary intent any more so than do “telephone, electric, cable, gas, water and other services.”69 In reaching this conclusion, the court also cited a Third Circuit case, Krasnov v. Dinan, where the court stated that one’s place of residence serves as prima facie evidence of domicile, but is not sufficient by itself to establish domicile.70

Additionally, the court found that Internet subscribers “doing business” in the state likely encompassed a substantial group of non-citizens (and non-residents),71 e.g., out-of-state commuters or Internet

66 Id. at *3 (emphasis added).
67 Id. at *5. Defendant Comcast did not dispute the plaintiffs’ assertion that 98% of residential subscribers were Pennsylvania residents. Id.
68 Id.
69 Id. The transient nature of Internet subscription contracts was presumably also the reason that the court rejected the plaintiffs’ argument that 86.5% of class members demonstrated intent to remain in the state by maintaining service for over five months. Id.
70 Id.; Krasnov v. Dinan, 465 F.2d 1298, 1300 (3d Cir. 1972) (“Where one lives is prima facie evidence of domicile, . . . but mere residency in a state is insufficient for purposes of diversity.”).
71 Schwartz, WL 487915 at *6 (“Schwartz appears to assume that only class members who subscribe to Comcast’s nonresidential internet service in Pennsylvania could be considered to be Comcast internet subscribers that are ‘doing business’ in
This was certainly a valid concern and probably sufficient alone for the court to deny remand to state court.

This conclusion is not outside the norm, as residence has never been equated to domicile or citizenship for diversity jurisdiction purposes. However, residence has often been accepted as prima facie evidence of domicile.

The term *prima facie* by legal definition describes evidence establishing a rebuttable presumption that what is asserted is true. In fact, at common law, a prima facie showing has almost always been established where a plaintiff shows that his or her claim is more likely than not to be true. For instance, in *Allavi v. Ashcroft*, an Afghan alien moving to reopen removal proceedings under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), failed to meet the required prima facie showing that he was “more likely than not” going to be tortured if removed. In *People v. Hood*, the Illinois Supreme Court used the “more likely than not” test to determine whether the prosecutor’s prima facie case had been made, where the prosecutor alleged the defendant had maintained possession of a firearm because it was found in his car. In *State v. Watson*, the Connecticut Supreme Court also applied the “more likely than not” test to determine whether a prima facie showing of possessing a gun had been made where the gun was

Pennsylvania. Because of this assumption, Schwartz fails to address the millions of Comcast internet subscribers across the nation that are not Pennsylvania citizens and could be considered to be ‘doing business’ in Pennsylvania.”).

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72 Id. at *4 (“Comcast also asserts that there are approximately 200,000 citizens of other states who are ‘doing business’ in Pennsylvania by commuting to work in Pennsylvania and countless numbers of citizens from other states who are ‘doing business’ with Pennsylvania via the internet.”).

73 See *Krasnov*, 465 F.2d at 1301.

74 Id. at 1300.

75 BLACK’S LAW DICTIONARY (8th ed. 2004) (“prima facie, adj. Sufficient to establish a fact or raise a presumption unless disproved or rebutted”).

76 *Allavi v. Ashcroft*, 109 F. App’x 935, 936 (9th Cir. 2004).

77 *People v. Hood*, 276 N.E.2d 310 (Ill. 1971).
found in defendant’s car. In Saunders v. State, the Delaware Supreme Court upheld a statute prohibiting possession of Molotov cocktails as constitutional because a possessor of Molotov cocktails was “more likely than not” intent on causing harm, thereby providing prima facie evidence of an intent to cause harm. In Sanderson v. International Flavors and Fragrances, Inc., the Court held that in personal injury cases, a prima facie showing of causation must be established by competent expert testimony establishing that the defendant’s conduct was more likely than not the cause of the injury. Similarly, a prima facie case for tort damages arising from food poisoning requires a showing that it is more likely than not that the food’s condition caused the injury.

What this demonstrates is that prima facie has often been synonymous with a showing that a fact is “more likely than not” to be true. Although a preponderance of the evidence standard has been the norm at common law in determining whether an individual was domiciled in a state, residence has traditionally been insufficient to establish domicile (indeed, it is only one of two elements required), despite it serving as prima facie evidence of domicile. Were residence deemed sufficient to establish domicile and citizenship for purposes of diversity jurisdiction, domicile and citizenship would be rendered meaningless.

Accordingly, many courts have applied a rebuttable presumption of domicile once residency is established. However,

81 Foster v. AFC Enters., Inc., 896 So. 2d. 293, 296 (3d Cir. 2005).
82 Lyon v. Glaser, 288 A.2d 12, 22 (N.J. 1972) (“[T]he State must establish the status of taxability, i.e., domicil [sic] by the preponderance of the credible evidence.”).
84 Id.
85 District of Columbia v. Murphy, 314 U.S. 441, 455 (1941); Sligh v. Doe, 596 F.2d 1169, 1171 (4th Cir. 1979); Fort Knox Transit v. Humphrey, 151 F.2d 602,
many courts have not accepted residence as independently sufficient to establish this presumption. For instance, in *Preston v. Tenet Healthsystem Memorial Medical Center, Inc.* (hereinafter *Preston I*), the plaintiffs alleged that the defendant infirmary failed to maintain safe conditions on the premises and to provide adequate transportation to safety during Hurricane Katrina. While the plaintiffs provided no evidence to show that at least two-thirds of the class was composed of Louisiana citizens, the defendants provided an affidavit from the director of medical records, indicating that 242 of 299 class members registered Louisiana as their primary residence. The court refused to apply the rebuttable presumption of evidence on the basis of “presence in the state” alone, suggesting that the plaintiffs should have produced additional evidence showing, for example, “vehicle registration or an extended period of residency and employment in Louisiana prior to the forced evacuation prompted by Hurricane Katrina.” Elaborating on its refusal to presume citizenship where only residence was shown, the court stated:

The cases cited [by the court] undeniably incorporate language amenable to an argument that the court may determine citizenship based solely on evidence of residency, but [the defendant] fails to appreciate that in these lawsuits, the moving party did not ultimately prevail just because the opposing party offered no rebuttal evidence. Instead, the court considered the entire record to determine whether the evidence of residency was simultaneously sufficient to establish citizenship . . . [The defendant’s] proposed approach for determining citizenship gives undue attention to the naked statements of law as opposed to the substance of

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87 Id. at 798.
88 Id. at 800.
the relevant opinions. Based on the record, which includes only the primary billing addresses of the hospitalized patients, [the defendant] still fail[s] to establish the type of residency information reviewed in other circuits employing the presumption that a person’s residency forms an adequate basis for inferring citizenship unless contested with sufficient evidence.89

However, the cases cited by the plaintiffs, to which the court refers, all concerned citizenship outside the context of CAFA where the parties’ citizenship needed to be individually determined for all parties.90 As will be discussed below, statistically speaking, the burden of citizenship to be proven under CAFA is substantially less. Nonetheless, courts have more often than not been strict in applying a rebuttable presumption of domicile where residence is proven.

3. Defining Class by Residence and Property Ownership

Some district courts have found residence and property ownership in the state sufficient to indicate that two-thirds of a plaintiff class were citizens of the state. In Joseph v. Unitrin, Inc., the court found an action brought “individually and on behalf of all similarly situated Texas residents,” with a class defined as all policyholders who paid premiums to a Texas-based insurance company for residential insurance coverage, sufficient to establish that two-thirds of the class were citizens of Texas.91 The court relied on the theory that evidence of one’s residence is prima facie proof of one’s domicile,92 finding there was “no indication of a mass exodus” from

89 Id.
90 See id. at 800 (citing Sligh, 596 F.2d at 1171; Fort Knox Transit, 151 F.2d at 602; Kelleam, 112 F.2d 940).
92 Id. at *5 (citing Stine v. Moore, 213 F.2d 446, 448 (5th Cir. 1954)).
Texas by more than one-third of these purported residents. The court further found that these policy owners were also likely to own homes in the state.

A similar story played out in *Caruso v. Allstate Insurance Co.*, where, in the wake of Hurricane Katrina, a Louisiana district court found that a class, including all Louisiana homeowners who purchased insurance policies from the defendant insurance companies, could be reliably presumed to be comprised of at least two-thirds Louisiana citizens. However, the plaintiffs’ class definition was not expressly limited to residents, so the court construed the homeowner’s insurance policy as both evidence of residence and intent to remain in the state. While this evidence of residence does not establish a class of 100% residency (as a class definition limited to state residents would) because a group of non-resident home owners may exist (e.g., members owning homes in multiple states and residing outside of Louisiana), the unique circumstances of Hurricane Katrina justify a departure from the stricter norm.

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93 *Id.* at *6.
94 *Id.* (“As these policies cover both the policyholder’s residence and household effects, it can be assumed that members of the putative class own both real and personal property in Texas.”).
95 469 F. Supp. 2d 364, 368 (E.D. La. 2007).
96 *Id.* at 367 (“Given that no one disputes that Hurricane Katrina wreaked [sic] havoc on immovable property in Louisiana, the plaintiffs’ assertion that they represent a class of individuals covered by homeowner’s policies for homes that are located in Louisiana creates a reliable presumption that this is a class of Louisiana residents. Indeed, owning a home is an indicium of domicile.”).
97 *Id.* at 368. Obviously, those members forced out of residence by the events of Katrina are forgiven, because “it is reasonable to assume that residents of these parishes might change their addresses in the immediate aftermath of the storm without changing their domiciles.” *Id.* In fact, a class definition limiting members to *actual* (remaining) Louisiana residents in this case would decrease the class size because the harm, by its nature, caused or forced class members out of their residence. See *id.* Rather, the court’s common sense consideration of Hurricane Katrina and use of homeowner policy possession as evidence of class members’ residential intent allows for a larger class of “would be” residents. See *id.*
The Joseph and Caruso rulings have been interpreted narrowly, such that homeownership and residence may be taken as sufficient evidence of domicile, but residence alone may not. For instance, in Phillips v. Severn Trent Environmental Services, Inc., the district court rejected the plaintiff’s contention that a class, defined as persons affected by allegedly hazardous drinking water and who were residents or occupants of a Louisiana apartment complex between May 15, 2007, and May 20, 2007 (less than one week), met the two-thirds citizenship requirement.98 The plaintiff had failed to offer any evidence demonstrating domiciliary intent, and the class period had included only the brief month of May 2007.99 Indeed, renters of an apartment, especially over such a shortly defined period of time, would be more likely to have only a transient presence in the state than homeowners.

4. Defining Class as Employees in the State

In Mattera v. Clear Channel Communications, the United States District Court for the Southern District of New York found the local controversy exception’s two-thirds citizenship requirement was met where the plaintiff class was defined as “all persons who worked for defendants as sales representatives at one of the New York radio stations and had their wages deducted at any time after March 9, 2000 to entry of judgment of this case.”100 The court required no further evidence and found it “reasonably likely that more than two-thirds of the putative class members of the proposed class—all of whom work[ed] in New York—[were] citizens of New York.”101

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99 Id.
101 Id. at 80.
B. Representative Samples

In addition to showing state citizenship by refined class definitions, the Nextel court suggested that future plaintiffs can meet their burden of proof for showing that state citizens comprise two-thirds of the class by providing representative samples of class members indicating domiciliary intent, e.g., affidavits or survey responses from potential class members.\(^{102}\)

However, this solution is not without difficulties because plaintiffs may tailor their samples in a biased manner to achieve favorable results. For instance, in *Evans v. Walter Industries, Inc.*, the Eleventh Circuit rejected an affidavit provided by the plaintiffs’ attorney attempting to show that because 93.8% of the class members were Alabama residents, two-thirds of the plaintiff class were likely citizens of Alabama.\(^{103}\) Although the plaintiffs’ sample was large, containing 10,118 potential class members, the court was skeptical of its neutrality because the affidavit made no mention of how the potential class members were selected.\(^{104}\) More specifically, the plaintiffs were seeking to certify a class containing two types of class members: (1) injured individuals who were owners, lessees, or licensees of property on which the defendants “deposited waste substances” and (2) individuals who were injured by simply coming in contact with the defendants’ waste substances.\(^{105}\) Fatally, the plaintiffs did not state which class member “type” was predominantly present in the sample or even the class:

We do not know if these 10,118 people represent both the property damage and personal injury classes. We do not know if [the plaintiffs’ attorney’s] method favored people currently living in Anniston over people who have left the area. In short, we know nothing about the

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\(^{102}\) *In re Sprint Nextel Corp.*, 593 F.3d 669, 675 (7th Cir. 2010).

\(^{103}\) 449 F.3d 1159, 1166 (11th Cir. 2006).

\(^{104}\) *Id.*

\(^{105}\) *Id.* at 1165–66.
percentage of the total class represented by the 10,118 people on which plaintiffs’ evidence depends. Moreover, the class, as defined in the complaint, is extremely broad, extending over an [eighty-five]-year period. We do not know if [plaintiff’s attorney] made any effort to estimate the number of people with claims who no longer live in Alabama.\textsuperscript{106}

Presumably, resident property owners, lessees, and licensees are more likely to be domiciliaries of the state, while those who were simply harmed by the toxic substances—but do not own, lease, or license property—are more likely to have only a transient presence in the state. In short, the lack of information provided by the plaintiffs in selecting individuals for their sample was interpreted suspiciously by the court for lack of neutrality.\textsuperscript{107}

However, other courts have accepted facially unreliable evidence. In \textit{Preston v. Tenet Healthsystem Memorial Medical Center} (hereinafter \textit{Preston II}), a case endorsed by the \textit{Nextel} court,\textsuperscript{108} the Fifth Circuit also addressed the question of how much evidence is necessary to establish that two-thirds of potential class members are citizens of the state, in a class action brought for damages sustained during the Hurricane Katrina disaster.\textsuperscript{109} There, the plaintiffs harmed by incidents of Katrina alleged that their hospital failed to maintain emergency power in its facilities and to develop an evacuation plan for patients.\textsuperscript{110} The plaintiffs argued that two-thirds of the class was comprised of Louisiana citizens by producing affidavits showing that only seven of 256 admitted patients were registered as residents of states other than Louisiana and that two out of thirty-five deceased

\textsuperscript{106} \textit{Id.} at 1166.
\textsuperscript{107} \textit{Id.}
\textsuperscript{108} \textit{In re Sprint Nextel Corp.}, 593 F.3d 669, 675 (7th Cir. 2010) (citing \textit{Preston II} as an example of a case properly producing a “representative sample” for evidence of citizenship).
\textsuperscript{109} \textit{Preston v. Tenet Healthsystem Mem’l Med. Ctr., Inc. (Preston II)}, 485 F.3d 804, 823–24 (5th Cir. 2007).
\textsuperscript{110} \textit{Id.} at 815.
patients had given out-of-state addresses. To show domiciliary intent, plaintiffs provided eight affidavits from class members indicating that they intended to return and remain in Louisiana.

First, the defendants attempted to rebut the plaintiffs’ evidence of residence by tracing the mailing addresses of potential class members located throughout the country through a private investigator, who found that forty-nine of 146 individuals identified as potential class members—slightly greater than one-third—resided outside of Louisiana, thus implying that less than two-thirds of the class were Louisiana residents. Following the district court’s reasoning, the Fifth Circuit rejected the defendants’ rebuttal evidence because it failed to show these class members intended to remain outside of Louisiana.

The defendants then attempted to discredit the plaintiffs’ affidavits of domiciliary intent by arguing that they were subjective. However, the court found the subjective nature of the affidavits unavailing, because the defendants failed to produce objective evidence showing that the plaintiffs had misrepresented their intentions: “This court gives little weight to statements of intent evidence, however, only when the subjective evidence conflicts with the objective facts in the record. [The defendants] point[] to no objective evidence in the record indicating that the affidavits misrepresented the plaintiffs’ intent of returning to New Orleans.” Under this standard, requiring rebuttal of subjective statements of domiciliary intent by objective evidence, defendants would be foreclosed from countering with similar class member affidavits of subjective intent to remain outside of the state. Defendants’ burden

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111 Id.
112 Id.
113 Id.
114 Id.
115 Id. at 816.
116 Id.
117 See id.
of rebuttal is thus not equal to plaintiffs’ burden of proof; it is far greater.\textsuperscript{118}

In retrospect, it is not only troubling that the Fifth Circuit accepted a minuscule sample size of eight members—the smaller the sample size, the less probative the evidence\textsuperscript{119}—but also that six of the eight affidavits were produced by named class representatives.\textsuperscript{120} As opposed to unnamed class members, class representatives are often compensated for their service to the class through monetary incentives.\textsuperscript{121} These awards are offered to class representatives as recognition for the “financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general.”\textsuperscript{122} Hence, class members have incentives to lie about things such as domicile,\textsuperscript{123} which, because of its subjective nature, is difficult to overturn or prove otherwise.\textsuperscript{124} In other cases, class representatives are little more than figureheads for litigation, with class counsel unilaterally directing the litigation.\textsuperscript{125} Accordingly, the potential for fabrication and manipulation of

\textsuperscript{118} See id.

\textsuperscript{119} Wheeler v. City of Columbus, Miss., 686 F.2d 1144, 1151 (5th Cir. 1982).

\textsuperscript{120} Preston II, 485 F.3d at 815.


\textsuperscript{122} Rodriguez v. West Publ’g Corp., 563 F.3d 948, 958–59 (9th Cir. 2009).

\textsuperscript{123} See id. at 959.

\textsuperscript{124} See Preston II, 485 F.3d at 816 (holding that subjective evidence of domiciliary intent is only undermined when it conflicts with objective facts).

\textsuperscript{125} See Unger v. Amedisys Inc., 401 F.3d 316, 321 (5th Cir. 2005) (“Class representatives must satisfy the court that they, and not counsel, are directing the litigation.”); Scott v. N.Y.C. Dist. Council of Carpenters Pension Plan, 224 F.R.D. 353, 356 (S.D.N.Y. 2004) (holding the named plaintiff as inadequate to represent the class because of an “alarming lack of familiarity with the suit,” as indicated by the plaintiff’s lack of knowledge of allegations contained in the complaint, his meeting with counsel only once in three years, and his statement that “he would leave every decision up to his attorney and never question his advice”).

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affidavits by either class representatives or their attorneys may undermine the credibility of affidavits of domiciliary intent.

Despite the irksome aspects of the Fifth Circuit’s ruling, the influence of the extreme circumstances of the Hurricane Katrina events on the court’s ruling should not go unnoticed:

The underlying facts of this lawsuit and the reason for the parties contesting the citizenship issue emanate from a common origin of circumstances: the unmerciful devastation caused by Hurricane Katrina. As an inevitable result of the property damage and evacuation, a great majority of the city’s population either temporarily or permanently relocated to habitable areas of Louisiana and other states. In this case, the aftermath of Hurricane Katrina and attendant flooding serves as a common precipitating factor for the mass relocation pertinent to our citizenship determination and threads together the proposed class and many other citizens.126

Hence, the court took note of the overall circumstances, and utilized common sense to draw the inference that at least two-thirds of the class members intended to remain in Louisiana, despite the plaintiffs’ paltry production of eight affidavits to establish domiciliary intent.127

The District Court for the Eastern District of Louisiana accepted similarly skewed evidence in Martin v. Lafon Nursing Facility of the Holy Family, Inc.128 The plaintiff filed a class action suit129 against a nursing home, accusing the defendant of negligence in

126 Preston II, 485 F.3d at 817.
127 Id.
129 Id. at 280. The class was defined as “[a]ll persons, except Defendants’ employees, who sustained injury and/or damage . . . as a result of unreasonable dangerous conditions and/or defects in and/or on the premises of LAFON on or about August 29, 2005, and/or as a result of the failure of LAFON to attain, maintain, and/or provide an adequate means of transportation to timely and/or safely
failing to protect the nursing home’s residents from the “effects” of Hurricane Katrina.\textsuperscript{130} In support of a motion to remand to state court via the home-state and local controversy exceptions, the plaintiff provided subjective evidence of domiciliary intent via questionnaire responses from class members.\textsuperscript{131} The questionnaires revealed that fifty-three of the sixty-eight class members (75\%) who responded were citizens of Louisiana.\textsuperscript{132} Following the standard that the Fifth Circuit adopted in \textit{Preston II}, the district court found the questionnaires sufficient to establish that two-thirds of the plaintiff class was comprised of Louisiana citizens because the defendant had not presented objective evidence “indicating that the questionnaires misrepresent[ed] the putative class members’ intent” nor “argued that the questionnaire responses [were] not authentic.”\textsuperscript{133}

To establish that the questionnaires “misrepresent[ed] the putative class members’ intent” as a whole, the defendant argued that the sample of questionnaire responses contained an abnormally high proportion of state citizens because the post office had stopped forwarding mail to persons forced out of the state.\textsuperscript{134} This allegedly implied that a smaller percentage of out-of-state class members would receive and respond to the questionnaires than remaining state residents, and presumably, it was less likely that class members forced out of the state intended to return and remain in the state.\textsuperscript{135}

\textsuperscript{130} Id. at 280.
\textsuperscript{131} Id. at 273.
\textsuperscript{132} Id. at 273–74.
\textsuperscript{133} Id. at 276.
\textsuperscript{134} Id.
\textsuperscript{135} See \textit{id}. The defendant’s argument used the same reasoning accepted by the court in \textit{Evans v. Walter Industries, Inc.}, where the court rejected the plaintiffs’ sample evidence of citizenship showing that 93.8\% of a class of (1) property owners and (2) non-property owners injured by the defendants’ toxic substances were residents of the state. 449 F.3d 1159, 1166 (11th Cir. 2006). The plaintiffs did not indicate the composition of property owners versus non-property owners in the

move persons off its premises in the wake of Hurricane Katrina, and the failure of LAFON to provide adequate medical care in the wake of Hurricane Katrina.” \textit{Id.} at 270.
The district court dismissed the defendant’s argument, finding that “the fact that not all potential class members responded” did not preclude the court from “assum[ing] that these responses [were] representative of the class as a whole.” More importantly, the court cited *Preston II* and quoted the portion of the Fifth Circuit’s opinion qualifying the extreme circumstances of the Katrina events as reason to presume that residents forced out of the state intended to return.

The *Preston II* and *Martin* decisions unveil suspicions about the actual utility of evidence of domiciliary intent. The events of Katrina, while extreme, were no more than a backdrop for the Fifth Circuit to apply a presumption of continuing domicile. However, a presumption of continuing domicile requires that domicile be established by class members in the first place, and in *Preston II*, aside from the questionable eight affidavits of domiciliary intent, the only evidence that the plaintiffs provided was of residence. Indeed, when the *Preston II* court stated that “[e]ven though eight affidavits may sample, and property owners were presumably more likely to be domiciliaries of the state. *Id.*

136 *Martin*, 548 F. Supp. 2d at 276. However, this particular line of reasoning misconstrues the defendant’s argument. The defendant contested the questionnaire sample’s composition, not size. *See id.* at 274.

137 *Id.*; see *Preston v. Tenet Healthsystem Mem’l Med. Ctr., Inc.* (*Preston II*), 485 F.3d 804, 817 (5th Cir. 2007).

138 *See Preston II*, 485 F.3d at 818 (“[W]e find no precedential support for the notion that a forced relocation (especially, a mandatory evacuation prompted by a natural disaster) destroys the presumption of continued domicile.”); *Denlinger v. Brennan*, 87 F.3d 214, 216 (7th Cir. 1996) (“S]ince domicile is a voluntary status, a forcible change in a person’s state of residence does not alter his domicile; hence the domicile of [a] prisoner before he was imprisoned is presumed to remain his domicile while he is in prison. . . . [T]he presumption articulated in *Sullivan* is rebuttable, but on this meager record it has not been rebutted.”) (internal citations and quotations omitted); *Fort Knox Transit v. Humphrey*, 151 F.2d 602, 602–03 (6th Cir. 1945) (“[U]pon the whole record and in the absence of any challenge to the jurisdiction, the plaintiff’s residence in Ohio is prima facie evidence of his citizenship in that state and is not overthrown by residence in Kentucky as a member of the Armed Forces of the United States, and there being no substantial evidence of voluntary relinquishment of an Ohio domicile”).

139 *See Preston II*, 485 F.3d at 815.
constitute a small number of statements outside the unique convergence of facts presented in this case, we find that here, the affidavits amplify the court’s carefully reasoned conclusion about the probable citizenship of the proposed class,” it appears that the court was seeking confirmation to justify its own “guesswork” about the probable citizenship of the class, rather than evidence that adequately bore on the question of intent in its own right.140

IV. CONSTRUING STATISTICAL SIGNIFICANCE

In discussing the solution of providing evidence of domiciliary intent through representative samples, the Seventh Circuit in Nextel stated that a level of statistical significance “greater than [fifty] percent would have allowed the district court to conclude that the plaintiffs had established the citizenship requirement by a preponderance of the evidence.”141 This level of statistical significance is admittedly less than the 95% level normally required by scientists and statisticians.142 Indeed, this standard merely requires the fact-finder to believe that the alleged hypothesis is “more likely than not” and “inherently, it allows the fact-finder to assess risks, to measure probabilities, [and] to make subjective judgments.”143

However, the obscure notion of statistical significance has generated much confusion in courts and its application to evidence standards.144 For example, statisticians employ different standards for

140 See id. at 818 (emphasis added).
141 In re Sprint Nextel Corp., 593 F.3d 669, 676 (7th Cir. 2010) (citing Ethyl Corp. v. EPA, 541 F.2d 1, 28 n.58 (D.C. Cir. 1976) (discussing the acceptable probability of error for evidence in great detail)).
142 Id. (“Statisticians and scientists usually want at least 95% certainty”); Ethyl Corp., 541 F.2d at 28 n.58 (“Typically, a scientist will not so certify evidence unless the probability of error, by standard statistical measurement, is less than 5%. That is, scientific fact is at least 95% certain.”).
143 Ethyl Corp., 541 F.2d at 28 n.58 (emphasis added).
accepting Type II errors from Type I errors in their studies. A Type I error occurs when a study mistakenly rejects the null hypothesis (the hypothesis against which the statistician seeks to provide evidence, in order to prove the alternative hypothesis). A Type II error occurs when a study mistakenly accepts the null hypothesis. By convention, statisticians accept a Type II error rate of 20% and a Type I error rate of 5%. Here, if a plaintiff were trying to prove that two-thirds of the proposed class members are citizens of the state, the null hypothesis would (roughly) be that the evidence that the plaintiff provided does not establish citizenship. Hence, were a statistician to act in accord with convention, he or she would accept data more likely to disprove the plaintiff’s claim than to support it (i.e., accepting a higher rate of Type II error than Type I error). Why should the plaintiff, who already bears the burden of showing citizenship of the class, be further hamstringed by statistical conventions?

Moreover, interpretation of the P-value (on which statistical significance is based) is often a mystery in courts, because the P-value does not say anything about causation. Rather, the calculated P-value indicates the probability that the sample data would result if the null hypothesis were true. For example, imagine that plaintiffs provided data indicating that 67% of a sample of class members, who are residents of and owned property in the state, are also citizens of the state. The null hypothesis might be that residence and in-state property ownership of members in this class correlate with citizenship at a rate less than 67% (i.e., insufficient to establish citizenship of the class), while the alternative hypothesis would be that residence and property ownership correlate with citizenship at least 67% of the time (i.e.,

145 Id. at 840.  
146 Id.  
147 Id.  
148 Id. at 840 n.54.  
149 See id. at 840 & n.54.  
150 Id. at 842.  
sufficient to establish citizenship of the class). If a statistician, trying to determine whether this sample was truly representative of the class as a whole, calculates a P-value of 0.49 for the study, that means there is a 49% chance that the plaintiffs’ sampling of class members would have selected citizens at the rate of 67%, even if less than 67% of the total class members were actually citizens of the state (i.e., if the null hypothesis were true). To calculate statistical significance, the statistician then easily computes the confidence coefficient, which is simply one minus the P-value (here, 0.51). This implies that there is a 51% chance that the plaintiffs’ sampling of class members would have selected a group composed of 67% citizens in a world where at least 67% of those class members with residency and owning property were actually citizens of the state (i.e., if the alternative hypothesis were true).

However, statistical significance does not establish confidence in the hypothesis test itself and the parameters upon which it rests. This issue is exacerbated by the ability of plaintiffs to tailor the variety of available statistical methods to their own goals. For instance, a manipulative statistician could take a large sample of data and select favorable portions to create a smaller tailored sample demonstrating what his party seeks to prove. Of course, the statistician would have to account for the fact that a decrease in sample size also decreases the statistical significance of the test.

152 See id.
153 See id. at 1339 (indicating that a P-value of 0.51 is not sufficient to deem the study statistically significant at the 0.05 level, because the P-value is less than 0.95).
154 See id. at 1342.
156 Id. at 461.
157 See Evans v. Walter Indus., Inc., 449 F.3d 1159, 1166 (11th Cir. 2006) (doubting genuineness of the plaintiff’s sample because the method for selecting persons in the representative sample was not disclosed).
158 See Garaud, supra note 155, at 462.
Moreover, the required reliability of sample evidence to establish citizenship is diminished in the context of the two-thirds requirement of the CAFA home-state and local controversy exceptions. For instance, consider a sample plaintiff class, exactly meeting the two-thirds citizenship requirement: there is a two-thirds (66.6%) chance that any single randomly selected member of this class is a citizen of the state. This is a logically diminished burden in contrast to the usual situation in diversity jurisdiction disputes where the citizenship of all (100%) individual parties must be established by a preponderance of the evidence.

Overall, it is not clear that statistical evidence from a representative sample offers substantial benefits to the court in determining citizenship of a class. As discussed above, the potential for manipulation of sample data and for court and jury misinterpretation are far too great to justify the costs of obtaining experts and collecting data, especially in the face of an unconventionally low required significance level of merely 51% for proving that two-thirds of the members of a class are citizens of the state. The potential for confusion is exacerbated because courts often use their own intuitions, instead of referring to statistics experts, to estimate the probative value of plaintiffs’ evidence. What objectivity is actually gained if courts still use their own unqualified, subjective intuitions to evaluate the probative value of these sample studies?

**CONCLUSION**

The Seventh Circuit’s decision to require plaintiffs to submit evidence of domiciliary intent, or to limit class definitions to include only citizens of the state, has severely hampered the ability of plaintiffs to utilize the class action device at the state level. On the one hand, providing such evidence likely entails locating unknown class

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members for response to questionnaires, and providing such evidence can be unduly expensive. If courts wish to objectively and fairly evaluate such representative samples, they must utilize experts to evaluate the statistical implications of these studies, driving the costs of litigation even further up, and diminishing plaintiffs’ potential for recovery. On the other hand, if courts do not utilize experts, the lack of judicial expertise on statistical matters, the potential for confusion and misinterpretation, and the ability of parties to manipulate and produce biased results implicates the concerns of unreliability caused by subjective judgments and “guesswork” estimations that the Seventh Circuit sought to avoid by requiring evidence in the first place. Moreover, requiring plaintiffs to define their class in terms of citizenship as an economically feasible alternative deprives non-citizens of the remedies available to citizen class members who were similarly wronged. Lastly, reliance on old principles of proving domicile, while relevant, should not be imported wholesale into the context of CAFA class action jurisdiction, where the citizenship of class members need not be shown. Accordingly, the Seventh Circuit should adopt a presumption of domicile where the class is defined to include only residents, especially since a defendant’s burden under CAFA for showing diversity is so easily met under the minimal diversity standard. By failing to adopt a rebuttable presumption of domicile, the Seventh Circuit has undermined the principles of practicality, reasonableness, and judicial economy that the class action was intended to promote.
WHAT DOES SPEED HAVE TO DO WITH IT?: AN ANALYSIS OF THE SEVENTH CIRCUIT’S APPLICATION OF THE SPEEDY TRIAL ACT

MEAGAN S. WININGS

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INTRODUCTION

The Sixth Amendment grants everyone the fundamental right to a speedy trial.1 It is our constitutional right to be charged and tried in an efficient and expeditious manner.2 This right is also protected by a federal statute, the Speedy Trial Act.3 While it would seem that this right is well-protected by both constitutional and federal law, in practice, it may not be. Many claims for a violation of one’s right to a speedy trial have been ignored; for example, in one Seventh Circuit case, the trial did not commence for over 430 days from the date of the charge.4 One reason that the Seventh Circuit affirms these lengthy delays is because it has been liberal with its application of the

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1 U.S. CONST. amend. VI; see Barker v. Wingo, 407 U.S. 514, 529–30 (1972) (stating that the right to a speedy trial is a fundamental right).
2 U.S. CONST. amend. VI.
4 See United States v. Cunningham, 393 F. App’x 403, 405–06 (7th Cir. 2010) (where 430 days passed between the indictment and trial but the Act was not violated because the court invoked the ends-of-justice exception).
excludable days exception provided in the Speedy Trial Act,\(^5\) as well as with what is considered a reasonable amount of time to bring the defendant to trial.\(^6\) Another reason is the lack of an efficient analytical standard for courts to use to determine if a violation of one’s right to a speedy trial occurred. The Seventh Circuit also chooses to affirm dismissal without prejudice a majority of the time, which allows the defendant to be reprosecuted, even though the Speedy Trial Act has been violated.\(^7\) As a result of the Seventh Circuit’s approach, defendants are tried well after what is required by the Speedy Trial Act, and those at fault for the delay are not punished.

This Note will examine the Seventh Circuit’s interpretation of the Sixth Amendment and the Speedy Trial Act, in light of the precedent passed down from the Supreme Court. The Seventh Circuit’s application of the right to a speedy trial will also be compared to the approach of the other circuit courts. This analysis helps to establish a theory that the right to a speedy trial may be more myth than reality in actual practice within the Seventh Circuit. While a bright-line rule of when a person’s right to a speedy trial has been violated may not be feasible, a more workable standard must be developed. The Seventh Circuit must find a way to balance one’s individual rights with the public interest. In addition, the Seventh Circuit must provide a meaningful remedy when a violation occurs, as well as deter violations through sanctions. This Note attempts to provide a balancing structure for these rights, as well as to recommend a better approach to provide a meaningful remedy for the violation of the right to a speedy trial.

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\(^5\) See 18 U.S.C. §§ 3161(h)(1)(A)–(H) (excluding some days from the seventy-day requirement).

\(^6\) See, e.g., United States v. Sykes, 614 F.3d 303, 305–06 (7th Cir. 2010); United States v. Hills, 618 F.3d 619, 631–32 (7th Cir. 2010); United States v. Killingsworth, 507 F.3d 1087, 1089 (7th Cir. 2007); United States v. Arango, 879 F.2d 1501, 1507-08 (7th Cir. 1989); United States v. Fountain, 840 F.2d 509, 511 (7th Cir. 1988).

\(^7\) See Hills, 618 F.3d at 631–32.
I. BACKGROUND

A defendant’s right to a speedy trial is protected by the Sixth Amendment to the United States Constitution and by federal statute. The Seventh Circuit has repeatedly analyzed the right under both contexts to determine if a violation of one’s right to a speedy trial occurred and to decide whether to dismiss with or without prejudice.

A. A Constitutional Right: The Sixth Amendment

While public policy should, and does, shape our laws and the way they are applied, our Founding Fathers established certain constitutional rights that were considered fundamental and were to be left untouched and unlimited. One of these constitutional rights is the right to a speedy trial and is found in the Sixth Amendment to the United States Constitution. The Sixth Amendment was put in place “(1) to prevent oppressive pretrial incarceration[,] (2) to minimize anxiety and concern of the accused[,] and (3) to limit the possibility that defense will be impaired.” In light of these factors, one can infer that the Founding Fathers thought that the right to a speedy trial was necessary and fundamental to preserve our rights and liberty as individuals.

The federal government has further expressed and defined this right through a statute, the Speedy Trial Act. However, the Speedy Trial Act does not, and indeed cannot, limit the Sixth Amendment’s

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9 See Sykes, 614 F.3d at 305–06; Hills, 618 F.3d at 631–32; Killingsworth, 507 F.3d at 1087; Arango, 879 F.2d at 1501; Fountain, 840 F.2d at 509.
10 See U.S. CONST. amend. VI; Barker v. Wingo, 407 U.S. 514, 529–30 (1972) (stating that the right to a speedy trial is a fundamental right).
11 U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .”).
12 Hills, 618 F.3d at 631–32.
13 Phipps, 933 N.E.2d at 1192–93.
guarantee of a speedy trial. As a result, courts must remember that the right they are ensuring is one guaranteed by the United States Constitution.

B. A Statutory Right: The Speedy Trial Act

The Speedy Trial Act assures that the defendant receives a speedy trial by setting out time limits in which the trial must occur. Under the Act, any information or indictment “shall be filed within thirty days from the date on which such individual was arrested or served with a summons.” In addition, the trial of a defendant shall occur within seventy days from the date of the indictment.

However, there are some periods of time that are considered excluded.

The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) any period of delay resulting from other proceedings concerning the defendant, including but not limited to

(A) delay resulting from any proceeding . . . to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from trial with respect to other charges against the defendant;

(C) delay resulting from any interlocutory appeal;

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14 See U.S. CONST. art. VI, § 1, cl. 2.
16 Id. § 3161(b).
17 Id. § 3161(c)(1).
18 Id. § 3161(h).
(D) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(E) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district . . .;

(F) delay resulting from transportation of any defendant . . .;

(G) delay resulting from consideration by the court of a proposed plea agreement . . .; and

(H) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.\(^\text{19}\)

In addition, a period of delay to allow the defendant to demonstrate his good conduct and a “period of delay resulting from the absence or unavailability of the defendant or an essential witness” are excluded.\(^\text{20}\) Furthermore, delay because a continuance is granted by a judge on his own motion or at the request of the defendant or government is also excluded.\(^\text{21}\)

If the time limit governing when an indictment or information can be filed is violated, the charge “shall be dismissed or otherwise dropped.”\(^\text{22}\) If the time limit required by 18 U.S.C. § 3161(c) is violated, the indictment shall be dismissed on motion of the defendant.\(^\text{23}\) When the court is determining whether to dismiss with or without prejudice, it shall consider “the seriousness of the offense[,]”

\(^{19}\) Id. §§ 3161(b)(1)(A)–(H).

\(^{20}\) Id. §§ 3161(b)(2), (3)(A).

\(^{21}\) Id. § 3161(7)(A).

\(^{22}\) Id. § 3162(a)(1).

\(^{23}\) Id. § 3162(a)(2).
the facts and circumstances of the case which led to the dismissal[,] and the impact of a reprosecution on the administration of [the Act] and on the administration of justice.”\(^{24}\) These factors seem to almost always favor dismissal without prejudice in the Seventh Circuit.

In *United States v. Taylor*, the Supreme Court reviewed the Speedy Trial Act’s legislative history and determined that prejudice to the defendant is a substantial factor in determining whether to dismiss with or without prejudice as well.\(^{25}\) The Supreme Court also determined that the legislative history shows that Congress did not intend for a certain type of dismissal to be the presumptive remedy for a Speedy Trial Act violation.\(^{26}\) Instead, courts have significant discretion when deciding if a violation occurred and whether to dismiss with or without prejudice.\(^{27}\)

The Supreme Court in *Barker v. Wingo* has provided insight into the policy reasons behind the Sixth Amendment Right to a speedy trial.\(^{28}\) These same policy reasons, as well as the Sixth Amendment, helped to shape the Speedy Trial Act. One important policy concern is that the accused be treated with “decent and fair procedures”; however, there is also a societal interest in providing a speedy trial.\(^{29}\) When courts are unable to provide a speedy trial, the defendant may gain an advantage.\(^{30}\) For example, defendants may be able to negotiate more effectively or manipulate the system, and those who are out on bond have the opportunity to commit additional crimes.\(^{31}\) In addition, lengthy delays could have detrimental effects on defendants’ rehabilitation because they are often confined for long periods of time.\(^{32}\) Defendants could also use delay as a tactic by waiting until

\(^{24}\) *Id.*


\(^{26}\) *Id.* at 334.

\(^{27}\) United States v. Fountain, 840 F.2d 509, 512 (7th Cir. 1988).

\(^{28}\) 407 U.S. 514, 519 (1972).

\(^{29}\) *Id.*

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

\(^{31}\) *Id.*

\(^{32}\) *Id.* at 520 (this also contributes to prison overcrowding).
witnesses are unavailable or their memories fade.\textsuperscript{33} As a result, in addition to protecting the defendant’s rights, the Speedy Trial Act serves an important societal function.

\textit{C. The Supreme Court’s Application of the Sixth Amendment and the Speedy Trial Act}

In \textit{United States v. Taylor}, the Supreme Court stated that:

\textbf{[A]} district court must carefully consider those factors as applied to the particular case and, whatever its decision, clearly articulate their effect in order to permit meaningful appellate review. Only then can an appellate court ascertain whether a district court has ignored or slighted a factor that Congress has deemed pertinent to the choice of remedy, thereby failing to act within the limits prescribed by Congress.\textsuperscript{34}

The Supreme Court in \textit{Taylor} also stated that “the district court’s judgment of how opposing considerations balance should not be lightly disturbed.”\textsuperscript{35} If the district court does not articulate the reasons for its decision, the appellate courts and Supreme Court are put in a difficult position. Do they act with deference or do they analyze the facts and circumstances of the case to decide how they would hold? The following cases demonstrate the approach that the Supreme Court has taken with regard to the right to a speedy trial.

\textit{1. Vermont v. Brillon}

In \textit{Vermont v. Brillon}, the defendant was arrested for felony domestic assault and habitual offender charges and was tried three

\textsuperscript{33} \textit{Id.} at 521.
\textsuperscript{34} 487 U.S. 326, 336–37 (1988).
\textsuperscript{35} \textit{Id.}
years later. The defendant was convicted of second-degree aggravated domestic assault in the district court. The Vermont Supreme Court vacated, and the United States Supreme Court granted certiorari. The Supreme Court then reversed and remanded.

During his trial, Brillon was appointed at least six different attorneys. The United States Supreme Court noted that assigned counsel acts on behalf of their clients, just as retained counsel does, and that delays sought by counsel are usually attributable to their clients. The Court stated that the Vermont Supreme Court erred when it attributed to the State the failure of assigned counsel to move the defendant’s case forward. The Vermont Supreme Court also failed to properly take into account the role of Brillon’s disruptive behavior. The Supreme Court held that delays caused by defense counsel, including appointed counsel, were attributable to the defendant and that Brillon was not denied his constitutional right to a speedy trial.

2. Barker v. Wingo

In Barker v. Wingo, the defendant, a state prisoner, challenged his conviction in a habeas corpus proceeding. The district court denied

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37 Id.
38 Id. at 1283.
39 Id.
40 Id. at 1287.
41 Id.
42 Id. at 1291.
43 Id. at 1292 (“His strident, aggressive behavior with regard to [his third counsel], whom he threatened, further impeded prompt trial and likely made it more difficult for the Defender General’s office to find replacement counsel.”).
44 Id. at 1293.
the petition, and the Sixth Circuit affirmed.46 The Supreme Court also affirmed.47

The Supreme Court laid out four factors to determine if a defendant had been deprived of his constitutional right to a speedy trial: “Length of [the] delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant.”48 Unless the delay is “presumptively prejudicial,” there is no need to analyze the other factors.49 The Supreme Court then stated that these factors must be “considered together with such other circumstances as may be relevant.”50

The Supreme Court determined that a delay between arrest and trial of well over five years was extraordinary, but that two other factors outweighed this deficiency.51 First, the defendant suffered minimal prejudice.52 Second, the Court inferred that the defendant did not want a speedy trial because he did not assert his right for four years.53 The Court noted that while the Commonwealth of Kentucky was granted sixteen continuances, Barker did not object until the twelfth.54 The Commonwealth was then granted additional continuances to which Barker did not object.55

In addition, the Court noted that delay could often be used as a defense tactic and that a violation of one’s right to a speedy trial does not per se prejudice the defendant.56 The Court rejected outright “the rule that a defendant who fails to demand a speedy trial forever waives

46 Id.
47 Id.
48 Id. at 530.
49 Id.
50 Id. at 533 (leaving the factors open-ended).
51 Id. at 533–34.
52 Id.
53 Id.
54 Id. at 516–17.
55 Id. at 517.
56 Id.
his right.” 57 The Court stated that the better rule is one where the defendant’s assertion or failure to assert his right is a factor to be considered. 58 This places “the primary burden on the courts and the prosecutors to assure that cases are brought to trial.” 59 The Court stated that unless there were extraordinary circumstances, it would be disinclined to rule that a defendant was denied his rights if the defendant failed to object to continuances and did not want a speedy trial. 60 As a result, the Supreme Court held that Barker was not deprived of his right to a speedy trial. 61

3. United States v. Taylor

In United States v. Taylor, the defendant was indicted for conspiracy to possess cocaine with intent to distribute. 62 The district court dismissed the indictment with prejudice, and the Ninth Circuit affirmed. 63 The Supreme Court reversed. 64

The Supreme Court stated that “review must serve to ensure that the purposes of the [Speedy Trial] Act and the legislative compromise it reflects are given effect.” 65 The Court noted that the trial was delayed for numerous reasons, including the defendant’s obligation to testify in another trial and slow processing by the trial court and the Government. 66 The Court also analyzed the factors laid out in Barker and noted that the defendant’s alleged crime was serious, the Government’s conduct was lackadaisical, and the defendant failed to

57 Id. at 528.
58 Id.
59 Id. at 529.
60 Id. at 536.
61 Id.
63 Id. at 326.
64 Id.
65 Id. at 336.
66 Id. at 328.
appear for trial. The Supreme Court also stated that the district court did not provide explanations for its findings with regard to these factors, and it did not consider each of the necessary factors. The Supreme Court pointed out that the district court did not make a finding of prejudice and that while that is not dispositive, it is a factor that favors reprosecution.

The Court criticized the district court’s reasoning by stating that the deterrent effect of barring reprosecution should not alone support a decision to dismiss with prejudice because it would make all the other factors in 18 U.S.C. § 3162(a)(2) superfluous. The Supreme Court stated that the district court abused its discretion because it did not weigh the factors correctly, it failed to explain why the Government was lackadaisical, it failed to consider that the defendant did not suffer prejudice, and it failed to take into account the defendant’s contribution to the delays. As a result, the Supreme Court reversed and held that no violation of the Speedy Trial Act occurred.

D. Other Circuits’ Application of the Sixth Amendment and the Speedy Trial Act

Just as it is important for the Supreme Court to act with deference to the district courts, it is important for the federal courts of appeals to do so as well. It is also necessary for the district courts to fully explain their reasoning so that the courts of appeals can provide meaningful

67 Id. at 338–40.
68 Id.
69 Id. at 341.
70 Id. at 342 (where the district court’s decision to dismiss with prejudice was heavily influenced by the court’s concern that not to do so would condone the Government’s behavior).
71 Id. at 342.
72 Id. at 343.
73 Id.
review.74 The following cases illustrate the other circuit courts’ application of both the Sixth Amendment right75 and the statutory right76 to a speedy trial.

1. The Third Circuit

In United States v. Stradford, Stradford and two co-defendants were charged with defrauding multiple lending agencies and engaging in other financial fraud.77 The district court denied Stradford’s motion to dismiss the indictment on Speedy Trial Act grounds, and the Third Circuit affirmed.78

The magistrate judge granted a continuance so that the parties could conduct plea discussions.79 The government required Stradford to consent to excluding that time for the purpose of the Speedy Trial Act if they were to discuss a plea bargain.80 Before the discussions began, Stradford filed a motion to dismiss the indictment for violations of the Speedy Trial Act.81 The district court denied Stradford’s motion.82 The Third Circuit reviewed the district court’s interpretation of the Speedy Trial Act de novo, the factual findings for clear error, and the decision granting a continuance for an abuse of discretion.83

The Third Circuit noted that one of the enumerated exceptions for the Speedy Trial Act that allows for time to be excluded is “‘[a]ny period of delay resulting from a continuance . . . if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public

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74 Id. at 336–37.
75 See U.S. CONST. amend. VI.
77 No. 08-3256, 2010 WL 3622995, at *1 (3d Cir. Sept. 20, 2010).
78 Id.
79 Id.
80 Id.
81 Id.
82 Id.
83 Id. at *2.
and the defendant in a speedy trial.’”84 Stradford argued that the continuance order was invalid because it contained inaccurate statements; however, the court stated that the reference to the wrong name was just careless error and the fact that the negotiations were not clearly in progress as the order stated did not matter.85 The continuance order was not invalidated because the district court had set forth its reasons for granting the ends-of-justice continuance as was required by 18 U.S.C. § 3161(h)(7)(A).86 As a result, the Third Circuit held that a Speedy Trial Act violation did not occur.87

2. The Fifth Circuit

In United States v. Gonzalez-Rodriguez, the defendant was convicted in the district court for possession of methamphetamine with intent to distribute.88 Defendant “moved to dismiss the indictment on grounds that his rights under the Speedy Trial Act had been violated.”89 The district court denied the defendant’s motion to dismiss because the Speedy Trial Act was not violated.90 The time it took to dispose of the oral motion for detention was considered excludable under § 3161(h)(1)(D) of the Act.91 The Fifth Circuit affirmed the defendant’s conviction.92

The Government made an oral motion for detention with the district court.93 The Fifth Circuit stated that “the day on which a pretrial motion is made and the day on which the hearing is held are both excluded for purposes of computing excludable delay under 18

84 Id. (citing Speedy Trial Act, 18 U.S.C. § 3161(h)(7)(A) (2006)).
85 Id. at *3.
86 Id. at *3–4.
87 Id. at *4.
88 621 F.3d 354, 357 (5th Cir. 2010).
89 Id. at 359.
90 Id.
91 Id.
92 Id. at 358.
93 Id.
U.S.C. § 3161(h)(1)(D).”94 The court noted that the Guidelines to the Administration of the Speedy Trial Act of 1974 recognize the starting date as the date that the motion is filed or made orally.95 “[T]he purpose of § 3161(h)(1)(D) is to ‘exclude all time that is consumed in placing the trial court in a position to dispose of a motion[,]’”96 The court saw no reason why an excludable delay would not be triggered by an oral motion in light of the purpose of the section.97 Therefore, the time that the district court took to decide the pretrial motion was excludable.98 As a result, the Fifth Circuit affirmed the district court’s holding that the Speedy Trial Act had not been violated.99

3. The Eighth Circuit

In United States v. Orozco-Osbaldo, the defendant was charged with conspiracy to possess and distribute methamphetamine.100 The defendant appealed the district court’s denial of his motion to dismiss for violation of the Speedy Trial Act.101 The Eighth Circuit affirmed the dismissal because the time spent by the district court considering joinder of defendants was prompt disposition of a pretrial motion.102

The Eighth Circuit stated that the district court was correct to exclude the time during which it considered a motion for joinder because it was excludable under § 3161(h)(1)(D) of the Act.103 The court considered it to be a “delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on,

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94 Id. at 368.
95 Id.
96 Id. at 368–69.
97 Id. at 369.
98 Id.
99 Id.
100 615 F.3d 955, 956–57 (8th Cir. 2010).
101 Id.
102 Id.
103 Id. at 957–58.
or other prompt disposition of, such motion.”104 As a result, the time was excludable, and there was no violation of the Speedy Trial Act.105

4. The Ninth Circuit

In United States v. Boyd, the defendant was convicted of “possession of methamphetamine with intent to distribute . . . [.] possession of a firearm in relation to a drug trafficking offense . . . [.] and being a felon in possession of a firearm.”106 The defendant appealed the decision of the district court, claiming a violation of the Speedy Trial Act.107 The Ninth Circuit affirmed the decision of the district court.108

The defendant claimed that his rights under the Speedy Trial Act were violated because the government colluded with state authorities to delay his prosecution in an effort to buy time until a federal indictment could be obtained.109 In affirming the district court, the Ninth Circuit stated that any delays by the state in prosecuting were in good faith.110 In addition, the Ninth Circuit stated that while it disapproved of the same prosecutor bringing both state and federal claims for the same conduct (as had occurred in this case), “the district court did not clearly err in finding that no collusion occurred here.”111 As a result, the Ninth Circuit agreed that no violation of the Speedy Trial Act occurred.112

104 Id.
105 Id.
106 392 F. App’x 595, 596 (9th Cir. 2010).
107 Id.
108 Id. at 597.
109 Id.
110 Id. (meaning that the prosecution did not intentionally delay the trial because any delay was done for the benefit of the trial).
111 Id.
112 Id.
E. The Seventh Circuit’s Application of the Sixth Amendment and the Speedy Trial Act

The Seventh Circuit has decided multiple cases that required an analysis of the Speedy Trial Act. Many of the cases required review to determine if the district court correctly decided to dismiss with or without prejudice. The Supreme Court in Taylor stated that the district court should “clearly articulate” the reasons for its decision because a district court’s judgment “should not be lightly disturbed.” As a result, the Seventh Circuit has the challenging task of balancing the necessary factors to determine if the district court abused its discretion, as well as determining if a violation of the Speedy Trial Act warrants dismissal with or without prejudice.

In the cases discussed below, the Seventh Circuit determined that only dismissal without prejudice should be granted despite the fact that there were lengthy delays and laziness on the part of the prosecution. However, if lengthy delays and laziness on the part of the prosecution does not warrant dismissal with prejudice, what does? The following section of this Note begins with an analysis of the Seventh Circuit’s interpretation, in five different cases, of the Supreme Court’s analysis. It will then discuss the similarities and differences among the Seventh Circuit, the other circuits, and the Supreme Court in their application of the Sixth Amendment and the Speedy Trial Act.

113 See, e.g., United States v. Sykes, 614 F.3d 303, 305–06 (7th Cir. 2010); United States v. Hills, 618 F.3d 619, 631–32 (7th Cir. 2010); United States v. Killingsworth, 507 F.3d 1087, 1088 (7th Cir. 2007); United States v. Arango, 879 F.2d 1501, 1507 (7th Cir. 1989); United States v. Fountain, 840 F.2d 509, 511 (7th Cir. 1988).

114 Id.


116 See, e.g., Sykes, 614 F.3d at 305–06; Hills, 618 F.3d at 631–32; Killingsworth, 507 F.3d at 1087; Arango, 879 F.2d at 1501; Fountain, 840 F.2d at 509.
1. United States v. Killingsworth

In United States v. Killingsworth, the defendant was charged with possession of cocaine with intent to distribute, as well as possession of a firearm used in furtherance of a drug-trafficking crime.117 The district court dismissed the indictment with prejudice for violation of the Speedy Trial Act.118 The Seventh Circuit reversed and remanded.119

Killingsworth was indicted on two counts and pled not guilty.120 However, arraignment on the indictment was never scheduled, and Killingsworth did not receive a trial within the time required by the Speedy Trial Act.121 Just three days after the Speedy Trial Act deadline had passed, Killingsworth filed a motion to dismiss the indictment with prejudice.122 During the hearing on the motion to dismiss, the government put forth two arguments.123 The first was that the government had never been required to request an arraignment in a criminal case where an individual had already been indicted.124 The second was that the government had contacted the magistrate judge’s chambers at least twice to inquire about the arraignment but had not received a reply.125 The district court stated that the offense was a serious one, but that it was impossible to determine if the court or government was at fault for the violation.126 The district court

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117 507 F.3d at 1087.
118 Id.
119 Id.
120 Id. at 1089.
121 Id.
122 Id.
123 Id.
124 Id.
125 Id.
126 Id.
ultimately decided to dismiss with prejudice because Killingsworth himself was not responsible for the delay.\textsuperscript{127}

In reviewing the decision, the Seventh Circuit stated that the district court undervalued how serious the crime was.\textsuperscript{128} It also stated that the district court “overemphasized Killingsworth’s conduct and gave insufficient weight to the fact that the court itself may have been at fault for failing to move the case along.”\textsuperscript{129} The court noted the fact that the delay was not intentional on the part of the government and that Killingsworth himself stated that he suffered no prejudice.\textsuperscript{130} The court determined that these two factors—absence of bad faith by the government and lack of prejudice to the defendant—leaned in favor of dismissal without prejudice.\textsuperscript{131} The Seventh Circuit stated that “the purpose of the Act would not be served by requiring the court to impose the maximum sanction for a minimum violation” because it was a serious offense, the delay was minor, and there was no bad faith shown.\textsuperscript{132}

The district court had also examined the fact that Killingsworth was cooperating and just sitting in jail during this period.\textsuperscript{133} The Seventh Circuit stated that whether a defendant was detained pending trial was not an explicit factor to consider under the Speedy Trial Act and was not its primary focus.\textsuperscript{134} As a result, the Seventh Circuit determined that the district court abused its discretion by dismissing the indictment with prejudice.\textsuperscript{135} The Seventh Circuit then reversed the decision of the district court and dismissed the indictment without prejudice, stating that “insufficient weight was given to the seriousness

\begin{itemize}
\item \textsuperscript{127} Id. at 1090.
\item \textsuperscript{128} Id.
\item \textsuperscript{129} Id.
\item \textsuperscript{130} Id.
\item \textsuperscript{131} Id. at 1091.
\item \textsuperscript{132} Id.
\item \textsuperscript{133} Id.
\item \textsuperscript{134} Id.
\item \textsuperscript{135} Id. at 1087.
\end{itemize}
of the offense, the lack of bad faith on the part of the government, and
the absence of prejudice to Killingsworth.”136

2. United States v. Arango

In United States v. Arango, the defendant was charged with a
narcotics offense.137 The district court denied Arango’s motion to
dismiss the indictment with prejudice.138 The Seventh Circuit found
no abuse of discretion and affirmed the district court’s decision.139

The district court dismissed the indictment against Arango “based
upon a seventy-two to ninety-three day . . . violation of the Speedy
Trial Act.”140 In determining whether to dismiss without prejudice, the
district court analyzed the same three factors that were used in
Killingsworth.141 On appeal, Arango argued that the district court
abused its discretion by dismissing without prejudice because of the
“substantial and prejudicial length of the delay.”142

In its review, the Seventh Circuit examined the district court’s
analysis of the three factors.143 It noted that possession of large
amounts of cocaine is a serious offense.144 In addition, the court stated
that a three-month delay was not “per se ‘substantial’ enough to justify
dismissing the charges with prejudice.”145 Arango also failed to show
any actual prejudice or how the delay impaired his rights.146 The
Seventh Circuit focused on the fact that the delay was the result of the

136 Id.
137 879 F.2d 1501 (7th Cir. 1989).
138 Id. at 1502.
139 Id. at 1509.
140 Id. at 1507.
141 Id. at 1507–08 ((1) whether it was a serious offense, (2) whether the delay
was minor, and (3) whether there was bad faith).
142 Id. at 1508.
143 Id.
144 Id.
145 Id.
146 Id.
court’s misunderstanding of the status of motions, some of which were filed by the defendant. The Seventh Circuit stated that because the delay was through no fault of the government, “dismissing the indictment with prejudice would not serve any purpose of encouraging the government to avoid the neglect or bad faith in the prosecution of its cases.” As a result, the Seventh Circuit affirmed the district court’s decision to dismiss without prejudice.

3. United States v. Fountain

In United States v. Fountain, the defendant was charged with first-degree murder and conspiracy to commit murder. The district court dismissed the murder indictment without prejudice. The Seventh Circuit affirmed the district court’s decision. Fountain’s trial was put on hold in an effort to get a witness to the murder to testify at his trial. The court re-arraigned Fountain, and eight days later, he invoked his rights under the Speedy Trial Act. The district court dismissed the indictment without prejudice, and a grand jury re-indicted Fountain the same day. Fountain argued that the Speedy Trial Act only postponed his trial. The Seventh Circuit partially agreed with him and stated that more time elapsed than if he would have “accepted the violation of the Speedy Trial Act stoically.” Instead, since Fountain’s motion to dismiss took the case off the trial calendar and caused a subsequent dismissal and

147 Id.
148 Id.
149 Id. at 1509.
150 840 F.2d 509, 511 (7th Cir. 1988).
151 Id.
152 Id. at 523.
153 Id. at 511.
154 Id.
155 Id.
156 Id.
157 Id.

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reindictment, the trial occurred 209 days after the mandate was issued.  

The Seventh Circuit conceded that a violation of the Speedy Trial Act occurred and stated that district courts have broad discretion in deciding to dismiss with or without prejudice. 159 The Seventh Circuit distinguished its approach from that of the other circuits. 160 The Seventh Circuit noted that its precedent required consideration of all the “statutory desiderata” in deciding when to dismiss with or without prejudice, while other circuits, such as the Ninth, have held that a “‘lackadaisical’ attitude by prosecutors requires dismissal with prejudice.” 161 In this case, the Seventh Circuit admitted that the prosecution was careless, but stated that other statutory factors had to be considered as well. 162  

The Seventh Circuit “observed that first-degree murder is a grave offense,” and that it is important to “deter murder and punish murderers” because “murder was a more serious offense than the violation of the Speedy Trial Act.” 163 The court also noted that a “defendant who waits passively while the time runs has less claim to dismissal with prejudice than does a defendant who demands, but does not receive, prompt attention.” 164 In addition, the court observed that the delay in this case did not lead to the detriment of Fountain. 165 In light of all of these factors, the Seventh Circuit affirmed, stating that the district court did not abuse its discretion by dismissing the indictment without prejudice. 166

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158 Id.
159 Id. at 512 (“[R]review on appeal is deferential.”).
160 Id.
161 Id.
162 Id.
163 Id.
164 Id. at 513.
165 Id.
166 Id.
However, after stating its holding, the Seventh Circuit went on to express its distaste at how the case proceeded.\footnote{Id.} The court focused on the fact that Fountain did not have counsel for a significant period of time and that counsel may have prevented some of the problems that Fountain encountered.\footnote{Id.} In addition, the court acknowledged that there was no excuse for the prosecution’s neglect of the case.\footnote{Id.} The Seventh Circuit also stated that if the same problem were to recur, it would “not be so easy to chalk it up to inadvertence.”\footnote{Id.}

4. United States v. Hills

In \textit{United States v. Hills}, Tylman, Hills, and Winters were indicted with “conspiracy to impede the IRS” and for filing false income tax returns.\footnote{618 F.3d 619, 624 (7th Cir. 2010).} They were tried in a joint trial in the district court.\footnote{Id.} The district court found Tylman and Hills guilty of conspiracy, and Hills and Winters guilty of filing false tax returns.\footnote{Id.} The defendants claimed that the district court made various errors, that their statutory and constitutional rights to a speedy trial were violated, and that a search had violated their Fourth Amendment rights.\footnote{Id.} The Seventh Circuit affirmed Tylman’s and Winters’s convictions, vacated Hills’s convictions, and remanded.\footnote{Id.}

The Seventh Circuit first addressed the defendants’ claim that their statutory right to a speedy trial had been violated.\footnote{Id. at 625.} The defendants argued that their right was violated because multiple continuances delayed the trial beyond the seventy-day period.
prescribed by the Speedy Trial Act.177 The Seventh Circuit determined that the proper level of review was for abuse of discretion and that a showing of actual prejudice was required.178 In reviewing the district court’s analysis, the Seventh Circuit examined the excludable days exception and stated that “no showing of actual delay in trial is required.”179 The court stated that it would follow its established precedent, which allowed certain classifications of delay, such as pretrial motions, to be automatically excludable.180 The Seventh Circuit determined that the district court’s automatic exclusion, based on ends-of-justice grounds, was proper in this case.181

In addition, the Seventh Circuit stated that when a court excludes time based on ends-of-justice grounds, it must explain its reasoning.182 The Seventh Circuit noted that congestion of a court’s trial calendar is not a reason for exclusion on ends-of-justice grounds.183 The court established the following as factors to analyze when determining whether exclusion based on ends-of-justice grounds is proper:

[W]hether failure to grant a continuance would result in a miscarriage of justice, whether the case is so complex that adequate trial preparation is impossible under the Speedy Trial Act’s time limits, and whether the failure to continue would deny the defendant reasonable time to obtain counsel, or would deny counsel the time necessary for effective preparation.184

178 Hills, 618 F.3d at 626.
179 Id.
180 Id. at 626–27.
181 Id. (allowing automatic exclusion for pre-trial motions, continuances, and on ends-of-justice grounds).
182 Id. at 628–29.
183 Id.
184 Id. (citing Speedy Trial Act, 18 U.S.C. § 3161(h)(7)(C) (2006)).
The Seventh Circuit examined the district court’s reasoning for granting the continuance, which included the complexity of the case and the fact that the defendants would not be greatly prejudiced by a delay since they were not in custody. The Seventh Circuit determined that the district court’s reasoning was sufficient to meet the requirements of § 3161 of the Act. As a result, the time was properly excluded and the court determined that the defendants’ Speedy Trial Act claim failed.

The defendants also argued that they had a personal right to a speedy trial and that Tylman’s counsel could not override their decision to exercise that right by filing a motion for a continuance. The court stated that this argument was without merit because “trial tactics have always been within counsel’s province.” Counsel does not have to obtain a defendant’s consent prior to making a tactical decision, such as the decision to seek a continuance.

The Seventh Circuit also considered the defendants’ constitutional right to a speedy trial under the Sixth Amendment. The court stated that it would review the district court’s legal conclusions de novo and its factual findings for clear error.

The factors analyzed to determine a Sixth Amendment speedy trial violation include “whether delay before trial was uncommonly long[,] whether the government or the criminal defendant is more to blame for that delay[,] whether, in due course, the defendant asserted his right to a speedy trial[,] and whether he suffered prejudice as the delay’s result.” The court also stated that a delay of one year is

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185 Id. at 628–29.
186 Id.
187 Id. at 629–30.
188 Id.
189 Id. at 626–28.
190 Id.
191 Id.
192 Id.
193 Id.
presumptively prejudicial. 194 While the Speedy Trial Act requires defendants to be tried within seventy days, 195 this is not a requirement in the constitutional analysis. Instead, the constitutional analysis focuses more on a presumption of prejudice and if the time that passed was reasonable. 196 The court determined that there was a presumption of prejudice in this case because there was a two-year delay. 197 However, the court determined that the delay was mostly attributable to the defendants for the following reasons: the continuance was to allow counsel more time to prepare, the delay occurred because of the defendants’ difficulty securing counsel, and the defendants caused a delay when they incorrectly believed the government was withholding information. 198 The court also determined that the defendants failed to show that they suffered any prejudice by the delay. 199 A defendant must demonstrate prejudice with specificity, and in this case, the defendants did not show that their defenses were prejudiced. 200 In addition, the defendants did not show evidence of anxiety or that they were subjected to pretrial incarceration. 201 As a result, the defendants’ constitutional right to a speedy trial was not violated. 202

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194 Id. at 629–30.
196 Hills, 618 F.3d at 626–28.
197 Id. at 629–30 (where there was a presumption of prejudice because the trial occurred two years after the indictment).
198 Id. at 630–32.
199 Id. at 632–33.
200 Id. at 632 (only two witnesses stated that passage of time affected their memories).
201 Id. at 632–33.
202 Id.
5. United States v. Sykes

In *United States v. Sykes*, the defendant was convicted on four counts of bank robbery in the district court. Sykes then filed a motion to dismiss the indictment for violation of the Speedy Trial Act. The district court dismissed the charges without prejudice and ordered Sykes released. The Seventh Circuit affirmed the district court’s decision.

The same day that the district court dismissed the charges without prejudice, a grand jury indicted Sykes for the same four bank robberies. Sykes disrupted the proceedings, and the judge entered a plea of not guilty on his behalf. Four days before the trial, Sykes moved to dismiss the charges based on his right to a speedy trial (and his Fifth Amendment right to meaningful access to the courts).

The Seventh Circuit stated that “[t]he Speedy Trial Act generally requires a federal criminal trial to begin within seventy days from the date the defendant is charged or makes his initial appearance.” However, there are some exclusions to the seventy-day rule that can be found in § 3161(h) of the Speedy Trial Act. These exclusions allow time to be automatically excluded when determining if the time limit provided by the Act has been violated. “After [seventy] nonexcludable days have passed, the Act requires the district court to

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203 614 F.3d 303, 305–06 (7th Cir. 2010).
204 *Id.* at 307.
205 *Id.*
206 *Id.* at 305–06.
207 *Id.* at 307.
208 *Id.* (“*[H]e again made some bizarre arguments and otherwise disrupted the proceedings. The judge held him in contempt and entered not guilty pleas on his behalf.*”).
209 *Id.*
210 *Id.* at 309–10 (citing Speedy Trial Act, 18 U.S.C. § 3161(c)(1) (2006)).
212 *Sykes*, 614 F.3d at 309–10.
dismiss the charges ‘on motion of the defendant.’”\(^{213}\) In this case, Sykes made such a motion, and the district court dismissed the charges.\(^{214}\)

The Seventh Circuit reviewed the district court’s decision for abuse of discretion, “but undertook more substantive scrutiny to ensure that the judgment [was] supported in terms of the factors identified in the statute.”\(^{215}\) The Seventh Circuit reviewed the district court’s explanation and analysis of the facts and determined that there was not an abuse of discretion.\(^{216}\) The district court correctly concluded that the bank robbery charges were “quite serious” and that “a dismissal with prejudice would result in ‘a gross miscarriage of justice’ given the gravity of the offenses.”\(^{217}\) The district court stated, and the Seventh Circuit agreed, that the delay was “‘unconscious’ on the part of the government and the court” and instead was a result of the actions of Sykes.\(^{218}\) Sykes also waited to claim the Speedy Trial Act violation until his motion to dismiss.\(^{219}\) In addition, the Seventh Circuit agreed with the district court’s statement that any claim of prejudice would be weak because Sykes was “‘largely responsible’ for most of the continuances.”\(^{220}\) The Seventh Circuit stated that because “Sykes did not bring the delay to the court’s attention as the number of nonexcludable days accumulated,” it could justify dismissal without prejudice.\(^{221}\) The court noted that “a defendant who waits passively while the time runs has less claim to dismissal with prejudice than does a defendant who demands, but does not receive, prompt

\(^{213}\) *Id.* (citing 18 U.S.C. § 3162(a)(2)).

\(^{214}\) *Id.*

\(^{215}\) *Id.* (citing United States v. Taylor, 487 U.S. 326, 337 (1988)).

\(^{216}\) *Id.* at 310.

\(^{217}\) *Id.* at 309–10.

\(^{218}\) *Id.*

\(^{219}\) *Id.*

\(^{220}\) *Id.*

\(^{221}\) *Id.* at 310.
attention.”222 However, there is not a “presumption in favor of dismissal without prejudice for violations of the Speedy Trial Act.”223 The Seventh Circuit also focused on the fact that Sykes had repeatedly made frivolous arguments.224 The court stated that while the delay was lengthy (224 nonexcludable days), it was only one factor to consider.225 A delay of that length does not require dismissal without prejudice on its own.226 As a result, the Seventh Circuit agreed with the district court’s analysis of the case and affirmed its decision to dismiss without prejudice.227

II. A COMPARISON OF THE SEVENTH CIRCUIT’S APPROACH WITH THE APPROACH OF OTHER CIRCUITS AND THE SUPREME COURT

The Seventh Circuit’s approach when analyzing a defendant’s constitutional and statutory right to a speedy trial is generally consistent with the approach of other circuits and the Supreme Court. In addition, the Seventh Circuit’s analysis of a court’s discretion to dismiss with or without prejudice has been in line with that of the other courts.

A. The Constitutional Right

The Supreme Court in Barker analyzed four major factors in determining if the defendant’s constitutional right to a speedy trial had been violated.228 It looked at (1) the length of the delay, (2) the reason for the delay, (3) whether the defendant asserted his right, and (4)

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222 Id. (citing United States v. Fountain, 840 F.2d 509, 513 (7th Cir. 1988)) (showing a consistent consideration of a defendant’s assertion of his right in the Seventh Circuit).
223 Id.
224 Id.
225 Id.
226 Id.
227 Id. at 311–12.
whether the defendant suffered prejudice. The Supreme Court also noted the detrimental effect that imprisonment could have on the defendant and the possibility that the defendant would use delay as a tactic.

The Seventh Circuit in *Hills* evaluated all of the factors laid out in *Barker*. In addition to those factors, the court stated that a delay of one year was presumptively prejudicial. The court put emphasis on who was at fault for the delay and the need for the defendant to demonstrate prejudice with specificity.

**B. The Statutory Right**

The Speedy Trial Act lists multiple periods of delay that are excluded when computing the time within which the trial must commence. These periods of delay are often automatically excludable and include pre-trial motions, continuances, and exclusions based on ends-of-justice grounds. The Fifth Circuit in *Gonzalez-Rodriguez* and the Eighth Circuit in *Orozco-Osbaldo* held that pretrial motions are automatically excluded under § 3161(h)(1)(D) of the Act. According to the Fifth and Eighth Circuits, a violation of the Speedy Trial Act does not occur as long as there is prompt disposition of the pretrial motion.

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229 *Id.*

230 *Id.* at 520–21.

231 United States v. Hills, 618 F.3d 619, 627 (7th Cir. 2010).

232 *Id.* at 629–30.

233 *Id.* at 632.


235 *Hills*, 618 F.3d at 626–27.

236 United States v. Gonzalez-Rodriguez, 621 F.3d 354, 369 (5th Cir. 2010); United States v. Orozco-Osbaldo, 615 F.3d 955, 957–58 (8th Cir. 2010).

237 *Gonzalez-Rodriguez*, 621 F.3d at 369; *Orozco-Osbaldo*, 615 F.3d at 956–57.
The Supreme Court in *Taylor* adopted the same factors used for the constitutional analysis that were provided in *Barker*.238 While the Seventh Circuit in *Hills* considered one common factor with *Taylor*—whether the defendant suffered prejudice—its view fell more in line with that of the Fifth and Eighth Circuits.

The Seventh Circuit in *Hills* focused on a need to show actual prejudice, but stated that there was no need to show actual delay.239 The court also noted some situations where time was automatically excludable.240 The Seventh Circuit then established factors to determine whether it was proper to exclude days based on ends-of-justice grounds.241 These factors led to the exclusion of additional situations, including where (1) there would be a miscarriage of justice, (2) the complexity of the case required it, and (3) the case required more time (for example, to allow for discovery or to appoint counsel).242 However, the court left these exclusions open to interpretation by simply stating that a court must explain its reasoning when excluding time based on ends-of-justice grounds.243

C. Dismissal With or Without Prejudice

The Speedy Trial Act provides the following factors for courts to consider when deciding to dismiss with or without prejudice: “the seriousness of the offense[,] the facts and circumstances of the case which led to the dismissal[,] and the impact of a reprosecution on the administration of [the Act] and on the administration of justice.”244 However, instead of relying solely on the factors required by the Act, the courts have developed their own version of factors to analyze.

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239 *Hills*, 618 F.3d at 626.
240 *Id.* at 626–27 (e.g., pretrial motions).
241 *Id.* at 628–29 (citing Speedy Trial Act, 18 U.S.C. § 3161(h)(7)(C) (2006)).
242 *Id.*
243 *Id.*
244 18 U.S.C. § 3162(a)(2).
The Supreme Court in Taylor focused on the seriousness of the crime, the lackadaisical conduct of the government, and the defendant’s failure to appear for trial when determining whether to dismiss with or without prejudice.\(^{245}\) The Court also required a finding of prejudice to even consider dismissal with prejudice because reprosecution is favored if there is no finding of prejudice.\(^{246}\)

Like the Supreme Court, the Seventh Circuit in Killingsworth focused on the seriousness of the crime, whether the defendant suffered prejudice, if a detriment to the defendant occurred, and if the delay was intentional.\(^{247}\) The Seventh Circuit in Arango focused on similar factors, but also considered who was at fault for the delay to be an important factor.\(^{248}\) The Seventh Circuit in Fountain took its own approach and focused primarily on whether the government was careless, if the defendant had asserted his right, and if the defendant suffered any detriment.\(^{249}\)

The Seventh Circuit further expanded on these factors in Sykes. The court in Sykes focused on the seriousness of the crime, the facts and circumstances of the case, whether the defendant suffered prejudice, whether the delay was a conscious effort on the part of the defendant or the government, whether the defendant asserted his right, and the length of the delay.\(^{250}\) This approach seems to mesh together the approach required by the Speedy Trial Act with that of the Supreme Court and previous cases in the Seventh Circuit. However, none of the cases discussed in this Note considered the impact of reprosecution,\(^{251}\) as is required by the Speedy Trial Act.\(^{252}\)

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\(^{246}\) Id. at 341.
\(^{247}\) United States v. Killingsworth, 507 F.3d 1087, 1090–91 (7th Cir. 2007).
\(^{248}\) United States v. Arango, 879 F.2d 1501, 1508 (7th Cir. 1989) (stating that since the delay was the fault of the court, there could be no deterrent effect from punishing the prosecution that was not at fault).
\(^{249}\) United States v. Fountain, 840 F.2d 509, 512–13 (7th Cir. 1988).
\(^{250}\) United States v. Sykes, 614 F.3d 303, 309–10 (7th Cir. 2010).
\(^{251}\) See supra Parts I.C, I.D, I.E.
III. THE REALITY OF THE RIGHT’S APPLICATION

The Seventh Circuit focuses on the same factors as the Supreme Court when determining whether a violation of one’s constitutional right to a speedy trial occurred. However, the Seventh Circuit ignores the approach taken by the Supreme Court in Taylor when it determines if a violation of the Speedy Trial Act occurred. Instead, the Seventh Circuit focuses on the excludable days exception. The Seventh Circuit seems to espouse the idea that considering multiple factors can help to protect a defendant’s rights more thoroughly. Its application of these factors to determine a constitutional and a statutory violation is usually thorough.

On the other hand, the Seventh Circuit’s approach in determining whether to dismiss with or without prejudice began as almost identical to the Supreme Court’s approach and has expanded with time. The Seventh Circuit has expanded on the factors laid out in the Speedy Trial Act, especially “the facts and circumstances of the case which led to the dismissal.” The Supreme Court and earlier Seventh Circuit decisions focused on the seriousness of the crime, whether the defendant was prejudiced, and if the delay was intentional (or a result of laziness by the prosecution). However, the Seventh Circuit

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255 See Hills, 618 F.3d at 623–24.
256 Id. at 626–29.
257 See generally United States v. Sykes, 614 F.3d 303, 305–06 (7th Cir. 2010); Hills, 618 F.3d at 623–24; United States v. Killingsworth, 507 F.3d 1087 (7th Cir. 2007); United States v. Arango, 879 F.2d 1501 (7th Cir. 1989); United States v. Fountain, 840 F.2d 509 (7th Cir. 1988).
259 See Taylor, 487 U.S. at 326.
260 See Hills, 618 F.3d at 619; Killingsworth, 507 F.3d at 1087; Arango, 879 F.2d at 1501; Fountain, 840 F.2d at 509.
261 See Taylor, 487 U.S. at 338–41; Killingsworth, 507 F.3d at 1090–91; Arango, 879 F.2d at 1508.
expanded this approach in *Sykes* by also examining the facts and circumstances of the case, who was at fault for the delay, and the length of the delay. These additional factors provide more insight, but lean heavily toward dismissal without prejudice. With regard to determining whether to dismiss with or without prejudice, the Seventh Circuit may have the more thorough approach (as compared to the Supreme Court and other circuits).

IV. IS THE RIGHT TO A SPEEDY TRIAL PROTECTED IN PRACTICE?

While the Seventh Circuit is thorough in its analysis and application of multiple factors to determine if a violation of the right to a speedy trial has occurred, it may not always come to the correct conclusion. The Seventh Circuit is consistent in its analysis of all of the necessary factors used to determine if a violation has occurred; however, it applies these factors very liberally. The court seems to imply that a grave violation would have to occur for the defendant to receive a meaningful remedy. The court has done this by liberally applying the excludable days exception in § 3162 of the Speedy Trial Act. This has been done to the point where it encompasses almost every delay caused by either party.

The Seventh Circuit in *Hills* “concluded that Congress intended certain classifications of delay to be excludable automatically.” This automatic exclusion includes time needed to decide pretrial motions, the granting of continuances, and exclusions based on ends-of-justice grounds. As a result, the Seventh Circuit has failed to analyze the

262 United States v. Sykes, 614 F.3d 303, 309–10 (7th Cir. 2010).
263 See, e.g., *Sykes*, 614 F.3d at 305–06; *Hills*, 618 F.3d at 631–32; *Killingsworth*, 507 F.3d at 1087; *Arango*, 879 F.2d at 1501; *Fountain*, 840 F.2d at 509.
264 See generally *Sykes*, 614 F.3d at 305–06; *Killingsworth*, 507 F.3d at 1087; *Arango*, 879 F.2d at 1501; *Fountain*, 840 F.2d at 509.
265 See id.
266 See id.
267 *Hills*, 618 F.3d at 626.
268 Id.
necessity or reasonableness of each exclusion. Instead, the Seventh Circuit has simply automatically excluded the classifications of delay provided in the Speedy Trial Act and has left the exclusions on ends-of-justice grounds open for interpretation.\(^{269}\) This has made it difficult for the defendant to claim a violation because most classifications of delay are easily excludable under the Speedy Trial Act.

This approach by the Seventh Circuit does not promote the purpose of the Sixth Amendment, which was “(1) to prevent oppressive pretrial incarceration[,] (2) to minimize anxiety and concern of the accused[,] and (3) to limit the possibility that defense will be impaired.”\(^{270}\) The purpose of the right is frustrated when lengthy delays are disguised under excludable exceptions. In addition, the Seventh Circuit has completely ignored one purpose of the Sixth Amendment—prevention of oppressive pre-trial incarceration.\(^{271}\) The Seventh Circuit consistently has been only concerned with delay being used as a tactic by the defendant, and it has consciously ignored lengthy pre-trial incarceration.\(^{272}\) This is a result of the exclusions of the Speedy Trial Act not being applied to meet the purposes of the Sixth Amendment.

Even if the days are not excludable, the defendant’s right is often not protected. In cases where the court admits that a violation of the right to a speedy trial has occurred, it often decides that the defendant still did not suffer prejudice.\(^{273}\) The court requires the level of prejudice to be extremely high before it will consider the violation to be prejudicial.

This means that even if the Seventh Circuit determines that a violation that warrants dismissal did occur, the defendant is still on an

\(^{269}\) See Speedy Trial Act, 18 U.S.C. §§ 3161(h)(1)(A)–(H) (2006) (listing the excludable days); Hills, 618 F.3d at 626.
\(^{270}\) Hills, 618 F.3d at 631–32 (internal quotation marks omitted).
\(^{271}\) See id.
\(^{272}\) See id. at 628–29, 632–33; United States v. Killingsworth, 507 F.3d 1087, 1091 (7th Cir. 2007) (stating that incarceration is not a focus).
\(^{273}\) See generally United States v. Sykes, 614 F.3d 303, 305–06 (7th Cir. 2010); Killingsworth, 507 F.3d at 1087; United States v. Arango, 879 F.2d 1501, 1501 (7th Cir. 1989); United States v. Fountain, 840 F.2d 509, 509 (7th Cir. 1988)
uphill climb. Without a finding of prejudice to the defense, the court is unlikely to dismiss with prejudice. The Seventh Circuit has repeatedly dismissed these types of claims without prejudice, even when the delays have been lengthy and at the fault of the prosecution. When the court dismisses without prejudice, the defendant does not receive a meaningful remedy. While some cases, and even the Speedy Trial Act, consider dismissal without prejudice a sanction, it is unlikely that a defendant would consider this a meaningful remedy. The defendant will often be reindicted and in the end has only delayed the inevitable. This does not provide a remedy or a proper sanction for the violation.

Furthermore, the Seventh Circuit, along with the Supreme Court and other circuits, seem to gloss over who is to blame for the delay, making this factor less important than it was meant to be. It makes sense to hold the defendant accountable for any delays he caused; however, other delays not caused by the defendant should be

274 See Hills, 618 F.3d at 628–33; Killingsworth, 507 F.3d at 1090; Arango, 879 F.2d at 1508.
275 See Fountain, 840 F.2d at 512–13.
276 Speedy Trial Act, 18 U.S.C. § 3162(a)(2); Killingsworth, 507 F.3d at 1091 (considering dismissal without prejudice as a sanction); United States v. Lauderdale, No. 06-cr-30142-MJR, 2007 WL 1100617, at *5 (S.D. Ill. Apr. 11, 2007) (stating that “dismissal without prejudice is ‘not a completely negligible sanction, viewed from a deterrent standpoint, since the grand jury may refuse to reindict and since even if it does the defendant may be acquitted.’”).
277 See Fountain, 840 F.2d at 512–13.
278 See United States v. Taylor, 487 U.S. 326, 328, 343 (1988) (where slow processing by the court and government occurred and there was a lackadaisical attitude on the part of the government); Barker v. Wingo, 407 U.S. 514, 516–17 (1972) (where there were more than sixteen continuances granted); United States v. Orozco-Osbaldo, 615 F.3d 955, 957–58 (8th Cir. 2010) (allowing all days needed to decide pre-trial motions to be excluded); United States v. Boyd, 392 F. App’x 595, 597 (9th Cir. 2010) (allowing delay because it was caused in good faith by the state); Killingsworth, 507 F.3d at 1089–90 (stating that it is impossible to determine if the court or government was at fault for the delay and that the delay was unintentional); Fountain, 840 F.2d at 513 (expressing distaste at how the case proceeded because of the prosecution’s neglect of the case).
attributable to the prosecution. It should not matter if the court or the prosecutor was responsible for the unreasonable delay. No matter which is at fault (as long as it is not the defendant), the defendant’s right has been unjustly violated. If the defendant is not responsible for the delay, it makes sense to hold the prosecution liable for that delay and to recognize a violation of the defendant’s right. The defendant deserves an adequate remedy when he has suffered a loss of his rights, and the prosecution should be deterred from allowing any future violations.

In addition, the fact that the delay was unintentional should not be considered. The notion that the prosecution did not intentionally violate the defendant’s rights should have no bearing on the court’s decision. It matters that the defendant’s rights were violated, not that the prosecution did not intentionally let it happen. Laziness on the part of the prosecution should favor the defendant and lean toward a finding that a violation of the defendant’s rights occurred.

While the Seventh Circuit often claims policy reasons for its approach of dismissing without prejudice, the policy reasons behind the Speedy Trial Act and Sixth Amendment do not support the court’s approach. It is true that one of the Seventh Circuit’s policy considerations is to protect the public and to prevent the impairment of the deterrent effect of punishment, but other policy considerations

279 See Barker, 407 U.S. at 529–30 (stating that it is proper to put the burden of ensuring a speedy trial on the prosecution).
280 See United States v. Arango, 879 F.2d 1501, 1508 (7th Cir. 1989) (where the court unreasonably differentiated between the court and prosecution being at fault).
281 See generally United States v. Sykes, 614 F.3d 303, 305–06 (7th Cir. 2010); Killingsworth, 507 F.3d at 1087; Arango, 879 F.2d at 1501; Fountain, 840 F.2d at 509.
282 See Fountain, 840 F.2d at 512–13 (“We therefore inquire not whether the prosecution was careless (it was), but whether the district judge made a reasoned decision in light of the statutory criteria.” Even though the prosecution was careless, “the district court was entitled to dismiss the indictment without prejudice.”).
283 Anne E. Melley, Annotation, Construction and Application of the Speedy Trial Act, 46 A.L.R. FED. 2D 129 § 3 (2010).
284 Id.
deal with the denial of the defendant’s liberty. Another function of the Speedy Trial Act is to hold the prosecution accountable for its actions and to ensure that the government does not ignore a case or leave a defendant in prison awaiting trial for an unreasonable amount of time. None of these policy reasons are met when the defendant is not tried in an expeditious manner or when the defendant is not provided a remedy. The prosecution receives no punishment for violating the defendant’s rights if it can simply bring the case against the defendant again. Justice is not served, and the defendant loses his liberty. It is important for the court to balance the threat that the defendant poses to society against a protection of the defendant’s rights. The Seventh Circuit has not struck this balance because it seems to require an extraordinary violation to even consider dismissal with prejudice.

The Seventh Circuit has stated additional public policy reasons for why it rarely dismisses with prejudice, such as the theory that it is better to deny a criminal his rights than to let him walk free. While it may be true that society would be safer and that many citizens would probably prefer that the defendant not walk free, the court has missed the point. While public policy should, and does, shape our laws and the way they are applied, our Founding Fathers established certain

285 Barker v. Wingo, 407 U.S. 514, 519 (1972); see United States v. Hills, 618 F.3d 619, 631–32 (7th Cir. 2010) (internal quotation marks omitted) (listing the purposes of the Sixth Amendment: “(1) to prevent oppressive pretrial incarceration[,] (2) to minimize anxiety and concern of the accused[,] and (3) to limit the possibility that defense will be impaired.”).

286 See id.

287 See Speedy Trial Act, 18 U.S.C. § 3162(a)(2) (2006) (including dismissal with or without prejudice as a sanction); United States v. Killingsworth, 507 F.3d 1087, 1091 (7th Cir. 2007) (“Courts view dismissal without prejudice as a sanction.”).

288 See generally United States v. Sykes, 614 F.3d 303 (7th Cir. 2010); Killingsworth, 507 F.3d at 1087; United States v. Arango, 879 F.2d 1501 (7th Cir. 1989); United States v. Fountain, 840 F.2d 509 (7th Cir. 1988).

289 See Fountain, 840 F.2d at 512.
rights that were considered fundamental and were to be left untouched and unlimited. This means that the Speedy Trial Act should be interpreted in a way that promotes the purposes of the Sixth Amendment.

With the way that the Seventh Circuit currently applies the Speedy Trial Act, the defendant can actually benefit from not asserting his right to a speedy trial. The defendant may actually end up being detained longer by asserting his right because if the court determines that no violation occurred, the defendant would have been detained the entire time that the court is making that decision. In addition, after the court determines that a violation did not occur, the trial continues. Even if the court determines that the defendant’s rights were violated, it can end up making the process longer and more strenuous for the defendant because he is often subject to reprosecution. This was not the intent of the Speedy Trial Act or the Sixth Amendment; as a result, a better process must emerge.

V. CHANGE IS REQUIRED

The defects discussed above have created negative effects on the rights of defendants in the Seventh Circuit. There are some technical issues with the court’s approach, as well as some possibly unintended consequences.

One technical issue is the lack of a well thought out standard in the Seventh Circuit with regard to the use of the excludable days exception. The courts’ ability to exclude days based on ends-of-justice grounds could result in unintended consequences. The court can exclude days if it can show that the reasons for granting the

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290 *Barker*, 407 U.S. at 529–30 (stating that the right to a speedy trial is a fundamental right).
291 *See Fountain*, 840 F.2d at 511.
292 *See id.* (where the trial was longer—delayed 209 days—because the defendant asserted that a violation occurred).
293 United States v. Hills, 618 F.3d 619, 631–32 (7th Cir. 2010).
294 *See id.* at 628–29.
continuance outweigh the best interests of the public and the
defendant. This exclusion is open-ended and gives the court the
opportunity to expand it far beyond the intent of the legislature. Since
the right to a speedy trial is protected by the Constitution and the
Speedy Trial Act, it is one that is considered important and
fundamental. This would seem to imply that other interests should
almost never outweigh the defendant’s right to a speedy trial. In
addition, the public has an interest in a guilty defendant being tried
and sentenced quickly and efficiently. While there may be occasions
when one party needs more time for discovery or preparation, this
should not be looked at lightly. The parties should be required to
adhere to the deadlines imposed by the court. Excluding days on ends-
of-justice grounds should only be used in limited circumstances that
should be better outlined by Congress in the Speedy Trial Act.

Another possible unintended consequence results from an
attorney’s ability to make a tactical decision. The defendant’s
attorney has the authority to make decisions regarding the progression
of the case. While the defendant has the right to decide to testify, to
plead guilty or not guilty, and to settle, the defendant’s attorney has the
right to make decisions regarding which motions to file. In effect,
this means that the defense attorney could unnecessarily delay the
case. If the defendant tried to claim a violation, he would likely fail
because the court would attribute the delay to the defendant. This is

295 Id.
296 U.S. CONST. amend. VI.
299 Melley, supra note 283, at § 3 (“to serve the public interest by . . . reducing
a defendant’s opportunity to commit crimes while on pretrial release.”).
300 See Hills, 618 F.3d at 626–30 (tactical decisions, including continuances,
are within counsel’s discretion).
301 See id. at 626–28.
302 Id.
303 Id.
because any action of the defendant’s counsel is attributed to the defendant.305 As a result, as long as the defense counsel can justify his decision as reasonable, he could unnecessarily delay the case, and the defendant would not be afforded a remedy.

Lastly, delay seems to be the only result of a recognized violation of the right to a speedy trial. In one case, the court noted that the defendant’s trial was lengthened by the assertion of his right to a speedy trial.306 A defendant’s assertion of a violation of his rights should not lengthen or further delay the process. However, because the courts almost always dismiss without prejudice,307 the case is simply brought again. This means that the only effect of the defendant’s assertion of his right is to delay his conviction or acquittal. It may be better for the defendant to just accept the violation of his right and allow the trial to continue, instead of start all over again.308 A better remedy should be provided if this is going to be the continued approach. Otherwise, the only remedy is for the court to recognize the violation of the defendant’s right and for the defendant to be charged again.309 When this occurs, the defendant does not gain anything from asserting his right.

305 See id.

306 United States v. Fountain, 840 F.2d 509, 511 (7th Cir. 1988).

307 See, e.g., United States v. Sykes, 614 F.3d 303, 305–06 (7th Cir. 2010); United States v. Hills, 618 F.3d 619, 631–32 (7th Cir. 2010); United States v. Killingsworth, 507 F.3d 1087, 1091 (7th Cir. 2007); United States v. Arango, 879 F.2d 1501, 1509 (7th Cir. 1989); Fountain, 840 F.2d at 509, 513.

308 See Fountain, 840 F.2d at 511 (more time passed before trial than if the defendant had not asserted his right to a speedy trial).

309 See Speedy Trial Act, 18 U.S.C. § 3162(a)(2) (2006) (including dismissal with or without prejudice as a sanction); Killingsworth, 507 F.3d at 1091 (“Courts view dismissal without prejudice as a sanction.”).
VI. A NEW APPROACH TO THE SPEEDY TRIAL ACT

With all the faults of the Seventh Circuit’s current approach to the Speedy Trial Act, a new bright-line rule must be established. While it is very difficult to establish the exact circumstances in which a violation occurs or in which a case should be dismissed with prejudice, a better standard than the one currently in place must emerge. One’s right to a speedy trial is protected by the Constitution,310 and this in and of itself shows the importance of the right to each individual.

In addition, besides protecting the defendant, the Speedy Trial Act also helps protect the public.311 One way in which the Act helps protect the public is by ensuring that the defendant is tried in an expeditious manner.312 The public interest is best served when the defendant is brought to justice in a timely and efficient manner.313 The defendant benefits because his constitutional and statutory right is protected and he does not have to endure unnecessary pre-trial incarceration. As a result, it is important to both the public and the defendant that a better way to assess the right to a speedy trial is developed.

One necessary step is to stop lengthy delays that are not the fault of the defendant.314 Even if the defendant’s case is not prejudiced (for example, by a witness’s loss of memory or similar situations), the defendant has still suffered harm. The defendant has a right to a speedy trial,315 and if the court does not enforce that right, he has suffered prejudice because his fundamental right has been limited.316

310 U.S. CONST. amend. VI.
311 Melley, supra note 283, at § 3.
312 Id.
313 Id. (“to serve the public interest by . . . reducing a defendant’s opportunity to commit crimes while on pretrial release.”).
314 This should partly be accomplished by limiting the excludable days exception. See supra Parts IV & V.
The Seventh Circuit in *Hills* stated that “delays approaching one year [are] presumptively prejudicial”, however, the court has not applied that presumption in its recent cases. The court should enforce the one-year threshold when determining if the defendant has been prejudiced. Any delay that is not attributable to the defendant and that is one year or longer would automatically show that the defendant has suffered prejudice. This finding of prejudice should then be considered with regard to choosing to dismiss with or without prejudice.

It is also important for the court to strike a balance between dismissing with and without prejudice. If a court recognizes that a defendant’s rights have been violated, the defendant still has no meaningful remedy unless the court chooses to dismiss with prejudice. If the court dismisses without prejudice, the defendant could be retried, and the offending party receives no punishment for its violation. While dismissal with prejudice should not be used liberally, it should at least be considered.

One solution is to afford the defendant a remedy through a civil suit. If the defendant’s rights have been violated, he could take action by suing the party that caused the delay. This would give the defendant an opportunity to get monetary compensation for the violation. However, this remedy would only compensate one group that the Speedy Trial Act was meant to protect. The Speedy Trial Act was enacted to protect the defendant, as well as to protect the public interest. A civil suit would compensate the defendant for a deprivation of his rights; however, it would not compensate the public for a violation of its rights. The public has an interest in quickly trying

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317 United States v. Hills, 618 F.3d 619, 630 (7th Cir. 2010).
318 See 18 U.S.C. § 3162(a)(2) (including dismissal with or without prejudice as a sanction); United States v. Killingsworth, 507 F.3d 1087, 1091 (7th Cir. 2007) (“Courts view dismissal without prejudice as a sanction.”); United States v. Fountain, 840 F.2d 509, 511 (7th Cir. 1988) (where the defendant was indicted again).
319 Possibly a civil suit grounded in negligence or a malpractice action against counsel.
320 Melley, *supra* note 283, at § 3.
and sentencing guilty defendants, and this remedy does not address that interest. In addition, this solution does not deter future violations because the individuals at fault are not likely to be held responsible. The larger entity that employs the individual would probably pay for any damages awarded. In order for monetary compensation to be an effective remedy and deter future violations, the individual at fault must be held responsible, and the interests of the defendant and of the public must be addressed. Since the proper party is not likely to be held responsible and the remedy does not benefit both parties suffering from the violation, a different approach may better serve the ends of justice.

The best solution may be to sanction the individual responsible for each violation. There is a long-standing sentiment to put the burden of ensuring a speedy trial on the prosecutors. It is practical to put the responsibility on the lawyers because they are in the best position to expedite the case by filing fewer motions and by speaking to the judge. If a lawyer were held responsible for his failure to abide by constitutional and statutory law, it may provide an incentive for him to efficiently expedite the process.

The Speedy Trial Act allows sanctions to be imposed on lawyers for conscious delay of trial. The Act allows the court to sanction the attorney at fault for the delay by reducing the amount of compensation paid to the attorney, imposing a fine, denying the attorney the right to practice before the court for a period of time, or filing a report with a

321 See id. (interest stems from a need to reduce a "defendant’s opportunity to commit crimes while on pretrial release and preventing extended pretrial delay from impairing the deterrent effect of punishment.")
322 If the employee was acting within the course of employment, the employer would be liable under the theory of respondeat superior.
324 United States v. Lauderdale, No. 06-cr-30142-MJR, 2007 WL 1100617, at *4 (S.D. Ill. Apr. 11, 2007) ("This rule reflects the long-held sentiment that the ultimate responsibility to ensure the prosecution of individuals is done legally and in a way that does not violate their rights should rest on the shoulders of those doing the prosecuting.").
disciplinary committee. However, the Seventh Circuit has only discussed dismissal with or without prejudice as a sanction and has not discussed sanctioning a lawyer under § 3162(b). In *Fountain*, the court readily admitted that the lawyers were lackadaisical and at fault; however, it did not sanction those individuals. If the case was handled poorly enough for the court to mention it in its opinion, sanctions may be warranted. If the lawyer handled the case poorly once, he may handle it poorly again.

The Seventh Circuit in *United States v. Carlone* stated that “[c]ourts . . . have broad and flexible powers to prevent the abuse of their processes.” The Seventh Circuit stated that “[a]lternative sanctions are available that do not involve . . . windfalls for law breakers.” The court stated that these alternatives included revoking or shortening continuances (only prospectively) or refusing to grant future continuances. The Seventh Circuit should continue to build on these alternative sanctions with the sanctions provided in § 3162(b) of the Speedy Trial Act.

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326 Id. §§ 3162(b)(4)(A)–(E).
327 See *United States v. Killingsworth*, 507 F.3d 1087, 1091 (7th Cir. 2007) (considering dismissal without prejudice as a sanction); *Lauderdale*, 2007 WL 1100617, at *5 (“dismissal without prejudice is ‘not a completely negligible sanction, viewed from a deterrent standpoint, since the grand jury may refuse to reindict and since even if it does the defendant may be acquitted.’”).
328 See generally *United States v. Sykes*, 614 F.3d 303 (7th Cir. 2010); *Killingsworth*, 507 F.3d 1087; *United States v. Arango*, 879 F.2d 1501 (7th Cir. 1989); *United States v. Fountain*, 840 F.2d 509 (7th Cir. 1988).
329 See *Fountain*, 840 F.2d at 513.
330 See id.
331 666 F.2d 1112, 1115–16 (7th Cir. 1981).
332 Id. (referring to the fact that dismissal with prejudice punishes “not only the prosecutor but the entire law-abiding public” because it forever precludes the government from trying defendants that have been accused of serious crimes).
333 Id.
If the court held the responsible party liable, as the statute provides for,\(^{334}\) it may help to protect the defendant’s rights. A violation is less likely if counsel knows that he could be required to pay a fine or be prohibited from practicing for a period of time.\(^{335}\) If the individuals are sanctioned, the defendant may feel like his right has been recognized and that the person responsible for the deprivation of that right has been held accountable. Sanctioning the lawyer who is at fault for the delay would also hold him responsible to the public for failure to try the defendant in an efficient and expedient manner. Sanctions would act as a deterrent in future cases because violators would know that there were consequences to their actions. In addition, sanctions are an attractive option because they do not prevent criminals from being punished “as a by-product of trying to prevent misconduct by government officers.”\(^{336}\) As a result, the public is still protected because sanctions allow the criminal to still be punished.

Sanctions could also deter the unnecessary expansion of the excludable days exception. If these exceptions are applied more conservatively, attorneys will not be able to hide under its expansive umbrella. Attorneys would not be able to designate as many forms of delay as excludable, which would cause them to be more cautious in the case proceedings. This would help to expedite the case because attorneys would not unnecessarily delay the trial for fear of sanctions.

In addition, there would be less concern for abuse of tactical decisions made by attorneys. Attorneys are allowed to make tactical decisions without approval of their clients;\(^{337}\) this includes requesting continuances.\(^{338}\) If sanctions can be awarded for unnecessary delay, attorneys would be less likely to abuse their authority to make these decisions. Sanctions would deter a defense attorney from requesting unnecessary continuances.

\(^{335}\) Id. §§ 3162(b)(4)(B)–(D) (providing for fines and denial of the right to practice).
\(^{336}\) Carlone, 666 F.2d at 1115–16.
\(^{337}\) United States v. Hills, 618 F.3d 619, 626–28 (7th Cir. 2010).
\(^{338}\) Id.
There would also be less concern about the ability to reprosecute the defendant if the trial were conducted according to the requirements of the Sixth Amendment and the Speedy Trial Act. Sanctions could help deter delays, which would result in quicker trials and less violations.

Allowing the court to administer sanctions may be the most appropriate and efficient approach because the Speedy Trial Act already allows courts to do so.\(^{339}\) The court is well-versed in how and why the delay occurred, and therefore, it may be able to impose sanctions more quickly. In addition, the court will likely know who is truly at fault for the delay; therefore, it will be easier for it to provide justice to the victim of the violation.

More defined guidelines for imposing these sanctions must be defined in the Speedy Trial Act.\(^{340}\) The Act currently allows sanctions

In any case in which counsel for the defendant or the attorney for the Government (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial without justification consistent with section 3161 . . .\(^{341}\)

This seems to allow sanctions only when counsel has intentionally, knowingly, or willfully delayed the trial.\(^{342}\) This unnecessarily limits the applicability of the sanctions provided by the Speedy Trial Act.

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\(^{339}\) See 18 U.S.C. §§ 3162(b)(4)(E)–(c) (“The authority to punish provided for by this subsection shall be in addition to any other authority or power available to such court.”).

\(^{340}\) See id. §§ 3162(b)(4)(A)–(E) (listing the current sanctions).

\(^{341}\) Id. § 3162(b).

\(^{342}\) See id.
There may be situations where counsel is lackadaisical in his duties, and while he does not intend to delay the trial, that is the direct result of his actions. In that situation, counsel is just as much at fault for the delay as if he willfully caused the delay. The Speedy Trial Act should expand its scope to allow sanctions for attorneys who unnecessarily neglect the case, both intentionally and unintentionally. This would provide a greater deterrent from violations and would hold counsel accountable for his duties.

The drawback of this remedy lies in what would occur if the court were at fault for the delay. It is unlikely that a judge will sanction himself; however, the Code of Conduct for United States Judges may provide for disciplinary action. The Code states that “[a] judge should dispose promptly of the business of the court.” This puts an obligation on the court to ensure that trials are conducted in an expeditious manner. In addition, the Code requires judges with supervisory authority to ensure that those under their control perform their duties “timely and effectively.” As a result, judges have an affirmative duty to ensure that the case is promptly decided, and supervisory judges have a duty to discipline judges that do not fulfill this duty. While the burden to ensure a speedy trial should still be placed on the prosecution, the Code provides a backup to ensure that the responsible party is punished.

343 See United States v. Fountain, 840 F.2d 509, 513 (7th Cir. 1988) (stating that the prosecution neglected the case).
344 See 18 U.S.C. §§ 3162(b)(4)(E)–(c) (“The authority to punish provided for by this subsection shall be in addition to any other authority or power available to such court.”).
346 Id. at canon 3(A)(5) (with commentary stating that judges are to reduce avoidable delays and ensure that lawyers cooperate).
347 Id. at canon 3(B)(4) (“A judge with supervisory authority over other judges should take reasonable measures to ensure that they perform their duties timely and effectively.”).
348 Id. at canons 3(A)(5), 3(B)(4).
There is no perfect remedy for the defendant; however, it is important for the court to find a balance between the defendant’s rights and the interests of the public. It is important for the court to protect society by ensuring that criminals end up in prison; however, this cannot be done without regard to the defendant’s constitutional and statutory rights. The court must find a balance that best promotes the imprisonment of criminals, as well as the purposes of the Sixth Amendment and the Speedy Trial Act.\(^{349}\) The Founders believed that the right to a speedy trial was so essential that they included it in the Constitution.\(^{350}\) Congress then strengthened this right through the Speedy Trial Act.\(^{351}\) This means that the court should show deference to the intentions of the Founders and of Congress. The court must do its part to protect and balance the interests and the rights of the defendant and the public. This balance is best met through the use of sanctions, as explained above.

**CONCLUSION**

The Seventh Circuit has a long uphill climb if it is going to find a way to protect defendants’ rights the way that they were intended to be protected by the Founding Fathers and Congress. While the Seventh Circuit is not out of line with the approach taken by the Supreme Court, that does not mean it is the best approach. The Seventh Circuit needs to take the initiative and take the first step toward striking that necessary balance between the interests of society and the rights of the defendant. This is not likely to happen unless the Seventh Circuit reduces the number of situations where excludable days are applicable and cuts down on the ability to expand these exclusions. Sanctions on the responsible individual provide the best remedy by deterring similar conduct in the future and still allowing criminals to be punished. The deterrent factor in turn protects the defendant by reducing the number of violations and lengthy delays. The Seventh Circuit should focus on

\(^{349}\) See United States v. Hills, 618 F.3d 619, 631–32 (7th Cir. 2010).

\(^{350}\) See U.S. CONST. amend. VI.

effectively balancing the constitutional and statutory rights of individuals and the public. The Seventh Circuit should take the initiative and develop a new approach that establishes this balance through the use of sanctions on individuals.
DISCHARGE OF RCRA INJUNCTIVE CLAIMS IN BANKRUPTCY: THE SEVENTH CIRCUIT’S DECISION IN UNITED STATES V. APEX OIL CO., INC.

DIANA E. RDZANEK*


INTRODUCTION

Courts have consistently struggled with the conflicting policy goals of environmental and bankruptcy law.1 Without Supreme Court guidance, lower courts have resorted to what has been deemed a case-by-case approach of balancing these competing interests.2 The cauldron of bankruptcy and environmental issues has been bubbling for some time and has now reached a boiling point.3 The response

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2. Id. at 80.
from Congress and the Supreme Court, however, has been virtually non-existent.\textsuperscript{4}

Metaphors of Homeric proportions have been written about the state of environmental claims in bankruptcy, describing the competing interests as a veritable “clash of titans” of law and policy with conflicting priorities.\textsuperscript{5} A debtor cannot get a fresh start as well as pay for environmental obligations.\textsuperscript{6} A cleanup order cannot be treated comparably with other injunctive relief while receiving administrative priority.\textsuperscript{7}

The Seventh Circuit recently commented on one of the many unresolved issues plaguing the intersection of environmental law and bankruptcy—the discharge of injunction orders under the Resource Conservation and Recovery Act (RCRA).\textsuperscript{8} This Note discusses the current circuit split representing the different ways that courts have defined rights to payment under section 101(5) of the Bankruptcy Code\textsuperscript{9} and the Seventh Circuit’s definitive holding in \textit{United States vs. Apex Oil Company, Inc.}\textsuperscript{10} First, this Note argues that the Seventh Circuit’s holding, that the environmental obligation at issue in \textit{Apex...ACCOUNTABILITY OFFICE]. Litigation costs, including bankruptcy issues, comprise between $25 million and $50 million annually. \textit{Id. at 14.}


\textsuperscript{6} See \textit{Midlantic Natl Bank v. N.J. Dep’t of Envtl Prot.}, 474 U.S. 494, 509 (1986).

\textsuperscript{7} Courts are divided on whether environmental cleanup costs should receive administrative priority. \textit{See In re Chateaugay Corp.}, 112 B.R. 513, 526 (S.D.N.Y. 1990) (“cleanup costs assessed post-petition where there has been a pre-petition release or threatened release of hazardous waste are entitled to an administrative priority under the Bankruptcy Code”). \textit{Contra In re Security Gas & Oil, Inc.}, 70 B.R. 786, 795 (N.D. Cal. 1987) (“[a] duty to clean up an environmental hazard created pre-petition is generally not one of the obligations entitled to priority under the Bankruptcy Code”).

\textsuperscript{8} \textit{See Resource Conservation and Recovery Act} [hereinafter RCRA], 42 U.S.C. § 6902(b) (2006); \textit{United States v. Apex Oil Co., Inc.}, 579 F.3d 734 (7th Cir. 2009).


\textsuperscript{10} \textit{Apex}, 579 F.3d at 734.
was not a “right to payment” and hence not dischargeable in bankruptcy, is the correct interpretation of the bankruptcy provision as well as the environmental statute. This Note then discusses the implications of the Seventh Circuit’s holding and the several equitable concerns that remain in the wake of the court’s decision.

I. BACKGROUND

A. Environmental Law and Policy

State and federal environmental laws generally have as their purpose the regulation and elimination of dangerous pollution.11 To effectuate broad statutory mandates, environmental laws vest the President, and thus the EPA, with extensive power.12 Among its preventative and remedial functions, the EPA has a continuing duty to identify sites releasing hazardous substances.13 The sites, ranked in order of priority, comprise the National Priorities List (NPL).14 Environmental statutes also work retroactively, with expansive liability provisions that reach third parties, including parent companies, shareholders, corporate successors and lenders.15 Common

11 See, e.g. RCRA, 42 U.S.C. § 6902(b) (2006) (endeavoring to further the Congressional policy of minimizing the present and future threat to human health and the environment posed by solid and hazardous wastes).


13 Kelley, 15 F.3d at 1003.

14 Id. Through the end of the 2007 fiscal year, the EPA classified 1,569 sites as NPL sites, from a list of over 47,000 hazardous waste sites potentially requiring cleanup actions. U.S. GOV’T ACCOUNTABILITY OFFICE, supra note 3, at 4.

15 Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter CERCLA), 42 U.S.C. §§ 9601–9675, 9607(a) (2006); see United States v. Bestfoods, 524 U.S. 51, 67 (1998) (parent company may be charged with derivative CERCLA liability for its subsidiary’s actions); Browning-Ferris Indus. of Ill., Inc. v. Ter Maat, 195 F.3d 953, 955–56 (7th Cir. 1999) (shareholder not immunized from CERCLA liability where he personally operated polluting landfill);
remedies for environmental claims include—depending on the statute—clean-up orders, civil penalties, and criminal sanctions against responsible parties.16

Generally, environmental laws authorize one or more of three courses of action. First, the government can undertake clean-up actions, including removal and remedial measures.17 Where the response is contingent with the National Contingency Plan, the costs of the cleanup actions are subsidized by the Hazardous Substances Fund.18 Second, the government can order abatement actions and assess penalties for non-compliance.19 Third, where the government or a private party undertakes the environmental cleanup or expends funds for it, a cost-recovery action may be brought against Potentially Responsible Parties (PRP).20

Although there are many federal and state statutes, two are particularly relevant: the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the RCRA.21 CERCLA was enacted in 1980 to address the problem of remediating abandoned waste sites by establishing legal liability as

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16 See Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 936 (8th Cir. 1995) (defendant dry-cleaning supply business liable for cleanup costs under CERCLA for release of hazardous chemicals); U.S. v. Tex-Tow, 589 F.2d 1310, 1315 (7th Cir. 1978) (defendant owners of tank barge liable under Clean Water Act for civil penalties under absolute liability standard); U.S. v. Hamel, 551 F.2d 107, 109 (6th Cir. 1977) (defendant could properly be charged with criminal sanctions for willfully discharging gasoline into navigable waterway).


18 Id.


20 Section 9607 defines four classes of PRP: (1) current owner and operator; (2) anyone who owned or operated the site at the time of the release of toxic substances; (3) any person who transported toxic substances to or from the site; and (4) any person who accepted transported toxic substances from the site. CERCLA, 42 U.S.C. § 9607(a) (2006).

well as a trust fund for environmental cleanup.\textsuperscript{22} CERCLA’s primary purpose is to effectuate cleanup of toxic waste sites or to compensate those who have attended to remediation of environmental hazards.\textsuperscript{23} CERCLA establishes a complicated scheme that enables the federal government to respond promptly and effectively to the pervasive problems inherent in hazardous waste disposal.\textsuperscript{24} Ultimately, CERCLA promotes the private allocation of responsibility for costs incurred in responding to threatened or actual releases, spills, or discharges of hazardous substances at existing or abandoned sites by laying liability at the feet of a broadly defined PRP.\textsuperscript{25}

RCRA is a comprehensive statute that governs the treatment, storage, and disposal of solid and hazardous waste.\textsuperscript{26} RCRA creates a “cradle to grave” regulatory framework for managing hazardous wastes by imposing compliance requirements on both generators and

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\textsuperscript{22} See H.R. REP. NO. 96-1016, at 17 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6128 (noting that bill would establish program for appropriate environmental response to protect public health and induce persons to voluntarily take remedial measures); Hillinger & Hillinger, \textit{supra} note 4, at 334.

\textsuperscript{23} Hillinger & Hillinger, \textit{supra} note 4, at 334–35.

\textsuperscript{24} A prima facie case for cost recovery under CERCLA is satisfied by establishing the following four elements: (1) the site is a facility as defined under CERCLA; (2) a release of hazardous substances has occurred or been threatened; (3) the release has caused the plaintiff to incur necessary costs of response; and (4) the defendant falls within one of the four categories of potentially responsible persons (PRPs). See CERCLA, 42 U.S.C. § 9607(a) (2006); Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1152–54 (9th Cir. 1989).

\textsuperscript{25} CERCLA, 42 U.S.C. § 9607(a) (2006).

\textsuperscript{26} Hazardous waste is defined in § 6903 as: a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may (A) cause, or significantly contribute to an increase in mortality or an increase in serious, irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

transporters of hazardous wastes, as well as owners and operators of treatment, storage, and disposal facilities.  

Unlike CERCLA, RCRA’s primary purpose is to reduce the generation of hazardous waste and to ensure proper treatment, storage, and disposal of waste that is nonetheless generated so as to minimize present and future threats to human health and environment. This difference in purpose is reflected in the remedial structures of the two statutes. RCRA claims are unique because they do not authorize any form of monetary relief and are purely injunctive.

B. Bankruptcy Law and Policy

The bankrupt debtor’s position has been likened to being stuck among a “circling flock of creditors who would otherwise feast merrily on the debtor’s carcass, with the swiftest among them realizing the choicest cuts.” To prevent a race to the courthouse, maximize the debtor’s assets, and preserve judicial order, there exist several procedural mechanisms by which debtors’ assets are liquidated or reorganized. The Bankruptcy Code aims to balance the dual goals of giving creditors what they are owed and providing debtors with a fresh economic start.

The “fresh start” principle is primarily achieved through two mechanisms: the automatic stay and the bankruptcy discharge. The

28 Hillinger & Hillinger, supra note 4, at 359.
32 Id.
34 Id.
automatic stay stops creditors from being able to collect debts from the moment the bankruptcy is filed to the conclusion of the bankruptcy case. The automatic stay protects the debtor’s assets throughout the bankruptcy, guarantees that creditors will receive a fair share of the assets, and prevents the proverbial race to the courthouse to file creditor claims. In essence, because the costs of litigating judicial claims against the debtor often deplete the estate, the main purpose of the automatic stay provision is to preserve the estate.

The most important mechanism provided to debtors to achieve a fresh start is the bankruptcy discharge. Except as otherwise provided in the Bankruptcy Code, a discharge in bankruptcy relieves the debtor from all debts that arose before bankruptcy. Individuals filing under Chapter 7 are discharged of all pre-petition debts, save for limited exceptions provided in the Bankruptcy Code. In a Chapter 11 bankruptcy, confirmation of a plan of reorganization discharges the debtor, usually a corporation, from all debts arising prior to the date of confirmation.

Section 1141(d)(1)(A) of the Bankruptcy Code provides that confirmation of a claim discharges “any debt that arose before the date of” confirmation of the bankruptcy. Debt is defined as liability on a claim. The Code further defines a claim as follows:

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35 Losch, supra note 31, at 143.
38 Section 1328 of the Bankruptcy Code expressly provides a discharge of all allowable debts: “the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title.” 11 U.S.C. § 1328(a) (2006) (emphasis added).
39 Id.
40 See 11 U.S.C. § 523(a) (2006). Nondischargeable claims include child support, judgments for accidents involving drunk driving, certain taxes, and debts incurred illegally or by fraud.
42 Id.
43 Id. § 101(12). For purposes of identifying claims, federal bankruptcy, rather than state law, applies. See In re Jensen, 995 F.2d 925, 930 n.5 (9th Cir. 1993)
(A) [a] right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
(B) [a] right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.44

Congress expressed its clear intention that the definition of claim be interpreted broadly, stating “the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case.”45

The usual interpretation of section 101(5)(B) is that if a holder of an equitable claim cannot obtain an equitable remedy but can obtain a money judgment instead, then the claim is dischargeable.46 The seemingly simple statutory interpretation has been complicated by the inconsistent judicial history of equitable claims in bankruptcy. A claim arises, for bankruptcy purposes, “when ‘the relationship between the debtor and creditor contain[s] all of the elements necessary to give rise to a legal obligation . . . under the relevant non-bankruptcy law.’”47

(quoting Arlene Elgart Mirsky et al., The Interface Between Bankruptcy and Environmental Laws, 46 BUS. LAW. 623, 651 (1991)) (“The determination of when a claim arises for purposes of bankruptcy law should be a matter of federal bankruptcy law and should not be governed by the particular state or nonCode federal law giving rise to the claim. The reason for this is that the Code definition of ‘claim’ expressly includes rights to payment or equitable relief that are unmatured or unliquidated. Most state or nonCode federal statutes are only concerned with claims that have matured or been liquidated”).

46 United States v. Apex Oil Co., Inc., 579 F.3d 734, 736 (7th Cir. 2009).
47 In re Duplan Corp., 212 F.3d 144 (2d Cir. 2000) (quoting In re Chateaugay Corp., 53 F.3d 478, 497 (2d Cir. 1995)).
The relevant non-bankruptcy legal obligation must arise prior to the filing of the bankruptcy petition.\textsuperscript{48}

The bankruptcy discharge is primarily associated with Chapter 7 debtors who liquidate their assets in exchange for relief from the burden of their debts, but is an equally important principle for debtors attempting reorganization under Chapter 11.\textsuperscript{49} Reorganization under Chapter 11 is most often used by debtors who wish to continue doing business but cannot meet obligations to their creditors.\textsuperscript{50} Chapter 11 reorganization provides payments to the debtor’s creditors in accordance with a reorganization plan submitted to the creditors for vote and approved by the bankruptcy court.\textsuperscript{51} In a Chapter 11 reorganization, debtors plan the repayment of their debts with the expectation that their debts will be discharged.\textsuperscript{52} Consequently, the guarantee of dischargeability is important for debtors who are trying to determine how best to dispose of bad debt and restructure the rest of their obligations for future financial health.\textsuperscript{53}

Outside of the bankruptcy discharge, the bankruptcy courts have general equitable powers under section 105 of the Bankruptcy Code, which states: “the court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the title.”\textsuperscript{54} The court may thus enjoin any action where it is appropriate.\textsuperscript{55}

As a general rule, when Congress empowers the federal courts to grant equitable remedies, the courts are presumed to be authorized to exercise their full equitable authority unless Congress clearly

\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{53} Id. at 877.
\textsuperscript{55} Heidt, supra note 37, at 80.

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indicates otherwise.56 This equitable authority includes the power to order prohibitory and mandatory injunctions, writs of mandamus, and restitutio
nary damages.57 Courts are limited in their broad discretion from awarding compensatory or punitive damages.58

Claims for contribution to environmental cleanup costs clearly fall within the scope of section 105(A) of the Bankruptcy Code.59 Such claims are, by their very nature, rights to payment.60 Environmental injunctions, on the other hand, are a form of equitable remedy that fall within the scope of section 105(B).61 In contrast to claims under section 105(A), which are rights to payment by definition, not all injunctions are rights to payment.62

Although environmental injunctions may differ significantly in both form and cost from other equitable relief, public policy supporting environmental cleanup does not require that environmental claims be treated differently from other claims in bankruptcy, in absence of clear legislative intent.63

C. Conflicts

The tension between bankruptcy and environmental principles is evident in the goals and obligations of the respective parties.64 The Bankruptcy Code aims to repay creditors while providing debtors with a fresh economic start.65 In contrast, environmental regulations

58 Id. at 737.
62 See Matter of Udell, 18 F.3d 403, 410 (7th Cir. 1994) (employer’s right to an injunction preventing a former employee from violating a covenant not to compete was not a claim under section 105(a)).
64 Losch, supra note 31, at 144.
65 See Porter & Thorne, supra note 33, at 68.
generally seek to protect public safety and the environment regardless of the particular interests of debtors and creditors. While this admittedly oversimplifies the conflict between bankruptcy and environmental laws, it is at precisely this crossroads that courts must determine whether the bankruptcy discharge applies to environmental injunctions.

When the bankrupt debtor is also a polluter under CERCLA or another environmental statute, the policy considerations of environmental and bankruptcy laws collide. A debtor with limited assets must, in a bankruptcy, distribute his assets according to priority of claim against him. An ideally positioned unsecured creditor would benefit from administrative expense status. However, because many environmental obligations are enormous financial burdens, giving those claims administrative priority effectively dwarfs all other unsecured claims. Such priority status helps the environmental enforcement agencies, but it may ruin a debtor’s attempts at reorganization. Where the environmental claims are given a larger share of the debtor’s assets, this inevitably leaves less to repay other creditors who receive a diminished share.

On the contrary, when environmental obligations are pooled with other general, unsecured claims, they are often discharged for pennies on the dollar. Discharging unpaid liability undermines the goals of environmental laws to force parties responsible for contamination to clean up the polluted sites.

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66 Losch, supra note 31, at 144–45.
67 Hillinger & Hillinger, supra note 4, at 371.
68 Id.; 11 U.S.C. § 507(a) (2006). Priority claims are ordered as follows: (1) domestic support obligations; (2) administrative expenses; (3) “claims” as defined in section 502; (4) payment of wages to corporate debtors’ employees; (5) contributions to employee benefit plans; (6) claims related to grain storage and fishing; (7) certain deposits for real and personal property; and (8) certain taxes.
69 Hillinger & Hillinger, supra note 4, at 390.
70 Id.
71 Id.
72 August, supra note 1, at 74.
73 Hillinger & Hillinger, supra note 4, at 390.
74 Id.
Bankruptcy issues that prevent or delay enforcement of environmental statutes can greatly increase the expenditures related to cleanup for those sites.\(^{75}\) Litigation and negotiation costs are largely site-specific, and the small number of sites with bankrupt PRPs can astronomically raise the overall level of spending on litigation.\(^{76}\)

Further issues arise in situations where there are multiple responsible parties at a given cleanup site. Bankrupt parties who cannot contribute to cleanup costs complicate negotiations between the remaining parties.\(^{77}\) It can be more difficult to settle claims in cases where some of the responsible parties are facing bankruptcy because other responsible parties do not want to pay for the insolvent party’s share of the cleanup costs.\(^{78}\)

The lower courts weigh the competing interests of the laws inconsistently, with conflicting results for debtors. Some courts give certain deference to environmental laws, while others favor bankruptcy provisions.\(^{79}\) There is also a complex middle ground that further confuses the issue.\(^{80}\)

**D. Judicial History**

1. **Supreme Court**

*Ohio v. Kovacs* was the first case in which the Supreme Court tackled the bankruptcy discharge as it relates to environmental


\(^{76}\) In the last 10 years, litigation-related expenses have comprised up to 23% of total EPA expenditures. *Id.* at 12–14.

\(^{77}\) U.S. GOVERNMENT ACCOUNTABILITY OFFICE, *LITIGATION HAS DECREASED AND EPA NEEDS BETTER INFORMATION ON SITE CLEANUP AND COST ISSUES TO ESTIMATE FUTURE PROGRAM FUNDING REQUIREMENTS* 34 (2009), available at http://www.gao.gov/new.items/d09656.pdf (citing reports where the EPA rejected settlement proposals from minimally responsible parties where bankrupt owners were largely responsible for site contamination but were unable to pay).

\(^{78}\) *Id.* at 6.

\(^{79}\) August, *supra* note 1, at 73.

\(^{80}\) *Id.*
injunctions. When this landmark case was decided, it was interpreted as a blanket edict that polluting debtors could discharge environmental obligations in bankruptcy. Over time, however, Kovacs has raised more questions than it has answered.

In Kovacs, the State of Ohio sought a declaration from the bankruptcy court that the debtor’s obligation to clean up a contaminated site was not dischargeable in bankruptcy. The debtor, the principal shareholder of the polluting corporation, had previously signed a stipulation and judgment requiring him to remove specified wastes from the property. When the debtor failed to comply with the injunction, the State appointed a receiver to take possession of the site. Prior to completion of the cleanup, the debtor filed for personal bankruptcy under Chapter 7, precluding the State from enforcing its environmental laws against him. The Supreme Court held that because the debtor’s cleanup duty had been reduced to a monetary obligation, it was a liability on a claim that was dischargeable under the Bankruptcy Code.

The Kovacs decision most importantly stands for the proposition that a debtor cannot maintain an ongoing nuisance in direct violation of state environmental laws. The state can exercise its regulatory powers and force compliance with its laws, even if the debtor must expend money to comply. Under Kovacs, what the state cannot do is force the debtor to pay money to the state; at that point,

81 469 U.S. 274 (1986).
83 Kovacs, 469 U.S. at 276–77.
84 Id. at 276.
85 Id.
86 Id. at 276 n.1. The bankruptcy court stayed the State’s request to discover the debtor’s income and assets.
87 Id. at 283.
89 Id.
the state is no longer acting in its role as regulator, and it is instead acting as a creditor.\footnote{Id.}

The Kovacs Court expressly limited its holding in several ways, making it difficult to consider as precedent for future cases. Several issues were not decided: whether a monetary obligation imposed prior to bankruptcy was dischargeable; whether the consequences would be different had a receiver not been appointed to facilitate the injunction; or whether any environmental claims at all are dischargeable.\footnote{Kovacs, 469 U.S. at 284.} The Kovacs Court noted that even if an injunction does not facially require payment of money, it still may present a “claim.”\footnote{Id. at 274.} In particular, the Court did not address the issue of whether an injunction against further pollution is dischargeable.\footnote{Id. at 284–85 (“[W]e do not address what the legal consequences would have been had Kovacs taken bankruptcy before a receiver had been appointed and a trustee had been designated with the usual duties of a bankruptcy trustee . . . . [W]e do not hold that the injunction against bringing further toxic wastes on the premises or against any conduct that will contribute to the pollution of the site or the State’s waters is dischargeable in bankruptcy; we here address . . . only the affirmative duty to clean up the site and the duty to pay money to that end.”).}

Kovacs fails to address the situations in which an injunction is not automatically dischargeable. The Supreme Court has since never addressed the specific issues on which it declined to comment in Kovacs. The limited holding in Kovacs has befuddled courts struggling to use any shred of guiding light from the Supreme Court in their respective analyses.\footnote{Kovacs, 469 U.S. at 284–85; see In re Alongi, 272 B.R. 148, 156 (Bankr. D. Md. 2001) (citing Kovacs, 469 U.S. at 284); see also Goodwyn, supra note 94, at 776–77 (discussing Kovacs and how the Supreme Court limited its holding to the facts of the particular case, rather than disposing of potential issues).}

Courts have struggled to identify a uniform legacy for Kovacs. In Midlantic National Bank v. New Jersey Department of Environmental Protection, the Supreme Court interpreted dicta in Kovacs to mean that the abandonment of property in bankruptcy is

\footnote{Id.}

\footnote{Kovacs, 469 U.S. at 284.}

\footnote{Id. at 284–85 (“[W]e do not address what the legal consequences would have been had Kovacs taken bankruptcy before a receiver had been appointed and a trustee had been designated with the usual duties of a bankruptcy trustee . . . . [W]e do not hold that the injunction against bringing further toxic wastes on the premises or against any conduct that will contribute to the pollution of the site or the State’s waters is dischargeable in bankruptcy; we here address . . . only the affirmative duty to clean up the site and the duty to pay money to that end.”).}

\footnote{Id. at 274.}

\footnote{Francis E. Goodwyn, Claims Estimation and the Use of the “Cleanup Trust” in Environmental Bankruptcy Cases, 9 AM. BANKR. INST. L. REV. 769, 776 (2001).}

\footnote{Kovacs, 469 U.S. at 284–85; see In re Alongi, 272 B.R. 148, 156 (Bankr. D. Md. 2001) (citing Kovacs, 469 U.S. at 284); see also Goodwyn, supra note 94, at 776–77 (discussing Kovacs and how the Supreme Court limited its holding to the facts of the particular case, rather than disposing of potential issues).}
subject to environmental laws. The subject property in *Midlantic* was uncontestedly burdensome and not of value to the bankrupt estate. The bankruptcy court allowed the trustee in bankruptcy to abandon the contaminated site, even though the debtor had done nothing to remediate the facility. The Third Circuit reversed, and the Supreme Court affirmed.

*Midlantic* seems to advocate a case-by-case approach in which courts must balance the environmental violation’s threat to public health against the estate’s ability to comply with environmental laws. Although the *Midlantic* Court dealt with abandonment of debtor property in the bankruptcy estate, and not the discharge of a claim for liability post-bankruptcy as in *Kovacs*, the underlying question was the same: who will pay the cleanup costs for the contaminated property?

2. The Circuit Split

The Supreme Court did not, in either *Kovacs* or *Midlantic*, address the discrete issue of when a claim arises for the purposes of bankruptcy. In *In re Chateaugay Corp.*, the Second Circuit considered what constituted a claim in the context of a bankrupt debtor who

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98 Id. at 498 n.3.

99 Id. at 498.

100 Hillinger & Hillinger, supra note 4, at 362–69. Lower courts are divided on how to treat the outcome of *Midlantic*. Some hold that *Midlantic* requires the trustee to bring contaminated property into complete compliance with all environmental laws before abandonment. *See In re Peerless Plating Co.*, 70 Bankr. 943, 946–47 n.1 (Bankr. W. D. Mich. 1987). Others interpret limiting language in *Midlantic* to mean that the exception applies only where there is an imminent danger to public health and safety. *In re Smith-Douglass, Inc.*, 856 F.2d 12, 15 (1988); *see also In re Purco, Inc.*, 76 Bankr. 523, 533 (Bankr. W.D. Pa. 1987); *In re Franklin Signal Corp.*, 65 Bankr. 268, 271–72 (Bankr. D. Minn. 1986).

101 Hillinger & Hillinger, supra note 4, at 369.
owned and operated literally dozens of hazardous waste sites. The Second Circuit held that the EPA’s costs of responding to the hazardous waste situations, even those not yet addressed at the time of the bankruptcy, involved claims. As such, the EPA was required to file a proof of claim for each of the sites and stand in line with the other creditors in the bankruptcy. With respect to injunctions requiring the debtor to clean up the waste sites, the Second Circuit made the distinction between seeking reimbursement for cleanup and accepting payment as an alternative to continued pollution. The Second Circuit held:

[A] cleanup order that accomplishes the dual objectives of removing accumulated wastes and stopping or ameliorating ongoing pollution emanating from such wastes is not a dischargeable claim. It is true that, if in lieu of such an order, EPA had undertaken the removal itself and sued for the response costs, its action would have both removed the accumulated waste and prevented continued pollution . . . But an order to clean up a site, to the extent that it imposes obligations distinct from any obligation to stop or ameliorate ongoing pollution, is a “claim” if the creditor obtaining the order had the option, which CERCLA confers, to do the cleanup work itself and sue for response costs, thereby converting the injunction into a monetary obligation.

Finding the logic of the Second Circuit persuasive, the Third Circuit held in *In re Torwico Electronics, Inc.* that a cleanup order entered after the bankruptcy bar date is not dischargeable. In *Torwico*, the Chapter 11 debtor had owned, but no longer possessed, the polluted property. The Third Circuit held that the debtor’s

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102 944 F.2d 997, 1006 (2d Cir. 1991).
103 *Id.*
104 *Id.* at 1004.
105 *Id.* at 1008.
106 *Id.*
obligations under the state’s administrative order requiring the debtor to clean up hazardous waste on the polluted property was not a claim under the Bankruptcy Code.  

The debtor claimed that because it no longer had possession of the cleanup site, it was no longer maintaining a nuisance or participating in or responsible for the ongoing release of hazardous chemicals at the site. The Third Circuit held that although the state did not have a right to payment, it had the right to force the debtor to comply with existing environmental laws, even if the debtor expended money to comply.  

The Third Circuit centered its analysis on the State of New Jersey’s regulatory role. The court found that if the State could force the debtor to pay money to the State, it would cease to be merely a regulator and would take on the role of creditor. So while forcing compliance is within the power of the State as regulator, including forcing the debtor to expend money to comply with court orders, the State cannot force the debtor to pay money directly to the state. Interestingly, the Court held that the cleanup obligation was not a right to payment, even though that option was available to the State. The State could have, under the Act, cleaned up the hazardous waste and then sought reimbursement, which would be a judicial right to payment.  

The Third Circuit rejected the debtor’s contention that Kovacs applied to the cleanup obligation, agreeing with the state that Kovacs was not applicable because the state was not seeking a money judgment, but only seeking to remedy the ongoing pollution by forcing

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108 Id. at 148.  
109 Id. at 151.  
110 Id. at 150.  
111 Id.  
112 Id. at 150.  
113 Id. at 151 n.6 (“The parties dispute[d] whether, if the state has an ‘alternate payment remedy’ the order becomes a ‘claim.’”); see In re Chateaugay Corp., 944 F.2d 997, 1008 (“[T]o the extent that [an order] imposes obligations distinct from any obligation to stop or ameliorate ongoing pollution, [it] is a ‘claim’ if the creditor obtaining the order had the option . . . to do the cleanup work itself and sue for response costs”).  
114 Torwico, 8 F.3d at 151.
the debtor to clean up the site.\textsuperscript{115} Under New Jersey law, the environmental obligations of the polluting company ran with the waste and not the land.\textsuperscript{116} Thus, the debtor company was responsible for the cleanup even though it was no longer in possession of the land.\textsuperscript{117}

The Sixth Circuit has held oppositely. In \textit{United States v. Whizco, Inc.}, the government sought to enjoin the defendant, a coal company, to obey orders of the Secretary of the Interior requiring the defendants to satisfy their statutory obligation to reclaim their abandoned coal mine.\textsuperscript{118} The court held that the former operator of the coal mine was required to reclaim the abandoned site, even though the mine had been liquidated, but made the point of distinguishing enforcement obligations that required performance from those that were monetary obligations: “to the extent that fulfilling his obligation to reclaim the site would force the defendant to spend money, the obligation [i]s a liability on a claim as defined by the Bankruptcy Code.”\textsuperscript{119} \textit{Whizco} suggests that all claims in which the defendant must spend money are rights to payment as defined in section 101(5).\textsuperscript{120}

The \textit{Whizco} position favors debtors in bankruptcy, because it follows “fresh start” principles. As such, \textit{Whizco} has been argued many times by bankrupt debtors trying to resolve environmental claims in court.\textsuperscript{121} However, most courts have declined to follow the Sixth Circuit’s distinction between money claims and injunctive relief.\textsuperscript{122}

\textsuperscript{115} \textit{Id.} at 149.
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} \textit{Id.}
\textsuperscript{118} 841 F.2d 147, 147 (6th Cir. 1988).
\textsuperscript{119} \textit{Id.} at 151.
\textsuperscript{120} \textit{Id.; see 11 U.S.C. § 101(5)}.
\textsuperscript{121} See, e.g. Kennedy v. Medicap Pharmacies, Inc., 267 F.3d 493, 496 (6th Cir. 2001) (distinguishing \textit{Whizco}’s reclamation order from a covenant not to compete); City of Toledo v. Rayford, No. L-97-1310, 1998 WL 230450, at *2 (Ohio App. 6 Dist. May 1, 1998).
\textsuperscript{122} United States v. Hubler, 117 B.R. 160 (W.D. Pa. 1990), \textit{aff’d}, 928 F.2d 1131 (3d Cir. 1991) (cessation order demanded performance, not payment, and thus, the obligations were not “claims” within meaning of Bankruptcy Code); \textit{In re Chateaugay Corp.}, 112 B.R. 513 (S.D.N.Y. 1990), \textit{aff’d}, 944 F.2d 997 (2d Cir. 1991) (“claims for injunctive relief for which creditors had option of converting injunction
3. The Seventh Circuit

The Seventh Circuit has previously considered environmental claims in bankruptcy, with varying results. In *In re Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Chicago I)*[^123] and *In re Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Chicago II)*, the Seventh Circuit affirmed the discharge of CERCLA claims.[^124] The court held that a claim arises for bankruptcy purposes when the claimant can “tie the bankruptcy debtor to a known release of a hazardous substance which this potential claimant knows will lead to CERCLA response costs.”[^125] Thus, in *Chicago I*, because the relevant authority waited to file a claim until four years after the bankruptcy approval date, the claim was discharged in bankruptcy.[^126] The discharge was affirmed in *Chicago II*, where the court found that sufficient information existed, had the plaintiff sought it out, to give at least constructive knowledge that it possessed a CERCLA claim prior to and during the bankruptcy.[^127]

The Seventh Circuit held broadly that cost incurred to comply with an equitable cleanup order is not equivalent to the right to payment.[^128] In *AM International, Inc. v. Datacard Corp*, the Seventh Circuit considered whether a cleanup order under RCRA was converted to a monetary obligation.[^129] Because only “rights to...

[^123]: 974 F.2d 775 (7th Cir. 1992).
[^124]: 3 F.3d 200 (7th Cir. 1993).
[^125]: *Chicago I*, 974 F.2d at 786.
[^126]: Id.
[^127]: *Chicago II*, 3 F.3d at 203, 207. Prior to the confirmation of the bankruptcy, the EPA launched a massive investigation of the site, and a state-commissioned study detailing the site’s problems was published. Id.
[^128]: AM Int’l, Inc. v. Datacard Corp, 106 F.3d 1342 (7th Cir. 1997).
[^129]: Id. at 1348.
payment” are dischargeable “claims” for bankruptcy purposes, the RCRA injunction was not a claim.\footnote{Id.; see Meghrig v. KFC W., Inc., 516 U.S. 479 (1996) (RCRA does not allow a party to clean up site and sue for response costs in lieu of seeking an injunction).}

In\textit{ In re CMC Heartland Partners}, the Seventh Circuit found in favor of the EPA because the CERCLA provision involved created a claim “running with the land.”\footnote{CMC, 966 F.2d at 1147.} The court found that a “statutory obligation attached to current ownership of the land survives bankruptcy.”\footnote{Id. at 1146.} The court distinguished “claims” in bankruptcy, noting that “[t]o the extent [the relevant federal statutory sections] require a person to pay money today because of acts before or during the reorganization proceedings, CERCLA creates a ‘claim’ in bankruptcy.”\footnote{Id. at 1147.} Thus, the court avoided the possibility that a cleanup order would be a response to an ongoing threat, and not just a repackaged claim for damages.\footnote{RCRA, 42 U.S.C. §§ 6901–6987, 6973 (2010); U.S. v. Apex Oil Co., Inc., 579 F.3d 734, 734 (7th Cir. 2009).}

II. \textit{United States v. Apex Oil Co., Inc.}

In \textit{U.S. v. Apex Oil Company, Inc.}, the United States, seeking injunctive relief under the endangerment provision of RCRA, brought an action against Apex Oil Company, Inc. (“Apex”). Apex was a successor company to Clark Oil and Refining Corporation.\footnote{Clark Oil Refining Corporation (“Clark Oil”) bought the Hartford Refinery in 1967. Apex Oil Company (“Apex Oil”) was a general partnership formed in 1979. In 1981, Clark Oil was merged into Apex Acquisition, Inc. and subsequently changed its name to Clark Oil and Refining Corporation (“Clark/Apex”). In 1987, Apex Oil and most of its subsidiaries, including Clark/Apex, filed for protection under Chapter 11 of the Bankruptcy Code. In 1988, Clark/Apex sold the Hartford Refinery to yet another incarnation of Clark Oil and Refining Corporation. Apex Oil Company, Inc. was incorporated in 1989 and merged into Apex Oil (“Apex”).} Fifteen
years after the company’s successful Chapter 11 reorganization, the government brought an action against the successor company for groundwater contamination at the site of a previously owned oil refinery in Hartford, Illinois. After a seventeen-day bench trial, the district judge found that millions of gallons of oil constituting a “hydrocarbon plume” were trapped underground at the site. The pollution contaminated the groundwater and emitted fumes into the surrounding area, creating hazards to health and to the environment. The district judge found that the evidence presented established Apex’s liability and that the injunction was appropriate.

The question brought before the Seventh Circuit was whether the claim had been discharged in Apex’s previous bankruptcy and therefore could not serve as the basis for the lawsuit. The principal issue addressed by the Seventh Circuit was whether the government’s claim to an injunction was discharged in bankruptcy, precluding the claim from being brought in another lawsuit. At the time the Government instituted the cause of action, Apex no longer owned the property, engaged in refining, or had the in-house capability to clean up the contaminated site. Apex argued that because it would be unable to fulfill its environmental obligations without payment of approximately $150 million dollars to an outside contractor, and therefore the equitable remedy had been reduced to payment, it was a dischargeable claim.


137 United States v. Apex Oil Co., Inc., 579 F.3d 734, 735 (7th Cir. 2009).
138 Id.
139 Id.
141 Apex, 579 F.3d at 735.
142 Id.
143 Id. at 736.
144 Notably, the government had initially asked for injunctions under either the Clean Water Act or CERCLA but changed positions when confronted with Apex’s bankruptcy discharge defense. Id. at 737.

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Judge Posner, writing for the court, explained that the definition of a “claim” in section 101(5)(B) of the Bankruptcy Code includes “a right to an equitable remedy for breach of performance” only if the breach “gives rise to a right to payment.”145 The critical inquiry for the statutory interpretation is the meaning of “gives rise to a right to payment.”146 The Seventh Circuit read the plain language of the statute to mean that if the equitable remedy was unobtainable and the holder of an equitable claim could obtain a money judgment instead, the claim would give rise to a right to payment and would hence be dischargeable.147

The Seventh Circuit compared the cleanup injunction to other equitable remedies that give rise to rights to payment because the claimant would be entitled to a money judgment, and it noted that certain equitable remedies like backpay orders and orders of equitable restitution would be dischargeable if not for explicit statutory authority to the contrary.148 Accordingly, only two types of injunctions give rise to an alternate right to payment: (1) injunctions that are no longer capable of performance, such as an injunction to do something that is no longer possible and (2) injunctions that actually call for the payment of money.149 The Court specifically rejected the notion that equitable remedies are orders to act and are never orders to pay.150

In contrast to equitable remedies that may be reduced to money judgments, the government’s RCRA claim does not entitle the plaintiff to demand payment of cleanup costs in lieu of the defendant cleaning up the site, either by doing the cleanup itself or by paying a third party.151 Because RCRA does not authorize any form of monetary

145 11 U.S.C. § 101(5)(B); Apex, 579 F.3d at 735.
146 Apex, 579 F.3d at 736.
147 Id.
148 Id.; see In re Davis, 3 F.3d 111, 116 (5th Cir. 1993) (a money judgment to the value of the equitable remedy or claim is a right to receive payment and is dischargeable in bankruptcy); UFG, LLC v. Sw. Corp., 848 N.E.2d 353, 363, 365 (Ind. App. 2006) (decree for specific performance that could not be performed and thus entitled the plaintiff to a money judgment was dischargeable).
149 Apex, 579 F.3d at 736.
150 Id.
151 Id.
relief, the Seventh Circuit concluded that that the cleanup order at issue could not be deemed a right to payment.152

The RCRA provision that was the basis of the government’s equitable claim did not entitle the government to a demand for any monetary relief, although it did entitle the plaintiff to equitable relief in the form of money.153 As such, the government’s equitable claim entitled the government to require Apex to clean up the site at Apex’s expense.154

The Seventh Circuit relied on the Supreme Court’s decision in Meghrig v. KFC Western, Inc. to support its interpretation that section 6973(a) did not authorize monetary relief.155 Meghrig interpreted RCRA’s companion provision authorizing private suits as not authorizing monetary relief.156 The relevant language from the two statutes is identical.157 The Seventh Circuit concluded on this basis that the government’s equitable claim allowed the court to compel the defendant to clean up the contaminated site, and nothing more.158

The court also rejected Apex’s second argument, that all equitable decrees requiring payment for compliance are money claims and are therefore dischargeable.159 The court found the position to be inconsistent with the Bankruptcy Code that creates only the limited right to the discharge of equitable claims.160 As such, the cost to the defendant is not equivalent to a right to payment for the plaintiff.161

152 Id. at 736–37.
153 Id. at 737.
154 Id.
156 Apex, 579 F.3d at 737.
157 Id.
158 Id.
159 Id.
160 11 U.S.C. § 101(5)(B); Apex, 579 F.3d at 737.
161 Apex, 579 F.3d at 737; see AM Int’l, Inc. v. Datacard Corp., 106 F.3d 1342, 1348 (7th Cir. 1997); In re Torwico Elecs., Inc., 8 F.3d 146, 150 (3d Cir. 1993), cert. denied, 511 U.S. 1046 (1994); In re CMC Heartland Partners, 966 F.2d 1143, 1145–47 (7th Cir. 1992); In re Commonwealth Oil Refining Co., 805 F.2d 1175, 1186–87 (5th Cir. 1986); Penn Terra, Ltd. v. Dep’t of Envtl. Res., 733 F.2d 267, 278–79 (3d Cir. 1984); U.S. v. Hubler, 117 B.R. 160, 164 and n.1 (W.D. Pa. 1990), aff’d, 928
The Court explained, “[a]lmost every equitable decree imposes a cost on the defendant, whether the decree requires him to do something, as in this case, or, as is more common, to refrain from doing something.”

The Seventh Circuit distinguished Ohio v. Kovacs, in which the receiver that had been appointed was seeking money for the injunction instead of an order for cleanup. The claim was a right to payment. Here, the government was not seeking money, and the injunction therefore did not entitle a right to payment that would be dischargeable in bankruptcy. In Apex, the EPA merely sought cleanup of the contaminated site, whereas the receiver in Kovacs sought money for cleanup. The court dismissed the notion that the two were synonymous.

III. ANALYSIS

Apex’s argument failed because it attempted to distinguish the environmental injunction under RCRA from all other equitable claims. Under the current statutory makeup of the Bankruptcy Code, however, distinguishing between equitable claims is simply not possible.

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162 Apex, 579 F.3d at 737.
163 Id.
164 Id.
165 Id.
166 Id.
167 Id. The Seventh Circuit also rejected Apex’s alternative argument that the injunction itself is vague and violates Rule 65(d) of the civil rules requiring that an injunction “state its terms specifically” and “describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.” Apex, 579 F.3d at 739. The issue is not addressed in this Note.
168 Id. at 736.
The distinctions that Apex suggests to limit the scope of a position that it realizes is untenable (that all equitable claims are dischargeable in bankruptcy in the absence of a specific exception in the Code)—between injunctions to do and injunctions not to do, between injunctions that require major expenditures and those that require minor ones, between injunctions that the defendant can comply with internally and injunctions that it has to hire an independent contractor in order to achieve compliance with—are arbitrary. 170

The root arbitrariness of Apex’s position is that neither the Bankruptcy Code nor RCRA make any legal distinction for the manner in which the cleanup occurs. 171 The Seventh Circuit underscored that adopting Apex’s position would encourage polluters to remain without internal cleanup capacity. 172 The cleanup costs exist whether they are paid for by the polluter or someone else. As the polluter most responsible for the environmental damage, Apex’s cleanup obligation withstands bankruptcy. 173 Were the court to adopt Apex’s position, it is unlikely that the state could effectively enforce its laws. 174 The argument that any order requiring the debtor to expend money creates a dischargeable claim is untenable, because virtually all enforcement actions impose some cost on the violator. 175

The Seventh Circuit reasoned that all equitable decrees impose costs on the defendants, and that discharge generally must be limited to cases where the claim gives rise to a right to payment. 176 This position is consistent with the Seventh Circuit’s previous decisions regarding the dischargeability of environmental claims in bankruptcy. The court clearly followed its own precedent in *In re CMC Heartland* 177

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170 *Apex*, 579 F.3d at 738.
171 *Id.*
172 *Id.*
173 *Id.* at 737.
174 *Id.*
176 *Apex*, 579 F.3d at 738.
Partners, which held that the statutory cleanup obligation that attached to current ownership of the land survived bankruptcy,177 and AM International, Inc. v. Datascore Corp., where that cost incurred to comply with a RCRA injunction was not equivalent to the right to payment.178

The Seventh Circuit’s reliance on its own precedent is indicative of the lack of guidance from higher authority, namely the Supreme Court or Congress. While the Seventh Circuit correctly interpreted the statutory language, other Circuits are still relying on the spotty lineage of cases following Kovacs to make conflicting decisions about the dischargeability of environmental claims.

The Seventh Circuit’s reliance on its own precedent, and similar lines of cases in other circuits, indicates that there is no unified approach to environmental claims in bankruptcy. The Seventh Circuit’s analysis is supported by some of the circuits, but starkly contrasted by the Sixth. Beginning with the latter, the Seventh Circuit explicitly rejected Apex’s attempt to support its position with United States v. Whizco, Inc.179

Whizco suggests that all claims where the defendant must spend money in order to comply with the court’s orders are rights to payment.180 The question presented in Whizco—whether the discharge provisions of the Bankruptcy Code apply to mandatory injunctive relief that cannot be performed personally and would require a debtor in a chapter 7 liquidation bankruptcy to spend money—is comparable to that in Apex.181 The facts of Whizco are also similar to those in Apex, as the debtor in Whizco had surrendered the property in question, as well as all the mining equipment, in his bankruptcy.182 The debtor no longer had the physical ability to perform the reclamation nor the right to enter the polluted site.183 Further, the

177 966 F.2d 1143, 1147 (7th Cir. 1992).
178 106 F.3d 1342, 1348–49 (7th Cir. 1997).
179 841 F.2d 147, 147 (6th Cir. 1988).
180 Id. at 151.
181 Id. at 147; see Apex, 579 F.3d at 735.
182 Whizco, 841 F.2d at 149; see generally Apex, 579 F.3d 735.
183 Whizco, 841 F.2d at 149.
debtor lacked the financial ability to post bond or to hire a third party to perform the cleanup work.\footnote{Id.}

The Sixth Circuit relied on \textit{Kovacs} in holding that the debtor’s obligation to comply with the injunction was discharged in bankruptcy.\footnote{Id.} According to the court, the petitioner in \textit{Whizco} essentially sought from the respondent debtor only a monetary payment and that such a required payment was a liability on a claim that was dischargeable under the Bankruptcy Code.\footnote{Ohio v. Kovacs, 469 U.S. 274, 284 (1986); \textit{Whizco}, 841 F.2d at 149.} Like \textit{Kovacs}, where the State of Ohio was essentially trying to obtain a money payment from the debtor, the debtor in \textit{Whizco} could not personally clean up the waste he wrongfully released into the environment.\footnote{Kovacs, 469 U.S. at 287–88; \textit{Whizco}, 841 F.2d at 149.} As such, the Sixth Circuit determined that the redress sought by the government was actually a money claim and dischargeable in bankruptcy.\footnote{\textit{Whizco}, 841 F.2d at 150.}

The Sixth Circuit rejected \textit{Whizco}, Inc.’s argument that an injunctive order should be discharged only when the government has an alternative right to payment of money in lieu of compelling the operator or his agent to perform his reclamation duties.\footnote{Id.} The Sixth Circuit held:

\begin{quote}
Although the terms of the injunction would not require the payment of money, to the extent that the injunction were to be effective, it would. . . . Thus, when we look at the substance of what the plaintiff seeks, rather than the form of the relief sought, we see that the plaintiff is really seeking payment.\footnote{Id. at 151.}
\end{quote}

The \textit{Whizco} court determined that money payment was a claim, regardless of the form of the court order demanding cleanup.\footnote{Id.} The
distinction between form and substance makes practical sense. An interpretation of the Bankruptcy Code that turns on the debtor’s financial reality is preferable for debtors who are legally liable but practically unable to pay for the environmental cleanup that would inevitably be performed by government agencies.

The Sixth Circuit applied *Kovacs* more literally than the Seventh Circuit, finding that the substance of the claim—namely, the money expense—governs over the form of the court order. While most courts begin inquiry into environmental matters in bankruptcy with a discussion of *Kovacs*, the Seventh Circuit stepped away from that approach. Instead, the Seventh Circuit turned to the statutory language of RCRA and the Bankruptcy Code.

The key difference between the Sixth and Seventh Circuits’ study of *Kovacs* is that the Sixth Circuit interpreted the case without respect to the appointment of the receiver, while the Seventh Circuit in *Apex* found that the appointment of a receiver transferred the power to make money claims out of the hands of the debtor, and therefore was inapplicable to the present case. Had the *Whizco* court considered the receiver’s role as intermediary seeking payment for the environmental cleanup, the court may have come to the same conclusion as the Seventh Circuit.

The Seventh Circuit’s analysis mirrors that of the Third Circuit in *In re Torwico Electronics, Inc.* In *Torwico*, the court applied an environmental law similar to the RCRA provision that limits claims to injunctive relief. The Third Circuit reasoned that because the New Jersey Department of Environmental Protection and Energy (NJDEPE) could not force the debtor to pay money to the State, the cleanup costs were not a claim in bankruptcy. NJDEPE had no right

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192 United States v. Whizco, Inc., 841 F.2d 147, 150 (6th Cir. 1988).
193 United States v. Apex Oil Co., Inc., 579 F.3d 735, 736 (7th Cir. 2009).
194 *Id.*
195 *Whizco*, 841 F.2d at 149.
196 *Apex*, 579 F.3d at 737.
197 8 F.3d 146 (3d Cir. 1993).
198 *Id.*
199 *Torwico*, 8 F.3d at 150.
to payment, because its authority was limited to enforcement of the laws requiring the debtor to clean up the hazardous wastes for which it was responsible under state law.\textsuperscript{200} The court in \textit{Torwico} stated that much like the remedy at issue in \textit{Apex}, “it is clear that the state demanded not that Torwico pay money over to the state, but rather that it take action to ameliorate ongoing hazard.”\textsuperscript{201}

Both the Sixth Circuit’s substance/form distinction and the Seventh Circuit’s determination that an injunction is not a universal right to payment have significant policy implications. If a debtor’s environmental obligations are dischargeable, as advocated by the Sixth Circuit, the entire burden of reclaiming and cleaning up the polluted sites falls on the government.\textsuperscript{202} Such policy decisions are the responsibility of Congress, which could easily modify the Bankruptcy Code with a specific provision stating that a debtor may not discharge his cleanup obligations. While a statutory mandate requiring compliance with environmental acts would further the aims of environmental policy, it would be devastating to both debtors and other creditors in bankruptcy. Environmental injunctions and cleanup orders often amount to exponential costs\textsuperscript{203} that, if allowed to take administrative priority, would mean that fewer debtors would be able to reorganize and more would be forced to liquidate.\textsuperscript{204} Further, in liquidation, the high costs of environmental obligations would leave little if anything for the debtor’s unsecured creditors.\textsuperscript{205}

The relatively simple legal issue in \textit{Apex} implicates complicated equitable principles in bankruptcy and environmental law. Although the Seventh Circuit was correct in affirming the injunction against Apex, the case highlights several of the issues that continuously plague polluters entering bankruptcy or those who have already gone through bankruptcy.

\begin{itemize}
\item \textsuperscript{200} \textit{Id.} at 148.
\item \textsuperscript{201} \textit{Id.} at 150.
\item \textsuperscript{202} \textit{See} United States v. Whizco, Inc., 841 F.2d 147 (6th Cir. 1988).
\item \textsuperscript{203} Porter & Thorne, \textit{supra} note 33, at 68.
\item \textsuperscript{204} \textit{Id.}
\item \textsuperscript{205} \textit{Id.}
\end{itemize}
First, the *Apex* holding puts the post-bankruptcy debtor in the position where they can be blindsided by astronomical cleanup costs. Bankruptcy courts confirm only those bankruptcy plans that feasibly pay all preferred creditors and claims, and then discharge the remaining debt. A debtor must be aware of all claims, potential liabilities, and debts that exist or potentially exist prior to the bankruptcy in order to plan reorganization. Debtors cannot anticipate a complete discharge if they do not know the status of their potential environmental liability. Without an accurate forecast of potential liabilities, debtors may end up grossly miscalculating their assets.

Thus, even the best-intentioned debtor can fall prey to a huge claim under the expectation of a complete discharge. *Apex* argued that had it known in 1986 that it would be liable for $150 million in cleanup costs, it would have had to undergo a Chapter 7 liquidation rather than a Chapter 11 reorganization, because it could not have successfully reorganized with the additional, non-dischargeable debt. Without a successor or surviving entity to take over liability for the cleanup, the full expense of the operation would fall on the government.

Of course, environmental statutes such as CERCLA and RCRA hold parties accountable regardless of financial status. The concept of the PRP mandates joint and several liability for all responsible parties without reference to business organization. More troubling for the debtor, *Apex* provides little hope that debtors may ever be able to discharge liability for RCRA claims. By simply structuring the cause of action as a RCRA injunctive suit rather than attempting to obtain a money judgment under CERCLA or a different statute, government agencies can ensure debtor compliance,

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206 United States v. Apex Oil Co., Inc., 579 F.3d 735, 736 (7th Cir. 2009).
207 Heidt, *supra* note 37, at 122.
208 *Id.*
209 *Id.*
210 *Apex*, 579 F.3d at 736.
211 Heidt, *supra* note 37, at 72.
212 *Id.* at 89.
even where it may not be the most equitable outcome for the parties involved. In Apex, the government originally filed its claim under CERCLA and the Clean Water Act, but repleaded when confronted with Apex’s bankruptcy defense.213 A claim under the relevant CERCLA provision could be converted to a money judgment, which is a claim for bankruptcy purposes.214 The corresponding RCRA claim does not have a money judgment as an available remedy.215 Filing the cleanup action under RCRA essentially guaranteed that Apex would not be discharged of liability.

Based on statutory purpose alone, CERCLA is a more appropriate statute under which to file than RCRA because its purposes are cleanup and remediation instead of prevention of future pollution.216 RCRA’s limited remedial structure can be somewhat explained by the correspondingly broad citizen suit provisions.217 Further, unlike CERCLA, which imposes broad liability on both the current owner of the polluted land as well as the responsible parties, RCRA aims to reduce environmental damages by regulating potential polluters.218 Because it failed to overcome the issue in litigation,219 Apex’s attempt to avoid liability for the cleanup was doomed from the start.

The Seventh Circuit’s holding in Apex is an unpleasant precedent for polluters. Although the government may file RCRA

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213 Apex, 579 F.3d at 737.
214 Butterfield, supra note 57, at 701.
215 Furrer v. Brown, 62 F.3d 1092, 1094 (8th Cir. 1995) (RCRA “does not give the district courts express authority in citizen suits to award money judgments for costs incurred in cleaning up contaminated sites. Thus, if such a remedy is to be available, we must find either that Congress, by authorizing the district court ‘to order … such other action as may be necessary,’ . . . implicitly created such a remedy, or that the ‘cause of action … may have become a part of the federal common law through the exercise of judicial power to fashion appropriate remedies for unlawful conduct’” (quoting Nw. Airlines, Inc. v. Transp. Workers Union of Am., 451 U.S. 77, 90 (1981)).
216 Butterfield, supra note 57, at 701.
217 Id.
218 Id.
claims, Congress intended that RCRA enforcement be a partnership between state and federal governments, with the state taking primary responsibility for implementation. The government selectively filed a claim under RCRA when confronted with Apex’s bankruptcy defense. The resulting Seventh Circuit decision gives the government carte blanche to shoehorn responsive claims into what is meant to be a preventative statute, for the purpose of avoiding bankruptcy defenses.

Although it will not resolve the conflicting principles between bankruptcy and environmental law, decreasing the number of bankrupt parties saddled with environmental liability would serve to partially ameliorate the problem. The EPA reported in 2005 that implementing a 1980 statutory mandate under CERCLA requiring businesses handling hazardous substances to provide assurance of their financial responsibility could help reduce the risk overall that companies entering bankruptcy would be responsible for costly environmental cleanup. This would also reduce the risk that the general public would have to assume the financial responsibility of the cleanup costs.

CONCLUSION

Although denying that a $150 million cleanup order is a “right to payment”—as the Seventh Circuit did in Apex—may seem initially adverse to the traditional prospect of a dischargeable claim, the Seventh Circuit was correct to affirm the district’s decision for at least two reasons. First, the Bankruptcy Code and relevant RCRA

221 Hillinger & Hillinger, supra note 4, at 359 (RCRA’s “cradle to grave” regulatory scheme is intended to prevent the types of untreated releases that CERCLA is designed to clean up).
223 Id.
provisions are blind to the financial status of a debtor in what is a purely equitable claim. Second, the Supreme Court’s decision in \textit{Kovacs} does not provide a blueprint for this type of environmental injunction in a bankruptcy case.

While the Seventh Circuit’s decision was legally correct, there are equitable concerns that span beyond the simple statutory analysis of the Bankruptcy Code. The injunction against Apex forces the company to spend vastly outside of its fiscal bankruptcy plan. As such, the debtor did not receive a “fresh start” in this case. In a cross section of law where one party gets the short end of the stick, the debtor company in this case certainly received just that. \textit{Apex} highlights the tension between the competing purposes of bankruptcy and environmental law. Until the issue is further treated by either the Supreme Court or by Congress, the status of environmental claims in bankruptcy will remain uncertain.
HOW LESS IS MORE: THE UNRAVELING OF THE INEXTRICABLE INTERTWINEMENT DOCTRINE UNDER UNITED STATES V. GORMAN

JAIME L. PADGETT*


INTRODUCTION

In July 2010, the United States Court of Appeals for the Seventh Circuit explicitly abolished the long-standing doctrine of inextricable intertwining as a basis of admissibility for other bad acts evidence.1 Other bad acts evidence is usually inadmissible, as it tends to suggest improper character inferences.2 However, in some instances, this type of evidence is intertwined with other admissible evidence in such a way that it helps to complete the story of the crime by filling a conceptual or chronological void3 or is so blended or connected that it incidentally involves, explains the circumstances surrounding, or tends to prove an element of the charged crime.4 In such circumstances, the


1 See United States v. Gorman, 613 F.3d 711 (7th Cir. 2010).

2 See infra notes 13–25.

3 See, e.g., United States v. Luster, 480 F.3d 551, 556–57 (7th Cir. 2007).

4 See, e.g., United States v. McLe, 436 F.3d 751, 760 (7th Cir. 2006); United States v. Gougis, 432 F.3d 735, 738 (7th Cir. 2005); United States v. Ojomo, 332 D.3d 487, 489 (7th Cir. 2003); United States v. Senffner, 280 F.3d 755, 764 (7th Cir. 2002).
doctrine of inextricable intertwinement is invoked to admit the evidence.\(^5\) This doctrine’s relationship with Federal Rule of Evidence 404(b)’s prohibition against the use of other bad acts evidence has become increasingly confusing and problematic. The Seventh Circuit’s recent decisions indicate an increasing frustration with the doctrine, with the court believing that the doctrine has “become overused, vague, and quite unhelpful” and as such, “has outlived its usefulness.”\(^6\) In *United States v. Gorman*, the Seventh Circuit altogether abolished the doctrine in favor of the exclusive use of Rule 404(b)\(^7\) as the basis of admissibility for other bad acts evidence.\(^8\) To date, the Seventh Circuit is alone in this practice. However, it is the position of this Comment that as a result of the way the doctrine has been expanded since its creation, the doctrine should be abolished in the other circuits as well. As currently applied, the doctrine poses significant threats to defendants’ rights.\(^9\)

### I. Character Evidence

The term “character evidence” is used to indicate any evidence “probative of a pertinent trait of a person’s character, such as honesty, temperance or peacefulness.”\(^10\) This evidence may be presented in either civil or criminal trials, and may be introduced in three ways: reputation testimony, personal opinion testimony, or by evidence of specific acts previously committed by the defendant.\(^11\) The most persuasive of these proofs is evidence of prior acts, which can be particularly damning in the context of prior crimes, wrongs, or misconducts.\(^12\) As such, the American legal system has created special

\(^{5}\) *Id.*

\(^{6}\) *Gorman*, 613 F.3d at 719.

\(^{7}\) *Fed. R. Evid.* 404(b).

\(^{8}\) *Gorman*, 613 F.3d at 719.

\(^{9}\) See *infra* notes 17–18, 229–43 and accompanying text.

\(^{10}\) *Fed. R. Evid.* 404 advisory committee’s note.

\(^{11}\) CHARLES MCCORMICK, *EVIDENCE* 443 (2d ed. 1972); see also *Fed. R. Evid.* 405.

\(^{12}\) MCCORMICK, *supra* note 11, at 443.
standards with which to determine the admissibility of this type of evidence.

A. Other Bad Acts Evidence

Admissibility of prior acts evidence, especially in the context of prior bad acts, poses substantial risks. Other bad acts evidence is often highly prejudicial, tending to “distract the trier of fact from the main question of what actually happened on the particular occasion . . . [and subtly permitting] . . . the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.”13 The introduction of other bad acts evidence may further prejudice the defendant by creating an unfair risk of surprise, thereby robbing him or her of the opportunity to prepare an adequate defense.14 It “saddles a person with disabilities because of prior conduct”15 and “violates a social commitment to the thesis that each person remains mentally free and autonomous at every point in his [or her] life.”16 The nature of the evidence is problematic as well; the evidence is often of little probative value, yet its introduction is unduly time-consuming. Its admissibility may even be unconstitutional, implicating, in the context of other criminal acts, the prohibition against double jeopardy17 or the right against self-incrimination.18 Recognizing the severity of the risks

13 FED. R. EVID. 404 advisory committee’s note.
15 Id.
16 Id.
17 22 CHARLES A. WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5239 (1978 & Supp. 1993) (“When the defendant has previously been acquitted of . . . uncharged crimes, their evidentiary use undermines the values that support the prohibition on double jeopardy.”); see also U.S. CONST. amend. V (“No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . .”).
18 WRIGHT & GRAHAM, supra note 17, at § 5239 (“The privilege against self-incrimination can be eroded where the defendant is forced to take the stand to answer the uncharged offenses, thus emphasizing his failure to testify as to the
and high likelihood of their occurrence, American courts exercise great caution in admitting such evidence.

Federal Rule of Evidence 404 embodies the current American rule regarding the admissibility of other bad acts evidence: “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” However, Rule 404(b) bans this evidence only when it is being used as propensity evidence, i.e., to demonstrate an individual’s propensity to act in a certain way based on his or her prior conduct. The prohibition against this use of character evidence “is so deeply embedded in our jurisprudence as to assume almost constitutional proportions.” However, Rule 404(b) provides an exception for certain uses of a specific kind of character evidence; the evidence “may . . . be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Proponents must offer the evidence for specific identified purposes, with the proponent only able to argue and the trier of fact only able to consider the evidence as possible proof of the elements for which it was offered. Once a permissible, non-propensity theory of relevance has been identified, the court cannot exclude the evidence unless it finds that “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue
delay, waste of time, or needless presentation of cumulative evidence” under Rule 403.25

B. Inextricable Intertwinement Doctrine

The inextricable intertwinement doctrine is frequently invoked as a basis of admissibility for other bad acts evidence. This judicially-created doctrine allows bad acts evidence to be admitted when it is intertwined with other admissible evidence in such a way that “it helps to complete the story of the crime by filling a conceptual or chronological void” or “is so blended or connected that it incidentally involves, explains the circumstances surrounding, or tends to prove any element of, the charged crime.” The doctrine is premised on the fact that evidence inextricably intertwined with the charged conduct is, by its very nature, not other bad acts and therefore, does not implicate Rule 404(b).28 As such, evidence admitted under this doctrine is not subject to the same constraints as evidence under Rule 404(b).29

24 FED. R. EVID. 403.
25 FED. R. EVID. 404(b) Senate Judiciary Committee’s note. (“It is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, i.e., prejudice, confusion or waste of time.”).
26 See, e.g., United States v. Luster, 480 F.3d 551, 556–57 (7th Cir. 2007).
27 See, e.g., United States v. McLee, 436 F.3d 751, 760 (7th Cir. 2006); United States v. Gougis, 432 F.3d 735, 738 (7th Cir. 2005); United States v. Ojomo, 332 D.3d 487, 489 (7th Cir. 2003); United States v. Senffner, 280 F.3d 755, 764 (7th Cir. 2002).
28 WRIGHT & GRAHAM, supra note 17, § 5239, at 427, 445.
29 United States v. Conner, 583 F.3d 1011, 1019 (7th Cir. 2009) (“[E]vidence admitted under this doctrine ‘lie[s] outside the purview of the Rule 404(b) character/propensity prohibition,’ and is not subject to its constraints regarding the manner in which the evidence may be used.”) (citations omitted); see also infra notes 229–43 and accompanying text.
1. Development

The inextricable intertwinment exception to the prohibition against other bad acts evidence first emerged as the “inseparable crimes exception.” While the court in People v. Molineux readily acknowledged that “the exceptions to the rule [of the inadmissibility of other bad acts evidence’s inadmissibility] cannot be stated with categorical precision,” the court clearly recognized an inextricable intertwinment exception. In that case, Ronald Molineux was charged with murder in the first degree for his alleged involvement in the death of Katharine Adams. Molineux sent by mail a bottle labeled “Bromo Seltzer” to Adams’s housemate, Harry Cornish; however, instead of containing Bromo Seltzer, the bottle contained cyanide of mercury, a type of poison. Cornish innocently administered the contents of the bottle to Adams while attempting to treat a headache of hers, and thus, inadvertently caused her death. During the course of the trial, the prosecution presented evidence of Molineux’s alleged involvement with the murder of Henry Barnet, who had died seven weeks earlier. Prior to his death, a bottle labeled as “Kutnow powder” had been sent to Barnet through the mail. When this bottle was tested after Barnet’s death, it was discovered that rather than containing the indicated Kutnow powder, the bottle actually contained cyanide of mercury. This same type of poison had also killed Barnet. Molineux was not charged with Barnet’s death. The prosecution presented evidence of Barnet’s death in an attempt to

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30 Brauser, supra note 23, at 1594–95.
31 61 N.E. 286 (N.Y. 1901).
32 Id. at 293.
33 Id. at 293, 299–302.
34 Id. at 287.
35 Id.
36 Id. at 287–88.
37 Id. at 289–90.
38 Id.
39 Id.
40 Id. at 290.
41 Id. at 286.
prove Molineux’s guilt in murdering Adams.\footnote{Id. at 289.} Molineux appealed the resulting conviction to the New York Court of Appeals.\footnote{Id. at 287.} The court of appeals strongly emphasized the general rule prohibiting the use of any other bad acts evidence.\footnote{Id. at 292–93.} The court did, however, recognize the existence of a few exceptions to this rule and reasoned that other bad acts evidence may be competent to prove, inter alia, “a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others.”\footnote{Id. at 294.}

Although at first blush, it would appear that the court was recognizing an exception only for other bad acts evidence that demonstrated a common plan or scheme, the court’s further development of the exception indicated that it also intended this exception to encompass other bad acts evidence inextricably intertwined with the charged crime. In elaborating upon the exception, the court indicated that the exception is meant to encompass situations in which “two or more crimes are committed by the same person in pursuance of a single design, or under circumstances which render it impossible to prove one without proving all.”\footnote{Id. at 299 (emphasis added).} Though the court’s discussion focused primarily upon the common scheme or plan prong of the exception, it is clear that the notion of inextricably intertwined evidence is separate and distinct. For this exception to apply, “there must be evidence of [a] system between the offense on trial and the one sought to be introduced. They must be connected as parts of a general and composite plan or scheme, or they must be so related to each other as to show a common motive or intent running through both.”\footnote{Id. (emphasis added).} The exception is extremely narrow, requiring a connection between the crimes “to have existed both in fact and in the mind of the actor.”\footnote{Id.}

\footnote{Id. at 289.}
\footnote{Id. at 287.}
\footnote{Id. at 292–93.}
\footnote{Id. at 294.}
\footnote{Id. at 299 (emphasis added).}
\footnote{Id. (emphasis added).}
dangers of admitting such evidence indicate that the “the accused should be given the benefit of the doubt, and the evidence rejected.”

Turning to the facts of the case, the Molineux court held that the evidence of Barnet’s death was not inextricably intertwined with Adams’ murder. Given the entirely unrelated motives for each murder (health club quarrels versus jealousy regarding a female’s affections, respectively) and the length of time between the murders (eight weeks), the court found it “impossible to perceive any legal connection between the two cases.” Although the methods were similar in each murder, “the methods referred to are as identical as any two shootings, stabbings, or assaults, but no more so.” Without a common plan or any similarities in motive or intent, the admission of the evidence of Barnet’s murder was a “clear error of law” and necessitated reversal of Molineux’s conviction.

2. Modern Application of the Inextricable Intertwinement Doctrine in the Seventh Circuit

The current state of the inextricable intertwinement doctrine is a far cry from the original form pronounced in Molineux, which encompassed only “circumstances which render[ed] it impossible to prove one without proving all.” The Seventh Circuit now considers other crimes evidence to be inextricably intertwined with the charged conduct when: (1) the evidence is so blended or connected that it incidentally involves, explains the circumstances surrounding, or tends to prove any element of the charged crime, (2) the absence of the evidence would create a chronological or conceptual void in the story of the charged crime, or (3) the evidence completes the story of the

49 Id.
50 Id. at 301.
51 Id. at 293.
52 Id. at 301.
53 Id. at 311.
54 Id. at 299.
charged crime. With the courts’ expansion of the doctrine, it has morphed from one of practical necessity—essential to convicting individuals of their charged crimes—to one of convenience.

This transformation has not gone unnoticed. Critics have widely criticized the doctrine as well as the courts’ inconsistent and overly broad application of it. The courts are not entirely to blame, however; the doctrine itself offers little by way of guidance. “Inextricably intertwined,” “intricately related,” “blended,” and “connected,” for example, are all nebulous terms, having only relational meaning. “[T]he test creates confusion because, quite simply, no one knows what it means.” It is the “vacuous nature of the test’s wording” that gives rise to the doctrine’s criticism, as this is precisely what makes the doctrine dangerous. The doctrine’s lack of clarity is “a virtual invitation for abuse.” Even with the best intentions, it may be impossible for a court to accurately and consistently apply the doctrine. However, courts are often condemned as having less than the best intentions, “substitut[ing] a careful analysis with [the doctrine’s] boilerplate jargon.” Rather than actually analyzing the necessity of the evidence, courts simply label

57 United States v. Green, 617 F.3d 233, 246 (3d Cir. 2010), cert. denied, 131 S. Ct. 363 (2010).
58 Imwinkelried, supra note 56, at 729.
59 Id. at 730; see also Brauser, supra note 23, at 1610–11 (describing a case in which the court found that other bad acts evidence set the “tone for the relationship” between the defendant and an undercover agent although the tone of the relationship was clearly not an element of the charged offenses).
60 Green, 617 F.3d at 246.
the evidence as inextricably intertwined when in fact, the evidence
was “anything but inseparable.”

a. Evidence “so blended or connected that it incidentally involves,
explains the circumstances surrounding, or tends to prove any element
of the charged crime”

Uncharged criminal activity arising from the same transaction or
transactions as the crime charged is said to incidentally involve the
charged crime and as such, is admitted as inextricably intertwined
evidence. In United States v. Gibson, the defendant was charged
with four counts of distributing and possessing crack cocaine with the
intent to distribute. During one of the charged sales, the defendant
agreed to sell two handguns to an undercover agent. Evidence of the
potential gun sales was admitted at trial as inextricably intertwined,
and the defendant appealed on that basis. The Seventh Circuit upheld
the admission, finding that because the defendant and the undercover
agent “were negotiating the sale of crack cocaine and guns at the same
time in the same conversations,” the evidence was inextricably
intertwined.

The Seventh Circuit also considers evidence that explains the
circumstances surrounding the charged crime to be inextricably

61 Imwinkelried, supra note 56, at 730.
62 United States v. Gibson, 170 F.3d 673, 681 (7th Cir. 1999) (“Uncarged
criminal activity is admissible under the ‘intricately related’ doctrine if it arises from
the same transaction or transactions as the charged crimes.”).
63 Id.
64 Id. at 676.
65 Id.
66 Id. at 680.
67 Id. at 681–82; see also United States v. Parkin, 917 F.2d 313, 317 (7th Cir.
1990) (holding evidence of conversation about potential cocaine sale that occurred
during charged marijuana sale inextricably intertwined); United States v. Hawkins,
823 F.2d 1020, 1023 (7th Cir. 1987) (finding evidence that defendant offered to
exchange guns for cocaine during charged gun transaction was inextricably
intertwined because statements were made during same transaction), overruled on
other grounds by United States v. Baldwin, 60 F.3d 363 (7th Cir.1995).
intertwined. For example, in United States v. Strong,68 the defendant was charged with being a felon in possession of a firearm and in possession of ammunition.69 During his trial, the district court admitted evidence that drugs were sold at the defendant’s home partly because it “helped explain why he would possess [the firearm and ammunition].”70 The Seventh Circuit upheld the admission, explaining that evidence of “drug trafficking supplies a motive for having [a] gun . . . [b]ecause weapons are ‘tools of the trade’ of drug dealers.”71 The court found that evidence of the defendant’s involvement in drug trafficking explained the circumstances surrounding his possession of the firearm and ammunition.72 In United States v. Richmond,73 the defendant was charged with, among other things, conspiracy for making false statements to obtain a firearm.74 The Seventh Circuit again held that evidence of the defendant’s gang association was inextricably intertwined with the charged conspiracy, as the evidence explained the circumstances surrounding the relationships of the involved individuals.75

Furthermore, evidence directly probative of the charged crime is admissible in the Seventh Circuit under the inextricable intertwinement doctrine, as it tends to prove an element of the charged crime. For example, in United States v. Roberts,76 the defendant was charged with conspiracy to commit armed bank robbery, armed bank robbery, use of a firearm in commission of a federal felony, and possession of a firearm after having been convicted of a felony.77 Evidence that the defendant was “caught with a dark steel revolver with a brown handle matching the description of the weapon he used only two days earlier to rob [a] Joliet bank [was] directly relevant to

68 485 F.3d 985 (7th Cir. 2007).
69 Id. at 986.
70 Id. at 990.
71 Id. (quoting United States v. Stokes, 211 F.3d 1039, 1042 (7th Cir. 2000)).
72 Id.
73 222 F.3d 414 (7th Cir. 2000).
74 Id. at 415.
75 Id. at 416–17.
76 933 F.2d 517 (7th Cir. 1991).
77 Id. at 517.
the crimes with which he was charged." As such, the court considered the evidence to be inextricably intertwined. Similarly, in United States v. Muhammad, the defendant appealed his conviction for conspiracy to possess with intent to distribute cocaine and possession of ammunition by a felon. Police initially encountered the defendant after being called to the scene of a shooting. After the defendant fled the scene, the police obtained a search warrant for his home, where they found several boxes of ammunition. The defendant challenged admission of testimony regarding the shooting scene as well as the admission of ammunition. Testimony about the defendant’s presence and flight from the shooting scene was admitted to put his arrest “in context” and formed “at least in part the basis for the indictment on [a charge of which he was acquitted] and for the ammunition possession count.” As such, “the testimony was ‘directly relevant to the crimes charged.’” Evidence that the defendant possessed the ammunition for which he was charged with possessing “was direct evidence of the crime for which [he] was indicted.” The court considered this evidence to be inextricably intertwined and upheld its admission as such.

Although in some situations, the evidence may in fact be inextricably intertwined, the cases discussed above demonstrate the court’s cavalier attitude to actually making that determination. For example, in United States v. Gibson, evidence that the defendant attempted to negotiate the sale of firearms was found to be inextricably intertwined with the four charged counts of distributing

78 Id. at 520.
79 Id.
80 928 F.2d 1461 (7th Cir. 1991).
81 Id. at 1463.
82 Id.
83 Id.
84 Id. at 1468.
85 Id.
86 Id.
87 Id.
88 Id.
89 170 F.3d 673 (7th Cir. 1999).
and possessing with the intent to distribute cocaine base.\textsuperscript{90} The attempted sale of the firearms was not an element of the charged crime;\textsuperscript{91} nor would the jury have been confused by the witness’s testimony had evidence of the conversation remained unoffered. Admittedly, evidence of any conversation relating to drugs may have been relevant; however, evidence of an entirely separate topic discussed by happenstance during the charged transactions is as inextricably intertwined with the charged crime as any conversations about the weather that may have taken place during that transaction.\textsuperscript{92} Even a cursory analysis would have revealed that the evidence of the defendant’s attempted firearm sale could easily have been extricated without harm to the prosecution’s case. Furthermore, it is not necessary to prove the circumstances surrounding a charged crime in order to prove the charged crime itself. By deeming evidence of extraneous circumstances “inextricable,” the Seventh Circuit has misinterpreted what “inextricable” actually means.

\textit{b. Evidence whose “absence would create a chronological or conceptual void in the story of the crime”}

Evidence necessary to avoid a chronological or conceptual void in the story of the crime is also frequently admitted as inextricably intertwined evidence. For example, in United States v. Adamo,\textsuperscript{93} the defendant was convicted of conspiracy to distribute cocaine.\textsuperscript{94} He challenged his conviction based partly on the district court’s decision to admit evidence of his personal cocaine use.\textsuperscript{95} During his trial, the prosecution offered testimony that he had purchased and consumed a “sample” of cocaine on the date that the alleged conspiracy began.\textsuperscript{96} The Seventh Circuit affirmed the lower court’s ruling, holding that

\textsuperscript{90} Id. at 676.
\textsuperscript{92} See Gibson, 170 F.3d at 676.
\textsuperscript{93} 882 F.2d 1218 (7th Cir. 1989).
\textsuperscript{94} Id. at 1220
\textsuperscript{95} Id. at 1234.
\textsuperscript{96} Id.
without the evidence, there would have been a “‘chronological and conceptual void’ in the witness[es’] testimony” as they recounted the events of that day. 97 Similarly, in United States v. Hattaway,98 evidence of the victim’s boyfriend’s death was admitted in the defendants’ trial for the abduction and holding of the victim.99 Evidence of the circumstances of the death implicated the defendant and the victim’s boyfriend in other crimes; this evidence helped the jury understand, for example, why the victim failed to call the authorities, which if absent would have left a chronological and conceptual void in the account of her ordeal.100 However, as is evident from discussions of these cases, evidence is now deemed to be inextricably intertwined when there is any type of chronological or conceptual void. Admission is no longer reserved for circumstances without which there would be a nonsensical void; rather, admission is now the regular course of action if there is any resulting chronological or conceptual void.

Evidence of a defendant’s role in previous bad acts that constitute necessary preliminary steps in completing the crime charged is also considered inextricably intertwined; without such evidence, there would be a chronological or conceptual void that may confuse the jury. In United States v. Cox,101 the court admitted evidence that the defendant had committed credit card fraud as inextricably intertwined with the charged crimes of persuading an individual to cross state lines with the intent to engage in prostitution and with transporting individuals under the age of 18 across state lines to engage in prostitution.102 The court found that evidence of credit card fraud established that the defendant had sufficient resources to be a “pimp” and proved how he “had the means to pay for the hotel gatherings at which he promoted his prostitution business.”103 The court reasoned

97 Id.
98 740 F.2d 1419 (7th Cir. 1984).
99 Id. at 1424–25.
100 Id. at 1425.
101 577 F.3d 833 (7th Cir. 2009).
102 Id. at 834.
103 Id. at 839.
that without an understanding of the defendant’s involvement in that preliminary step, there would have been a chronological and conceptual void in the story of the charged crime.\footnote{Id.}

c. Evidence that “completes the story of the crime charged”

Most other bad acts evidence can be said to complete the story of the charged crime; as such, the court often considers this category to overlap with the other categorical bases of admissibility.\footnote{This trend is unsurprising given the court’s changing formulations of the inextricable intertwinement doctrine; the court now considers the “complete the story” basis of intertwinement to be the same as the “chronological or conceptual void” basis, contrary to earlier formulations. \textit{Compare}, e.g., United States v. Luster, 480 F.3d 551, 556–57 (7th Cir. 2007), \textit{with} United States v. Ramirez, 45 F.3d 1096, 1102 (7th Cir. 1995).} For example, in \textit{Gibson},\footnote{United States v. Gibson, 170 F.3d 673 (7th Cir. 1999).} the court explicitly found that “there were at least two bases for admitting the gun evidence.”\footnote{\textit{Id.} at 681.} In addition to viewing the evidence as so blended or connected to be inextricably intertwined,\footnote{See \textit{supra} notes 62–67 and accompanying text.} the gun evidence “was [also] necessary to provide the jury with the ‘complete story’ of the defendant’s crimes; negotiations about the gun were so intertwined with the drug sales ‘that admission of the portions of the taped conversations pertaining to gun sales was necessary to enable the jury to fully understand and make sense of the underlying negotiations for the sale of crack cocaine.’”\footnote{\textit{Gibson}, 170 F.3d at 682.}

Similarly, in \textit{Hattaway},\footnote{United States v. Hattaway, 740 F.2d 1419, 1424–25 (7th Cir. 1984).} in addition to considering evidence of the victim’s boyfriend’s death necessary to avoid a chronological or conceptual void,\footnote{See \textit{supra} notes 93–100 and accompanying text.} the evidence also helped complete the story of the victim’s ordeal. The evidence of the defendants’ role in her boyfriend’s death explained why the defendants kidnapped her only to release her

\footnote{104 Id.}
\footnote{105 Id. at 681.}
\footnote{106 United States v. Gibson, 170 F.3d 673 (7th Cir. 1999).}
\footnote{107 See \textit{supra} notes 62–67 and accompanying text.}
\footnote{108 \textit{Gibson}, 170 F.3d at 682.}
\footnote{109 United States v. Hattaway, 740 F.2d 1419, 1424–25 (7th Cir. 1984).}
\footnote{110 See \textit{supra} notes 93–100 and accompanying text.}
after her boyfriend’s body was found.\textsuperscript{112} However, the court frequently upholds the admission of other bad acts evidence, citing only the “completes the story” basis of intertwinement. For example, in \textit{United States v. Harris},\textsuperscript{113} the Seventh Circuit considered testimony regarding the defendant’s “modus operandi for the sale of drugs . . . including the negotiations, the purchase, the transfer of the cocaine, and the use of code language” as necessary to complete the story of the charged crime of distributing cocaine.\textsuperscript{114} Without this evidence, the jury would have had “a somewhat confusing and incomplete picture.”\textsuperscript{115} However, “all relevant prosecution evidence explains the crime or completes the story.”\textsuperscript{116} Therefore, the court must engage in careful consideration of the evidence’s actual inextricableness lest it admit dangerous evidence unnecessarily.

II. THE UNRAVELING OF THE INEXTRICABLE INTERTWINEMENT DOCTRINE

Often, however, the Seventh Circuit is not specific as to why it considers evidence inextricably intertwined. Even in the circumstances in which the court is explicit, there is still significant overlap between the categories, demonstrating, in part, the loose nature of the doctrine. This looseness, as well as courts’ seeming difficulty in applying the doctrine, has caused widespread criticism. Like many other jurisdictions attempting to apply the inextricable intertwinenent doctrine, the Seventh Circuit seems to have “lost its way.”\textsuperscript{117}

\textsuperscript{112} \textit{Hattaway}, 740 F.2d at 1424–25.
\textsuperscript{113} 271 F.3d 690, 705 (7th Cir. 2001).
\textsuperscript{114} \textit{Id}.
\textsuperscript{115} \textit{Id}.
\textsuperscript{116} \textit{United States v. Bowie}, 232 F.3d 923, 929 (D.C. Cir. 2000).
\textsuperscript{117} 1 \textsc{Michael H. Graham}, \textsc{Handbook of Federal Evidence} § 404:5, at 709 n.22 (6th ed. 2006).
A. The Seventh Circuit's Growing Dissatisfaction

Criticisms of the doctrine have not gone unnoticed, however, at least by the Seventh Circuit. The court has become increasingly vocal in expressing its own concerns regarding the doctrine and serious doubts about the doctrine's continuing viability. The court had occasion to consider two instances of other crimes evidence admitted under the inextricably intertwined doctrine in United States v. Taylor.\textsuperscript{118} Taylor and Hogsett were convicted in separate trials of distributing crack.\textsuperscript{119} Both appealed their convictions based on the lower courts' admission of other crimes evidence under the inextricable intertwining doctrine, and the Seventh Circuit consolidated their appeals.\textsuperscript{120} During Taylor’s trial, the prosecution presented evidence that Taylor was a known crack dealer, with the arresting officer, among others, testifying.\textsuperscript{121} The officer testified that he knew Taylor to be a crack dealer based on knowledge gained “throughout his career as a police officer and as a drug and gang officer.”\textsuperscript{122} This testimony implied to the jury that Taylor had a long history of drug and gang activity and thus was the basis of Taylor’s appeal.\textsuperscript{123} The prosecution argued that the testimony was inextricably intertwined with the rest of the officer’s testimony; the statement explained why the officer arrested Taylor for the admittedly trivial offense of illegally tinted automobile windows: he knew Taylor’s car and knew him to be a crack dealer.\textsuperscript{124} However, the “evidence was at once irrelevant and damaging, as was the officer’s testimony about his prior professional knowledge of Taylor. It is not as if the government

\textsuperscript{118} 522 F.3d 731, 734 (7th Cir. 2008), cert. denied, Taylor v. United States, 129 S. Ct. 190 (2008), and cert. denied, Hogsett v. United States, 129 S. Ct. 1308 (2009).
\textsuperscript{119} Id. at 732.
\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} Id. at 733.
\textsuperscript{123} Id.
\textsuperscript{124} Id. at 733–34.
had to try to justify the arrest on the basis not of the traffic offenses but of suspicion that Taylor was a drug dealer.\textsuperscript{125}

Hogsett’s appeal was based on the trial testimony of the passenger in his car at the time of his arrest.\textsuperscript{126} She testified that she and Hogsett were on their way “to hit a lick” when he was arrested and explained that this meant that they were going to sell drugs.\textsuperscript{127} When questioned as to how she knew what “hit a lick” meant, she indicated that she had hit licks with Hogsett in the past.\textsuperscript{128} This last statement indicated that the defendant had a history selling drugs, which was why the defense objected to its admission.\textsuperscript{129} The government argued that this statement was inextricably intertwined with the rest of her testimony, filling a conceptual void and forming “an integral part of the witness’ account of the circumstances surrounding the offenses of which the defendant was indicted.”\textsuperscript{130}

In determining the propriety of admitting the statements into evidence, the court expressed two interpretations of the inextricable intertwining doctrine: “evidence ‘intrinsic’ to the charged crime itself, in the sense of being evidence of the crime” or “evidence of another crime [that] may be introduced in order to ‘complete the story’ of the charged crime.”\textsuperscript{131} However, “neither formulation is satisfactory: to courts adopting the former, ‘inextricably intertwined evidence is intrinsic, and evidence is intrinsic if it is inextricably intertwined,’ while ‘the ‘complete the story’ definition of ‘inextricably intertwined’ threatens to override Rule 404(b).”\textsuperscript{132} The court found in these two instances that the statements constituted impermissible character evidence, implying to the jury that the defendants were longtime drug offenders and suggesting that they were therefore more likely to have committed the charged drug offenses.\textsuperscript{133} The police

\textsuperscript{125} Id. at 734.
\textsuperscript{126} Id. at 735.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} Id.
\textsuperscript{131} Id. at 734.
\textsuperscript{132} Id. (citing United States v. Bowie, 232 F.3d 923, 927–28 (D.C. Cir. 2000)).
\textsuperscript{133} Taylor, 522 F.3d at 735–36.
officer’s testimony was “just a way of telling the jury that the officer knew Taylor to have been a drug offender and gang member for a long time and that at the time of the arrest Taylor was a wanted criminal.” The same rationale applied to Hogsett’s case. The court recognized that the inextricable intertwine doctrine’s “vagueness invites prosecutors to expand the exceptions to the rule beyond the proper boundaries of the exceptions.” “A defendant’s bad act may be only tangentially related to the charged crime, but it nevertheless could ‘complete the story’ or ‘incidentally involve’ the charged offense or ‘explain the circumstances.’ If the prosecution’s evidence did not ‘explain’ or ‘incidentally involve’ the charged crime, it is difficult to see how it could pass the minimal requirement for admissibility that evidence be relevant.”

This potential for abuse motivated the court to carefully consider whether the evidence could be admissible under any of Rule 404(b)’s exceptions. “Almost all evidence admissible under the ‘inextricably interwoven’ doctrine is admissible under one of the specific exceptions in Rule 404(b).” In actively re-directing the evidence to Rule 404(b), the court seemed to be attempting to redirect judges and lawyers to the Rule’s exceptions as the primary basis to admit other bad acts evidence. The court essentially re-offered the evidence it deemed inadmissible under the inextricable intertwine doctrine under Rule 404(b). For example, the court argued that the officer’s testimony in Taylor’s case could have been offered to demonstrate identity: “the fact that a defendant’s buyers had dealt with him previously could explain how they were able to identify him, why they picked him for the controlled buy, and why he was willing to deal with them.” Similarly, the court argued that the passenger’s testimony in Hogsett’s case could have been offered to show the absence of

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134 Id. at 735.
135 Id. at 734–35.
136 Id. at 735.
137 Id. at 734.
138 Id. at 735.
139 Id. at 734.
The court pointed out that without the explanation of how the passenger knew the meaning of “hit a lick,” the defense could have challenged the accuracy of her understanding for lack of foundation in its closing argument, leaving the prosecution no opportunity to present contrary evidence. Therefore, the prosecution could have offered the testimony as a way of demonstrating absence of mistake. Although the court determined that the evidence was improperly admitted under the inextricable intertwinement doctrine, given the overwhelming evidence of guilt at the trials, the errors were deemed harmless. Given the harmless nature of the errors, the court did not address the impact of the proper alternative bases of admissibility under Rule 404(b); however, its distaste for the inextricable intertwinement doctrine and strong preference for admission under Rule 404(b) was clear.

The court’s strong preference for the use of Rule 404(b) as the basis of admissibility for other bad acts evidence is also evident in United States v. Conner. An FBI informant participated in two controlled purchases of crack cocaine. During the first buy on December 20, 2006, the informant called Conner’s co-defendant, Hughes, to request a quarter ounce of crack cocaine. Hughes indicated that although he did not have that amount, he knew someone who did: Conner. Hughes instructed the informant to meet him at Conner’s residence, and there, Conner provided the informant with 5.737 grams of crack cocaine. For the second buy on January 10, 2007, the informant called Conner directly to request the drugs. However, when Conner did not return the informant’s call to provide details of the sale, the informant resorted to contacting Hughes

140 Id. at 735.
141 Id.
142 Id.
143 Id. at 734–35.
144 583 F.3d 1011 (7th Cir. 2009).
145 Id. at 1016.
146 Id.
147 Id.
148 Id.
149 Id.
again. Hughes was able to make contact with Conner, who directed him to another co-defendant, Robison. Robison was in possession of some of Conner’s crack cocaine supply, from which Conner instructed him to provide the requisite amount to Hughes. Robison met the informant and Hughes at a local drug store and made the exchange. Conner was not present at this exchange. Conner was charged only for his involvement with the December 20, 2006, buy.

During Conner’s trial, the government introduced evidence of Conner’s involvement with the January 10 buy, as well as evidence of his prior drug-dealing relationships with his co-defendants, Hughes and Robison. Both Hughes and Robison pled guilty and agreed to cooperate with the government, with both testifying against Conner. Hughes testified to his and Conner’s long history of selling drugs together and to the specifics of how Conner would prepare the crack cocaine as well as how much money Conner would typically make from these drug sales. Robison testified to his involvement in Conner’s operation, serving as a middleman making pickups and deliveries of cocaine. The government argued that this evidence was inextricably intertwined with evidence of the charged crime; it helped provide the jury with a more complete picture, illustrating and providing context for the relationship among the co-defendants as well as indicating that the sale was not an isolated event. The government alternatively argued that the evidence was admissible under Rule 404(b), as it demonstrated knowledge, intent, and a common scheme or plan. The district court did not address the

\[150\] Id.
\[151\] Id.
\[152\] Id. at 1016–17.
\[153\] Id. at 1017.
\[154\] Id.
\[155\] Id.
\[156\] Id.
\[157\] Id.
\[158\] Id.
\[159\] Id.
\[160\] Id. at 1020.
\[161\] Id. at 1017.
evidence’s admissibility under Rule 404(b) and opted instead to admit the evidence under the inextricable intertwinement doctrine.\footnote{Id.}

On appeal, the Seventh Circuit held that the evidence was inadmissible under the inextricable intertwinement doctrine.\footnote{Id. at 1020.} As Conner was charged only with distribution, the jury did not need to understand the relationship among the co-defendants or the circumstances surrounding the January 10 buy.\footnote{Id.} Neither evidence of Conner’s relationship with his co-defendants nor his involvement in the January 10 sale was “necessary to complete the story of the single [distribution] on trial. Nor was it needed to avoid a conceptual or chronological void in the story of the [charged distribution].”\footnote{Id. at 1020–21 (quoting United States v. Simpson, 479 F.3d 492, 501 (7th Cir. 2007)).} Therefore, admission under the inextricable intertwinement doctrine was inappropriate.\footnote{Id.} The court again emphasized the potential for abuse of the doctrine and its strong preference for the use of Rule 404(b).\footnote{Id. at 1020.}

However, the court acknowledged that the doctrines, at least in theory, have distinct purposes.\footnote{Id. at 1021.} Evidence rightfully admitted under the inextricable intertwinement doctrine does not fall within the meaning of ‘other acts’ contemplated by Rule 404(b).\footnote{Id. (quoting United States v. Ramirez, 45 F.3d 1096, 1102 (7th Cir. 1995)).} “[E]vidence concerning the chronological unfolding of events that led to an indictment, or other circumstances surrounding the crime, is not evidence of ‘other acts’ within the meaning of [Rule] 404(b).”\footnote{Id. (quoting United States v. Simpson, 479 F.3d 492, 501 (7th Cir. 2007)).} As the evidence in Conner’s case related to “separate transactions that took place at separate times . . . [this evidence] . . . falls squarely within the types of ‘other acts’ contemplated by Rule 404(b).”\footnote{Id. at 1020–21 (quoting United States v. Simpson, 479 F.3d 492, 501 (7th Cir. 2007))).} After a brief explanation of Rule 404(b)’s exceptions, the court found that
evidence of Conner’s prior drug relationship with his co-defendants and his involvement with the January 10 sale were relevant to prove absence of mistake, knowledge, and intent.172

In so holding, the Conner court seemed to be reconsidering the position developed in Taylor. By recognizing the distinct purposes that the doctrines are meant to serve and attempting to classify the evidence accordingly, the court indicated that there are situations in which inextricably intertwined evidence will not be admissible under Rule 404(b). While the Taylor court recognized this possibility,173 its focus was on the overlap between the two doctrines as bases of admissibility rather than the differences.174 The Conner court seemed to be offering the inextricable intertwinement doctrine another chance at life, provided that attorneys arguing for evidence’s admissibility under the doctrine and lower court judges realize the potential dangers of recklessly invoking the doctrine and follow the Seventh Circuit’s guidance to begin using the doctrine in a safe and responsible manner.175

B. The End of the Inextricable Intertwinement Doctrine in the Seventh Circuit

However, in July 2010, the Seventh Circuit put the final nail in the doctrine’s proverbial coffin.176 The court explicitly abolished this theory of admissibility for other bad acts evidence in United States v. Gorman,177 overturning a long history of allowing evidence to be admitted under this doctrine.

The Gorman case came before the court on appeal from the Southern District of Indiana.178 Defendant Jamarkus Gorman had been

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172 Id. at 1021–22.
173 See United States v. Taylor 522 F.3d 731, 734–36 (7th Cir. 2008).
174 Id. at 735 (“Almost all evidence admissible under the ‘inextricably intertwined’ doctrine is admissible under one of the specific exceptions in Rule 404(b), or under the judge-made ‘no confusion’ exception . . . .”).
175 Conner, 583 F.3d at 1024–25.
176 See United States v. Gorman, 613 F.3d 711 (7th Cir. 2010).
177 Id.
178 Id. at 711–12.
convicted of perjury after giving false testimony before a grand jury in violation of 18 U.S.C. § 1623. In the course of investigating Gorman’s cousin for drug trafficking, federal agents obtained and executed a search warrant for Gorman’s home, intending to seize a Bentley automobile they believed had been obtained by the proceeds of the cousin’s illegal drug trafficking activities. The agents informed Gorman of their intentions, whereupon he indicated that he was unaware of any such Bentley. Gorman escorted the agents to the building’s garage and indicated parking spots 20 and 22 as his assigned parking spots. These parking spots were vacant, and the agents’ investigation concluded without recovery of the Bentley.

Despite his assignment to these parking spots, Gorman actually used parking spots 31A and B, in which the Bentley was parked. These parking spaces, and thus the Bentley, were not visible from the parking spots that Gorman showed the agents. Following the agents’ departure, Gorman enlisted several unscrupulous individuals to assist him in removing the Bentley from the building’s parking garage altogether. Upon Gorman’s instruction and direction, these individuals removed the Bentley by greasing the floor with oil to allow the Bentley’s tires to slide and loading the automobile into the bed of a flatbed tow truck. At the automobile shop to which the individuals had towed the Bentley, the men broke into the car by cutting the soft top and by prying open the trunk to remove bags of money. The car was subsequently abandoned and found shortly thereafter by the investigating agents.

179 Id. at 713; see 18 U.S.C. § 1623 (2006).
180 Gorman, 613 F.3d at 713.
181 Id.
182 Id. at 713–14.
183 Id.
184 Id. at 714.
185 Id. at 713–14.
186 Id. at 714.
187 Id.
188 Id.
189 Id.
It was during the investigation of yet another alleged illegal activity perpetrated by his cousin that Gorman was called to testify before the grand jury.\textsuperscript{190} He was questioned about the Bentley, and it was his remarks on this subject that gave rise to the perjury case against him.\textsuperscript{191} The testimony was as follows:

Grand Juror: Mr. Gorman, did you have a Bentley in your garage at Lion’s Gate [his residence searched by the federal agents]?

Jamarkus: No.

Grand Juror: Ever?

Jamarkus: No, never.\textsuperscript{192}

Prior to the trial, the government notified Gorman of its intention to introduce evidence of his involvement in an uncharged conspiracy to obstruct justice by concealing evidence from federal officers in violation of 18 U.S.C. § 1512(c)\textsuperscript{193}—namely, evidence of Gorman’s involvement with the storage and subsequent theft of the Bentley.\textsuperscript{194} Objecting to the use of such evidence, the defense filed a motion in limine seeking to suppress the evidence as impermissible other bad acts evidence under 404(b).\textsuperscript{195} The defense argued that the evidence tended to prove only Gorman’s propensity to commit perjury by subjecting him to the risk that the jury would “assume that anyone who would commit such a theft would have a propensity to commit the somewhat less extravagant perjury that was charged.”\textsuperscript{196} The

\textsuperscript{190} Id. at 714–15.
\textsuperscript{191} Id. at 715.
\textsuperscript{192} Id.
\textsuperscript{193} Id.
\textsuperscript{194} Id.
\textsuperscript{195} Id.
\textsuperscript{196} Brief and Required Combined Appendix of Defendant-Appellant Jamarkus Gorman at 8, United States v. Gorman, 613 F.3d 711 (7th Cir. 2010) (No. 09-3010).
government argued for the admissibility of the evidence, claiming that the evidence of the storage and theft “provide[d] an explanation of why [Gorman] would make the charged false declaration,” filling “what would otherwise be a gaping conceptual void.”197 The district court admitted this evidence under the inextricable intertwinement doctrine, finding that the evidence was “inextricably intertwined to [sic] the fact of the perjury . . . and provides an explanation to the jury to understand why the defendant would . . . provide the false statement.”198 The district court thus included the evidence of Gorman’s involvement with the Bentley as evidence of his motivation to commit perjury.199 The jury convicted Gorman of perjury and sentenced him to thirty-six months of imprisonment.200

Gorman appealed his conviction to the United States Court of Appeals for the Seventh Circuit based on, inter alia, the admission of the evidence relating to his involvement in the storage and theft of the Bentley.201 A district court’s evidentiary rulings are reviewed under an abuse of discretion standard.202 The appellate court gives special deference to the trial court’s rulings and should reverse only where the record contains no evidence on which the district court judge could have rationally based his or her evidentiary ruling.203 In determining whether the district court improperly admitted the evidence, the Seventh Circuit reviewed the three general bases of admissibility of

197 Brief of the Plaintiff-Appellee United States of America at 33, United States v. Gorman, 613 F.3d 711 (7th Cir. 2010) (No. 09-3010).
198 Brief and Required Combined Appendix of Defendant-Appellant Jamarkus Gorman, supra note 196, at 18.
199 The district court found that “to include the facts as alleged that it had to do with retrieving or claiming the money that was stashed in the automobile, and that it was allegedly drug proceeds, are also relevant facts, and the prejudicial value of which does not outweigh the probative value in this case because they are inextricably intertwined to [sic] the fact of the perjury, and that is alleged in the indictment, and provides an explanation to the jury to understand why the defendant would, if the Government can prove that he did, provide the false statement . . . .” Brief of the Plaintiff-Appellee United States of America, supra note 197, at 16.
200 Gorman, 613 F.3d at 715.
201 Id.
202 United States v. Joseph, 310 F.3d 975, 978 (7th Cir. 2002).
203 United States v. Conley, 291 F.3d 464, 472 (7th Cir. 2002).
other bad acts evidence: (1) direct evidence, (2) Rule 404(b)’s “other bad acts” evidence, and (3) inextricably intertwined or intricately related evidence. Evidence of Gorman’s involvement in the uncharged conspiracy was admitted as inextricably intertwined evidence; accordingly, the court should review the evidence in light of that doctrine. However, the court did not address whether the evidence was properly admitted as inextricably intertwined evidence. The standard of review is such that if the record reflects any rational basis for the district court’s admission of the evidence, the district court’s finding will be affirmed. “Under an abuse of discretion standard of review, as long as the admission was proper, the fact that the rationale for admission may have been blurred matters little.” The court indicated that, “any confusion of the proper channel of admissibility is insignificant to that ultimate outcome.”

Given that Gorman was charged with perjury based on his denial of ever having the Bentley, the court believed that the evidence that he actually did have the Bentley was direct evidence of the charged crime. Therefore, the evidence would have been properly admitted as direct evidence; the fact that it was admitted as inextricably intertwined evidence “is insignificant to the ultimate outcome.”

Although the court did not address whether the evidence of Gorman’s involvement in the uncharged conspiracy was inextricably intertwined with the charged perjury, the court did address the inextricable intertwinement doctrine in great detail. Having “recently cast doubt on the continuing viability of the inextricable intertwinement doctrine,” the court now moved to completely

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204 Gorman, 613 F.3d at 717–18.
205 Id. at 715.
206 Id. at 717–20.
207 Id. at 717, 719.
208 Id. at 719 (citing Conley, 291 F.3d at 472).
209 Gorman, 613 F.3d at 719.
210 Id.
211 Id.
212 Id. at 718; see also United States v. Conner, 583 F.3d 1011 (7th Cir. 2009); United States v. Taylor 522 F.3d 731, 734–36 (7th Cir. 2008).
abolish the doctrine, believing it to have “outlived its usefulness.”213 Having earlier surveyed the three bases of admissibility of other bad acts evidence, the court discussed the relationship among the three doctrines and concluded that there is no further need for the inextricably intertwined doctrine.214 Either other bad acts evidence is direct evidence, in which case it is always admissible, constrained only by Rule 403, or it is propensity evidence, in which case it is constrained by Rule 404(b) and Rule 403.215 The court found that “almost all evidence admitted under this [inextricable intertwinement] doctrine is also admissible under Rule 404(b).”216 For example, in this case, had the evidence not been direct evidence, it would have been admissible under Rule 404(b) as indicative of motive. As such, “there is often no need to spread the fog of inextricably intertwined over it.”217 The court found that the inextricable intertwinement doctrine has become “overused, vague, and quite unhelpful.”218 Given the doctrine’s confusing nature and the court’s belief in its redundancy in light of other doctrines, the court concluded that “[h]enceforth, resort to inextricable intertwinement is unavailable when determining a theory of admissibility.”219

C. Analysis

The Seventh Circuit believed that “almost all evidence admitted under [the inextricable intertwinement] doctrine is also admissible under Rule 404(b).”220 This means one of two things: (1) either the court is merging the doctrine with Rule 404(b) and in effect, indicating its position that Rule 404(b) is a rule of inclusion rather than one of exclusion, or (2) the court is eradicating bases of admissibility

213 Gorman, 613 F.3d at 719.
214 Id. at 718–19.
215 Id. at 718.
216 Id. (quoting Conner, 583 F.3d at 1019).
217 Gorman, 613 F.3d at 718 (quoting Conner, 583 F.3d at 1019) (internal quotation marks omitted).
218 Id. at 719.
219 Id.
220 Id. at 718 (citing Conner, 583 F.3d at 1019).
previously covered by the inextricable intertwinement doctrine, such as ‘explains the circumstances’ if there is not a corresponding exception under Rule 404(b). Either way, the court has taken important and necessary steps to safeguard defendants’ rights. 1. Rule 404(b) as Inclusive or Exclusive

There has been substantial debate regarding whether Rule 404(b)’s list of exceptions was meant to be exhaustive, and thus whether Rule 404(b) was meant to be an inclusive or exclusive rule. Many courts view the Rule’s language of “such as” as indicative of Congress’s intent that the list be non-exhaustive, i.e., that other bad acts evidence be admissible for purposes other than those specifically articulated by the Rule. Based on this language, courts admit other bad acts evidence for purposes not specifically articulated by Rule 404(b).

However, a careful examination of Rule 404(b)’s legislative history indicates that this may not have been Congress’ intent, and by imputing such an intent, the courts have created a plethora of “overused, vague, and quite unhelpful” overlapping doctrines of admissibility. As originally submitted to Congress, Rule 404(b) read:

221 See United States v. Taylor, 522 F.3d 731, 736 (7th Cir. 2008) (citing Huddleston v. United States, 485 U.S. 681, 687–89) (“The aim of the rule is simply to keep from the jury evidence that the defendant is prone to commit crimes or is otherwise a bad person.”); Udembra v. Nicoli, 237 F.3d 8, 15 (1st Cir. 2001) (“[W]e reject the appellant’s concept that Rule 404(b) contains a comprehensive list of all the ways in which evidence of other bad acts may be specially relevant. Although the text of that rule enumerates some of the purposes for which such evidence may be admitted (e.g., to show ‘motive’ or ‘intent’), that list is not exhaustive.”); United States v. Fields, 871 F.2d 188, 196 (1st Cir. 1989) (“[Rule 404(b)’s] list is not exhaustive . . . ‘for the range of relevancy outside the ban is almost infinite; and further, . . . the purposes are not mutually exclusive for the particular line of proof may fall within several of them.’”) (citing CHARLES MCCORMICK, EVIDENCE § 190 at 448 (Cleary ed. 1972)).

222 See, e.g., United States v. Cruz-Garcia, 344 F.3d 951, 955 (9th Cir. 2003) (admitting other bad acts evidence to refute defense’s assertions defendant was too unsophisticated to have committed charged crime).

223 Gorman, 613 F.3d at 719.
Evidence of other bad acts, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. This subdivision does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.\footnote{224Fed. Rules of Evidence Notes of Advisory Committee on Rule, Notes to Rule 404 (Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1932; Mar. 2, 1987, eff. Oct. 1, 1987) (Amended Dec. 1, 1991) (emphasis added).}

The House of Representatives Committee on the Judiciary amended the second sentence of the Rule to read “It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”\footnote{225H.R. REP. NO. 93-650 (1974) (emphasis added).} The House believed that this formulation of the Rule placed greater emphasis on admissibility.\footnote{226Id.} However, this does not indicate that the House intended to change the scope of the Rule. Placing greater emphasis on admissibility is not the same thing as changing the scope of admissibility. Congress simply changed the sentence from a negative statement to a positive one, which does not necessarily reflect any substantive changes in the statement’s meaning. Although there may not be any decisive evidence of Congress’ intended scope for Rule 404(b), in effect, the scope of the Rule could be precisely what the Seventh Circuit decided in\footnote{227See 613 F.3d 711.} Gorman.\footnote{228See id. at 718–19.} By redirecting all evidence previously understood as inextricably intertwined to be admitted under Rule 404(b), the court may have subtly indicated its position that Rule 404(b) is to be applied as a rule of inclusion.\footnote{228Id.} Admission under Rule 404(b) requires many safety precautions for defendants not taken when the inextricable intertwinement doctrine is invoked. By viewing the Rule as inclusive, the court may be merging the inextricable intertwinement doctrine with Rule 404(b); this allows the court to provide necessary protection.
to defendants’ rights by subjecting the evidence to the Rule’s precautions without the court having to worry that necessary prosecutorial evidence will systemically go unadmitted as a result of the inextricable intertwinement doctrine’s abolition.

2. Providing More Protection to Defendants

Prior to the court’s ruling in Gorman, by simply labeling evidence as “inextricably intertwined,” courts could avoid examining the evidence’s applicability of evidence under Rule 404(b). For example, to admit other bad acts evidence under Rule 404(b), the Seventh Circuit stated that the court must determine if:

(1) the evidence is directed toward establishing a matter in issue other than the defendant’s propensity to commit the crime charged, (2) the evidence shows that the other act is similar enough and close enough in time to be relevant to the matter in issue, (3) the evidence is sufficient to support a jury finding that the defendant committed the similar act, and (4) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. 229

In failing to examine the admissibility of evidence under Rule 404(b), courts turn a “blind eye to the danger of admitting prejudicial [other bad acts] evidence.” 230 Evidence admitted under Rule 404(b) entails a variety of precautionary steps, such as requiring notice to the defendant, requiring the non-propensity purpose to be specifically articulated, and requiring a corresponding limiting instruction. 231 All of these precautions are designed to protect the defendant from what is known to be extremely prejudicial evidence. 232 Although evidence admitted as inextricably intertwined is subject to Rule 403’s balancing

229 United States v. McAnderson, 914 F.2d 934, 945 (7th Cir. 1990).
230 Imwinkelried, supra note 56, at 730; see also supra text accompanying notes 13–18.
231 FED. R. EVID. 404 advisory committee’s note.
232 See supra notes 12–18 and accompanying text.
test, the evidence is not subject to any other constraints. This is presumably because evidence historically admitted under this doctrine was not offered to prove anything. Inextricably intertwined evidence was not meant to be substantively considered; rather, the evidence was simply necessary to maintain cohesion in the prosecution’s case.

Therefore, precautions ensuring that the evidence would be non-prejudicial did not develop. To use inextricably intertwined evidence, the government does not have to prove that the defendant actually committed the other bad acts; in contrast, many jurisdictions require the government to prove to some standard that the defendant actually committed the other bad acts in question. Furthermore, neither the prosecution nor the judge must specify “why he or she believes that the deletion of the references will impair the narrative integrity of the prosecution’s account of the charged offense,” for example, although it may be argued that without the evidence, there will be a chronological or conceptual void in the evidence, neither is required to identify what that void may be. Although some jurisdictions do provide a limiting instruction for inextricably intertwined evidence,

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233 FED. R. EVID. 403; see also, e.g., United States v. Strong, 485 F.3d 985, 990–91 (7th Cir. 2007) (“Even inextricably intertwined evidence must withstand scrutiny under Federal Rule of Evidence 403, which allows a district court to exclude relevant evidence if its prejudicial impact substantially outweighs its probative value.”).

234 See United States v. Senffner, 280 F.3d 755, 763–64 (7th Cir. 2002). “[S]o long as those [inextricably intertwined] acts meet the requirements of Rule 403, they may be admitted in evidence at trial.” Id. at 764.

235 See People v. Molineux, 61 N.E. 286 (N.Y. 1901).

236 See, e.g., Jennifer Y. Schuster, Uncharged Misconduct Under Rule 404(b): The Admissibility of Inextricably Intertwined Evidence, 42 U. MIAMI L. REV. 947, 961, 971–72. “As the courts began to articulate preadmission requirements for Rule 404(b) evidence, particularly the clear and convincing standard of proof prior to admission, the courts were reluctant to subject [inextricably intertwined] evidence to these requirements, because to do so would put too great a burden upon the government.” Id. at 971.


238 Imwinkelried, supra note 56, at 731.

239 Id. at 741.
guiding the jury away from impermissible character inferences,\(^{240}\) there is a "marked judicial trend" towards not providing such an instruction.\(^{241}\) Furthermore, whereas evidence admitted under Rule 404(b) may be used only to demonstrate the element for which it was offered,\(^{242}\) "treating evidence as inextricably intertwined . . . also carries the implicit finding that the evidence is admissible for all purposes notwithstanding its bearing on character, thus eliminating the defense’s entitlement, upon request, to a jury instruction."\(^{243}\)

CONCLUSION

By abolishing the doctrine of inextricable intertwinement as a basis for other bad acts evidence in Gorman,\(^{244}\) the Seventh Circuit not only afforded desperately needed protections to defendants but also eased a substantial burden on the judicial system. As previously applied, the doctrine threatened defendants’ rights to a fair trial, too easily allowing impermissible character evidence to be admitted because it was inextricably intertwined with evidence necessary to prove the charged crime.\(^{245}\) Therefore, if the court had continued to use this doctrine, to adequately protect defendants, it would have been necessary to overhaul the doctrine, clearly delineating what evidence is and is not admissible under it, as this is currently unclear.\(^{246}\) This task has plagued courts for more than 100 years;\(^{247}\) however, even if the court found its way through the fog, continuing to use the doctrine would require detailed analyses of the facts of each case and a detailed construction and evaluation of each parties’ arguments to determine exactly what evidence is inextricably intertwined. Not only would this further stress an already extremely over-worked judiciary, but it also

\(^{240}\) Id. at 731.

\(^{241}\) Id. at 742.

\(^{242}\) See supra note 23 and accompanying text.


\(^{244}\) 613 F.3d 711 (7th Cir. 2010).

\(^{245}\) See supra notes 53–58 and accompanying text.

\(^{246}\) Id.

\(^{247}\) See People v. Molineux, 61 N.E. 286, 294 (N.Y. 1901).
interferes with the parties’ rights to construct their case as they so choose and potentially affects the court’s impartiality. This area of the law is contentious enough, with Rule 404(b) being the most litigated Rule in the Federal Rules of Evidence.²⁴⁸ Compounding the complexities of this Rule by continuing to have a vague and misused doctrine was wasteful of the judiciary’s already scarce time and dangerous for defendants. By abolishing the doctrine of inextricable intertwinement and having one less basis of admissibility for other bad acts evidence, the court has given defendants and the judiciary in general so much more.

²⁴⁸ MCCORMICK, supra note 11, at 327 n.2. (noting that Rule 404(b) cases were as abundant “as the sands of the sea”).
PAPA DON’T PREACH: BADGER CATHOLIC V. WALSH MUDDIES THE LINE BETWEEN CHURCH AND STATE

NICHOLAS K. GRAVES*

Cite as: Nicholas K. Graves, Papa Don’t Preach: Badger Catholic v. Walsh Muddies the Line Between Church and State, 6 SEVENTH CIRCUIT REV. 230 (2010), at http://www.kentlaw.edu/7cr/v6-1/graves.pdf.

INTRODUCTION

Despite a multiplicity of judicial decisions throughout the country, the line between religious and secular influence in education has remained cloudy since the U.S. Supreme Court first addressed the issue.1 Perhaps because “[t]he task of separating the secular from the religious in education is one of magnitude, intricacy, and delicacy,”2 the courts have been cautious to draw hard lines on the government’s interaction with religious institutions.3 In recent years, the ambiguity created by overlapping analysis has stretched to religious use of school facilities and funds.4


3 See id. at 237–38 (stating that the complexity of religion in education would turn any hard-line standard into a wall “as winding as the famous serpentine wall designed by Mr. Jefferson for the University he founded”).
4 See Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 221 (2000) (holding that University tuition can be used to fund activities that advocate
Throughout the nation, groups have targeted religious recognition in the context of governmental operations. Thus, a court must act with vigilance when deciding whether to afford or deny a specific group rights because the court’s decision ultimately may implicate the group’s right to expression. While the words “Separation of Church and State” are not included in the Constitution, this long-standing principle has shaped all levels of government decision-making when religion enters into secular society. The First Amendment’s guarantee of religious autonomy has created a peculiar labyrinth of standards that the government must follow to accord religious groups fair treatment under the law. While the Church and State are fundamentally separate entities, both must co-exist and inherently influence the community’s expectations.

The First Amendment states in part that, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” While the Constitution prohibits Congress from establishing a national church or taking any religious preference, its broad language has begged many questions that the Supreme Court has aimed to answer.11 As a result, the Court’s application of the First

various beliefs); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 835 (1995) (holding that the University’s refusal to fund a religious newspaper constituted viewpoint discrimination in violation of the First Amendment); Widmar v. Vincent, 454 U.S. 263, 277 (1981) (holding that a university’s denial of funding to religious groups using an open forum constituted content discrimination); Healy v. James, 408 U.S. 169, 192–93 (1972) (upholding a university’s right to exclude First Amendment activities that violate reasonable campus rules or interfere with other student’s education).

5 See, e.g., Southworth, 529 U.S. at 220–21; Rosenberger, 515 U.S. at 822–23.
6 Witte, supra note 1, at 1871–72 (stating that separationism in Supreme Court decisions has abandoned harsh application and avoided metaphors).
7 See U.S. CONST. amend. I; Witte, supra note 1, at 1871–72.
8 See Zelman v. Simmons-Harris, 536 U.S. 639, 653–54 (2002); Rosenberger, 515 U.S. at 841.
10 U.S. CONST. amend. I.
Amendment to specific instances has resulted in various inconsistencies.  

Expectedly, the Court’s application of the First Amendment in the context of public education has resulted in significant controversy. With the proper rearing of our nation’s youth fixed as a standard in the public discourse, religion’s role in education has found an unsettling lack of direction. Spirited debate has resulted about when and where religious interjection is appropriate in various stages of education. Groups have targeted the use of school buildings and funds for religious purposes, as well as religious expression by practice or speech. The Court’s inconsistent decisions have accorded religious institutions an expansion of rights that seemingly cross the “high and impregnable” wall that separates Church and State. 

Like minority groups, religious institutions are protected by virtue of the reasonableness standard and strict scrutiny. The standard forbids the government from denying religious institutions equal funding or access to a forum where reasonable. Rather than excluding religious institutions from public venues, the Supreme Court has recognized that the First Amendment’s Establishment Clause does not trump religious organizations’ freedom of expression. If the

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13 See Laycock, supra note 9, at 1667–70.
14 See Wite, supra note 1, at 1904.
15 See Good News Club v. Milford Cent. Sch., 533 U.S. 98, 108 (2001); Rosenberger, 515 U.S. at 831–32. The Court has created several different categories of State forums, as well as multiple degrees of scrutiny and analysis so that specific cases come down to trivial differences of when and where State and religious interaction can occur. See Rosenberger, 515 U.S. at 843.
19 Good News Club, 533 U.S. at 106–07.
government allowed a secular group access to a public forum, it must grant the same access to a religious group.\textsuperscript{21} Applying the reasonableness standard, the Supreme Court has held that any speech, including religious speech, cannot be discriminated against unless a reasonable interest in creating a limited public forum exists.\textsuperscript{22}

The Supreme Court has attempted to define the boundaries between religion and public education.\textsuperscript{23} Through the adaptation of the \textit{Lemon} test, the Court established an overarching standard, which mandates that schools not discriminate or deny access based on any beliefs absent a reasonable justification.\textsuperscript{24} This aimed to remove any preference for one viewpoint over another.\textsuperscript{25} Such viewpoint discrimination would deny all citizens the right to a neutrally-operated government by favoring one group over another.\textsuperscript{26} The Court has since molded its analysis on public forum cases around the type of discrimination in which the State engages.\textsuperscript{27}

The First Amendment’s guarantees of free speech, of free religious exercise, and against establishment have made it nearly impossible for the Court to take any hard stance on religion’s role in education.\textsuperscript{28} While schools have been afforded the ability to create limited forums with specific purposes, they are also hard-pressed to

\textsuperscript{21} See \textit{Rosenberger}, 515 U.S. at 835.
\textsuperscript{22} Id.
\textsuperscript{24} \textit{Lemon v. Kurtzman}, 403 U.S. 602, 612–13 (1971) (holding that a policy will not offend the Establishment Clause if it passes a three-prong test: (1) The government’s action must have a secular legislative purpose; (2) the primary effect of the government’s action must not advance or inhibit religion; and (3) it must not foster and result in “an excessive government entanglement with religion”).
\textsuperscript{25} See \textit{Rosenberger}, 515 U.S. at 829 (holding that viewpoint discrimination is an egregious form of content discrimination and that the government must abstain from regulating any speech when the restriction is based on the message or perspective the speaker is expounding).
\textsuperscript{26} Id.
\textsuperscript{27} Id.
avoid enforcing regulations on religious groups’ various forms of expression. Schools may define the purpose and uses of such forums so as not to discriminate, but may not limit the discourse in which its students engage. However, these limited forums have created tension when they restrict religious expression.

Moreover, the same analysis is applied to schools when they fund student activities. Be it university newspapers, speaker presentations, or events by religious organizations, schools are generally not allowed to deny funding because of a particular viewpoint expressed by those organizations. Such funding is subject to the same limited forum exceptions as other public forums. Again, problems arise under the Free Speech, Establishment, and Exercise Clauses when affording religious groups public funds.

Recent Supreme Court viewpoint discrimination analysis has left federal circuits to question when religious recognition has overstepped its bounds. Some circuits have upheld state denial of forums and funds when religious exercises rise to the level of worship. Alternatively, other circuits have allowed religious groups access to forums when their meetings include group prayers, religious

29 See Rosenberger, 515 U.S. at 843–44.
30 See Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106–07 (2001). While these forums are still subject to scrutiny under viewpoint discrimination analysis, schools may designate a forum’s boundaries so as not to violate the Constitution, federal or state law, or its own rules and regulations. Id.
31 See generally Good News Club, 533 U.S. 98; Witte, supra note 1, at 1904.
32 See Rosenberger, 515 U.S. at 834–35.
34 See Rosenberger, 515 U.S. at 845–46.
35 See Good News Club, 533 U.S. at 107.
36 See Badger Catholic, Inc. v. Walsh, 620 F.3d 775, 780 (7th Cir. 2010); Bronx Household of Faith v. Bd. of Educ. of N.Y., 492 F.3d 89, 104 (2d Cir. 2007) (Calabresi, J., concurring); Prince v. Jacoby, 303 F.3d 1074, 1092 (9th Cir. 2002).
speakers, and numerous other religious activities.\textsuperscript{38} In many instances, what has been found as religious worship or practice in one circuit is interpreted as mere public activity by a religious organization in another.\textsuperscript{39}

Such inconsistencies are exemplified in the recent Seventh Circuit decision, \textit{Badger Catholic, Inc. v. Walsh}.\textsuperscript{40} While the court recognized the University of Wisconsin-Madison’s right to create a forum for a limited purpose,\textsuperscript{41} the court held that the university had to provide identical funds to both religious groups and other student groups.\textsuperscript{42} In doing so, the Seventh Circuit muddied the line between Church and State in public education beyond what is justified by precedent, the Constitution, or history.\textsuperscript{43}

The Seventh Circuit’s decision in \textit{Badger Catholic} departed from its previous decisions and misapplied the standards expressed by the Supreme Court.\textsuperscript{44} Moreover, numerous circuits across the country have heard cases similar to \textit{Badger Catholic} and have reasoned differently.\textsuperscript{45} Plainly, the decision chips away at the wall between Church and State.\textsuperscript{46}

\textsuperscript{38} See \textit{Prince}, 303 F.3d at 1093–94.
\textsuperscript{39} Compare \textit{Badger Catholic}, 620 F.3d at 781, with \textit{Bronx Household of Faith}, 492 F.3d at 100–01.
\textsuperscript{40} See generally \textit{Badger Catholic}, 620 F.3d 775.
\textsuperscript{41} Id. at 780–81.
\textsuperscript{42} Id. at 779.
\textsuperscript{44} See \textit{Linnemeir v. Bd. of Trustees of Purdue Univ.}, 260 F.3d 757, 759–60 (7th Cir. 2001) (academic freedom and states’ rights require deference to educational judgment that is not invidious); Doe v. Small, 964 F.2d 611, 618 (7th Cir. 1992) (mere compliance with the Establishment Clause is not a compelling state interest that would warrant discrimination against a religious group).
\textsuperscript{45} See \textit{Bronx Household of Faith v. Bd. of Educ. of N.Y.}, 492 F.3d 89, 104 (2d Cir. 2007) (Calabresi, J., concurring); \textit{Prince v. Jacoby}, 303 F.3d 1074, 1092 (9th Cir. 2002).
\textsuperscript{46} See \textit{Witte}, \textit{supra} note 1, at 1870–71.
In understanding the direction of the Seventh Circuit’s recent divergence, it is critical to understand judicial precedent as it relates to Church and State and the First Amendment. Understanding the evolution of Supreme Court jurisprudence, along with the purpose of the First Amendment, is markedly important because they highlight the overarching purpose of the Establishment Clause.

Additionally, it is imperative to understand the federal circuits’ current interpretations of the relationship between religion and public education, as they highlight how the public in general perceives the Supreme Court. Coming to this understanding will provide insight into the Seventh Circuit’s recent decision in this area of law.

This Comment will examine both the implications and potential shortcomings of the Badger Catholic decision. With other circuits broadening religious interaction in public education, the Seventh Circuit’s holding in Badger Catholic was ultimately decided incorrectly.

Because the Supreme Court has failed to provide a clear standard for circuits to apply, decisions like Badger Catholic represent an opportunity to provide clarity. Until viewpoint discrimination is more clearly explained, public funds and facilities remain in a

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47 See generally Badger Catholic, 620 F.3d 775.
48 There is constant debate over the exact meaning of the Free Speech, Free Exercise, and Establishment Clauses, stretching as far back as the drafting of the Constitution and the Federalist Papers, which discussed the proper approach American governance should follow. See Witte, supra note 1, at 1871. Recent decisions have aimed to carve out an understanding that promotes neutrality of gift and denial in relation to religion. See Green, supra note 43, at 1113–14. Generally, the court aims to treat religious institutions in the same manner as it would any other group. Id.
49 See Bronx Household of Faith, 492 F.3d 89, 92–106 (Calabresi, J., concurring).
50 See id.
51 See generally Badger Catholic, 620 F.3d 775.
53 See generally Badger Catholic, 620 F.3d 775.
nebulous state that burdens the Seventh Circuit as well as other circuits across the country.\textsuperscript{54}

I. BACKGROUND

A. What is Separation of Church and State?

The difficulty in distinguishing between the establishment of religion and facilitating its free exercise may be attributed to the different understandings of what the Constitution confers through the First Amendment.\textsuperscript{55} In many ways, the Free Speech Clause, the Establishment Clause, and the Free Exercise Clause are in constant constraint of and contradiction to each other.\textsuperscript{56} The government is barred from the unequal recognition of religious institutions while simultaneously providing these institutions the same expressive rights that all citizens enjoy.\textsuperscript{57} As such, it is difficult to determine whether the government is merely providing a forum or funding to the citizenry and when it is funding religious activity.\textsuperscript{58}

The line dividing Church and State is unclear because the precedent does not follow one coherent path. Whereas a state cannot supplement religious schoolteachers’ salaries,\textsuperscript{59} it can provide public transportation for religious school pupils.\textsuperscript{60} The State can loan books

\textsuperscript{54} Laycock, \textit{supra} note 9, at 1669.  
\textsuperscript{55} \textit{Id.}  
\textsuperscript{56} Indeed, in \textit{Locke v. Davey}, the Court recognized that there is an inherent tension between the Establishment and Free Exercise Clauses of the First Amendment. 540 U.S. 712, 718 (2004). Nevertheless, such tension is relieved as the Court’s interpretation allows some “room for play in the joints.” \textit{Id.}  
\textsuperscript{57} See \textit{U.S. Const. amend. 1; Locke}, 540 U.S. at 718.  
\textsuperscript{58} See \textit{Illinois ex rel. McCollum v. Bd. of Educ.}, 333 U.S. 203, 237 (1948) (Jackson, J., concurring) ("the task of separating the secular from the religious in education is one of magnitude, intricacy and delicacy").  
\textsuperscript{59} See \textit{Lemon v. Kurtzman}, 403 U.S. 602, 622–23 (1971) (holding that Pennsylvania’s Nonpublic Elementary and Secondary Education Act violated the Establishment Clause when it reimbursed salaries of nonpublic schoolteachers who taught secular material, as well as reimbursed the schools for secular textbooks and instructional materials).  
\textsuperscript{60} \textit{Everson v. Bd. of Educ.}, 330 U.S. 1, 16–18 (1947).
to religious schools, but it cannot loan any supplemental material to them.\textsuperscript{61} Rather than providing a clear rule, these inconsistencies breed confusion among the nation’s courts.\textsuperscript{62} In many ways, the divisions drawn by the Supreme Court were agonizingly trivial.\textsuperscript{63} Nonetheless, such decisions aimed to discern what separation actually meant in society.\textsuperscript{64} 

Separationism can be divided into three general categories.\textsuperscript{65} As postulated by Carl H. Esbeck, separationist views can be classified as strict, pluralist, or institutional.\textsuperscript{66} While strict separationists would command a completely secular state, institutional separationists envision a theocentric state just short of a theocracy.\textsuperscript{67} However, what jurisprudence has created is a neutral and pluralistic separation between Church and State.\textsuperscript{68} Justice Black attempted to define exactly what the separation meant to American society, with the government barred from establishing a national church or selectively aiding or preferring one religious group to another.\textsuperscript{69}

Nevertheless, Justice Black’s view has developed into a fiction in actual practice.\textsuperscript{70} The government has consistently funded various religious institutions without any conflict with the Supreme Court’s analysis of the Establishment or Free Exercise Clauses.\textsuperscript{71} From providing tax breaks to churches to facilitating religious activity in public buildings, the government has not followed Justice Black’s perception of religion’s role in government.\textsuperscript{72} As such, the conundrum

\textsuperscript{61} Lemon, 403 U.S. at 624.  
\textsuperscript{62} See Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995); Lemon, 403 U.S. at 624.  
\textsuperscript{63} See Lemon, 403 U.S. at 624.  
\textsuperscript{64} Id.  
\textsuperscript{65} See Esbeck, supra note 28, at 378–79.  
\textsuperscript{66} Id.  
\textsuperscript{67} Id. at 379 (dividing the separation ideologies into strict separationists, who desire a secular state, pluralistic separationists, who desire a neutral state, and institutional separationists, who envision a theocentric state).  
\textsuperscript{68} Id. at 388.  
\textsuperscript{69} See Everson v. Bd. of Educ., 330 U.S. 1, 12–16 (1947).  
\textsuperscript{70} Green, supra note 43, at 1119–20.  
\textsuperscript{71} Id. at 1120.  
\textsuperscript{72} Id.
of religious interaction with government is an overwhelming area because it involves contradictions in interpretation, viewpoint, and jurisprudence. This problem is only magnified when a court focuses on specific intrusions of religion into government activity. In recent years, courts have paid special attention to funding and facilitating religious activity. Regardless of the focus, the separation remains a serpentine wall.

B. The Supreme Court’s Stance

Parsing through the U.S. Supreme Court’s decisions dealing with religion can be daunting. Perhaps because this is an “extraordinarily sensitive area of constitutional law,” the Court has struggled to draw hard lines on how religious institutions and government funding should interact. Nevertheless, the Court’s constant refinement of law and its understanding of the First Amendment has provided some shape to the lingering questions.

In examining the government’s approach to funding and facilitating religious activity, the Court has adopted an evenhanded approach so as to neither affirm nor deny any religious group’s position. To a degree, the government is forbidden from stopping or limiting religious expression. However, the First Amendment’s Establishment Clause negates the government’s ability to foster these activities. Even so, the Court has recognized the division between Church and State as something other than a complete barrier.

73 See id.
75 See Rosenberger, 515 U.S. at 835.
76 See Witte, supra note 1, at 1869.
78 See generally Rosenberger, 515 U.S. 819.
81 See id.
82 See Rosenberger, 515 U.S. at 835–36.
Because religion is an integral part of American society and values, it shapes how we understand the very question it aims to answer. In doing so, religion has gained many liberties, which in turn has created a labyrinth of jurisprudence that precludes any possibility of clear guidance for lower courts to follow.

Adding to the complexity of the relationship between Church and State, public education provides a sensitive area where society demands religious independence, yet such independence cannot encroach on religion’s involvement in the student’s life outside school. In addressing the ability of religious groups to operate in the public sphere, the Court has concentrated on the State’s purpose in enacting its rules.

1. Tests in Development

In addressing the relationship between Church and State, the Court has developed several tests that help to understand exactly what principles the First Amendment aims to protect. Historically, the Establishment Clause has been analyzed under the three-pronged test developed in *Lemon v. Kurtzman*. The test requires that government action (1) have a secular purpose; (2) not have the effect of either advancing or inhibiting religion; and (3) not result in government entanglement with religion. The *Lemon* test has become integral to framing how public education and religious organizations must

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85 Id.
89 403 U.S. at 613.
90 Id.
Recent Supreme Court decisions have attempted to guide the federal circuits. The Court analyzed situations based on whether the government was discriminating against the viewpoint of certain speech, or the content of that speech. The Court has held viewpoint discrimination as a more egregious form of content-based discrimination. Generally, the government is forbidden from denying religious organizations access when the denial is based purely on the propagated message. Likewise, content discrimination is presumptively unconstitutional due to its focus on the content of what a group is saying. Though these categories are markedly similar, content discrimination has faced less scrutiny and has been found acceptable in some situations. Through this analysis, the Court has aimed to prevent discrimination of a particular group based on its views or actions, while allowing the government to set the parameters for the time, place, and manner in which the speech is made.

Additionally, the Court has allowed the government to separate religious and government activity by creating limited public forums. While open forums require the state to provide full protection and funding for all speech, a government institution that establishes a

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91 See Mawdsley & Beckmann, supra note 88, at 455 (“While framed in the context of government financial support for religious schools, the Lemon test has been invoked in a wide range of religion cases to both prohibit and permit efforts to accommodate religious beliefs in public schools and permit government support for religious schools.”).
93 Good News Club, 533 U.S. at 108.
94 Rosenberger, 515 U.S. at 829.
98 See Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) (the time, place, and manner test is applicable only to speech regulations that are content neutral).
99 See Widmar, 454 U.S. at 278.
limited forum for a particular purpose may regulate the use of that forum.\textsuperscript{100}

Whether it is dealing with elementary schools or public universities, the government must tread lightly so as not to overstep its citizens’ rights as well as the rights of religious organizations.\textsuperscript{101}

2. Content and Viewpoint Discrimination

In many ways, content and viewpoint discrimination are ambiguous.\textsuperscript{102} Discrimination against speech is presumed to be unconstitutional.\textsuperscript{103} Likewise, the First Amendment is breached whenever the government places financial burdens on groups because of the subject matter of their speech.\textsuperscript{104} Content discrimination occurs when government intervention is based on a speaker’s actions rather than the subject matter of his or her speech.\textsuperscript{105} Generally, the content of the speech being expounded cannot be the focus of governmental prejudice.\textsuperscript{106} Such regulations explicitly or implicitly presume to regulate the speech because of the substance of the message.\textsuperscript{107} Furthermore, the Court has developed the notion of viewpoint discrimination, which constitutes a more egregious form of content discrimination.\textsuperscript{108} Viewpoint discrimination violations target the specific ideology behind an opinion that the group or speaker is presenting.\textsuperscript{109} Such regulations are imposed because of a disagreement

\textsuperscript{100} See Christian Legal Soc’y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez, 130 S. Ct. 2971, 2975 (2010).
\textsuperscript{102} Id. at 828.
\textsuperscript{103} Id.
\textsuperscript{104} Id. at 843.
\textsuperscript{105} See Roman Catholic Found., UW-Madison, Inc. v. Regents of Univ. of Wis. Sys., 578 F. Supp. 2d 1121, 1137 (W.D. Wis. 2008).
\textsuperscript{107} Roman Catholic Found., 578 F. Supp. 2d at 1137.
\textsuperscript{108} Rosenberger, 515 U.S. at 829.
\textsuperscript{109} See Roman Catholic Found., 578 F. Supp. 2d at 1137.
with the particular position that the speaker expounds. Thus, content discrimination always occurs when viewpoint discrimination does, but not vice versa.

The Court has examined situations where the government has refused to fund religious groups under a Free Exercise analysis, as well as situations where the government recognized religious groups’ rights under the Establishment Clause.

In Lamb’s Chapel v. Center Moriches Union Free School District, a school district provided its facilities to community groups, yet refused a church’s request to show religious films. The Court held that because the school district opened its doors to the public, it could not refuse organizations merely because they were religious. The school’s focus on the subject matter of the speech, rather than on the manner in which it was being expressed, constituted viewpoint discrimination. Following Lamb’s Chapel, the Court attempted to define the differences between viewpoint and content discrimination.

Just as schools cannot close their doors to religious groups merely because they are religious, they cannot deny them funding where there are secular parallels to the activities that receive funding. Whether it is the printing and distribution of newspapers on campus or disbursement of federal scholarships to students

110 Id.
111 Id. (“Viewpoint discrimination is thus an especially egregious form of content discrimination in which the government targets not just subject matter, but the particular views taken on subjects by speakers.”).
114 Id. at 392.
115 Id. at 391.
117 Id.
118 See id. at 845–46 (holding that the University’s refusal to fund a campus organization’s publication, written from a Christian viewpoint, when other publications from other viewpoints were funded violated the Free Speech Clause: “[the University’s] course of action was a denial of the right of free speech and
pursuing religious training, public institutions must maintain a neutral stance on how they conduct their activities.

In *Christian Legal Society Chapter of the University of California, Hastings College of Law v. Martinez*, the Court held that a publicly-funded law school’s anti-discrimination policy could be evenly applied to all groups that it funded, including religious groups. There, a Christian society at the school barred homosexuals from joining the organization. Because this was in violation of the school’s anti-discrimination policy, the law school denied the group funding and access to its facilities. The Court found that the school’s policy was applicable to all organizations in the school and thus did not single out the religious group. In fact, the Court noted that because the policy was so inclusive, it was impossible to contend that it was discriminatory against any one group. When a public university implements regulations on a limited public forum, it can decide the parameters of the content that that forum allows, but views that fit within the parameters cannot be discriminated against.

Contrastingly, in *Locke v. Davey*, a student pursing a degree in theology was denied a government-funded scholarship and contended that this was discrimination in contravention of the Free Exercise Clause. The Court disagreed, reasoning that the Free Exercise Clause and the Establishment Clause allow some “play in the joints between them.” While the government could not hinder the student’s pursuits, funding his pursuits would amount to providing for

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120 Id. at 649–50.
121 130 S. Ct. 2971, 2989 (2010).
122 Id. at 2979–80.
123 Id. at 2989.
124 Id.
125 Id. at 2993 (“It is, after all, hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers.”) (emphasis in original).
126 Id.
128 Id. at 718 (internal quotation marks omitted).
religious training. The school was allowed to participate in its own form of government speech by deciding the limits of what it endorses, and what it does not. So long as the institution is not evincing hostility towards religion in its actions, it is not required to supply funds or access to religious institutions merely because a secular alternative exists.

The directions in *Locke* are not applicable across the board. In *Zelman v. Simmons-Harris*, taxpayers challenged a scholarship program that funded recipients who attended religious schools. The scholarship program aimed to allow parents and students the ability to attend any school of their choice. The Court held that the scholarship program was not a violation of the Free Exercise Clause because the program was neutral and provided funding to a broad class of citizens. The fact that the families directed the funding to religious institutions was not unconstitutional. As the school had created an open forum for its students, it could not discriminate against certain institutions merely because they support religion. However, the Court’s decision faced serious criticism because it appeared as indirect preferential treatment for religion. By providing funding to parents who chose private religious institutions over public schools, the separation between Church and State became a farce.

The commingling of content and viewpoint discrimination looks to be a mess of precedent. Nevertheless, distinctions in their

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129 *Id.* at 725.
130 *Id.* at 729–30.
131 *Id.* at 724–25 (the state had a substantial interest in not funding the pursuit of devotional degrees).
133 *Id.*
134 *Id.* at 647.
135 *Id.* at 652–53.
136 *Id.*
137 *Id.* at 652.
138 *Id.* at 685 (Stevens, J., dissenting).
139 *Id.*
analysis exist.\textsuperscript{141} The government “is not required to and does not allow persons to engage in every type of speech”; content discrimination is appropriate when the restrictions are “reasonable in light of the purpose served by the forum.”\textsuperscript{142} Conversely, viewpoint discrimination is generally prohibited in open forums as well as limited forums.\textsuperscript{143} While the views of a speaker cannot be the basis of State regulation, the Court has endorsed the idea that universities can focus a forum on a specific, intentional purpose and regulate speech that falls outside that content.\textsuperscript{144}

3. Open and Limited Forums

In \textit{Lamb’s Chapel}, the Court also addressed the issue of when a government creates a forum.\textsuperscript{145} There, a church sued a school district because it was refused access to facilities to show religious films on family values.\textsuperscript{146} The Court recognized that the school district was allowed to preserve property under its control and dictate its use.\textsuperscript{147} However, because the school district did not intentionally define the limits of the forum, thus creating an open forum, it could not deny the church access because of its religion.\textsuperscript{148}

In \textit{Good News Club v. Milford Central School}, the Court held that a school conducted viewpoint discrimination because it refused a religious youth club access to its facilities after school hours.\textsuperscript{149} The

\textsuperscript{143}Id. at 107.
\textsuperscript{146}Id.
\textsuperscript{147}Id. at 2146.
\textsuperscript{148}Id. at 2148. Though the Court recognized that there may be a compelling interest in avoiding an Establishement Clause violation, an open access policy to the forum allowed religious use of the property. \textit{Id.}
Court rejected the school’s argument that granting access would be government endorsement amounting to a violation of the Establishment Clause. On the contrary, permitting the school to deny the religious organization access would be just as threatening to the Constitution as allowing that organization access. Critically, the Court viewed the school as an open facility, rather than a limited forum. Just as in Lamb’s Chapel, a forum open to the public had been created without intentional limits.

Moreover, a forum does not necessarily have to be a physical space; funding can represent a metaphysical forum. In Rosenberger v. Rector and Visitors of the University of Virginia, the Court held that there was no difference between a public school funding a physical facility and giving students access to its funds to pay for activities. The Court recognized that a university may appropriate public funds to promote particular policies as it wishes, so creating a limited forum. In order to do so, it need only intentionally create the forum and set out its limits and purpose. From that point, the forum is judged as to whether its limits are reasonable in light of its defined purpose.

In creating a limited forum, the State must distinguish it from the traditional or open public forum. In that sense, the restrictions that the government imposes on an open forum are placed under greater scrutiny than those imposed on a limited public forum. In limited public forums, the government opens property for use by certain groups and dictates its use.

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150 Id.
151 Id.
152 Id.
153 See id. at 109; Lamb’s Chapel, 113 S. Ct. at 2148.
155 Id. at 843.
156 Id. at 833.
158 Id. at 806.
160 Id.
161 Rosenberger, 515 U.S. at 829–30.
Additionally, there is another division between these two types of forums. While there is the traditional open forum, and the limited public forum, there also exists a designated public forum. In the case of a designated public forum, the Court uses strict scrutiny to ensure that the government does not unreasonably restrict speech in the nontraditional space. While a traditional open public forum usually uses public spaces like parks and streets, a designated public forum uses spaces that are not typically open to the public.

Deciding what type of forum a school creates is critical because it changes the analysis under the neutrality test. If a forum is left open to the public, content and viewpoint discrimination are subject to harsher treatment and the State’s restrictions are subject to strict scrutiny. Alternatively, a limited public forum’s restrictions need only be viewpoint-neutral and reasonable in light of its purpose. Therefore, knowing whether a university has reasonably restricted a forum is critical when deciding if its actions are constitutional.

163 Id.
164 Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985); see also Choose Life Ill., Inc. v. White, 547 F.3d 853, 864 (7th Cir. 2008).
165 Good News Club, 533 U.S. at 106. Universities and schools can fall into all three categories, but generally, they fall into either a traditional open forum or a limited public forum. See id. These spaces are usually open to and funded by the public. See id. However, unless the school sets a purpose for its facilities, they are presumed to be “nonpublic forum[s]”—property that “is not by tradition or design a forum for public communication.” See Choose Life Ill., 547 F.3d at 864.
166 See Martinez, 130 S. Ct. at 2983; Rosenberger, 515 U.S. at 829–30; Cornelius, 473 U.S. at 802.
167 Martinez, 130 S. Ct. at 2983.
169 See Choose Life Ill., 547 F.3d at 864.
C. Division Among Circuits

Not surprisingly, the lack of specific direction from the Supreme Court has led to varying approaches on how to decide the constitutionality of forum restrictions. While some circuits have been more rigid in their understanding of what an open forum is and when viewpoint discrimination actually occurs, opposing views still linger.

In Bronx Household of Faith v. Board of Education of the City of New York, the Second Circuit addressed the State’s refusal to permit church use of school facilities for Sunday worship.170 There, under two concurring opinions, the court vacated the permanent injunction enjoining the school district from enforcing its prohibition against religious use.171 The court decided that the State’s restriction on worship was not viewpoint discrimination.172 Because the purpose of the Bronx Household was specifically for worship, it fell outside the content of the school’s purpose and was properly denied.173

In the Ninth Circuit case, Prince v. Jacoby, a high school student brought an action against a school district because it refused to allow a bible club the same benefits that it does to other clubs.174 Namely, the club was given different access to school supplies, audio/visual equipment and school vehicles.175 The court held that the different treatment of the bible club from other school-sanctioned clubs was in violation of the First Amendment under Widmar.176 The school created a limited public forum and chose to give benefits to groups; having done so, it could not restrict a group’s access to these benefits based on the group’s views.177 The court further held that even if it were not an open forum, the State did not have unlimited power to restrict speech, and any restriction had to be viewpoint-

170 492 F.3d 89, 92–93 (2d Cir. 2007).
171 Id. at 90–123.
172 Id. at 98–99.
173 Id. at 100–01.
174 303 F.3d 1074, 1077 (9th Cir. 2002).
175 Id.
176 Id. at 1091.
177 Id.
neutral and “reasonable in light of the purpose served by the forum.” Because the restriction against the bible club was based purely on its religious viewpoint, the restriction was unconstitutional.

In another Ninth Circuit case, *Tucker v. State of California Department of Education*, an employee sued the State for a ban on displays of religious material and religious advocacy by employees. The court there held that such a restriction was unwarranted under the First Amendment. Again, the court emphasized that the State had not created a limited forum and could not constitutionally restrict its employees’ speech. Although this particular case involved a state employee and was subject to another type of analysis, analysis under viewpoint discrimination and open forum precedent was still appropriate. Pursuant to *Widmar* and *Rosenberger*, the court decided that there was no “plausible fear” that the employee’s speech would be attributed to the State and implicate the Establishment Clause. As such, the State’s ban was unconstitutional.

While the Ninth Circuit has recognized that religious discrimination in open forums is generally not permissible, it has held prohibitions limiting religious organizations constitutional when

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178 *Id.* The school officially recognized and allowed full access to “groups that engage in any lawful activity which promotes the academic, vocational, personal, or social/civil/cultural growth of students.” *Id.* at 1091–92 (internal quotation marks omitted).
179 *Id.*
180 97 F.3d 1204, 1208 (9th Cir. 1996).
181 *Id.* at 1209–10.
182 *Id.* at 1209 (“[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse”) (emphasis in original) (internal quotation marks omitted).
183 The court decided that *Pickering v. Board of Education*, 391 U.S. 563 (1968), was the controlling analysis for government employee speech. *Tucker*, 97 F.3d at 1210.
184 *Id.* at 1211.
185 *Id.*
186 *Id.* at 1213.
187 *Prince*, 303 F.3d at 1074; *Tucker*, 97 F.3d at 1213.
the State creates a limited public forum.\textsuperscript{188} In \textit{Faith Center Church Evangelistic Ministries v. Glover}, the court held that a library constituted a limited public forum because the State intentionally dedicated its property for expressive conduct.\textsuperscript{189} The court set out the different levels of scrutiny applicable to open forums, nonpublic forums, and limited public forums.\textsuperscript{190} In traditional public forums, like streets and parks, the State can engage in content-based regulations when it is “necessary to serve a compelling state interest and [when it is] narrowly drawn to achieve that end.”\textsuperscript{191} Regulation in nonpublic forums is less demanding: restrictions need only be reasonable and not enforced against the speaker’s view.\textsuperscript{192} The court determined that the library did not fall into either of these categories because the State did not make the meeting room open for indiscriminate use; it excluded use by schools “for instructional purposes as a regular part of the curriculum,” as well as use for religious services.\textsuperscript{193} Nevertheless, pursuant to \textit{Good News Club v. Milford Central School},\textsuperscript{194} there was a distinction between religious activity and mere religious worship devoid of any moral teachings.\textsuperscript{195} As such, the court listed various activities, like effective communication of a group’s goals, the discussion of religious books, teaching, praying, singing, and sharing testimonials as permissible. However, pure religious worship is not a viewpoint but a category of content, and can be properly excluded.\textsuperscript{196}

It is clear from just these few cases discussing the boundaries of limited public forums and its relationship to viewpoint discrimination that the circuits are engaging in complex precedential

\textsuperscript{189} Id. at 907.
\textsuperscript{190} Id. at 907–08.
\textsuperscript{191} Id. at 907 (internal quotation marks omitted).
\textsuperscript{192} Id. at 907–08.
\textsuperscript{193} Id. at 909.
\textsuperscript{195} Glover, 480 F.3d at 913–14.
\textsuperscript{196} Id. at 915.
weaving. What is apparent is that when a State creates a limited public forum, it is within its power to restrict religious activity like worship. While the government must allow some activity “quintessentially religious” in nature, not all religious activity is protected under the doctrines of neutrality.

II. THE SEVENTH CIRCUIT

A. Decisions Before Badger Catholic

The Seventh Circuit has addressed the issues surrounding the Establishment Clause, religion in public institutions, and the scope of forum creation in various recent cases.

In one instance, several churches challenged an ordinance that restricted the use of land zoned for commercial and business uses. The court looked to the motivation for the regulations and determined that the city was not motivated by a disagreement with the churches’ message but rather was concerned with the effective use of land. As this was a viewpoint-neutral purpose and a reasonable restriction of the land’s use, the court held that it was constitutional.

In Southworth v. Board of Regents of the University of Wisconsin System, students challenged the mandatory activity fee that the University imposed on grounds that such a fee amounted to

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197 See Bronx Household of Faith v. Bd. of Educ. of N.Y., 492 F.3d 89, 92–93 (2d Cir. 2007); Tucker v. Cal. Dep’t of Educ., 97 F.3d 1204, 1208 (9th Cir. 1996).
198 See Bronx Household of Faith, 492 F.3d at 101.
200 Choose Life Ill., Inc. v. White, 547 F.3d 853, 864 (7th Cir. 2008); Christian Legal Soc’y v. Walker, 453 F.3d 853, 865–66 (7th Cir. 2006); Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 765 (7th Cir. 2003); Southworth v. Bd. of Regents of Univ. of Wis. Sys., 307 F.3d 566, 580 (7th Cir. 2002).
201 Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 758–59 (7th Cir. 2003).
202 Id. at 765.
203 Id.
support for views to which they objected.\textsuperscript{204} The court held that the fee was reasonable and that the fund constituted a metaphysical limited public forum.\textsuperscript{205} Even so, the court held that the student government that defined the parameters of the forum was not entitled to unbridled discretion.\textsuperscript{206} Instead, it had to develop specific and concrete standards guiding its funding decision.\textsuperscript{207} So while the court recognized that the University could create a limited forum that could discriminate against certain content, these limits would have to be spelled out specifically.\textsuperscript{208}

The court also examined the application of neutrality in \textit{Christian Legal Society v. Walker}.\textsuperscript{209} There, a student organization sued a public law school after it was derecognized for excluding homosexuals from its organization’s voting membership, citing that it was entitled to free speech and free exercise of religion.\textsuperscript{210} The school had a nondiscrimination policy that was concededly viewpoint-neutral; however, the court questioned whether it was applied in a viewpoint-neutral way.\textsuperscript{211} Although the court noted that denying recognition to a student organization is a significant infringement, it still found that the group showed a likelihood of success on its claim that the school unconstitutionally derecognized it.\textsuperscript{212} In doing so, the court recognized that a student organization could be restrictive if found to be a limited public forum.\textsuperscript{213} Here, the court was concerned with the student’s expressive rights.\textsuperscript{214} Even with a viewpoint-neutral stance, it is

\begin{itemize}
\item \textsuperscript{204} 307 F.3d at 570–71.
\item \textsuperscript{205} \textit{Id.} at 580.
\item \textsuperscript{206} \textit{Id.}
\item \textsuperscript{207} \textit{Id.}
\item \textsuperscript{208} \textit{Id.}
\item \textsuperscript{209} 453 F.3d 853, 865–66 (2006).
\item \textsuperscript{210} \textit{Id.}
\item \textsuperscript{211} \textit{Id.} at 866.
\item \textsuperscript{212} \textit{Id.} at 867.
\item \textsuperscript{213} \textit{Id.} at 866.
\item \textsuperscript{214} \textit{Id.} at 867 (the policy would significantly affect the organization’s ability to express its disapproval of homosexuality).
\end{itemize}
possible for a university to improperly restrict the activities of its students.215

Likewise, *Doe v. Small* addressed the use of public spaces by religious groups.216 There, action was sought to enjoin the display of a religious painting in a park.217 The injunction ordered by the district court that forbade the painting was held overly broad.218 The Seventh Circuit determined that the park, as a public forum, must accept religious speech.219 By limiting expression, the State does not act neutrally, but is hostile towards the religious groups’ viewpoint.220 The court instructed that any restriction placed on the open forum must be narrowly tailored.221

In *Choose Life Illinois v. White*, the court addressed the definition of public forums.222 An anti-abortion group sought to compel the State to issue “Choose Life” license plates.223 After deciding that license plates did not constitute government speech,224 the court held that they were a limited public forum.225 Because the plates had not been open for general public discourse, the court concluded that the State had not intentionally opened the nontraditional forum for public use.226 In the end, the court concluded

215 See id.
216 964 F.2d 611 (7th Cir. 1992).
217 Id. at 612–13.
218 Id. at 621.
219 Id. at 619.
220 Id.
221 Id. at 621 (“The district court’s order was not narrowly tailored because it sought to eliminate the display of the paintings ‘by any party’ instead of limiting it to the ‘evil’ of the City’s alleged endorsement of the painting alone.”).
222 547 F.3d 853, 864 (7th Cir. 2008).
223 Id.
224 Id. at 863 (“Messages on specialty license plates cannot be characterized as the government’s speech. Like many states, Illinois invites private civic and charitable organizations to place their messages on specialty license plates. The plates serve as ‘mobile billboards’ for the organizations and like-minded vehicle owners to promote their causes and also are a lucrative source of funds.”).
225 Id. at 864–65 (declining to qualify license plates as an open or designated forum).
226 Id. at 864.
that the government was allowed to restrict this area based on the content of the message.\textsuperscript{227} As it had restricted all license plate designs that addressed abortion, rather than targeting only the pro-life view, the government was engaging in content discrimination.\textsuperscript{228} The court held this restriction reasonable in light of the plates’ purpose, especially since the State evinced no hostility towards any particular view.\textsuperscript{229}

Additionally, in \textit{Linnemeir v. Board of Trustees of Purdue University}, students sought to enjoin a play that a university was presenting because it evinced anti-Christian beliefs.\textsuperscript{230} Though the court recognized that a university policy promoting a particular belief would violate the First Amendment, merely allowing students to choose a play and display it did not amount to endorsement.\textsuperscript{231} The court stated that just as a classroom is not a public forum, neither is a university theater.\textsuperscript{232} Moreover, it recognized the need for academic freedom:

\begin{quote}
If an Establishment Clause violation arose each time a student believed that a school practice either advanced or disapproved of a religion, school curricula would be reduced to the lowest common denominator, permitting each student to become a ‘curriculum review committee’ unto himself.\textsuperscript{233}
\end{quote}

The court urged that educational deference and deference to State’s rights are required so long as the action is not invidious.\textsuperscript{234} Again, the court recognized the rights that universities have in defining and funding their actions.\textsuperscript{235} This decision was criticized, as there was no

\begin{footnotes}
\item[227] Id. at 865.
\item[228] Id.
\item[229] Id.
\item[230] 260 F.3d 757, 758–59 (7th Cir. 2001).
\item[231] Id. at 759–60.
\item[232] Id. at 760.
\item[233] Id.
\item[234] Id.
\item[235] Id.
\end{footnotes}
evidence that the University allowed other theater groups to use its stage, and its choice of one ideology and denial of others constituted viewpoint discrimination.236

These cases demonstrate the breadth of application that the court has made in viewpoint discrimination and limited forum cases. When the State acts against a religious group, or any group for that matter, it must be motivated by something other than the group’s views.237 Moreover, when it creates a limited forum, it needs to specify the limits of that forum, so it is readily identifiable which content is not allowed.238 It is also important to recognize that the mere existence of a viewpoint-neutral policy does not mean that its application will also be viewpoint-neutral.239

B. Badger Catholic

Decided in 2010, Badger Catholic, Inc. v. Walsh involved a religious group at the University of Wisconsin and its attempt to gain funding for its activities.240 The school collects nearly $400 from each of its students in order to provide for a variety of non-instructional student services and programs.241 These funds are made available to qualifying student organizations, which include those that engage in “expressive activities, concerts, some athletic activities, and recreational activities.”242 Additionally, the fund’s purpose was to “provide a source of funds to ensure that students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life

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236 Id. at 767 (Coffey, J., dissenting).
237 Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 765 (7th Cir. 2003).
238 See Southworth v. Bd. of Regents of Univ. of Wis. Sys., 307 F.3d 566, 580 (7th Cir. 2002).
240 Badger Catholic, Inc. v. Walsh, 620 F.3d 775, 776–77 (7th Cir. 2010).
242 Id
outside the lecture hall.” In order to gain access to these funds, student organizations must meet criteria primarily set by the student government. Moreover, the University stated that the forum was developed to foster “dialogue, or discussion, or debate.”

In 2005, the University of Wisconsin Roman Catholic Foundation (RCF) began to seek reimbursement from the school’s fund. Though the school expressed concerns about RCF’s eligibility, it eventually approved the group as a registered student organization. In achieving eligibility, RCF submitted to student control and agreed not to seek funding for “masses, weddings, funerals, or other sacramental acts requiring the direct control of ordained clergy.”

Although by 2007, RCF was allowed to seek funding, the University did not fund RCF’s activities in their entirety. Specifically, the University concluded that it could not reimburse four of RCF’s expenditures because they were for worship, proselytizing, or sectarian religious instruction. RCF provided a mentoring program with spiritual directors for spiritual mentoring, a training institute for the organization’s leaders to gain perspective on how to talk about prayer, worship, and the Catholic faith, a drum shield

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243 Id. (emphasis added).
244 Id.
245 Id. at 1134 (internal quotation marks omitted).
246 Id. at 1127.
247 Id. The RCF was not a recognized student organization originally. While it later met the criteria under the student government’s mandates, it initially struggled as it had members who were not University students. Id. Moreover, it was not controlled by students but by the St. Paul’s Catholic Center and various religious officials, including a pastor and bishop. Id. The organization was also in violation because it did not allow non-Catholics to participate in its meetings. Id.
248 Id.
249 Id.
250 Id.
251 Id.
252 The spiritual mentors included nuns and priests who would talk to the students about anything they wanted to talk about for a half-hour. Id. at 1127–28.
253 These meetings included a variety of activities including masses, prayer, and worship services. Id. at 1128.
used in praise and worship bands, and the cost of a Rosary instructional pamphlet that told students how to pray the Rosary.\textsuperscript{254} By the time the case reached the court, the University had also denied RCF funding for a summer training camp that trained the organization’s leaders and included several masses, communal prayers, and worship programs.\textsuperscript{255} Moreover, the University denied funding for a program that brought nuns from Italy to Madison to meet with the group’s students to advise them on their “path in the world” and determine whether they should “be a priest, or religious, or . . . married.”\textsuperscript{256} While the school did not fund these activities, it still funded the majority of RCF’s actions, including large and small group discussion, education and service offerings, theater and choral activities, and welcoming activities.\textsuperscript{257}

The district court determined that the fund that the University created constituted a nonphysical forum under \textit{Rosenberger} and stated that such a forum was required to distribute reimbursements on a viewpoint-neutral basis.\textsuperscript{258} Likening the case to \textit{Rosenberger}, the court referred to the University of Virginia’s rejected argument that the publications primarily promoted or manifested a particular belief in or about a deity or an ultimate reality.\textsuperscript{259} Just as that was considered a limited public forum, so too was the University of Wisconsin’s fund.\textsuperscript{260} The court concluded that the University was entitled to adopt reasonable content-based restrictions on the limited forum, but that its current denials were too broad.\textsuperscript{261} The court noted that merely labeling types of speech as dialogue or worship was not dispositive of whether the regulations were constitutional.\textsuperscript{262} Instead, the University would have to explain its choices in funding and needed to analyze the

\textsuperscript{254} \textit{Id.}
\textsuperscript{255} \textit{Id.}
\textsuperscript{256} \textit{Id.}
\textsuperscript{257} \textit{Id.}
\textsuperscript{258} \textit{Id.} at 1129–30.
\textsuperscript{259} \textit{Id.} at 1130; see \textit{Rosenberger v. Rector & Visitors of Univ. of Va.}, 515 U.S. 819, 822–30.
\textsuperscript{260} \textit{Roman Catholic Found.}, 578 F. Supp. 2d at 1130.
\textsuperscript{261} \textit{Id.} at 1133–34.
\textsuperscript{262} \textit{Id.}
specific content of each disputed activity, rather than rely on highly abstract labels.263

In Badger Catholic, Inc. v. Walsh, the Court of Appeals for the Seventh Circuit affirmed the district court’s decision.264 The court rejected the argument that funding prayer, proselytizing, or religious instruction would violate the Establishment Clause.265 Instead, it held that because the University had decided that nonreligious counseling groups were within the forum’s scope, it could not exclude religious groups offering prayer as a means of counseling.266 Furthermore, the court did not agree that the University was allowed to make this decision, whether or not the Establishment Clause required it.267 Relying on Locke, the court stressed that the State’s program should not evince hostility towards religion.268 Though Locke noted that schools could speak through their decisions about which programs to support, such as having a department on philosophy but not theology, the court held that the forum created by the University of Wisconsin was not to propagate its own message, but to provide its students the ability to speak.269 The court concluded that the University cannot shape Badger Catholic’s message by selectively funding speech of which it approves, and not funding views of which it disapproved.270 Because the University created a public forum, it had to accept all comers within the forum’s scope.271

263 Id. at 1134–35.
264 620 F.3d 775 (7th Cir. 2010).
265 Id. at 778.
266 Id.
267 Id. at 779.
268 Id. at 780; see Locke v. Davey, 540 U.S. 712, 724–25 (2004).
269 Badger Catholic, 620 F.3d at 780. The court noted that this seemed like an overly formalistic distinction. Id. Nevertheless, it qualified its holding because the University of Wisconsin had previously told the Supreme Court that it would establish neutral rules and not shut out any perspectives. Id.
270 Id.
271 Id.
III. ANALYSIS

A. Overarching Problem

Religion in public education is much like Pandora’s box, unleashing an area of the law that lends itself to excessive complication and entanglement.272 Regardless of the standard or test applied by the courts, religion has faced a burden unlike any other institution in American democracy.273 Focusing specifically on content and viewpoint discrimination, courts have struggled to apply these seemingly straightforward tests.274 In one instance, a court may find that the government is acting constitutionally, while another court may find activity of nearly the same nature unconstitutional.275 Thus, different circuits have reached markedly different results.276

The Seventh Circuit’s holding, which determined what public universities must fund, is perilous.277 In an attempt to make the situation clearer for government institutions, Badger Catholic unnecessarily integrates Church and State.278 Ironically, the goal that

272 See Witte, supra note 1, at 1904.
274 See Bronx Household of Faith v. Bd. of Educ. of N.Y., 492 F.3d 89, 99–100 (2d Cir. 2007) (finding a violation of the Establishment Clause where a church was permitted to use school facilities for Sunday service); Prince v. Jacoby, 303 F.3d 1074, 1092–93 (9th Cir. 2002) (requiring a school to give bible club access to facilities even though it conducted religious speech); Linnemeir v. Bd. of Trustees of Purdue Univ., 260 F.3d 757, 759–60 (7th Cir. 2001) (finding no First Amendment violation where a public university presented a student play that evinced anti-Christian beliefs).
275 Compare Bronx Household of Faith, 492 F.3d at 100, with Prince, 303 F.3d at 1093.
276 See Bronx Household of Faith, 492 F.3d at 99–100; Prince, 303 F.3d at 1092–93; Linnemeir, 260 F.3d at 759–60.
277 See Badger Catholic, Inc. v. Walsh, 620 F.3d 775, 782–83 (7th Cir. 2010) (Williams, J., dissenting); Green, supra note 43, at 1118–19.
278 See Badger Catholic, Inc., 620 F.3d at 789 (Williams, J., dissenting).
the Seventh Circuit hoped to achieve may end up working towards an opposite end.\footnote{279 See id. at 781 (the court aimed to define parameters that would enforce neutrality towards religion).}

The problem stems from the constant battle between the Establishment Clause and the Free Exercise Clause.\footnote{280 See Green, supra note 43, at 1126–27.} The tests developed to handle the varying issues under each clause fail to address the true complexity of the problem—resulting in the Supreme Court’s inability to come to a clear answer.\footnote{281 See Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971); Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).} Decisions like \textit{Badger Catholic} exemplify the inherent problem that American jurisprudence has created for itself.\footnote{282 See Green, supra note 43, at 1132 ("[E]venhanded neutrality is incomplete as a constitutional doctrine because it fails to account for the other important values that inform the religion clauses, such as protecting religious liberty and autonomy, ensuring religious (and secular) equality, alleviating religious dissension, and protecting the legitimacy and integrity of both government and religion. A focus on neutrality, however, discounts these values of liberty, equality, diffusion, and government integrity.").} Whether with respect to funding or facilitating in some manner, analyzing religion’s role in education under independent tests developed for specific clauses of the First Amendment belittles the magnitude of the situation.\footnote{283 Id. at 1131–32.}

The Seventh Circuit’s decision in \textit{Badger Catholic} placed an unnecessary burden on the State and forced the government as well as students to implicitly endorse various religious activities, regardless of their own ideology.\footnote{284 See Good News Club v. Milford Cent. Sch., 533 U.S. 98, 115 (2001).} By concluding that the forum in \textit{Badger Catholic} was an open forum, the Seventh Circuit missed the direction of the law and misinterpreted the purpose of viewpoint discrimination analysis.\footnote{285 See \textit{Badger Catholic}, 620 F.3d at 781; Green, supra note 43, at 1135–36.} What the University created was a forum for a specific purpose and with concrete limitations.\footnote{286 \textit{Badger Catholic}, 620 F.3d at 783 (Williams, J., dissenting).} These limitations were
publicly available and reasonable in light of the forum’s purpose and the tenets of the Constitution.\textsuperscript{287}

Plainly, the Seventh Circuit’s decision failed to recognize that public institutions have the ability to stop some activity and are required in some instances to limit religious speech so that religion receives no preferential treatment from the State.\textsuperscript{288} There is a specific distinction between the state providing equal access to all groups regardless of their views and the funding and propagating of religious worship and activity.\textsuperscript{289} While the former is necessarily protected under the First Amendment, the latter represents an unreasonable encroachment.\textsuperscript{290}

In looking at where to go from here, the Seventh Circuit must understand the true movement of its own law as well as how the Establishment Clause was meant to affect religion.\textsuperscript{291} What has occurred here is but a tremor of what may come if other circuits follow the same route.\textsuperscript{292}

\textit{B. Badger Catholic Detailed}

The Seventh Circuit failed to recognize the University of Wisconsin’s prerogative to create a limited forum and restrict access to that forum based on the content of activities.\textsuperscript{293} Specifically, the University created the forum to foster discussion of philosophical, religious, scientific, social, and political subjects.\textsuperscript{294} Moreover, it fully

\begin{footnotesize}
\begin{enumerate}
\item[287]Id.
\item[289]Green, \textit{supra} note 43, at 1131–32.
\item[290]Id.
\item[291]See \textit{Christian Legal Soc’y v. Walker}, 453 F.3d 853, 865–66 (7th Cir. 2006); \textit{Civil Liberties for Urban Believers v. City of Chicago}, 342 F.3d 752, 765 (7th Cir. 2003); \textit{Southworth v. Bd. of Regents of Univ. of Wis. Sys.}, 307 F.3d 566, 580 (7th Cir. 2002).
\item[292]See Green, \textit{supra} note 43, at 1135–36.
\item[293]See \textit{Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez}, 130 S. Ct. 2971, 2990 (2010).
\item[294]Roman Catholic Found., \textit{UW-Madison, Inc. v. Regents of Univ. of Wis. Sys.}, 578 F. Supp. 2d 1121, 1126 (W.D. Wis. 2008).
\end{enumerate}
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funded dialogue and debate on these topics.\textsuperscript{295} What it did not fund was any form of worship, proselytizing, or religious instruction.\textsuperscript{296} All student organizations could access this fund so long as they stayed within these limits.\textsuperscript{297} In doing so, the University created a specific limited forum.\textsuperscript{298}

However, the court stretched the tenets of neutrality to demolish the barriers that the University created.\textsuperscript{299} By requiring the school to reimburse Badger Catholic on the same basis that it reimburses other groups, the court missed the mark.\textsuperscript{300} While facially, this approach appears viewpoint-neutral, it degraded what these activities actually were.\textsuperscript{301} The court seemed to see no difference between students mentoring students and students seeking advice from nuns and priests.\textsuperscript{302} However, there is a significant difference.\textsuperscript{303} While one is a discussion and dialogue about various social problems at a school, the other is religious instruction.\textsuperscript{304} It is not far-fetched that nuns and priests will be giving particular religious instruction that cannot be rivaled by a secular counterpart.\textsuperscript{305} By its very nature,

\textsuperscript{295} Id. at 1134.
\textsuperscript{296} Id.
\textsuperscript{297} Id. at 1126.
\textsuperscript{299} See Green, supra note 43, at 1131–32.
\textsuperscript{301} Badger Catholic, Inc. v. Walsh, 620 F.3d 775, 785 (7th Cir. 2010) (Williams, J., dissenting).
\textsuperscript{302} See id. at 779 (majority opinion).
\textsuperscript{303} Id. at 785 (Williams, J., dissenting) (“If religion, and the practice of one’s religion, can be described as merely dialog or debate from a religious perspective, what work does the Free Exercise [C]lause of the First Amendment do?”); see also Bronx Household of Faith v. Bd. of Educ. of N.Y., 492 F.3d 89, 102 (2d Cir. 2007) (Calabresi, J., concurring) (“Worship is adoration, not ritual; and any other characterization of it is both profoundly demeaning and false.”).
\textsuperscript{304} See Rosenberger, 515 U.S. at 831 (“Religion . . . provides . . . a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered.”).
\textsuperscript{305} Roman Catholic Found., UW-Madison, Inc. v. Regents of Univ. of Wis. Sys., 578 F.Supp.2d 1121, 1127–28 (W.D. Wis. 2008).
religious mentoring is on a level fundamentally different from student dialogue. There is no comparison between the two, and trying to draw congruence only denigrates the value of religion.

All of the activity for which the University rejected funding follows this same analysis. A training institute for the organization’s leaders that conducts mass, prayer, and worship sessions is not equivalent to a normal organization’s leadership training. The same applies to the summer training camp that it conducted. These are exercises in religious devotion and proselytizing, not mere training.

Moreover, the pamphlets that Badger Catholic distributes differ significantly from the newspapers discussed in *Rosenberger*. While the newspapers were intended to give religious perspective and advice on current topics, Badger Catholic’s pamphlets were instructions on worship. It instructed members on the rosary and how to pray it. This is markedly different from evincing a religious perspective.

That the University funded all but 9% of Badger Catholic’s activities also lends some insight into how specific its limitations actually were. The six activities that it did not fund plainly did not

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306 See *Rosenberger*, 515 U.S. at 831.
307 See *Bronx Household of Faith*, 492 F.3d at 102.
308 Id.
310 Badger Catholic, Inc. v. Walsh, 620 F.3d 775, 785 (7th Cir. 2010) (Williams, J., dissenting).
311 Id.
312 See *Green*, *supra* note 43, at 1120–21.
315 *Roman Catholic Found.*, 578 F. Supp. 2d at 1128.
316 See *Rosenberger*, 515 U.S. at 827.
317 Badger Catholic, Inc. v. Walsh, 620 F.3d 775, 783 (7th Cir. 2010) (Williams, J., dissenting).
further the forum’s goals.318 This was reasonable content discrimination.319 By forbidding worship, proselytizing, or religious instruction, the University did not target religious views generally or Catholicism specifically.320 Instead, it forbad actions.321 Presumably, any group that might seek reimbursement under these categories would be rejected.322 The court attempted to liken Badger Catholic’s activities to secular counterparts and missed the point of these activities.323

The court also incorrectly assumed that worship and proselytizing are automatically religious.324 It is just as likely that a student group could form to worship and proselytize for a sports team or a pop star.325 These are categories of conduct, not religious views.326 The separation is only magnified by the unrivaled equivalency that religion creates for itself.327 That mass, prayer, and worship are typically religious and hold no secular equal does not mean that the actions amount to a viewpoint.328 Instead, it demonstrates the specificity that the University has created in its forum.329 Mentoring programs are not the equivalent of religious

318 Id.
320 See Martinez, 130 S. Ct. at 2990.
321 See id.
322 Badger Catholic, 620 F.3d at 785 (Williams, J., dissenting).
323 See id. at 777–78 (majority opinion).
324 See id. at 778–79.
326 Id.
327 See Bronx Household of Faith v. Bd. of Educ. of N.Y., 492 F.3d 89, 102 (2d Cir. 2007) (Calabresi, J., concurring).
mentoring because the latter incorporates a specific level of worship and prayer outside the scope of the forum’s purpose.\footnote{Badger Catholic, Inc. v. Walsh, 620 F.3d 775, 783 (7th Cir. 2010) (Williams, J., dissenting); see Bronx Household of Faith, 492 F.3d at 102 (Calabresi, J., concurring).}

Finally, the court ignored the academic deference that it had previously exercised and the well-respected notion that the State can preserve property under its control so long as the self-created barriers are reasonable and viewpoint-neutral.\footnote{See Christian Legal Soc’y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez, 130 S. Ct. 2971, 2983 (2010).} With scarce resources available, the University is allowed to decide which projects and conduct it wishes to fund.\footnote{Martinez, 130 S. Ct. at 2998; see also Badger Catholic, 620 F.3d at 786–87 (7th Cir. 2010) (Williams, J., dissenting).} It must merely block access to the limited forum reasonably and without regard to viewpoint.\footnote{See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 46 (1983); Widmar v. Vincent, 454 U.S. 263, 270 (1981).} The University is allowed to make hard decisions about its funding.\footnote{See Martinez, 130 S. Ct. at 2998; see also Badger Catholic, 620 F.3d at 786–87 (7th Cir. 2010) (Williams, J., dissenting).} As such, the Seventh Circuit’s decision in \textit{Badger Catholic} was wrong.\footnote{See id.}

\textbf{CONCLUSION}

The Court of Appeals for the Seventh Circuit had the chance to protect the separation of church and state in \textit{Badger Catholic v. Walsh}, but instead misapplied the neutrality test and created further ambiguity. Perhaps because the court misunderstood the facts of the case or misinterpreted precedent, the University of Wisconsin is unnecessarily required to fund religious activity that it never aimed to. Rather than creating a more level playing field for participation by all student organizations, the court mishandled \textit{Badger Catholic v. Walsh} and disregarded the high level of separation that the First Amendment demands. Moreover, by equating secular tasks with quintessential religious actions, the decision partakes in blanket assumptions about
religious activity. Rather than clarifying the discussion of religious funding in public education, the court’s decision merely adds to the serpentine wall of separation.
CONCLUDE TO EXCLUDE: THE EXCLUSIONARY RULE’S ROLE IN CIVIL FORFEITURE PROCEEDINGS

DANIEL W. KAMINSKI

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INTRODUCTION

Suppose that while you are travelling under suspicious circumstances, the police stop and question you. Because you were not expecting this, you exhibit a nervous demeanor that provides the officers with reasonable suspicion, and they detain your luggage. The officers do not have probable cause to search your bag, but they do so anyway, only to discover that you are carrying $100,000 in cash. Although the search clearly violates the Fourth Amendment,1 certain jurisdictions would permit the government to initiate a forfeiture proceeding on the illegally seized currency. Some of these jurisdictions, however, would not permit you to use the exclusionary rule in this civil forfeiture proceeding.2

* J.D. candidate, May 2012, Chicago-Kent College of Law, Illinois Institute of Technology; B.A., Political Science and Legal Studies, 2008, University of Wisconsin–Madison. I would like to thank Louis Hu for his invaluable help and encouragement.


The Framers’ purpose in drafting the Fourth Amendment was to provide American citizens with an indefeasible right against unreasonable search or seizure. The judicially created exclusionary rule seeks to protect that right by excluding from trial any evidence obtained through an unconstitutional search or seizure. Typically, the exclusionary rule applies only in criminal trials.

However, the United States Supreme Court has held that, in determining whether to invoke the exclusionary rule outside of the criminal trial context, courts must balance the benefits of deterrence against the costs to society. Under the Supreme Court’s approach, the benefits of deterrence may be low if the officers conducted the search for criminal prosecution purposes. In that situation the exclusion of evidence in a civil proceeding would be unlikely to provide significant additional deterrence, since application of the exclusionary rule in the criminal trial has already served to deter the officers from committing future Fourth Amendment violations. Moreover, the cost to society of excluding probative evidence is relatively high. As a result of these relative costs and benefits, certain jurisdictions have declined to apply the exclusionary rule to civil forfeiture proceedings. Courts’ refusal to apply the exclusionary rule outside the criminal trial context appears to weaken the fundamental right against unreasonable search and seizure.

This Note will examine the evolution of the exclusionary rule and its application to proceedings outside of the criminal trial context.

5 Mapp, 367 U.S. at 655.
7 See id.
9 See, e.g., $241,600 U.S. Currency, 67 Cal. App. 4th at 1113.
First, the Note will focus on the Supreme Court’s development of the exclusionary rule as a sanction used in criminal trials to deter law enforcement officers from violating citizens’ Fourth Amendment rights.11 Second, the Note will examine the Supreme Court’s application of the exclusionary rule to quasi-criminal forfeiture proceedings in One 1958 Plymouth Sedan v. Pennsylvania.12 Third, the Note will examine the Supreme Court’s reluctance to extend the exclusionary rule beyond the criminal trial context, focusing on the cost-benefit analysis test applied by the Court.13 Fourth, the Note will examine the confusion that has developed in state and lower federal courts with respect to Plymouth14 and the subsequent cases in which the Court applied the cost-benefit analysis and failed to invoke the exclusionary rule outside of the criminal trial context.15 Fifth, the Note will examine United States v. Marrocco,16 a recent Seventh Circuit case that contained a pertinent concurring opinion by Judge Easterbrook relating to the application of the exclusionary rule in civil forfeiture proceedings.17 Finally, the Note will investigate the questioned validity of the Plymouth holding and its impact on modern forfeiture proceedings. Because the viability of Plymouth is in question, the Court’s cost-benefit analysis could determine whether to invoke the exclusionary rule in the context of civil forfeiture. While

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11 See Weeks, 232 U.S. at 398.
13 See Calandra, 414 U.S. at 349.
14 See United States v. $191,910 in U.S. Currency, 16 F.3d 1051, 1063 (9th Cir. 1994) superseded in part by statute, Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202. (holding that the Fourth Amendment exclusionary rule is applied to forfeiture actions based on the precedent established in Plymouth); People v. $241,600 U.S. Currency, 67 Cal. App. 4th 1100, 1113 (Cal. Ct. App. 1998) (distinguishing the Plymouth precedent and holding that the Fourth Amendment exclusionary rule does not apply to civil forfeiture proceedings using the Court’s cost-benefit analysis).
15 See Scott, 524 U.S. at 369; Lopez-Mendoza, 468 U.S. at 1050; Janis, 428 U.S. at 460; Calandra, 414 U.S. at 354.
16 578 F.3d 627, 630 (7th Cir. 2009).
17 Id. at 642 (Easterbrook, J., concurring).
the cost-benefit test has never applied the exclusionary rule beyond the
criminal trial context, the changing objectives of law enforcement
officers, and the changing statutory structure of civil forfeiture
statutes, suggests that the cost-benefit analysis should weigh in favor
of applying the exclusionary rule in civil forfeiture proceedings.

I. FRAMING THE ISSUE: THE EVOLUTION OF THE EXCLUSIONARY
RULE IN CRIMINAL PROCEEDINGS

The Fourth Amendment to the United States Constitution
provides:

The right of the people to be secure in their persons, houses,
papers, and effects, against unreasonable searches and
seizures, shall not be violated, and no Warrants shall issue,
but upon probable cause, supported by Oath or affirmation,
and particularly describing the place to be searched, and the
persons or things to be seized.18

The premise underlying the Framers’ drafting of the Fourth
Amendment was that American citizens have indefeasible rights to
personal security, personal liberty, and private property, which may
only be restricted after the state has probable cause to suspect that a
citizen has committed a crime.19 For years, however, the Court
searched for a remedy for American citizens who were subjected to
unreasonable searches or seizures.20 In 1914, the Supreme Court
developed the judicial remedy known as the exclusionary rule to better
safeguard Americans’ Fourth Amendment rights.21 In Weeks v. United
States, a United States Marshal entered Fremont Weeks’s home

18 U.S. CONST. amend. IV.
19 Boyd v. United States, 116 U.S. 616, 630 (1886), overruled on other
21 Weeks v. United States, 232 U.S. 383, 398 (1914), overruled on other
without a warrant and seized books, letters, money, papers, and notes, along with other property.22 Weeks petitioned the court for the return of his property, contending that the warrantless search of his home violated the Fourth Amendment.23 The district court denied Weeks’s petition and admitted the illegally seized property into evidence.24 Weeks appealed, and the Supreme Court granted certiorari.25 On appeal, the Supreme Court concluded:

If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the [Fourth] Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.26

While “the efforts of the courts and their officials to bring the guilty to punishment [was] praiseworthy,” such efforts “are not to be aided by the sacrifice of those great principles established b[y] years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.”27 The Court also referenced its decision in Adams v. New York, stating that “the [Fourth] Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law.”28 By admitting illegally seized property into evidence, the Court “would . . . affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against . . . unauthorized action.”29 Because

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22 Id. at 387.
23 Id. at 388.
24 Id.
25 Id. at 389.
26 Id. at 393.
27 Id.
28 Id. at 394 (citing Adams v. New York, 192 U.S. 585, 598 (1904)).
29 Id.
the United States Marshal’s warrantless search was a direct violation of the Fourth Amendment, the district court erred by admitting the property into evidence.\(^{30}\)

Although the Supreme Court developed the exclusionary rule in *Weeks* to serve as a judicial safeguard of citizens’ Fourth Amendment rights, there was a limitation—the exclusionary rule was only applicable against the federal government and its agencies.\(^{31}\)

In 1961, the Supreme Court overturned *Weeks* in part, when it held in *Mapp v. Ohio* that the exclusionary rule also applied to state criminal trials.\(^{32}\) The Court concluded that, because the Fourth Amendment’s right of privacy applied to the states through the Due Process Clause of the Fourteenth Amendment, the same sanction of exclusion used against the Federal Government also should apply to the states.\(^{33}\) The Court stated that “[t]he ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest.”\(^{34}\) The Court has never hesitated to enforce against the states the rights of freedom of speech and the press or the right to not be convicted by use of a coerced confession; why then would it hesitate to apply the right to be protected against unconstitutional search and seizure?\(^{35}\) Should the Court allow the state to admit evidence that was unlawfully seized, it would in effect encourage disobedience of the Federal Constitution, which states are bound to uphold.\(^{36}\) Thus, the Supreme Court expanded the exclusionary rule to apply to both state and federal criminal prosecutions.\(^{37}\)

\(^{30}\) *Id.* at 398.

\(^{31}\) *Id.*


\(^{33}\) *Id.* at 655.

\(^{34}\) *Id.* at 660.

\(^{35}\) *Id.* at 656.

\(^{36}\) *Id.* at 657.

\(^{37}\) *Id.* at 660; see also *Weeks v. United States*, 232 U.S. 383, 398 (1914).
II. THE EXCLUSIONARY RULE APPLIED TO QUASI-CRIMINAL FORFEITURE PROCEEDINGS

Following its decision in *Weeks*, the Court had never applied the exclusionary rule outside the criminal trial context. In *Plymouth*, the Supreme Court granted certiorari to determine whether the exclusionary rule enunciated in *Weeks* and extended to the states in *Mapp* was applicable to civil forfeiture proceedings. In *Plymouth*, two law enforcement officers observed that a car was weighed down in the rear, and subsequently pulled over the vehicle. The officers identified themselves, questioned the owner, George McGonigle, and searched the car, which revealed thirty-one cases of liquor that failed to bear Pennsylvania tax seals. The officers seized the liquor and car and arrested McGonigle; however, the officers did not have a search or arrest warrant. Pennsylvania filed for forfeiture of the automobile pursuant to state statute. At the hearing, McGonigle sought dismissal of the forfeiture petition on the ground that the forfeiture of the vehicle depended on admission of evidence obtained in violation of the Fourth Amendment. The Pennsylvania trial court dismissed the forfeiture petition.

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38 See *Weeks*, 232 U.S. at 398.
39 See id.
40 See 367 U.S. at 660.
42 Id. at 694.
43 Id.
44 Id.
45 Id.; see 47 PA. STAT. ANN. § 6-601 (West 1964) (“No property rights shall exist in any liquor, alcohol or malt or brewed beverage illegally manufactured or possessed, or in any still, equipment, material, utensil, vehicle, boat, vessel, animals or aircraft used in the illegal manufacture or illegal transportation of liquor, alcohol or malt or brewed beverages, and the same shall be deemed contraband and proceedings for its forfeiture to the Commonwealth may . . . be instituted . . .”).
46 *Plymouth*, 380 U.S. at 694–95.
47 Id. at 695.
On appeal, the intermediate appellate court reversed and directed that the automobile be forfeited. The Pennsylvania Supreme Court, affirming the order of the appellate court, concluded that “the exclusionary rule . . . applies only to criminal prosecutions and is not applicable in a forfeiture proceeding which the Pennsylvania court deemed civil in nature.”

The United States Supreme Court granted certiorari to determine whether the exclusionary rule applied to the forfeiture proceeding. Initially, the Court examined its decision in Boyd v. United States, which involved a forfeiture proceeding by the United States to forfeit thirty-five cases of plate glass due to the offender’s failure to pay a customs duty. The Court quoted the Boyd opinion, which stated “that proceedings instituted for the purpose of declaring the forfeiture of a man’s property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal.” The Court in Boyd concluded that, because the statute required not only a fine or imprisonment for the failure to pay the customs duty, but also that such merchandise shall be forfeited, the proceeding was actually criminal in nature. Believing Boyd to be dispositive of the issue in Plymouth, the Court concluded that the exclusionary rule applied because the Pennsylvania forfeiture proceeding was “quasi-criminal” in nature, since the forfeiture of the vehicle was necessitated by a criminal conviction. While the Pennsylvania proceeding was technically a civil forfeiture proceeding, the Court concluded that in substance and effect, it was a criminal proceeding since the forfeiture statute that authorized the proceeding affixed penalties to criminal acts. Thus, “[i]t would be anomalous . . . to hold that in the criminal

48 Id.
49 Id.
50 Id. at 696.
51 Id. at 696–98 (citing Boyd v. United States, 116 U.S. 616, 633–34 (1886)).
52 Id. at 697 (quoting Boyd, 116 U.S. at 634).
54 Plymouth, 380 U.S. at 700.
55 Id.
proceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, requiring the determination that the criminal law had been violated, the same evidence would be admissible.56 The Court held that the exclusionary rule applied to the quasi-criminal forfeiture proceeding.57

An important caveat, however, is that the Court’s decision was based on the character of the particular forfeiture proceeding at issue, and thus, a distinction may be made when a civil forfeiture proceeding is not necessitated by a criminal conviction.58

III. THE EVOLUTION OF THE SUPREME COURT’S COST-BENEFIT ANALYSIS TEST AND ITS IMPACT ON THE EXTENSION OF THE EXCLUSIONARY RULE BEYOND CRIMINAL PROCEEDINGS

The primary purpose behind the judicially created exclusionary rule is to safeguard American citizens’ Fourth Amendment rights through deterrence of future unlawful police conduct.59 Since Plymouth, the Supreme Court has refused, in a number of cases, to extend the exclusionary rule beyond the criminal trial context.60 The cost-benefit analysis utilized by the Supreme Court has never applied the exclusionary rule outside the context of criminal prosecution because the substantial costs to society of excluding concededly relevant evidence has always outweighed the deterrence benefits achieved through application of the rule.61

56 Id. at 701.
57 Id. at 702.
58 See id. at 696.
61 See id. at 448.
A. The Court’s Cost-Benefit Analysis Applied to Grand Jury Proceedings

Following its decision in Plymouth, the Court developed a cost-benefit analysis test in order to determine whether the application of the exclusionary rule in situations outside the criminal trial context would achieve the rule’s intended purpose, deterrence.\(^{62}\) In United States v. Calandra, the Court examined whether a witness summoned to testify before a grand jury could answer questions based on evidence obtained from an unlawful search and seizure.\(^{63}\) Federal agents obtained a search warrant, which authorized a search of John Calandra’s place of business in connection with suspected illegal gambling operations.\(^{64}\) The officers failed to uncover any gambling paraphernalia; however, the officers discovered a card that indicated that Calandra had received periodic payments from Dr. Walter Loveland.\(^{65}\) The officers, who were aware that the U.S. Attorney’s Office was investigating the possibility that Dr. Loveland had been a victim of loan-sharking, seized the letter along with various other items, which included books and records of the company.\(^{66}\) Following the seizure, the state of Ohio convened a special grand jury to investigate the potential loan-sharking activities, which were a violation of federal law.\(^{67}\) The grand jury subpoenaed Calandra to determine whether the seized evidence related to loan-sharking.\(^{68}\) Calandra moved to suppress the evidence because the search exceeded the scope of the warrant.\(^{69}\) The United States District Court for the Northern District of Ohio granted Calandra’s motion to suppress and ruled that he need not answer any questions related to the seized evidence.

\(^{62}\) Calandra, 414 U.S. at 349.
\(^{63}\) Id. at 339.
\(^{64}\) Id. at 340.
\(^{65}\) Id.
\(^{66}\) Id. at 340–41.
\(^{67}\) Id. at 341.
\(^{68}\) Id.
\(^{69}\) Id.
evidence. The United States Court of Appeals for the Sixth Circuit, affirming the decision, held that “the exclusionary rule may be invoked by a witness before the grand jury to bar questioning based on evidence obtained in an unlawful search and seizure.”

The Supreme Court granted certiorari. Initially, the Court stated that the purpose of the exclusionary rule “is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.” In deciding whether to apply the exclusionary rule to grand jury proceedings, the Court “weigh[ed] the potential injury to the historic role and functions of the grand jury against the potential benefits of the rule as applied in this context.”

First, the Court determined that the application of the exclusionary rule would interfere with grand jury proceedings. “Suppression hearings would halt the orderly process of an investigation,” which would “frustrate the public’s interest in the fair and expeditious administration of the criminal laws.”

Next, the Court concluded that the deterrence benefits of applying the exclusionary rule to grand jury proceedings would be fairly low. Extending the exclusionary rule to grand jury proceedings “would deter only police investigation consciously directed toward the discovery of evidence solely for use in a grand jury investigation.” The Court stated that “[w]hatever deterrence of police misconduct may result from the exclusion of illegally seized evidence from criminal trials, it is unrealistic to assume that application of the rule to

70 Id.
71 Id. at 342.
72 Id.
73 Id. at 347.
74 Id. at 349.
75 Id.
76 Id.
77 Id. at 350.
78 Id. at 351.
79 Id.
Applying the exclusionary rule to grand jury proceedings would provide a minimal advancement of deterrence of police misconduct because the officers are “consciously directed” toward discovering evidence admissible in criminal trials. Thus, the social costs to the grand jury proceeding “outweigh[ed] the benefit of any possible incremental deterrent effect” achieved through its application. As a result, the Court declined to extend the exclusionary rule to grand jury proceedings.

B. The Court’s Cost-Benefit Analysis Applied to Civil Tax Proceedings

Using the cost-benefit approach adopted in *Calandra*, the Supreme Court also declined to extend the exclusionary rule to civil tax proceedings. In *United States v. Janis*, the Court examined whether evidence illegally seized by a state criminal law enforcement official was admissible in a civil tax proceeding brought by the United States. The Los Angeles police had obtained a defective search warrant and, when executing the warrant, had uncovered evidence of Max Janis’s book-making activity, including cash. Based on the evidence recovered, the police contacted the Internal Revenue Service (IRS). The IRS determined that Max Janis had not filed a federal wagering tax return, which was required for book-making activities. Upon examination of the evidence, the IRS made an assessment.

80 *Id.*
81 *Id.* at 351–52.
82 *Id.* at 354.
83 *Id.*
85 *Id.*
86 *Id.* at 436.
87 *Id.*
88 *Id.* at 437.
against Max Janis in excess of $89,026.00. Based on the assessment, the IRS brought a separate civil tax proceeding in federal district court, seeking to levy the cash that the police had seized. After Janis moved to suppress the evidence seized and to quash the assessment, the district court granted the motion because the evidence relied upon by the IRS was obtained through the defective search warrant and, thus, the assessment was based on illegally obtained evidence in violation of the Fourth Amendment.

On appeal, the Court first noted the deterrent sanction imposed by the exclusionary rule, which had already “punished” the Los Angeles police by barring use of the evidence in state criminal court. The Court also reasoned that the illegally obtained evidence would be inadmissible in federal criminal court, which meant that the “entire criminal enforcement process” had been frustrated. Since the federal civil tax proceeding fell outside the “zone of primary interest” of the Los Angeles police, the exclusion of the evidence in a federal civil proceeding was “unlikely to provide significant, much less substantial, additional deterrence” because the use of the exclusionary rule in the criminal trials had already deterred the Los Angeles police from conducting illegal searches.

Second, the Court noted the substantial cost imposed on society by excluding “what concededly is relevant evidence.” In declining to extend the exclusionary rule to civil tax proceedings, the Court concluded that the “additional marginal deterrence” gained by applying the exclusionary rule to the federal civil tax proceeding

89 Id.
90 Id.
91 Id. at 439 (internal quotation marks omitted).
92 Id. at 448.
93 Id.
94 Id. at 458.
95 Id.
96 Id. at 449.
“surely does not outweigh the cost to society of extending the rule to that situation.”97

C. The Court’s Cost-Benefit Analysis Applied to Civil Deportation Proceedings

Following Janis, the Supreme Court next declined to extend the exclusionary rule to civil deportation proceedings.98 In INS v. Lopez-Mendoza, Immigration and Naturalization Service (INS) agents arrested Lopez-Mendoza at his place of work without securing either a search warrant to search the premises or an arrest warrant to place the occupants into custody.99 Following the arrest, the INS instituted deportation proceedings against Lopez-Mendoza.100 In a hearing held before an immigration judge, Lopez-Mendoza moved to terminate the deportation proceeding on grounds that his arrest had been illegal.101 The immigration judge concluded that Lopez-Mendoza was deportable because the legality of the arrest was irrelevant to the deportation proceeding.102 Lopez-Mendoza appealed, and “[t]he Court of Appeals vacated the order of deportation and remanded for a determination whether Lopez-Mendoza’s Fourth Amendment rights had been violated when he was arrested.”103

On appeal, the Supreme Court applied the same cost-benefit analysis it had used in Janis.104 Initially, the Court conceded that the exclusionary rule’s deterrence value would likely be higher here than in Janis because the INS agents who arrested Lopez-Mendoza were the same agents who brought the deportation proceeding against

97 Id. at 453–54.
99 Id. at 1035.
100 Id.
101 Id.
102 Id. at 1035–36.
103 Id. at 1036.
104 Id. at 1042; see also United States v. Janis, 428 U.S. 433, 453–54 (1976).
him. However, the Court pointed to three factors that reduced the exclusionary rule’s deterrence value in civil deportation proceedings. First, the Court noted that deportation was still possible regardless of whether the arrest was illegal, as deportation was supported by evidence that was derived independently from the arrest. Second, the Court pointed out that INS agents arrested almost 500 illegal aliens per year; however, over 97.5% agree to voluntary deportation without a formal hearing. Because of this, “the arresting officer is most unlikely to shape his conduct in anticipation of the exclusion of evidence at a formal deportation hearing.” Third, “the INS ha[d] its own comprehensive scheme for deterring Fourth Amendment violations by its officers.” The INS’s scheme included regulations that “require[d] that no one be detained without reasonable suspicion of illegal alienage, and that no one be arrested unless there is an admission of illegal alienage or other strong evidence thereof.” Additionally, new INS officers “receive[d] instruction and examination in Fourth Amendment law,” and the INS punished any immigration officer who committed a Fourth Amendment violation. The Court concluded that the “INS’s attention to Fourth Amendment interests [could] not guarantee that constitutional violations w[ould] not occur, but it d[id] reduce the likely deterrent value of the exclusionary rule.”

In weighing the costs, the Court concluded that the social costs of applying the exclusionary rule in the context of deportation proceedings would be very high, since the release from custody would immediately permit the illegal alien to continue his unlawful presence

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105 Lopez-Mendoza, 468 U.S. at 1042.
106 Id. at 1043–45.
107 Id. at 1043.
108 Id. at 1044.
109 Id.
110 Id.
111 Id. at 1045.
112 Id.
113 Id.
in the United States.¹¹⁴ In balancing the benefits of deterrence against the costs to society, the Court declined to apply the exclusionary rule in civil deportation hearings based on the high social costs of allowing an immigrant to remain illegally inside the United States.¹¹⁵

D. The Court’s Cost-Benefit Analysis Applied to Probation-Revocation Hearings

Following *Lopez-Mendoza*, the Court next declined to apply the exclusionary rule to probation revocation hearings.¹¹⁶ In *Pennsylvania Board of Probation and Parole v. Scott*, parole officers entered Scott’s residence—which was his mother’s home—without consent and seized five firearms, a compound bow, and three arrows.¹¹⁷ At the parole violation hearing, Scott challenged the introduction of the seized evidence as a violation of his Fourth Amendment rights.¹¹⁸ The Court concluded that the societal costs of excluding evidence “are particularly high in the context of parole revocation hearings”¹¹⁹ because “parolees . . . are more likely to commit future criminal offenses than are average citizens.”¹²⁰ Moreover, the deterrence value of excluding evidence illegally seized by officers “unaware that the subject of [the] search is a parolee” would be marginal because the use of the exclusionary rule in criminal trials already deterred these officers from conducting illegal searches.¹²¹ In that situation, an officer would be searching for evidence admissible at a criminal trial and, thus, would be deterred from obtaining evidence in violation of the Fourth Amendment, which would be inadmissible at trial.¹²²

¹¹⁴ *Id.* at 1047.
¹¹⁵ *Id.* at 1050.
¹¹⁷ *Id.* at 360.
¹¹⁸ *Id.*
¹¹⁹ *Id.* at 365.
¹²⁰ *Id.*
¹²¹ *Id.* at 367.
¹²² *Id.*
Additionally, the Court concluded, “even when the officer knows that the subject of his search is a parolee, the officer will be deterred from violating Fourth Amendment rights by the application of the exclusionary rule to criminal trials.” In balancing these interests, the Court declined to extend the exclusionary rule to parole violation hearings.

As indicated by the above cases, the Supreme Court has taken dramatic steps from its initial decisions in *Mapp*, *Weeks*, and *Plymouth*. Following those decisions, the Court has consistently applied a balancing test—weighing the benefits of deterrence against the costs to society—in deciding whether to invoke the exclusionary rule. In examining the benefits of deterrence, the Court has focused on the fact that officers are generally deterred from conducting illegal searches based on the application of the exclusionary rule in criminal trials. Thus, if the Court found that the officer or agency that conducted the search was consciously directed towards criminal prosecution, then the Court would conclude that the application of the exclusionary rule would lead to only a marginal increase in deterrence. Moreover, the Court has focused heavily on the costs to society in both excluding probative evidence from subsequent proceedings and the exclusionary rule’s impact on the administrative proceeding. In balancing the costs and benefits, the Court’s undivided trend has been to decline application of the exclusionary rule outside the criminal trial context.

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123 *Id.* at 368.
124 *Id.* at 369.
126 *Janis*, 428 U.S. at 448.
127 *See id.* at 458.
129 *See Scott*, 524 U.S. at 369; *Lopez-Mendoza*, 468 U.S. at 1050; *Janis*, 428 U.S. at 460; *Calandra*, 414 U.S. at 354.

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IV. THE DIVIDED DECISIONS IN THE LOWER FEDERAL AND STATE COURTS

The Supreme Court decisions since Mapp, which have consistently declined to extend the exclusionary rule beyond the criminal trial context, stand in stark contrast to the Court’s decision in Plymouth and have left state and lower federal courts questioning whether to apply the exclusionary rule in civil forfeiture proceedings. At the crux of this confusion is the Plymouth Court’s finding that civil forfeiture proceedings are “quasi-criminal” in nature because, like a criminal proceeding, the object is to penalize for the commission of an offense against the law.

Because the Supreme Court’s decision in Plymouth stands in stark contrast to its decisions in Janis, Lopez-Mendoza, and Scott, lower state and federal courts have been given two options to determine whether to apply the exclusionary rule to civil forfeiture proceedings: (1) follow the precedent established in Plymouth; or (2) distinguish Plymouth, treat the forfeiture as a civil proceeding, and weigh the benefit of deterrence against the cost to society. As a result, lower courts have continued to provide inconsistent rulings in deciding whether the exclusionary rule is applicable to civil forfeiture proceedings.

A. The Ninth Circuit and its Reaffirmation of Plymouth

The United States Court of Appeals for the Ninth Circuit is one of the lower courts that, following Plymouth, have held that the

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130 See Scott, 524 U.S. at 369; Lopez-Mendoza, 468 U.S. at 1050; Janis, 428 U.S. at 460; Calandra, 414 U.S. at 354.
exclusionary rule applies in civil forfeiture proceedings. For example, in United States v. $191,910 in U.S. Currency, officers became suspicious of Bruce Morgan after he placed his bags through an airport security x-ray machine, and when searched, the officers discovered the bags contained a large sum of money. The district court held that the search was illegal and granted Morgan’s motion for summary judgment. The Ninth Circuit affirmed the decision to apply the exclusionary rule to the civil forfeiture proceeding.

B. California State Court: The Cost-Benefit Analysis Applied to Civil Forfeiture Proceedings

In contrast with the Ninth Circuit, California is one state that, following Plymouth, has held that the exclusionary rule is not applicable to civil forfeiture proceedings. In People v. $241,600 in U.S. Currency, the California Court of Appeals distinguished its case from Plymouth, stating that, “unlike in Plymouth, the forfeiture action is an in rem civil proceeding which is not based on a provision requiring the claimant to be found guilty of a criminal offense nor imposing imprisonment as a penalty for a criminal act.” After concluding that the case was a purely civil action, the California court applied the Janis test to determine whether the deterrence value of applying the exclusionary rule to a civil forfeiture proceeding

133 See $191,910 in U.S. Currency, 16 F.3d at 1063. The Eleventh and Eighth Circuits have also held this way. United States v. $291,828.00 in U.S. Currency, 536 F.3d 1234, 1237 (11th Cir. 2008) (holding that the Fourth Amendment exclusionary rule applied to forfeiture actions); United States v. $7,850.00 in U.S. Currency, 7 F.3d 1355, 1357 (8th Cir. 1993) (holding that because forfeiture proceedings are quasi-criminal in character, the exclusionary rule applies, barring evidence obtained in violation of the Fourth Amendment).
134 16 F.3d at 1054.
135 Id. at 1056–57.
136 Id. at 1054.
138 Id. at 1111–12.
outweighed the societal costs. In concluding that the exclusionary rule did not apply to civil forfeiture proceedings, the court stated that “[t]he likelihood of achieving additional deterrence by excluding illegally seized evidence in a civil forfeiture proceeding is not sufficient to outweigh the societal costs imposed by the exclusion.”

The court reinforced its decision by stating that “[t]o date the United States Supreme Court has rejected application of the exclusionary rule to civil cases, and we decline to do so as well in this civil forfeiture case.”

V. THE SEVENTH CIRCUIT AND THE EXCLUSIONARY RULE IN CIVIL FORFEITURE PROCEEDINGS

To date, the United States Court of Appeals for the Seventh Circuit has remained silent on whether the exclusionary rule would be applied in civil forfeiture proceedings; however, in a recent concurring opinion, Judge Easterbrook provided insight into how the court may decide the issue. In United States v. Marrocco, the Seventh Circuit was presented with a civil forfeiture case that developed following an illegal search of luggage. An officer for the Amtrak police had searched a computer database and discovered that Vincent Fallon had paid cash for a one-way ticket less than seventy-two hours before departure, which fit the profile of a drug courier. Upon observing Fallon enter his compartment, two officers approached and questioned him as to whether he was carrying any weapons, drugs, or large sums of money. During the officers’ questioning, Fallon exhibited a nervous demeanor, which provided the officers with reasonable
suspicion to detain his luggage. While Fallon denied the officers’ request to search the luggage, he told them that the luggage contained $50,000. The officers brought the luggage to the Amtrak police office, used a pocketknife to open the luggage, and uncovered numerous bundles of money. Subsequent to the search, the officers summoned a canine unit to conduct a sniff of the briefcase. The canine unit alerted to the briefcase, which served as an indication that it contained drugs or money contaminated with drugs. The officers retained the briefcase and the funds, and the government subsequently filed a complaint in federal district court seeking forfeiture of the funds under the Controlled Substances Act. Prior to trial, Fallon filed a motion to suppress the seizure of the funds, and the district court granted his motion.

On appeal, the Seventh Circuit reversed the decision of the district court. The court held that, under the inevitable discovery doctrine, it was improper to suppress the funds. The court noted that it is proper to apply the inevitable discovery doctrine as long as the officers show that they “ultimately or inevitably would have . . . discovered [the challenged evidence] by lawful means.” The court went on to state that, to satisfy its burden under the inevitable discovery doctrine, the government must first show that it would have obtained “an independent, legal justification for conducting a search that would have led to the discovery of the evidence.” Second, “the government must demonstrate that it would have conducted a lawful

\[146 Id. at 630.\]
\[147 Id.\]
\[148 Id.\]
\[149 Id.\]
\[150 Id.\]
\[152 Marrocco, 578 F.3d at 630.\]
\[153 Id. at 642.\]
\[154 Id.\]
\[155 Id. at 637 (quoting Nix v. Williams, 467 U.S. 431, 444 (1984)).\]
\[156 Id. at 637–38.\]
search absent the challenged conduct." The court concluded that the officers met the first burden because the result of the dog-sniff test, which would have supported the issuance of a warrant, provided an independent legal justification for searching the briefcase. Because the officers already knew that the briefcase contained money, the court concluded that the “officers detained the briefcase in order to conduct an investigation that would establish a link between the funds and illegal activity.” The officers also met the second requirement because the “investigating officers undoubtedly would have followed routine, established steps resulting in the issuance of a warrant.”

Based on the government’s satisfaction of the inevitable discovery doctrine, the Seventh Circuit overturned the district court’s ruling to suppress the illegally seized funds and remanded the case to determine whether the funds were subject to forfeiture.

While he agreed with the majority’s application of the inevitable discovery doctrine, Judge Easterbrook suggested in a concurring opinion that the parties failed to argue whether the exclusionary rule applied in civil forfeiture cases, which would have superseded the doctrine of inevitable discovery. In a detailed analysis relating to the exclusionary rule in civil forfeiture proceedings, Judge Easterbrook stated:

Suppressing the res in a civil proceeding, even though the property is subject to forfeiture, would be like dismissing the indictment in a criminal proceeding whenever the defendant was arrested without probable cause. The Supreme Court has been unwilling to use the exclusionary rule to “suppress” the

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157 Id. at 638.
158 Id.
159 Id. at 639.
160 Id.
161 Id. at 642.
162 Id. (Easterbrook, J., concurring).
body of an improperly arrested defendant. Why then would it be sensible to suppress the res?\textsuperscript{163}

Judge Easterbrook also distinguished \textit{Marrocco} from \textit{Plymouth}, stating that “[a]lthough \textit{Plymouth} suppressed evidence in a forfeiture, \textit{Janis} stated that this was because that forfeiture was intended as a criminal punishment. The forfeiture in our case is civil. It is farther from a criminal prosecution than is a probation-revocation proceeding.”\textsuperscript{164} Judge Easterbrook’s reference to a probation-revocation proceeding suggested an attempt to align the Seventh Circuit’s analysis with the analysis used in \textit{Scott}.\textsuperscript{165} Based on this inference, it would appear that Judge Easterbrook would invoke the cost-benefit test used in \textit{Janis},\textsuperscript{166} which was applied in \textit{Scott},\textsuperscript{167} to determine whether the social costs of applying the exclusionary rule outweigh the benefits of deterring officers in the context of civil forfeiture proceedings.\textsuperscript{168} While the court did not decide the scope of this inquiry, it appears reasonable to suggest that the Seventh Circuit would apply the balancing test established in \textit{Calandra} to determine whether to apply the exclusionary rule to civil forfeiture proceedings.\textsuperscript{169}

\textsuperscript{163} \textit{Id.} (citations omitted).
\textsuperscript{164} \textit{Id.} (citations omitted).
\textsuperscript{165} \textit{See id.}
\textsuperscript{168} \textit{See Marrocco}, 578 F.3d at 642 (Easterbrook, J., concurring).
\textsuperscript{169} \textit{See id.} at 643.
VI. WITH THE VALIDITY OF PLYMOUTH IN QUESTION, WOULD THE SUPREME COURT’S COST-BENEFIT ANALYSIS BAR THE EXCLUSIONARY RULE IN CIVIL FORFEITURE PROCEEDINGS?

Since Plymouth, the Supreme Court has never applied the exclusionary rule to bar evidence outside the criminal trial context.\(^{170}\) While the Court has never directly overturned the holding in Plymouth, its decisions following Plymouth,\(^{171}\) coupled with the changing statutory construction of state and federal forfeiture statutes,\(^{172}\) suggests that Plymouth’s validity may be in jeopardy and that courts should analyze whether the exclusionary rule applies to civil forfeiture using the Court’s current cost-benefit analysis.\(^{173}\)

A. Plymouth’s Questioned Validity

Federal courts that have applied the exclusionary rule to civil forfeiture proceedings cite the precedent established in Plymouth to validate their rulings.\(^{174}\) The basis for their rulings revolves around the Plymouth Court’s classification of a civil forfeiture proceeding as “quasi-criminal.”\(^{175}\)

The evolution of state and federal forfeiture statutes has, however, created a clear distinction between the “quasi-criminal” forfeiture proceeding in Plymouth and current civil forfeiture proceedings.\(^{176}\) In


\(^{171}\) See id.


\(^{173}\) See Calandra, 414 U.S. at 354.

\(^{174}\) See e.g., United States v. $191,910 in U.S. Currency, 16 F.3d 1051, 1063 (9th Cir. 1994); United States v. $7,850.00 in U.S. Currency, 7 F.3d 1355, 1357 (8th Cir. 1993).

\(^{175}\) See $191,910 in U.S. Currency, 16 F.3d at 1063; 7,850.00 in U.S. Currency, 7 F.3d at 1356.

\(^{176}\) See 21 U.S.C. § 881 (e)(1)(A); 720 ILL. COMP. STAT. 646/85(g)(1)–(3).
Plymouth, McGonigle’s violation of a Pennsylvania liquor law that permitted a fine also subjected his car to forfeiture. There, the Court classified the forfeiture proceeding as “quasi-criminal” because the forfeiture was viewed as an additional penalty for McGonigle’s commission of a crime. Since the holding in Plymouth, forfeiture statutes have evolved. The federal forfeiture statute does not require the individual possessing the property to be charged with a criminal offense; rather, the government need only establish by a preponderance of the evidence that the property seized was used in the commission of a criminal offense. For example, in Marrocco, $7,850.00 in U.S. Currency, and $191,910.00 in U.S. Currency, the government initiated a forfeiture proceeding absent the claimant’s commission of a criminal offense. Because of the statutory differences in the forfeiture proceedings in Marrocco, $7,850.00 in U.S. Currency, and $191,910.00 in U.S. Currency, the court’s reliance on Plymouth as precedent is called into question when determining whether the exclusionary rule applies to civil forfeiture proceedings.

178 Id. at 700.
179 See 18 U.S.C § 981(c)(3) (2006) (stating that if the Government's theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense, the Government shall establish that there was a substantial connection between the property and the offense).
180 Id. § 981(c)(1) (stating that the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture).
181 United States v. Marrocco, 578 F.3d 627, 630 (7th Cir. 2009); United States v. $191,910 in U.S. Currency, 16 F.3d 1051, 1056 (9th Cir. 1994) (the agents instructed the claimant of the illegally seized funds that he was free to leave or accompany the bags); United States v. $7,850.00 in U.S. Currency, 7 F.3d 1355, 1356 (8th Cir. 1993).
182 See $191,910.00 in U.S. Currency, 16 F.3d at 1056; $7,850.00 in U.S. Currency, 7 F.3d at 1356.
183 See Plymouth, 380 U.S. at 702.
Furthermore, the Plymouth Court, while applying the exclusionary rule to forfeiture proceedings, narrowed its holding by stating that it applied only “to forfeiture proceedings such as the one involved here,” which indicated that the Court’s holding may be confined to the facts of that particular case.

Based on the statutory difference in forfeiture proceedings, and the notion that Plymouth is confined to its facts, the viability of Plymouth with respect to current forfeiture law is suspect, and a strong argument can be formed that the federal courts of appeals’ reliance on Plymouth is outdated and should be replaced with the Court’s current cost-benefit analysis.

B. The Supreme Court’s Cost-Benefit Analysis Could Bar the Exclusionary Rule in Civil Forfeiture Proceedings

Based on the analysis from cases that utilize the cost-benefit analysis, a strong argument can be formed that the Court’s cost-benefit approach could bar the exclusionary rule in civil forfeiture proceedings. Similar to the forfeiture proceedings in Marrocco, $7,850.00 in U.S. Currency, and $191,910.00 in U.S. Currency, the forfeiture proceeding in $241,600.00 in U.S. Currency did not necessitate the claimant being found guilty of a criminal act. Because the case was outside the scope of Plymouth, the California court followed the precedent established in Calandra and applied the cost-benefit analysis to the civil forfeiture proceeding.

184 Plymouth, 380 U.S. at 702.
186 See Plymouth, 380 U.S. at 702.
187 See Scott, 524 U.S. at 369; Lopez-Mendoza, 468 U.S. at 1050; Janis, 428 U.S. at 460; Calandra, 414 U.S. at 354.
189 Id. at 1113.
The California appellate court first weighed the deterrence value of extending the exclusionary rule to civil forfeiture proceedings. Because the exclusionary rule is already applied in criminal trials, the court concluded that the additional benefit of deterrence from excluding the evidence in the forfeiture proceeding would be marginal because the officers would be “punished” by the exclusion of evidence in state criminal trials. On the cost side, the court looked to the Janis holding, which stated that the societal costs are high due to the “inadmissibility of relevant, probative evidence.” In balancing both sides, the court declined to extend the exclusionary rule to civil forfeiture proceedings because the cost of excluding probative evidence outweighed any benefit of deterrence.

This conclusion is consistent with the Supreme Court’s holdings since Plymouth, which have declined to extend the exclusionary rule outside the criminal trial context, and are supported by the statutory distinction between current forfeiture statutes as compared with the statute relied upon in Plymouth. Thus, under one reading of Supreme Court precedent, application of the Court’s cost-benefit analysis could bar use of the exclusionary rule in civil forfeiture proceedings.

190 *Id.*
191 *Id.*
192 *Id.*
VII. REGARDLESS OF SUPREME COURT PRECEDENT, THE EXCLUSIONARY RULE SHOULD APPLY TO CIVIL FORFEITURE PROCEEDINGS

Since Plymouth, the Supreme Court’s resistance in applying the exclusionary rule to civil proceedings is well-noted. Additionally, modern forfeiture statutes, which have evolved since Plymouth, have drawn into question whether the conclusion that civil forfeiture is a “quasi-criminal” proceeding is still viable today. Moreover, the Plymouth Court noted that its decision was narrow and applied only to “the forfeiture proceeding such as the one involved [in that case].” Notwithstanding the viability of Plymouth or the precedent in subsequent Supreme Court decisions, this Note argues in the following sections that the exclusionary rule should be applied in civil forfeiture proceedings.

A. Quasi-Criminal Forfeiture Proceeding Versus Civil Forfeiture Proceeding: A Distinction that Should Not Make a Difference

Recall that the purpose of the exclusionary rule is to deter future unlawful police conduct. As evidenced above, the first step that a court would take in holding that the exclusionary rule does not extend to civil forfeiture proceedings is to distinguish Plymouth’s “quasi-criminal” classification. Logically, it would follow that, by distinguishing Plymouth, a court would analyze its case using the Supreme Court’s cost-benefit analysis, which has never applied the exclusionary rule to civil proceedings. Does the distinction between a “quasi-criminal” proceeding and a civil proceeding impact whether adequate deterrence would be achieved? In inferring that the exclusionary rule might be barred from civil forfeiture proceedings,

198 See, e.g., Janis, 428 U.S. at 460.
200 Plymouth, 380 U.S. at 702.
203 See Janis, 428 U.S. at 458.
Judge Easterbrook stated, “The forfeiture in our case is civil. It is farther from a criminal prosecution than is a probation-revocation proceeding.”204 Because the exclusionary rule was barred in probation-revocation proceedings, it would follow that the rule would be barred in a civil forfeiture hearing.205 The correlation between the “proceeding” and application of the exclusionary rule is furthered in the Janis holding, which stated, “[i]n the complex and turbulent history of the rule, the Court never has applied it to exclude evidence from a civil proceeding.”206 This idea was also prevalent in $241,600.00 in U.S. Currency, which first made sure to distinguish itself from Plymouth and qualify its proceeding as civil.207 However, a court that focuses on the nature of the proceeding when determining whether to invoke the exclusionary rule may overlook the primary goal of the exclusionary rule—i.e., deterrence.208

When examining the deterrence benefits in proceedings outside the criminal trial context the Supreme Court has focused on the fact that the exclusionary rule already bars evidence in criminal proceedings.209 Because the exclusionary rule is applied to criminal proceedings, courts have concluded that the additional benefit of deterrence from excluding the evidence outside the criminal trial context would be marginal because the officers are already “punished” by the exclusion of evidence in criminal proceedings.210 While this narrow approach fails to determine the actual motive of the officer who conducted the seizure, it also fails to adapt to overall changes in

204 United States v. Marrocco, 578 F.3d 627, 642 (7th Cir. 2009) (Easterbrook, J., concurring).
206 Janis, 428 U.S. at 447.
210 See e.g., $241,600 U.S. Currency, 67 Cal. App. 4th at 1113.
modern law enforcement objectives.\textsuperscript{211} There is no question that, when law enforcement officers act on the spur of the moment to seize evidence and stop crime, “[t]heir fear of evidentiary suppression in the criminal trial will have as much deterrent effect as can be expected”;\textsuperscript{212} however, in situations where the officer has first identified the person he is investigating, the deterrence value in that specific instance may increase.\textsuperscript{213}

In the changing climate of police investigations, the characterization of the proceeding becomes irrelevant, as a court’s overall goal should be to determine whether adequate deterrence has been achieved, which can be fulfilled only by evaluating the changing objectives of law enforcement agencies that conducted the illegal search.\textsuperscript{214}

\textbf{B. The Changing Objective of Law Enforcement Agencies}

Civil forfeiture has evolved as a main objective in modern law enforcement.\textsuperscript{215} The first step developed in the \textit{Calandra} Court’s cost-benefit test is to determine whether an officer who conducted the illegal search would be further deterred if the exclusionary rule were applied and the illegally seized evidence were suppressed.\textsuperscript{216} Traditionally, the Court has concluded that law enforcement officers are consciously directed towards criminal prosecution, which limits any additional deterrence that would be achieved through suppression of evidence in a subsequent proceeding.\textsuperscript{217} However, modern law

\begin{itemize}
  \item \textsuperscript{211} Crandley, \textit{supra} note 128, at 160.
  \item \textsuperscript{212} \textit{Scott}, 524 U.S. at 373 (Souter, J., dissenting).
  \item \textsuperscript{213} \textit{Id.}
  \item \textsuperscript{214} Tirado v. Comm’r of Internal Revenue, 689 F.2d 307, 310 (2d Cir. 1982) (holding that determining when the likelihood of substantial deterrence justifies excluding evidence requires some assessment of the motives of the officials who seized the challenged evidence).
  \item \textsuperscript{215} Crandley, \textit{supra} note 128, at 178.
  \item \textsuperscript{216} United States v. Calandra, 414 U.S. 338, 352 (1974).
\end{itemize}
enforcement objectives have evolved, which would result in substantial deterrence if the exclusionary rule were applied to civil forfeiture proceedings.\textsuperscript{218}

1. Modern legislation has provided a changing objective for law enforcement officers in forfeiture cases.

Congressional legislation, which for over twenty years “has expanded the reach of forfeiture laws,” provides evidence to support the changing focus of modern law enforcement agencies.\textsuperscript{219} In 1970, Congress passed 21 U.S.C. § 881, which authorized “the government to seize and forfeit drugs, drug manufacturing and storage equipment, and conveyances used to transport drugs.”\textsuperscript{220} The statute’s purpose was to inhibit the spread of drugs in a way that criminal prosecution could not—“by striking at its economic roots.”\textsuperscript{221} Criminal prosecution may send a drug dealer to jail; however, the operation of the criminal organization would most likely continue under the guidance of a subordinate who would likely take over his position.\textsuperscript{222} By attacking the means of production, forfeiture could stop the drug trafficking business for good.\textsuperscript{223} Since the initial statute was passed, Congress has consistently expanded the reach of the statute to include proceeds traceable to drug transactions.\textsuperscript{224} Congressional encouragement and advancement of the forfeiture statute provides evidence that modern law enforcement objectives have evolved to focus on civil forfeiture proceedings.\textsuperscript{225}

\textsuperscript{218} Crandley, \textit{supra} note 128, at 166–67.
\textsuperscript{219} \textit{Id.} at 166.
\textsuperscript{221} \textit{Id.}
\textsuperscript{222} \textit{Id.}
\textsuperscript{223} \textit{Id.}
\textsuperscript{224} \textit{Id.} at 45.
\textsuperscript{225} Crandley, \textit{supra} note 128, at 166.
2. Changing governmental policy reflects the changing objectives of modern law enforcement agencies.

The Asset Forfeiture Policy Manual of the United States Department of Justice also suggests that law enforcement objectives have shifted towards forfeiture. The guidelines produced by the Department of Justice for asset forfeiture illustrate the complex planning that is involved in forfeiture proceedings. Detailed in the 2007 “pre-seizure planning” section is the equity threshold necessary to pursue a forfeiture. The plan requires that the minimum amount of cash to be pursued exceed $5,000. Furthermore, vehicles must exceed $5,000 in value, vessels must exceed $10,000, and aircraft must exceed $10,000. Additionally, the plan notes that prior to the seizure, the agency must determine whether any liens or mortgages are involved in the property being pursued so that officers may determine whether the agency should go forward with the seizure. The specificity illustrated in the “pre-seizing” section illustrates the conscious direction of law enforcement officers in targeting forfeiture.

3. Civil proceedings provide law enforcement agencies with an easier and more efficient tool for crime prevention.

Civil forfeiture also provides law enforcement with an efficient and effective weapon in the war against drugs. The changing nature of criminal activity has led law enforcement agencies to use civil

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227 Id. at 5.
228 Id.
229 Id. at 6.
230 Id.
231 U.S. DEP’T OF JUSTICE, supra note 226, at 8.
232 See id.
233 Crandley, supra note 128, at 161.
remedies to achieve criminal justice goals. Generally, “civil remedies are easier to use, more efficient, and less costly than criminal prosecutions.”

Procedural advantages have also led civil forfeiture to become a popular remedy among law enforcement agencies. The two most important advantages stem from the legal fiction derived from forfeiture cases, that “the property is guilty and on trial.” First, forfeiture may be pursued even when a lack of sufficient evidence prevents a criminal conviction. While criminal prosecutions require an offender to be found guilty beyond a reasonable doubt, in a civil forfeiture proceeding, the government only needs to establish that the property is subject to forfeiture by a preponderance of the evidence in order to effectuate forfeiture. Second, forfeiture proceedings lack constitutional safeguards that are present in criminal prosecution hearings. A claimant, challenging the government’s seizure of property, is not afforded the right to an attorney, does not receive a presumption of innocence, and is unable to use the hearsay objection. These procedural advantages suggest that the objectives of law enforcement officers have been modified to attack drug trafficking in an easier and more efficient manner.

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235 Id. at 1345.
236 Blumenson & Nilsen, supra note 220, at 46.
237 Id. at 47.
238 Id.
239 See 18 U.S.C. § 981(c)(1) (2006) (stating that the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture).
240 Blumenson & Nilsen, supra note 220, at 46.
241 Id. at 48.
242 Cheh, supra note 234, at 1345.
4. The Financial Incentive of Forfeiture and Its Impact on Law Enforcement Objectives

Law enforcement’s evolving focus on civil forfeiture is also supported by the financial incentive achieved through its use.243 In 1984, Congress enacted two amendments that expanded the power of forfeiture.244 The bill’s first amendment provided federal law enforcement agencies the right to retain and use proceeds from asset forfeitures.245 The second amendment created the federal “equitable sharing” program, which provided state and local agencies the greater share of proceeds even when federal agents were involved in the arrest.246 The equitable sharing program included a “federal adoption” procedure, which allowed state agencies that turned seized assets over to the Justice Department for federal forfeiture to receive back up to 80% of the assets’ value.247 These amendments provide state and federal law enforcement officers with “a financial motivation to expand forfeiture.”248 This incentive also appears in state statutes, which allow law enforcement agencies to retain certain percentages of assets obtained.249 As a result, the financial incentive provided to law

243 Blumenson & Nilsen, supra note 220, at 50.
244 Id.
245 See 21 U.S.C. § 881(e)(1)(A) (2006) (stating that forfeited property may be transferred to any federal agency or to any state or local law enforcement agency that participated directly in the seizure or forfeiture of the property); see also Blumenson & Nilsen, supra note 220, at 50.
246 Blumenson & Nilsen, supra note 220, at 51.
247 Id.
248 Crandley, supra note 128, at 170.
249 See, e.g., 720 ILL. COMP. STAT. 646/85 (g)(1)–(3) (stating that 65% shall be distributed to the metropolitan enforcement group or local, municipal, county, or State law enforcement agency or agencies that conducted or participated in the investigation resulting in the forfeiture; 12.5% shall be distributed to the Office of the State’s Attorney of the county in which the prosecution resulting in the forfeiture was instituted; 12.5% shall be distributed to the Office of the State’s Attorney’s Appellate Prosecutor; and 10% shall be retained by the Department of State Police for expenses related to the administration and sale of seized and forfeited property).
enforcement agencies further suggests that modern policing objectives have evolved to focus on civil forfeiture proceedings.

5. Civil forfeiture statistics support the changing objective of law enforcement agencies.

Law enforcement’s increasing focus on forfeiture, which is shown by the Department of Justice’s policy manual, Congressional legislation, the efficiency of civil proceedings, and financial incentives, is supported in the Justice Department’s Asset Forfeiture Fund, which reported $1.4 billion forfeited during the 2009 fiscal year. In comparison, in 1994, the Justice Department took just under $550 million. These statistics suggest that, contrary to the assertion that criminal law enforcement officers are focused only on criminal prosecution, civil forfeiture has, in fact, evolved to be a significant mechanism to hinder illegal conduct. Moreover, unlike tax assessments, parole revocations, or deportation hearings, which clearly fall outside the conscious direction of law enforcement officers, the statistics above support the idea that civil forfeiture is “ingrained into mainstream police practices.”

250 See U.S. Dep’t of Justice, supra note 226, at 5.


252 See Blumenson & Nilsen, supra note 220, at 46; Cheh, supra note 234, at 1333; Crandley, supra note 128, at 161.


255 Crandley, supra note 128, at 162.

256 Id.


260 Crandley, supra note 128, at 159–60.
Department’s manual, the efficiency of civil forfeiture procedures, and financial incentives, all serve as indicators that modern law enforcement officers have expanded their objective focus to civil forfeiture.\textsuperscript{261}

\textbf{C. Deterrence and the Changing Law Enforcement Objective}

Modern legislation,\textsuperscript{262} agency policy,\textsuperscript{263} efficiency of civil proceedings,\textsuperscript{264} and greater financial incentive\textsuperscript{265} provide sufficient evidence to conclude that modern law enforcement officers have expanded their objective focus to forfeiture.\textsuperscript{266} Historically, criminal conviction was the primary objective in crime prevention; however, today, forfeiture enables law enforcement agencies to fight crime and raise money at the same time.\textsuperscript{267} Moreover, pre-seizure planning adds validity to the dissent in \textit{Scott}, which suggested that a law enforcement officer will have “first identified the person he has his eye on,” which in turn may increase the level of deterrence achieved through application of the exclusionary rule in civil forfeiture proceedings.\textsuperscript{268} Because of this, courts must adapt their perspective in analyzing the deterrence of officers, in order to gauge the significant benefit of deterrence that would be achieved by applying the exclusionary rule in civil forfeiture proceedings.\textsuperscript{269}

\textsuperscript{261} \textit{Id.} at 161; \textit{see also} Blumenson & Nilsen, \textit{supra} note 220, at 46; Cheh, \textit{supra} note 234, at 1333.


\textsuperscript{263} \textit{See} U.S. DEP’T OF JUSTICE, \textit{supra} note 226, at 5.

\textsuperscript{264} Blumenson & Nilsen, \textit{supra} note 220, at 46; Cheh, \textit{supra} note 234, at 1333; Crandley, \textit{supra} note 128, at 161.

\textsuperscript{265} Blumenson & Nilsen, \textit{supra} note 220, at 50.

\textsuperscript{266} Crandley, \textit{supra} note 128, at 160.

\textsuperscript{267} Blumenson & Nilsen, \textit{supra} note 220, at 55.


\textsuperscript{269} Crandley, \textit{supra} note 128, at 175.

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D. Societal Costs in Applying the Exclusionary Rule to Civil Forfeiture

The societal costs are low in the context of civil forfeiture. The second step in the Calandra analysis is to determine the societal costs of applying the exclusionary rule to civil forfeiture proceedings. Evidence that could be linked to criminal activity “concededly is relevant evidence,” the exclusion of which would impose a significant cost to society. However, the procedural advantages related to civil forfeiture help to alleviate these costs. First, notwithstanding the exclusion of illegally obtained evidence, the government may establish underlying criminal activity that would lead to forfeiture by introducing additional evidence from an independent source, untainted by the illegal search. Additionally, the government may introduce evidence obtained illegally as long as it can illustrate that the inevitable discovery doctrine would apply. Procedural advantages also diminish the costs of excluding the relevant evidence. The government’s burden of proof, which is beyond a reasonable doubt in criminal trials, is lowered to only a preponderance of the evidence in a forfeiture proceeding. Furthermore, constitutional safeguards that are present in criminal trials are absent from civil forfeiture.

272 Crandley, supra note 128, at 176.
273 United States v. Price, 558 F.3d 270, 281 (3d Cir. 2009) (citing Murray v. United States, 487 U.S. 533, 537 (1988)) (“The independent source doctrine serves as an exception to the exclusionary rule and permits the introduction of ‘evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities untainted by the initial illegality.’”).
274 United States v. Marrocco, 578 F.3d 627, 637 (7th Cir. 2009) (citing Nix v. Williams, 467 U.S. 431, 444 (1984)) (stating that application of the inevitable discovery doctrine is proper so long as the officers show that they “ultimately or inevitably would have . . . discovered [the challenged evidence] by lawful means”).
275 Crandley, supra note 128, at 176.
276 Blumenson & Nilsen, supra note 220, at 48.
proceedings. Finally, even if an illegal search occurs, in the instances where the seized item is contraband, the government is not required to return the property because of its inherent illegality. Thus, the costs of barring relevant evidence from civil forfeiture proceedings are minimized due to the procedural advantages given to civil forfeiture and the government’s ability to introduce evidence to support forfeiture through the doctrines of inevitable discovery and independent source.

E. The Benefits of Deterrence Outweigh the Costs to Society in the Context of Civil Forfeiture Proceedings

As illustrated above, modern police objectives have evolved to focus on forfeiture. Because of this increased focus, the level of deterrence that would be achieved in extending the exclusionary rule to civil forfeiture would be substantial. Additionally, while costs relative to society would arise from excluding relevant evidence from trial, procedural mechanisms, the inevitable discovery doctrine, and the independent source doctrine help to prevent these costs from harming the administrative function of civil forfeiture proceedings. Thus, in weighing the benefits of deterrence against the costs to society, the benefits that accrue due to law enforcement’s changing objectives outweigh the social costs, and, as a result, even if

277 Id. (stating there is no presumption of innocence, no right to an attorney, and no hearsay objection afforded to claimants in civil forfeiture cases).
278 Crandley, supra note 128, at 178.
279 See Marrocco, 578 F.3d at 637; United States v. Price, 558 F.3d 270, 281 (3d Cir. 2009); see also Crandley, supra note 128, at 176.
280 U.S. DEP’T OF JUSTICE, supra note 226, at 6; see also Blumenson & Nilsen, supra note 220, at 46; Cheh, supra note 234, at 1333; Crandley, supra note 128, at 161.
281 Crandley, supra note 128, at 161.
282 See Blumenson & Nilsen, supra note 220, at 50.
283 See Marrocco, 578 F.3d at 637.
284 See Price, 558 F.3d at 281 (3d Cir. 2009).
the *Plymouth* precedent were overturned, the exclusionary rule should be applied in the context of civil forfeiture proceedings.

**CONCLUSION**

The uncertain viability of *Plymouth*, coupled with Supreme Court precedent following *Plymouth*, has brought into question the applicability of the exclusionary rule in civil forfeiture proceedings. Because the Court has consistently focused on criminal prosecution as the sole objective of law enforcement, the Court, using a cost-benefit analysis, has refused to extend the exclusionary rule to civil proceedings.286 However, the changing objectives of law enforcement agencies have led forfeiture to become “ingrained into mainstream police practices.”287 Thus, “[t]he unique role of civil forfeiture in modern policing makes it sui generis in the level of deterrence the exclusionary rule will produce” and would not be outweighed by the minimal costs associated with the relatively government-friendly proceeding.288

However, application of the exclusionary rule in civil forfeiture proceedings would create new questions, which up to this point have been left unanswered. Property seized by law enforcement agencies is classified into two different categories: 1) contraband *per se* and 2) derivative contraband.289 Contraband *per se* is forfeitable without regard to the right of the owner due to its inherent illegality.290 In contrast, forfeiture of derivative contraband requires the government to establish by a preponderance of the evidence that the property was used, or intended to be used, to facilitate the commission of a crime.291

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287 Crandley, supra note 128, at 160.
288 Id.
290 Id. at 475.
291 Id. at 475–76.
Money is not contraband *per se*, and thus, the government must establish by a preponderance of the evidence that it was used, or intended to be used, to facilitate a violation of the law.\(^{292}\)

In a situation where money that was illegally seized is the sole evidence offered by the government, and neither the inevitable discovery doctrine\(^{293}\) nor the independent source doctrine\(^{294}\) applies, it would be impossible to establish that the money was in fact derivative contraband, due to the application of the exclusionary rule. However, even in the absence of evidence, a strong presumption that the money is illegal can be supported due to the thorough planning efforts that predate the seizure.\(^{295}\) While this presumption cannot be used as evidence, courts will be left with the question of what to do with the money.

Certainly, public policy dictates that the agency that conducted the illegal search should not benefit from it. Releasing money, however, that carries a presumption that it is associated with illegal activity would also be contrary to public policy. When the exclusionary rule is applied in a criminal setting, the only person receiving the benefit of the rule is the person whose rights were violated; however, in the context of civil forfeiture, the release of the property would not only benefit the carrier of the funds, but potentially the entire criminal organization that is supported by the funds. Thus, the application of the exclusionary rule in the context of civil forfeiture proceedings would leave courts with a new dilemma—what should be done with the money, which is a question that will be left for another day.


\(^{293}\) See United States v. Marrocco, 578 F.3d 627, 637 (7th Cir. 2009) (citing Nix v. Williams, 467 U.S. 431, 444 (1984)) (stating that the inevitable discovery is proper so long as the officers show that they “ultimately or inevitably would have . . . discovered [the challenged evidence] by lawful means”).

\(^{294}\) See United States v. Price, 558 F.3d 270, 281 (3d Cir. 2009) (citing Murray v. United States, 487 U.S. 533, 537 (1988)) (“The independent source doctrine serves as an exception to the exclusionary rule and permits the introduction of ‘evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities untainted by the initial illegality.’”).

FEDERAL PREEMPTION OF STATE-LAW FAILURE-TO-WARN CLAIMS: HAS THE PRESUMPTION AGAINST PREEMPTION GONE TOO FAR?

AMANDA N. HART


INTRODUCTION

Both state law and products liability tort suits regulate prescription drugs. Generally, a prescription drug manufacturer has a duty to warn physicians of any dangerous effects that the manufacturer knows or has reason to know are inherent in the use of the prescription drug. A prescription drug manufacturer that fails to warn a physician can be held liable for breach of duty. State-law products liability claims based on this failure are commonly referred to as “failure-to-warn claims.”

In addition to state regulation, prescription drugs are strictly regulated by federal law. The Food, Drug, and Cosmetic Act (FDCA) was created to supplement protection already provided by state

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* J.D. candidate, May 2011, Chicago-Kent College of Law, Illinois Institute of Technology; B.S., Molecular and Cellular Biology, 2005, University of Illinois, Urbana-Champaign.


3 Id.
regulation and common-law products liability. The FDCA requires that the Food and Drug Administration (FDA) approve prescription drug labels before the prescription drugs may be distributed for sale. Additionally, the FDCA specifies what information must be included on the label, where it must be placed, and how to change information on the label. Upon a determination that a proposed warning label is false or misleading, the FDA will deny approval and distribution of that prescription drug. Therefore, if the FDA finds that there is insufficient evidence that a prescription drug could have the side effect listed on the warning label, it will withdraw the drug from distribution. Additionally, a Changes Being Effected (CBE) supplement permits a manufacturer to change its warning label “to reflect newly acquired information” without prior FDA approval.

When state and federal regulation of prescription drugs conflict, a determination must be made as to whether federal law preempts state law. This principle of federal preemption derives from the Supremacy Clause of the United States Constitution. A preemption analysis is based on the assumption that the historic police powers of the states are not to be superseded by federal law unless Congress clearly intended it to do so. This presumption is

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4 Levine, 129 S. Ct. at 1195.
5 “The FDA is charged with ‘promot[ing] the public health by promptly and efficiently reviewing [drug manufacturers’] clinical research and taking appropriate action on the marketing of regulated products in a timely manner’ and ‘protect[ing] the public health by ensuring that . . . drugs are safe and effective.’” Colacicco v. Apotex, Inc., 521 F.3d 253, 257 (3d Cir. 2008) (citing 21 U.S.C. §§ 301–397 (2006)).
7 Id. §§ 331, 332, 355.
8 Id. § 352.
9 Id. § 355(e).
10 See 21 C.F.R. 601.12.
11 See U.S. Const. art. VI, cl. 2. (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).
particularly applicable where matters related to health and safety are involved.\textsuperscript{13} Determining whether a presumption of preemption applies is the first step that a court takes in determining whether state law or federal law prevails.\textsuperscript{14}

Where the court finds no express presumption of preemption, the court applies a conflict preemption analysis to determine the propriety of preemption.\textsuperscript{15} Under the doctrine of conflict preemption, preemption of state law may be inferred where it is impossible to comply with both federal and state law or where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”\textsuperscript{16}

Historically, there has been a presumption against preemption with regard to prescription drugs.\textsuperscript{17} Courts have often concluded that, because state-law failure-to-warn claims fall within the states’ police powers over the health and safety of its citizens, the presumption against preemption of state law should apply.\textsuperscript{18} This view was reaffirmed with the 1962 FDCA amendment, in which Congress took care to preserve state law by adding a savings clause\textsuperscript{19} that indicated that federal law would preempt state law only upon a “direct and positive conflict” with the FDCA.\textsuperscript{20} Accordingly, state-law failure-to-

\textsuperscript{13} See Hillsborough County, Fla. v. Automated Med. Labs., Inc., 471 U.S. 707, 716 (1985) (in order for federal law to preempt state law, there must be a conflict that is strong enough to overcome the presumption that state and local regulation of health and safety matters can coexist with federal regulation).
\textsuperscript{14} See Levine, 129 S. Ct. at 1194–95.
\textsuperscript{15} See Colacicco v. Apotex, Inc., 521 F.3d 253, 265 (3d Cir. 2008).
\textsuperscript{16} Washington v. Fred’s Stores of Tenn., Inc., 427 F. Supp. 2d 725, 730 (S.D. Miss. 2006).
\textsuperscript{17} See e.g., Hillsborough County, 471 U.S. at 715–16.
\textsuperscript{18} See id.
\textsuperscript{19} “The intention of Congress in inserting a savings clause is not to preserve common law claims when they conflict with federal regulatory standards, but to prevent a manufacturer from having a complete defense to a common law action not addressed by a standard by merely stating that it is in full compliance with all federal safety standards.” 63B AM. JUR. 2d Products Liability § 1923 (2010).
warn claims continued to evade preemption despite FDA regulations.\textsuperscript{21} In 2001, the landscape of federal preemption began to change. Many prescription drug manufacturers began filing preemption motions in the district courts, and in many of these cases, the FDA filed amicus briefs in support of these manufacturers.\textsuperscript{22} This was the first step in the movement toward federal preemption. The preamble to Congress’s 2006 FDCA amendment strengthened this movement by expressly stating that preemption applies to “claims that a [manufacturer] breached an obligation to warn by failing to include a statement in labeling or in advertising, the substance of which had been proposed to FDA for inclusion in labeling, if that statement was not required by FDA at the time plaintiff claims the [manufacturer] had an obligation to warn.”\textsuperscript{23} This amendment also provided for “changes being effected” supplements, which allowed manufacturers to change labels prior to FDA approval based on newly acquired information.\textsuperscript{24}

The Third Circuit was the first federal court of appeals to address the issue of preemption in the context of prescription drugs.\textsuperscript{25} In \textit{Colacicco v. Apotex, Inc.}, the court considered whether action taken by the FDA and its corresponding regulatory scheme preempted the plaintiffs’ state-law failure-to-warn claims.\textsuperscript{26} Based upon its consideration of the presumption against preemption, Congressional intent, and the FDA’s actions taken pursuant to its statutorily-granted authority, the Third Circuit held that the plaintiffs’ state-law failure-to-warn claims conflicted with federal law, and thus were preempted.\textsuperscript{27}

\textsuperscript{21} See, e.g., Riegel v. Medtronic, Inc., 552 U.S. 312, 340 (2008) (Ginsburg, J., dissenting) (“By the time Congress enacted the MDA in 1976, state common-law tort claims for drug labeling and design defects had continued unabated despite nearly four decades of FDA regulation.”).

\textsuperscript{22} Id.


\textsuperscript{24} \textit{Colacicco}, 521 F.3d at 259.

\textsuperscript{25} \textit{Mason I}, 546 F. Supp. 2d at 621.

\textsuperscript{26} 521 F.3d at 256.

\textsuperscript{27} Id. at 276.
Because the Seventh Circuit had yet to address the issue of preemption in the context of prescription drugs, the district court in *Mason v. SmithKline Beecham Corporation* relied upon the Third Circuit’s reasoning in *Colacicco*. The court held that, because the FDA had repeatedly rejected the warning label that the plaintiffs contended state law required, the plaintiffs’ state-law failure-to-warn claims were preempted.

In 2009, the United States Supreme Court was given the opportunity to consider the presumption against preemption in the context of prescription drugs. In its landmark decision in *Wyeth v. Levine*, the Supreme Court “restored the landscape of federal preemption to its pre-2001 form.” The Court established a new standard for federal preemption. It held that, absent clear evidence that the FDA would not have approved a prescription drug label that the plaintiffs asserted was required by state law, federal law would not preempt the plaintiffs’ state-law failure-to-warn claims.

The Seventh Circuit recently had the opportunity to reconsider the lower court’s decision in *Mason v. SmithKline Beecham Corporation* in light of the Supreme Court’s decision in *Levine*. The Seventh Circuit adopted the standard set forth in *Levine*—absent clear evidence that the FDA would not have approved a drug labeling change, state-law failure-to-warn claims are not preempted. The court used the facts in *Levine* as a baseline to determine whether the manufacturer effectively demonstrated that the FDA would not have approved the label change that the plaintiffs asserted was required by state law. The court found insufficient facts to establish clear

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28 See *Mason I*, 546 F. Supp. 2d at 621.
29 Id. at 626.
31 *Mason v. SmithKline Beecham Corp. (Mason II)*, 596 F.3d 387, 391 (7th Cir. 2010).
32 See *Levine*, 129 S. Ct. at 1198.
33 Id.
34 See *Mason II*, 596 F.3d at 391.
35 Id.
36 Id. at 392 (stating that if the evidence were less compelling than it was in *Levine*, the court would not find preemption).
evidence and thus, held that FDA regulations did not preempt the plaintiffs’ state-law failure-to-warn claims. In doing so, the Seventh Circuit overturned the decision of the lower court.

The Seventh Circuit’s adoption of the “clear evidence” standard reflects an apparent shift toward a presumption against preemption. Admittedly, states have an interest in the health and safety of their citizens; however, the shortcomings of the presumption against preemption outweigh this interest. This Note analyzes the presumption against preemption in the context of prescription drugs and argues that Congress should enact an express preemption clause for prescription drugs similar to the Medical Device Amendments of 1976.

I. BACKGROUND

A. Federal and State Regulation of Prescription Drugs

Prescription drugs are regulated by both state law and products liability tort suits. Generally, a prescription drug manufacturer has a duty to warn physicians of any dangerous effects that the manufacturer knows or has reason to know are inherent in the use of the prescription drug. If the manufacturer does not effectively warn the physician, the manufacturer can be held liable for a breach of duty. State products liability actions based on this failure to provide adequate warnings are commonly known as “failure-to-warn” claims. To successfully bring a common law failure-to-warn claim, the consumer bears the burden of proving that the manufacturer failed to adequately warn him of any risks associated with the prescription drug and that

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37 Id. at 396 (finding that the manufacturer did not meet its burden of demonstrating by clear evidence that the FDA would have rejected a label change).
38 This statute provides that, after a medical device receives FDA pre-market approval, a state may not establish or enforce any requirement that (1) is different from, or in addition to, any requirement applicable under federal law, and (2) relates to the safety or effectiveness of the device. 21 U.S.C. § 360k(a) (2006).
39 See Levine, 129 S. Ct. at 1195.
40 Rosenhouse, supra note 2.
41 Id.
42 See 63A AM. JUR. 2D Products Liability § 1240 (2010).
the failure to warn was the proximate cause of the consumer’s injury.  

Prescription drugs are also strictly regulated by federal law. The FDCA requires approval of a prescription drug’s warning label before it may be distributed for sale. The FDCA specifies what risk information must be included in the label, where the information must appear, and how to change information on the label. Where the FDA finds that a warning label is false or misleading, it will deny approval of the prescription drug. Additionally, the FDA will withdraw approval of any prescription drug already on the market upon receipt of information that there is a lack of substantial evidence that a prescription drug will have the effect that the warning label suggests.

When state and federal regulation of prescription drugs conflict, a determination must be made as to whether federal law preempts state law. In these situations, some courts have held that state-law products liability claims based on inadequate warnings were preempted, or supplanted, by FDA regulation. However, other courts have concluded that state-law failure-to-warn claims fall within the states’ police powers to regulate the health and safety of their citizens, and thus, a presumption against preemption should apply.

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43 Rosenhouse, supra note 2.
44 See Levine, 129 S. Ct. at 1195.
46 Id. § 352.
47 Id. § 355(e).
49 See supra text accompanying note 14.
A. Federal Preemption Generally

The principle of federal preemption, that federal law can supplant inconsistent state law, derives from the Supremacy Clause of the United States Constitution. There are three different types of federal preemption. The first type of preemption, known as express preemption, preempts state law where a federal statute unequivocally states that its provisions preempt state law. The second and third types of preemption, field preemption and conflict preemption, fall into the category of implied preemption. Under implied preemption, state-law claims are preempted where “Congressional intent is inferred from the existence of a pervasive regulatory scheme” or where “state law conflicts with federal law or interferes with the achievement of federal objectives.” Specifically, under the doctrine of field preemption, federal preemption may be inferred from Congress’s intent to control an entire regulatory field. Under the doctrine of conflict preemption, preemption of state law may be inferred where it

50 Here, federal preemption refers to ordinary preemption rather than to complete preemption. Ordinary preemption is a federal defense to plaintiff’s state-law claim and may arise either expressly by statute or by a direct conflict between state and federal law. Washington v. Fred’s Stores of Tenn., Inc., 427 F. Supp. 2d 725, 727 (S.D. Miss. 2006). Complete preemption, however, is jurisdictional in nature and authorizes removal to federal court. Id.

51 See U.S. CONST. art. VI, cl. 2. (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

52 Washington, 427 F. Supp. 2d at 728.

53 Id. (“Under express preemption, the federal statute must clearly state that its provisions preempt state law.”).

54 Id. (“The second and third categories of ordinary preemption, field preemption and conflict preemption, must be implied from the circumstances.”). Express and implied preemption differ in that, in an implied preemption analysis, it is possible to infer Congressional intent to preempt state law based only on the effect that allowing state law products liability claims would have on the federal scheme established by Congress. 63B AM. JUR. 2d Products Liability § 1923 (2010).


56 63B AM. JUR. 2d Products Liability § 1923.
is impossible to comply with both federal and state law or where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”

B. Federal Preemption in the Context of Prescription Drugs

All three categories of federal preemption require a court to discern Congressional intent. Where Congress has not explicitly stated that federal law preempts state law, preemption may be implied where there is an actual conflict between state law and the federal regulatory scheme. Courts have traditionally applied a presumption against preemption unless a person or entity that is seeking to have the law preempted demonstrates that there is clear Congressional intent to preclude the states from acting.

The most commonly implicated category of preemption in the context of prescription drugs is conflict preemption, which is implicated when it is impossible for a prescription drug manufacturer to comply with both state and federal prescription drug regulations. Courts have often concluded that, because state-law failure-to-warn claims fall within the states’ police powers over the health and safety of its citizens, the presumption against preemption should apply.

Until 1962, the FDA carried the burden of proving that a prescription drug was unsafe to prevent distribution of that prescription drug. In 1962, however, Congress amended the FDCA to require manufacturers to demonstrate that their prescription drugs were “safe for use under the conditions prescribed, recommended, or suggested in the proposed labeling” before they could be distributed. This amendment effectively shifted the burden of proof from the FDA

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57 Washington, 427 F. Supp. 2d at 730.
58 Id.
59 63B AM. JUR. 2D Products Liability § 1923.
61 Washington, 427 F. Supp. 2d at 730.
63 Id.
to the manufacturer.\textsuperscript{65} Significantly, Congress took care to preserve state law by adding a savings clause to this amendment,\textsuperscript{66} which stated that federal law would preempt state law only upon a “direct and positive conflict” with the FDCA.\textsuperscript{67} Accordingly, plaintiffs continue to successfully bring state-law failure-to-warn claims despite FDA regulations.\textsuperscript{68}

Until the early 2000s, prescription drug manufacturers rarely invoked the defense of federal preemption.\textsuperscript{69} Notably, when manufacturers asserted this defense, they rarely succeeded.\textsuperscript{70} However, this began to change in 2001, when many prescription drug manufacturers began filing preemption motions in the district courts, and in many of these cases, the FDA filed amicus briefs in support of these manufacturers.\textsuperscript{71} This was the first step in the movement away from a presumption against preemption.

This movement toward preemption was bolstered by Congress’s 2007 FDCA amendment. The preamble to this amendment expressly states that preemption applies to “claims that a [manufacturer] breached an obligation to warn by failing to include a statement in labeling or in advertising, the substance of which had been proposed to FDA for inclusion in labeling, if that statement was not required by FDA at the time plaintiff claims the [manufacturer] had an obligation to warn.”\textsuperscript{72} The 2007 amendment also granted the

\textsuperscript{66} “The intention of Congress in inserting a savings clause is not to preserve common law claims when they conflict with federal regulatory standards, but to prevent a manufacturer from having a complete defense to a common law action not addressed by a standard by merely stating that it is in full compliance with all federal safety standards.” 63B AM. JUR. 2D Products Liability § 1923 (2010).
\textsuperscript{68} See supra text accompanying note 22.
\textsuperscript{69} Mason v. SmithKline Beecham Corp. (\textit{Mason II}), 596 F.3d 387, 391 (7th Cir. 2010).
\textsuperscript{70} \textit{Id.}
\textsuperscript{71} \textit{Id.}
\textsuperscript{72} Mason v. SmithKline Beecham Corp. (\textit{Mason I}), 546 F. Supp. 2d 618, 625 (C.D. Ill. 2008) (citing Colacicco v. Apotex, Inc., 521 F.3d 253, 269 (3d Cir. 2008)).
FDA statutory authority to require manufacturers to alter their prescription drug labels based on safety information discovered after initial FDA approval. By choosing not to enact any provision that would have required FDA preapproval for all label changes, Congress reinforced its position that manufacturers were responsible for updating their own labels.

C. Cases Holding That Failure-to-Warn Claims are Preempted

The Third Circuit was the first appellate court to extensively address the issue of preemption in the context of suicide from prescription drugs, in Colacicco v. Apotex, Inc. There, the court considered whether action taken by the FDA and its corresponding regulatory scheme preempted the plaintiffs’ state-law failure-to-warn claims.

SmithKline Beecham, doing business as GlaxoSmithKline (GSK), manufactures the antidepressant Paxil, a selective serotonin reuptake inhibitor (SSRI). Lois Colacicco, a fifty-five-year-old woman, was prescribed Paxil on October 6, 2003, to treat depression. Shortly thereafter, Colacicco began taking the generic version of Paxil, manufactured by Apotex, Inc. Less than a month later, Colacicco committed suicide. At the time of her death, the label for the prescription drug included a warning, identical to that of Paxil, which stated that the “possibility of suicide attempt is inherent in major depressive disorder and may persist until significant

74 Id. (citing S. 1082, 110th Cong. § 208 (2007) (as passed) (proposing new § 506D)).
75 Mason I, 546 F. Supp. 2d at 621.
76 Colacicco, 521 F.3d at 256.
77 Id.
78 Id.
79 Id.
80 Id.
remission occurs.” The label failed to warn of any increased risk of suicide.

After her death, Colacicco’s husband filed suit against Apotex and GSK in the United States District Court for the Eastern District of Pennsylvania. Mr. Colacicco alleged that both Apotex and GSK violated state common-law tort rules by selling prescription drugs with labels that failed to warn patients about the increased risk of suicide. Both manufacturers moved for dismissal on the ground that federal law preempted the state-law failure-to-warn claim. The district court dismissed Colacicco’s claim on the basis of preemption.

On appeal, Colacicco argued that because CBE supplements allowed manufacturers to strengthen and augment prescription drug warning labels without prior FDA approval, the FDA labeling requirements “constitute[d] mere minimum standards of information that may be required in their labeling.” Thus, it was possible for GSK to comply with both state and federal labeling regulations. In response, the manufacturers argued that, even though changes made under CBE regulation do not require prior FDA approval, the FDA has the final authority on the legality of those labels, and thus preemption should apply. Thus, the court was faced with the issue of whether the plaintiffs’ state-law failure-to-warn claims conflicted with the federal scheme.

In its analysis, the Third Circuit first considered whether there was an applicable presumption of preemption. The court noted that in all preemption cases, the analysis begins with the presumption

81 Id.
82 Id.
83 Id.
84 Id.
85 Id.
87 Id. at 268.
88 Id.
89 Id.
90 Id. at 262.
91 Id.
against preemption, particularly in cases that involve a field traditionally regulated by the states, unless Congress made its intent to preempt state law clear and manifest.\textsuperscript{92} Courts that have applied a presumption against preemption tend to premise it on the fact that states have the power to protect the health and safety of their citizens.\textsuperscript{93} In this case, the plaintiffs argued that preemption was inappropriate because Congress never expressly stated its intent to preempt state-law tort actions challenging prescription drug labeling.\textsuperscript{94} However, the manufacturers contended that a presumption of preemption applied to this case because the federal government, not the states, had traditionally regulated prescription drug labeling.\textsuperscript{95}

The Third Circuit looked to the purpose of Congress to determine whether there was any express intent for preemption of state law.\textsuperscript{96} In considering the arguments of both sides, the court found a lack of Congressional directive expressly approving or rejecting preemption in the context of prescription drugs.\textsuperscript{97} Because Congress did not expressly state its intent to approve or reject preemption in the context of prescription drugs, the court applied a conflict preemption analysis to determine the propriety of preemption.\textsuperscript{98} Conflict preemption is applicable when compliance with both federal and state regulations is impossible or when “state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”\textsuperscript{99}

The plaintiff argued that conflict preemption did not apply because it was possible for GSK to comply with both state and federal law.\textsuperscript{100} GSK argued that, because the CBE supplement allowed prescription drug manufacturers to strengthen warning labels without

\textsuperscript{92} Id. at 268.
\textsuperscript{93} See supra text accompanying note 14.
\textsuperscript{94} Colacicco, 521 F.3d at 263.
\textsuperscript{95} Id.
\textsuperscript{96} Id. at 264.
\textsuperscript{97} Id. at 265.
\textsuperscript{98} Id.
\textsuperscript{99} Id. (citing Hillsborough County, Fla. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985)).
\textsuperscript{100} Id. at 268.
prior FDA approval, the FDA labeling requirements constituted mere minimum standards.\footnote{Id.} However, the court looked to the FDA’s past treatment of warning labels for Paxil and found that for over twenty years, the FDA had actively monitored the potential connection between suicide and SSRIs and, in finding no scientific basis for the connection, repeatedly rejected the warning label of increased risk of suicide.\footnote{Id.} The FDA determined that the inclusion of such a warning without scientific basis would constitute false and misleading labeling.\footnote{Id.}

Additionally, in determining whether the plaintiff’s failure-to-warn claim should be preempted, the Third Circuit considered the FDA’s actions taken pursuant to its statutorily-granted authority.\footnote{Id.} The FDCA authorizes the FDA to prohibit false or misleading prescription drug labeling.\footnote{Id.} The standard for adding a warning to a prescription drug label is the existence of “reasonable evidence of a causal association [of a clinically significant hazard] with a drug.”\footnote{Id.} Thus, any state law obligation to include a warning asserting the existence of an association between SSRIs and suicidality when the FDA had determined that the evidence did not support such an association would constitute false labeling.\footnote{Id.}

Another factor that the court considered was the FDA’s position on federal preemption.\footnote{Id. at 276.} The court found that the FDA had remained consistent in its position that it had the duty to establish prescription drug warning requirements.\footnote{Id.} The court also acknowledged that the FDA had remained consistent in its position that the plaintiff’s claims were preempted as a result of the FDA’s

\footnote{Labeling Requirements for Prescription Drugs and/or Insulin, 21 C.F.R. § 201.57(c) (2006).}

\footnote{See id.}

\footnote{Colacicco, 521 F.3d at 253.}

\footnote{Id. at 276.}
repeated rejection of warning labels based on insufficient scientific evidence.\textsuperscript{110}

Based on the court’s review of FDA regulations, the FDA’s actions taken pursuant to its statutorily-granted authority, and the FDA’s position on federal preemption, the court found that the plaintiff’s failure-to-warn claims were preempted by FDA regulation.\textsuperscript{111}

In \textit{Mason v. SmithKline Beecham Corporation}, the United States District Court for the Central District of Illinois was presented with a case strikingly similar to \textit{Colacicco}. In this case the defendant, SmithKline Beecham (SKB), manufactured Paxil.\textsuperscript{112} Two days after the plaintiffs’ daughter, twenty-three-year-old Tricia Mason, began taking Paxil, she committed suicide.\textsuperscript{113} The plaintiffs filed a state-law claim against SKB, alleging that SKB failed to warn consumers about the dangerous side effects of the prescription drug, including an increased risk of self-harm.\textsuperscript{114} SKB moved for summary judgment on the basis of preemption.\textsuperscript{115} The court granted summary judgment and held that the plaintiffs’ state-law tort claims for failure to warn were preempted.\textsuperscript{116}

Like the manufacturer in \textit{Colacicco}, SKB argued that the plaintiffs’ claims were preempted based on proposed warnings that directly conflicted with the FDA-approved labeling for Paxil.\textsuperscript{117} The plaintiffs, however, contended that the court should not find that their state-law failure-to-warn claims were preempted absent clear evidence of a conflict between state and federal regulations.\textsuperscript{118} The plaintiffs further argued that conflict preemption did not apply to this case because it was possible for SKB to comply with both state and federal

\begin{footnotes}
\item[110] Id. at 274.
\item[111] Id. at 275.
\item[113] Id.
\item[114] Id.
\item[115] Id. at 620.
\item[116] Id. at 627.
\item[117] Id. at 620.
\item[118] Id. at 619.
\end{footnotes}
law.119 This argument was premised on the fact that manufacturers are permitted to strengthen warning labels, without prior FDA approval, through CBE supplements.120 Thus, the plaintiffs contended that SKB could have strengthened the warning label for Paxil and still have met the minimum FDCA labeling requirements.121

To determine whether it was possible for SKB to comply with both state and federal regulations, the district court applied a conflict preemption analysis.122 Because the Seventh Circuit had yet to address whether state-law claims were preempted in the context of prescription drugs, the district court looked to the Third Circuit’s decision in Colacicco for guidance.123

The plaintiffs’ state-law failure-to-warn claims were based on the fact that the prescription drug labeling for Paxil was false or misleading due to its failure to warn consumers of any risk of self-harm.124 The court rejected the plaintiffs’ claims and followed the Third Circuit’s reasoning that, where a plaintiff’s proposed labeling change conflicts with FDA-approved labeling, state-law failure-to-warn claims are preempted.125 The court noted that any other outcome would present a direct conflict for SKB.126 If SKB complied with federal law, it would be exposed to substantial liability from state tort law claims for failing to add a warning that the plaintiffs contended was necessary under state law.127 If SKB acted to avoid state tort law claims by adding the warning that the plaintiffs contended was necessary, it would expose itself to federal liability, including the possibility that the FDA would withdraw its approval of Paxil for false or misleading labeling.128

119 Id. at 623.
120 Id.
121 Id.
122 Id. at 621.
123 Id.
124 Id. at 626.
125 Id.
126 Id.
127 Id.
128 Id.
D. Wyeth v. Levine: Failure-to-Warn Claim Only Preempted upon “Clear Evidence”

Almost a year after the Third Circuit’s decision in Colacicco, the United States Supreme Court was faced with the issue of preemption in the context of prescription drugs in Wyeth v. Levine. This landmark decision restored the federal preemption landscape to its pre-2001 form.

Wyeth manufacturers Phenergan, an antihistamine prescribed to treat nausea. Phenergan is a corrosive prescription drug that can cause gangrene upon entry into a patient’s artery. Phenergan may be injected intravenously through either the “IV-push” method or the “IV-drip” method. On April 7, 2000, Diana Levine went to her health care clinic, where she was prescribed Phenergan to treat nausea associated with her migraine. The physician administered the Phenergan through the IV-push method, as opposed to the IV-drip method. The Phenergan accidentally entered Levine’s artery, causing gangrene to develop in her right hand and forearm, both of which had to be amputated as a result.

Levine contended that Phenergan’s labeling failed to adequately warn physicians about the risk of IV-push administration, a warning that Levine argued was required by state law. Wyeth filed a motion for summary judgment; its argument was premised on the

130 Mason v. SmithKline Beecham Corp. (Mason II), 596 F.3d 387, 391 (7th Cir. 2010).
131 Levine, 129 S. Ct. at 1191.
132 Id.
133 This method of administration involves injecting Phenergan directly into a patient’s vein. Id.
134 This method of administration involves adding Phenergan to a saline solution and allowing the liquid to slowly enter through a catheter inserted into the patient’s vein. Id.
135 Id.
136 Id.
137 Id.
138 Id. at 1191, 1194.
notion that Levine’s failure-to-warn claims were preempted by federal law.139

The trial court found no merit in Wyeth’s conflict preemption argument, stating that there was no evidence that the FDA had “specifically disallowed” stronger language.140 The Vermont Supreme Court affirmed the trial court’s denial of Wyeth’s motion for summary judgment, holding that Wyeth could have, through the FDA’s CBE regulation, warned against the IV-push administration without prior FDA approval and that the FDA’s requirements are minimal standards that do not create a ceiling for state-law warning label requirements.141

The issue presented to the United States Supreme Court was whether FDA prescription drug labeling requirements preempt state-law failure-to-warn claims premised on the theory that different labeling judgments were necessary to make prescription drugs reasonably safe for use.142 Wyeth argued that it was impossible for it to comply with both state and federal labeling requirements and that recognition of the plaintiff’s state-law failure-to-warn claim creates an “obstacle to the accomplishment and execution of the full purposes and objectives of Congress” by transferring prescription drug labeling decision-making from the experts of the FDA to a lay jury.143

The Supreme Court first considered the purpose expressed by Congress.144 Traditionally, courts begin with a presumption against preemption, based on the policy that historic police powers are not to be superseded by federal law unless there is clear intent by Congress to do so.145 Wyeth contended that the presumption against preemption should not apply because the FDA had regulated prescription drug labeling for more than a century, demonstrating clear Congressional intent for federal preemption.146 Additionally, Wyeth argued that the

139 Id. at 1192.
140 Id.
141 Id. at 1193.
142 Id.
143 Id.
144 Id. at 1195.
145 Id.
146 Id.
plaintiff’s state-law failure-to-warn claim was preempted because it was impossible to comply with state and federal regulations—a classic conflict-preemption case. It argued that the CBE supplement, which permits a manufacturer to strengthen a warning label without prior FDA approval, was not implicated in this case because the 2006 amendment provides only that a manufacturer may change its label to reflect newly acquired information. Wyeth asserted that it could only have changed the label in response to new information not yet considered by the FDA, and thus it was impossible for it to strengthen its label to comply with state-law requirements without violating federal law.

The Court, however, found that Wyeth could have strengthened its claim though a CBE supplement because, in its notice of the final rule, the FDA explained that “newly acquired information” is not limited to new data but also includes new analyses of previously submitted data. The plaintiff presented evidence of at least twenty incidents prior to her injury in which injection of the prescription drug resulted in gangrene and amputation. She argued that Wyeth could and should have analyzed the acquired data and, through a CBE supplement, added a stronger warning label about the IV-push administration of the prescription drug. Ultimately, the Court held that absent clear evidence that the FDA would not have approved a change to Phenergan’s label, it would not conclude that it was impossible for Wyeth to comply with both federal and state requirements. While the Court found no preemption in Levine, it stated that preemption could be found where the manufacturer meets a strict standard of proving that there was clear evidence that the FDA

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147 Id. at 1196.  
148 Id.  
149 Id.  
150 Id. at 1197.  
151 Id.  
152 Id.  
153 Id. at 1198.
would not have approved the proposed change(s) in the prescription drug’s label.154

III. THE SEVENTH CIRCUIT’S RETURN TO A PRESUMPTION AGAINST PREEMPTION

In *Mason v. SmithKline Beecham Corporation*, the Seventh Circuit reconsidered the lower court’s decision in light of *Levine*.155 The court adopted the standard set forth in *Levine*—absent clear evidence that the FDA would not have approved a drug labeling change, state-law failure-to-warn claims are not preempted.156 The court found that the Supreme Court failed to clarify what constitutes “clear evidence” and that the only thing that was apparent was that the evidence presented in *Levine* did not constitute “clear evidence” such that preemption would apply.157 Therefore, the court was faced with the task of interpreting the *Levine* “clear evidence” standard.158

The court used *Levine* as a benchmark to determine whether GSK had presented “clear evidence” that the FDA would not have approved the plaintiffs’ proposed labeling change.159 If the evidence were found to be less compelling than the evidence in *Levine*, the court would reject GSK’s argument that federal law preempted the state-law failure-to-warn claim.160

In *Levine*, the Supreme Court first reviewed the administrative history of Phenergan. It found that the record in *Levine* clearly proffered ample evidence that the “FDA specifically considered and reconsidered the strength of Phenergan’s IV-push-related warnings in light of new scientific and medical data.”161 Additionally, there was evidence that, instead of banning the administration of Phenergan

154 *Id.* at 1204.
155 *Mason v. SmithKline Beecham Corp. (Mason II)*, 596 F.3d 387, 391 (7th Cir. 2010).
156 *Id.*
157 *Id.*
158 See *id*.
159 *Id.* at 392.
160 *Id.*
161 *Id.* at 393 (quoting *Wyeth v. Levine*, 129 S. Ct. 1187, 1222 (2009)).
through the IV-push method altogether, Wyeth and FDA authorities agreed that there was a need for better warning of the problems of intra-arterial injection.\textsuperscript{162} A year later, the FDA committee recommended a stronger label for Phenergan regarding the IV-push method but decided not to prohibit the administration of the prescription drug through the IV-push method.\textsuperscript{163} Ultimately, the Supreme Court found that it was clear from the administrative history of Phenergan that the FDA had “strongly considered a similar warning to the one that plaintiff proposed and the Court still did not find preemption.”\textsuperscript{164}

Following the Supreme Court’s analysis in \textit{Levine}, the Seventh Circuit examined the administrative history of Paxil.\textsuperscript{165} In 1989, GSK filed a prescription drug application with the FDA seeking market approval of its new prescription drug, Paxil.\textsuperscript{166} At the time of its approval, the FDA did not require any warnings of suicide risk.\textsuperscript{167} From the date of its approval through February 2003, GSK’s analysis of suicides and suicide attempts of patients taking Paxil found no relationship between suicide and Paxil.\textsuperscript{168} Additionally, the FDA had been thoroughly reviewing the available data about prescription drugs such as Paxil and determined that there was no increased risk of suicide resulting from consumption of these prescription drugs.\textsuperscript{169} GSK also pointed to the FDA’s failure to require a warning about the risk of suicide just before the suicide in this case as evidence that the FDA would not have approved the increased warning that the plaintiffs contended state law required.\textsuperscript{170}

However, in a press release in October 2003, the FDA recommended that physicians stop prescribing Paxil to children because it was investigating the increased risk of suicide resulting

\textsuperscript{162} \textit{Id.}
\textsuperscript{163} \textit{Id.}
\textsuperscript{164} \textit{Id.}
\textsuperscript{165} \textit{Id.}
\textsuperscript{166} \textit{Id.}
\textsuperscript{167} \textit{Id.}
\textsuperscript{168} \textit{Id.} at 394.
\textsuperscript{169} \textit{Id.}
\textsuperscript{170} \textit{Id.} at 395.
from consumption of this prescription drug. The court found that, in light of this evidence, it seemed unlikely that the FDA would have refused to allow GSK to submit a label change to warn Paxil consumers about the potential risk of suicide for young adults.

Considering the administrative history of Paxil as a whole, the court concluded that the evidence fell short of demonstrating by “clear evidence” that the FDA would not have approved the label change that the plaintiffs contended was required by state law. Therefore, the Seventh Circuit overturned the decision of the lower court and held that the plaintiffs’ state-law failure-to-warn claims were not preempted by FDA regulations.

IV. THE IMPACT OF A PRESUMPTION AGAINST PREEMPTION

Prior to Levine, state-law failure-to-warn claims were preempted where the FDA had rejected warnings that plaintiffs contended should have been included in the warning label. In other words, because imposing state tort liability for failure-to-warn would conflict with FDA-approved labeling, federal law preempted these state-law failure-to-warn claims. However, after Levine, state-law failure-to-warn claims have been preempted only where the manufacturer meets the strict burden of proving that there is clear evidence that the FDA would not have approved the proposed change(s) in the label. Mason v. SmithKline Beecham Corp. reflects the Seventh Circuit’s clear shift toward the presumption against preemption. Admittedly, states have an interest in the health and safety of their citizens; however, the harms resulting from the presumption against preemption outweigh this interest. An adoption of an express preemption clause similar to the Medical Device Amendments of 1976

171 Id.
172 Id.
173 Id.
174 Id. at 396.
175 See generally Colacicco v. Apotex, Inc., 521 F.3d 253 (3d Cir. 2008); see also Mason II, 596 F.3d at 387.
176 Mason II, 596 F.3d at 391.
(MDA) would solve many of the harms of the current standard for prescription drug preemption.

A. Harms Resulting from the Presumption Against Preemption

First, recognition of state-law failure-to-warn claims subjects prescription drug manufacturers to a multitude of state laws. Standards of care for prescription drug labeling vary from state to state.177 “Absent a determination that the FDA-approved labeling and the FDA’s refusal to require the warnings suggested by plaintiffs . . . preempt start tort actions, the manufacturers may be subjected to considerable liability based on varying standards, with no benchmark that they should follow.”178 A national standard for prescription drug labeling requirements would ease the burden on prescription drug manufacturers of complying with the fifty-one separate regulatory schemes of each state and the federal government.

Additionally, state-law failure-to-warn claims substitute a lay jury’s decision regarding prescription drug labeling for the expert judgment of the FDA.179 New prescription drugs must obtain the FDA’s stamp of approval as “safe” and “effective” before being marketed to the public.180 Once a product is on the market, the FDCA employs the FDA to monitor new information and authorizes it to withdraw approval in light of new safety concerns.181 A state tort regime which allows a lay jury to make important decisions about prescription drug labeling is incompatible with this scheme.

State-law failure-to-warn claims may also lead to unsubstantiated warning labels. A highly probable risk of holding a prescription drug manufacturer strictly liable for failure to warn of any “knowable” risk is the destruction of the viability of any warnings. If every report of a possible risk, no matter how speculative, imposed an affirmative duty to give some warning, a manufacturer would be

177 Colacicco, 521 F.3d at 267.
178 Id. at 267–68.
180 See id. at 1195.
required to provide notice to all physicians of even the slightest risks, thereby diluting the force of any specific warning.\textsuperscript{182} Lastly, recognition of state law failure-to-warn claims stifles medical research and testing. Courts have noted for many years that prescription drug tort liability could deter manufacturers from developing and marketing prescription drugs.\textsuperscript{183} Highly beneficial, commonly used drugs are often incapable of being made entirely safe.\textsuperscript{184} Additionally, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety for many new or experimental drugs.\textsuperscript{185} However, medical advancement justifies the development, marketing, and use of the drug notwithstanding a medically recognizable risk.

\textbf{B. The Medical Device Amendments of 1976 (MDA)}

Until Congress’s enactment of the MDA, the introduction of new medical devices was left largely to each state to supervise and regulate in any particular manner.\textsuperscript{186} However, the landscape of medical device regulation began to change in the 1960s and 1970s, when many complex medical devices thrived and some began to fail.\textsuperscript{187} The most notable medical device failure was the Dalkon Shield, an intrauterine device that failed in 1970, leading to many serious infections and deaths.\textsuperscript{188} Unfortunately, thousands of resulting tort claims also failed.\textsuperscript{189} Many believed that this demonstrated the inability of the common law tort regime to manage risks associated

\textsuperscript{183} \textit{Id.} at 1357.
\textsuperscript{184} \textit{Id.} at 1358.
\textsuperscript{185} \textit{Id.} (citing \textsc{Restatement (Second) of Torts} § 402A (1965)).
\textsuperscript{186} Riegel v. Medtronic, 552 U.S. 312, 315 (2008).
\textsuperscript{187} \textit{Id.}
\textsuperscript{188} \textit{Id.}
\textsuperscript{189} \textit{Id.}
with dangerous medical devices. As a result, Congress stepped in and enacted the MDA.

The MDA created a scheme of federal oversight for medical devices while dramatically reducing state regulation and oversight requirements. This statute provides that, after a medical device receives FDA pre-market approval, a state may not establish or enforce any requirement that (1) is different from, or in addition to, any requirement applicable under federal law, and (2) relates to the safety or effectiveness of the device. Accordingly, while the MDA preempts many state common-law tort claims, it does not preempt those that do not impose requirements different from or in addition to federal requirements. Further, the MDA permits the FDA to exempt certain state and local requirements from preemption.

The MDA maintained the FDA requirement of pre-market approval prior to distribution of any medical device. Pre-market approval imposes certain specific requirements applicable to all medical devices, including a review of the device’s proposed labeling. Once a device has received FDA pre-market approval, it must be marketed without any significant differences from the specifications in the approval application because the FDA has deemed that these specifications provide a reasonable assurance of safety and effectiveness. Notably, a new medical device is not required to undergo pre-market approval if the FDA finds that it is a substantial equivalent of another device exempt from pre-market approval.

After pre-market approval, medical devices are subject to reporting requirements, which include the obligation to inform the FDA of any new clinical investigations or scientific studies concerning

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190 Id.
191 Id. at 316.
192 Id. at 312.
194 Id. § 360k(b).
195 Medtronic, 552 U.S. at 313.
196 Id.
197 Id.
the device that the applicant knows or reasonably should know of and to report incidents in which the device has contributed to death or serious injury. The FDA may withdraw pre-market approval of any medical device based on newly acquired data and must withdraw approval if it determines that the device is unsafe or ineffective under its labeling conditions.

The MDA imposes three different class levels of continuing oversight for medical devices depending on the risks presented by the device. Class I medical devices include elastic bandages and examination gloves and are subject to the lowest level of oversight, known as “general controls,” such as labeling requirements. Class II medical devices include powered wheelchairs and surgical drapes and are subject to general controls and “special controls,” including performance standards and post-market surveillance measures. Class III oversight applies to medical devices that are purported to be for a use in supporting or sustaining human life or for a use that is of substantial importance in preventing impairment of human health or presents a potential unreasonable risk of illness or injury. Because of the nature of this class of medical devices, it receives the strictest federal oversight of the three.

C. Proposed Prescription Drug Preemption Clause

Congress should enact an express preemption clause similar to the MDA for prescription drugs. A similar statute would provide that, after a prescription drug manufacturer has received FDA pre-market approval, the states may not promulgate any regulations that differ from or impose greater restrictions than federal regulations. While this statute would preempt most state common-law tort claims, it would

199 Id. § 814.84(b)(2).
200 Id. § 803.50(a).
201 Id. § 360e(e)(1).
202 See Medtronic, 552 U.S. at 316–17.
203 Id. at 316.
204 Id. at 316.
206 Medtronic, 552 U.S. at 317.
not preempt those that do not impose requirements different from or in addition to federal requirements. Further, Congress could grant the FDA the power to exempt certain state and local requirements from preemption.\footnote{See 21 U.S.C. § 360k(b).}

A prescription drug preemption statute should maintain the current FDA pre-market approval regulations, which are nearly identical to those for medical devices. However, unlike the MDA, which permits a new medical device to forego pre-market approval if the FDA finds that it is a substantial equivalent of another device exempt from pre-market approval,\footnote{See id. § 360c(f)(1)(A).} all prescription drugs should be subject to pre-market approval because of the risk of resulting injuries or illnesses.

This proposed statute should maintain the FDA oversight currently in place for prescription drugs. Congress need not establish differing class levels for continuing oversight for prescription drugs as it has done in the MDA\footnote{See Medtronic, 552 U.S. at 316–17.} because all prescription drugs present a “potential unreasonable risk of illness or injury,” as is characteristic of Class III medical devices.\footnote{See 21 U.S.C. § 360c(a)(1)(C)(ii).} Thus, all prescription drugs should be subject to the most extensive federal oversight.

\section*{D. Effects of the Proposed Prescription Drug Preemption Clause}

Congress’s enactment of a preemption clause for prescription drugs similar to the MDA would address many of the harms of the current preemption standard. First, an express preemption clause would create a uniform standard of care for manufacturers to observe. Manufacturers would no longer be subject to the fifty-one different standards of care currently in place. A uniform standard would inevitably lead to less tort liability for manufacturers, as it is much easier to comply with a single standard of care and would result in lower operating costs to the manufacturer.
An express preemption clause would also return the decision of prescription drug labeling requirements to the expert judgment of the FDA rather than the lay jury because most state-law failure-to-warn claims will be preempted. This is important because FDA scientists thoroughly test the safety and effectiveness of prescription drugs before approving them for distribution\textsuperscript{211} and continue to monitor the safety and effectiveness of the prescription drugs throughout their distribution.\textsuperscript{212} Lay juries do not have the proper experience with prescription drug labeling to compete with the expertise of the FDA.

Next, an express preemption clause would reduce unsubstantiated warning labels. Once the FDA has approved a prescription drug for distribution, the manufacturer knows exactly what information must be included in the label. Additionally, upon receipt of new information, the FDA would inform the manufacturer of any necessary labeling changes. Accordingly, manufacturers would no longer have to concern themselves with providing notice to physicians of every possible risk, no matter how minute.

Lastly, an express preemption clause would help reduce the negative effect that the current standard of preemption has on medical research and testing. A national standard of care will undoubtedly reduce manufacturers’ tort liability, which courts have found deters manufacturers from developing and marketing prescription drugs.\textsuperscript{213} As a result, manufacturers will be able to research, develop, and market highly beneficial prescription drugs that they may not have otherwise considered researching and developing under the current standard.

CONCLUSION

The Seventh Circuit’s adoption of the Supreme Court’s strict “clear evidence” standard reflects a clear shift to a presumption against preemption. This new standard has subjected manufacturers to increased tort liability, which has negatively impacted the prescription

\textsuperscript{211} See Wyeth v. Levine, 129 S. Ct. 1187, 1195 (2009).
\textsuperscript{212} See 21 U.S.C. § 355(e).
drug market. Accordingly, in order to decrease manufacturers’ tort liability and resolve many of the resulting harms, Congress should enact an express preemption clause similar to the Medical Device Amendments of 1976.
In an emphatic proclamation that may have far-reaching implications for Second Amendment jurisprudence, the Supreme Court recently held that the right to keep and bear arms for self-defense is fundamental to our scheme of ordered liberty.1 In a plurality opinion, the Court in McDonald v. City of Chicago declared that the Second Amendment right to keep and bear arms for self-defense is incorporated and fully applicable to the States by virtue of the Due Process Clause of the Fourteenth Amendment.2

Similar to the First and Fourth Amendments, the Second Amendment codifies a pre-existing right3 and has recently been the focus of two of the most prominent Supreme Court decisions in the

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1 See McDonald v. City of Chicago, Ill., 130 S. Ct. 3020, 3050 (2010) (plurality opinion).
3 McDonald, 130 S. Ct. at 3066; Heller I, 554 U.S. at 591–92.
past decade. Discussion concerning the Second Amendment is not reserved for the recondite and esoteric debates of academia. Rather, the discussion extends to the public forum, where there are arguments on the scope of the right to keep and bear arms, rallies that demand rigorous gun control laws, and theories regarding the intent of the Framers of the Bill of Rights that divide the public, politicians, and scholars.

The Supreme Court’s ruling in *McDonald* was preceded by the landmark case of *District of Columbia v. Heller (Heller I)*. The Supreme Court affirmed the decision of the District of Columbia Circuit, invalidating a law banning the possession of handguns in the District of Columbia, but in doing so neglected to identify a precise level of judicial scrutiny; rather, the Court left the difficult task of determining the applicable level of scrutiny to the various federal courts, a challenge they would be forced to face when presented with subsequent challenges to laws banning the possession of firearms. The decision not to address the judicial scrutiny quandary in *Heller I* was mimicked by the Court in *McDonald* and has subsequently been followed by a number of federal courts. Recently, when presented with the opportunity to address the “‘levels of scrutiny’ quagmire” left unanswered by *Heller I* and *McDonald*, the Seventh Circuit

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5 *Heller I*, 554 U.S. at 570–71.

6 *Id.* at 571 (“Under any of the standards of scrutiny the Court has applied to enumerated constitutional rights, this prohibition—in the place where the importance of the lawful defense of self, family, and property is most acute—would fail constitutional muster.”).

7 See cases cited infra notes 128–29.

8 United States v. Skoien, 614 F.3d 638, 641–42 (7th Cir. 2010) [hereinafter *Skoien III*].

declined to engage in meaningful judicial review. This Comment will critique the Seventh Circuit’s decision.

This Comment will begin with a brief discussion of *Heller I* and will examine the impact of the Supreme Court’s proclamation that the right to keep and bear arms for self-defense is a right that precedes the Constitution. Part II introduces the Lautenberg Amendment to the Gun Control Act of 1968, a statute that bars individuals convicted of misdemeanor crimes of domestic violence from possessing firearms. This section begins with the history behind the enactment of the Lautenberg Amendment and ends with the Supreme Court’s interpretation of the amendment in the context of Second Amendment jurisprudence after *Heller I*. Part II also analyzes the factual background and procedural history leading up to the Seventh Circuit’s decision in *United States v. Skoien* (*Skoien III*), and will include a critique of the court’s decision in the aforementioned case. It will be suggested that the Seventh Circuit erred by failing to confront the “‘levels of scrutiny’ quagmire” when presented with the opportunity in *Skoien III*. Part III will attempt to discern why a majority of courts after *Heller I* applied the doctrine of intermediate scrutiny to legislation that infringed on the right to keep and bear arms for self-defense. This Comment will conclude with an abridged review of *McDonald* and will suggest that there is sufficient case law to provide a foundation for the application of strict scrutiny analysis to the Lautenberg Amendment.

**I. DISTRICT OF COLUMBIA v. HELLER**

*Heller I* is a watershed case wherein the Supreme Court struck down the District of Columbia’s handgun ban because the Second Amendment “elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and

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10 *Skoien III*, 614 F.3d at 641.
12 *Skoien III*, 614 F.3d at 641–42.
In *Heller I*, special police officer Dick Anthony Heller brought an action challenging the District’s handgun ban on Second Amendment grounds and sought to enjoin the District from enforcing the aforementioned gun control statute. The Supreme Court embarked on a lengthy review of historical texts to aid in interpreting the Second Amendment. The Court highlighted post-ratification sentiments, pre-Civil War case law, and post-Civil War legislation and concluded that precedent does not preclude the espousal of the original understanding of the Second Amendment. Following a searching inquiry and textualist reading of the Second Amendment, the Court held that the Second Amendment codifies a pre-existing right to keep and bear arms for self-defense. Therefore, the Court declared unconstitutional the District of Columbia’s ban on the possession of handguns under its interpretation of the Second Amendment. The Court, however, maintained that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms,” which are “presumptively lawful” under the Court’s ruling. The Court then identified a number of “presumptively lawful” regulatory measures, specifically prohibitions on the possession of firearms by felons and the mentally ill, and stated that it “identif[i]es these presumptively lawful regulatory measures only as examples; [the] list does not purport to be exhaustive.” In addition, the Court in *Heller I* suggested that the two exacting levels of heightened scrutiny—intermediate scrutiny and strict scrutiny—should

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13 *Heller I*, 554 U.S. at 635.
14 *Id.* at 574–76.
15 *Id.* at 605–27.
16 *Id.*
17 *Id.* at 625.
18 *Id.* at 635.
19 *Id.* at 626, 627 n.26.
be applied to laws that interfere with the Second Amendment right to keep and bear arms for the defense of self, family, and property.\(^{22}\)

The Court’s decision in *Heller I* has resulted in a myriad of challenges to existing firearm legislation. By rejecting the collective rights interpretation of the Second Amendment,\(^ {23}\) the Supreme Court enabled the Second Amendment to be incorporated and fully applicable to the States by virtue of the Due Process Clause of the Fourteenth Amendment.\(^ {24}\) Justice Stevens, writing in dissent, cautioned that the *Heller I* ruling would leave lower federal courts without a clear standard for resolving challenges to existing firearm legislation.\(^ {25}\) Justice Stevens was correct to caution against the Court’s decision in *Heller I*. As evidenced by the recent Seventh Circuit case, *Skoien III*, the federal courts have had difficulty adjudicating Second Amendment challenges to laws that infringe on the Second Amendment. In *Skoien III*, the Court of Appeals for the Seventh Circuit upheld the constitutionality of the Lautenberg Amendment in the face of a Second Amendment challenge.\(^ {26}\) However, the court parroted the majority in *Heller I* and refused to apply a specific standard of scrutiny.\(^ {27}\)

II. *UNITED STATES V. SKOIEN*

Defendant Steven Skoien was convicted in 2006 of domestic battery in a Wisconsin circuit court and sentenced to two years’ probation.\(^ {28}\) As a condition of his probation and in correspondence

\(^{22}\) Id. at 628–29; see id. at 628 n.27.

\(^{23}\) Id. at 579–80; see United States v. Skoien, 857 F.3d 803, 807 (7th Cir. 2009) [hereinafter *Skoien II*]; Gillespie v. City of Indianapolis, 185 F.3d 693, 711 (7th Cir. 1999).

\(^{24}\) See McDonald v. Chicago, 130 S. Ct. 3020, 3050 (2010) (plurality opinion) (holding that the right to keep and bear arms is fundamental to our scheme of ordered liberty).

\(^{25}\) Id. at 718–19 (Breyer, J., dissenting).

\(^{26}\) *Skoien III*, 614 F.3d 638, 642 (7th Cir. 2010).

\(^{27}\) See id.

\(^{28}\) *Skoien II*, 587 F.3d. at 806.
with 18 U.S.C. § 922(g)(9), Skoien was prohibited from possessing a firearm.  

In 2007, his probation officer learned that he had purchased a deer-hunting license. In light of the aforementioned discovery, the probation officer believed that Skoien had purchased a firearm, and probation agents searched his home as a result. Upon searching Skoien’s property, Wisconsin probation agents discovered a Winchester twelve-gauge shotgun, shotgun ammunition, a statute-issued tag for a gun deer kill in the name of Steven Skoien, and a deer carcass in Skoien’s garage. Skoien was subsequently indicted by a federal grand jury for possessing a firearm in violation of 18 U.S.C. § 922(g)(9).

A. Skoien’s Second Amendment Claim

Skoien filed a motion to dismiss the indictment on the grounds that § 922(g)(9) violated his Second Amendment right to keep and bear arms. At the time that Skoien filed his motion to dismiss, Seventh Circuit precedent precluded him from alleging that § 922(g)(9) contravened the Second Amendment. As a result, the district court denied Skoien’s motion to dismiss. Shortly after the

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29 Id.
30 Id.
31 Id.
32 Id.
33 Id.
34 Defendant’s Motion to Dismiss Indictment at ¶ 2, United States v. Skoien, 2008 WL 4682598 (W.D. Wis. Aug. 27, 2008) (No. 08-cr-12-bbc) [hereinafter Skoien I]; see U.S. CONST. amend. II.
35 See Gillespie v. City of Indianapolis, 185 F.3d 693, 710 (7th Cir. 1999) (holding that the link between the ability to “keep and bear Arms” and “a well regulated Militia” is suggestive of the fact that the right does not extend to individuals, but rather to the people collectively and only to the extent necessary to protect their interest in protection by a militia); see also United States v. Price, 328 F.3d 958, 961 (7th Cir. 2003) (stating that § 922(g)(9) is constitutional under the “collective rights” model for interpreting the Second Amendment).
aforementioned denial, the Supreme Court in *Heller I* held that the Second Amendment protects an individual’s right to possess a firearm for a lawful purpose, unrelated to service in a militia. Consequently, Skoien filed a motion to reconsider the motion to dismiss the indictment.38

In the defendant’s brief, a considerable amount of emphasis was placed on *Heller I,* which struck down the District of Columbia’s handgun ban because it was too broad, extending to an entire class of arms that is overwhelmingly chosen by American society for the lawful purposes of self-defense and hunting.40 Skoien claimed that the Winchester twelve-gauge shotgun is “clearly an ‘arm’ that is overwhelmingly chosen by American society for the lawful purpose of hunting.”41 Furthermore, in light of the fact that the Court in *Heller* declared that the Second Amendment codified a pre-existing individual right to keep and bear arms, Skoien argued that the court in the instant case must declare unconstitutional § 922(g)(9) if it determines that the statute is not narrowly tailored to serve a compelling governmental interest.42

Judge Barbara Crabb of the Western District of Wisconsin considered the motion to dismiss filed by Skoien, which alleged that § 922(g)(9) violated the Second Amendment to the United States Constitution.43 Skoien acknowledged that the Court of Appeals for the Seventh Circuit upheld the constitutionality of § 922(g)(9), but argued

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38 See generally Brief in Support of Defendant’s Motion to Reconsider Motion to Dismiss Indictment, *Skoien I*, 2008 WL 4682598 (No. 08-cr-12-bbc).
39 See generally id.
40 *Heller I*, 554 U.S. at 625–30 (only the sorts of weapons that were in common use at the time the Second Amendment was ratified are protected).
41 Brief in Support of Defendant’s Motion to Reconsider Motion to Dismiss Indictment, *supra* note 38, at 3.
42 Id. at 4–5.
43 *Skoien I*, No. 08-cr-12-bbc, 2008 WL 4682598, at *1 (W.D. Wis. Aug. 27, 2008).
that the statute should be reevaluated in light of the recent Supreme Court decision in *Heller I.*

In her analysis, Judge Crabb noted that the Court in *Heller* held that the Second Amendment right to bear arms protects an individual right to possess and carry weapons in case of confrontation, but stated that the Court did not address the constitutionality of § 922(g)(9). In addition, Judge Crabb mentioned that the majority cautioned against interpreting its decision as a suggestion that all gun laws and firearm restrictions are unconstitutional. Rather, the Court declared that its opinion does not cast doubt on the countless longstanding prohibitions on the possession of firearms by certain groups of individuals.

Skoien, however, urged the court to review § 922(g)(9) using the doctrine of strict scrutiny, which requires a court to examine any legislative action that impinges upon a fundamental right or involves the use of a suspect classification to ensure that it is narrowly tailored to serve a compelling governmental purpose.

Skoien urged the court to consider the doctrine of strict scrutiny when rendering its decision. In the opinion of the court, Judge Crabb acknowledged that strict scrutiny may be the appropriate standard to apply to a legislative effort to restrict firearm possession, but noted that it was unnecessary to resolve the issue in the instant case.

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44 Id.
45 Id.; see *Heller I*, 554 U.S. at 582–83.
47 Id. (quoting *Heller I*, 554 U.S. at 626–27) (“[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”).
48 Id.; see *Sklar v. Byrne*, 727 F.2d 633, 636 (7th Cir. 1984) (“Where the legislative classification works to the disadvantage of a constitutionally suspect class[,] . . . then courts may uphold the classification only if it is ‘precisely tailored to serve a compelling governmental interest.’”)
49 Brief in Support of Defendant’s Motion to Reconsider Motion to Dismiss Indictment, *supra* note 38, at 4–5.
The court declared that § 922(g)(9) passes constitutional muster under the doctrine of strict scrutiny because it is narrowly tailored to achieve a compelling governmental interest. The government has a compelling interest in protecting the families of individuals convicted of misdemeanor crimes of domestic violence because they pose the greatest harm to their families. The court noted that the Supreme Court's acknowledgement of the existence of "longstanding prohibitions on the possession of firearms by felons" in *Heller* is an express recognition of the fact that an individual may forfeit his right to keep and bear arms under the Second Amendment when he commits a crime determined by the legislature to be of a serious nature. Furthermore, the court noted that in enacting § 922(g)(9), Congress designated misdemeanor crimes of domestic violence as being serious in nature.

Judge Crabb then considered whether existing Seventh Circuit precedent upholding § 922(g)(9), based on the interpretation of the Second Amendment right to keep and bear arms as a collective right, should be upheld in light of *Heller I*. The court referenced the Seventh Circuit decision in *Gillespie v. City of Indianapolis*, which served as precedent in the district court case. The *Gillespie* court had noted that the Court of Appeals for the Seventh Circuit held that *United States v. Miller* and its progeny confirm that the Second Amendment does not establish an individual right to possess a firearm independent from the role that possession of a firearm might play in maintaining a militia. Therefore, the court reasoned that § 922(g)(9)
is constitutional in the Seventh Circuit up and until either the Court of Appeals for the Seventh Circuit or the Supreme Court specifically rules to the contrary. Judge Crabb proceeded to emphasize that the Court of Appeals for the Seventh Circuit previously upheld the constitutionality of 18 U.S.C. § 922(g)(1), the felon-in-possession statute, and that “[c]onstitutionally speaking, there is nothing remarkable about the extension of federal firearms disabilities to persons convicted of misdemeanors, as opposed to felonies.” Therefore, Judge Crabb denied the motion to dismiss the indictment.

After reviewing precedent in the Seventh Circuit and in consideration of the recent Supreme Court decision in *Heller I*, the court found that § 922(g)(9) is constitutional under the Second Amendment.

**B. The Court of Appeals for the Seventh Circuit**

Skoien appealed the denial of his motion to dismiss. The defendant’s argument on appeal was that § 922(g)(9), known colloquially as the Lautenberg Amendment, violated his right to keep and bear arms under the Second Amendment. On appeal, the Court of Appeals for the Seventh Circuit engaged in a comprehensive review that inures not to the individual but to the people collectively, its reach extending so far as is necessary to protect their common interest in protection by a militia.”; see United States v. Miller, 307 U.S. 174, 178 (1939) (holding that in the absence of a nexus between the firearm and the preservation or proficiency of a well-regulated militia, it cannot be said that the Second Amendment guarantees an individual right to keep and bear arms).


60 See United States v. Price, 328 F.3d 958, 961 (7th Cir. 2003) (establishing that even under the individual rights model for interpreting the Second Amendment, the right to keep and bear arms can be restricted); accord United States v. Emerson, 270 F.3d 203, 260 (5th Cir. 2001).

61 *Gillespie*, 185 F.3d at 706.


63 *Id.*

64 See Defendant-Appellant’s Reply Brief at 1, *Skoien II*, 587 F.3d 803 (7th Cir. 2009) (No. 08-3770).

65 *Skoien II*, 587 F.3d. at 807.
of the recent Supreme Court decision in *Heller I*. Writing for the court, Judge Sykes concluded that intermediate scrutiny was the appropriate standard of review for Skoien’s Second Amendment challenge to the constitutionality of § 922(g)(9). After reiterating that the doctrine of intermediate scrutiny requires that a law be substantially related to an important governmental interest, Judge Sykes stated that the government has the burden of establishing “a reasonable fit between its important interest in reducing domestic gun violence and the means chosen to advance that interest,” namely the permanent disarmament of domestic violence misdemeanants under the Lautenberg Amendment. Accordingly, the court vacated the indictment and remanded the case to the district court with instructions to apply the doctrine of intermediate scrutiny.

To determine whether the doctrine of intermediate scrutiny or strict scrutiny should apply when reviewing the constitutionality of § 922(g)(9), Judge Sykes noted that the Court in *Heller* held that the Second Amendment secures an individual pre-existing right to keep and bear arms for the defense of self, family, and home. After a thorough analysis of the text of the Second Amendment and the founding-era sources of its original conventional meaning, the Supreme Court in *Heller I* held that the Second Amendment does not declare a collective right to keep and bear arms, but rather it guarantees an individual right to armed defense not limited to service in a militia.

In *Heller I*, the Court highlighted the importance of logical nexus between the operative clause and the prefatory clause of the Second Amendment. The Court began with an analysis of the language of the operative clause: “the right of the people to keep and bear Arms,
shall not be infringed.”72 The majority in *Heller I* proceeded to consult historical sources of information to identify the meaning of the language of the operative clause at the time of its codification.73 The Supreme Court determined that the elements of the operative clause of the Second Amendment guarantee an individual right to keep and bear arms in case of confrontation, a meaning that is confirmed by the fact that the right to keep and bear arms is a natural right.74 The Seventh Circuit noted that the Court analyzed the prefatory clause of the Second Amendment: “[a] well regulated Militia, being necessary to the security of a Free State.”75 The majority in *Heller* considered the aforementioned militia clause alongside the relevant historical background and concluded that the clause was not a limitation on the scope of the right to keep and bear arms, but rather it described the motivating purpose behind codifying the pre-existing right.76 The Court concluded that the right was codified in the Second Amendment to prevent the federal government from disarming the citizenry.77 The Seventh Circuit found this reasoning to be highly persuasive. Judge Sykes then noted that the Court invalidated the District of Columbia’s handgun ban78 as unconstitutional “[u]nder any of the standards of scrutiny that [the Supreme Court] ha[s] applied to enumerated

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72 *Skoien II*, 587 F.3d at 806; see U.S. CONST. amend. II.
73 *Heller I*, 554 U.S. at 592–96.
74 *Heller I*, 554 U.S. at 592 (“[The right to keep and bear arms] is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second [A]mendment declares that it shall not be infringed . . .”).
75 *Skoien II*, 587 F.3d at 807; see U.S. CONST. amend. II.
76 *Skoien II*, 587 F.3d at 807.
77 *Heller I*, 554 U.S. at 599 (“The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right [to bear arms]; most undoubtedly [they] thought it even more important for self-defense and hunting. But the threat that the new Federal Government would destroy the citizens’ militia by taking away their arms was the reason that right . . . was codified.”).
78 *Skoien II*, 587 F.3d at 808.
constitutional rights.”79 In a statement that has the potential to become as revered as the famous footnote in United States v. Carolene Products,80 the Court stated that “nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill.”81 The majority in Skoien II noted that this list was not exhaustive, and the Supreme Court identified these presumptively lawful prohibitions only as examples.82

Judge Sykes noted that the limiting language from Heller I is not mandatory authority, but rather it is persuasive dicta.83 Judge Sykes observed that the Supreme Court failed to shed light on the requisite standard of scrutiny that should be applied when reviewing these presumptively lawful regulatory measures.84 Therefore, Judge Sykes reasoned that all gun laws, aside from those that are categorically invalid under Heller I, must be independently justified.85

The court reasoned that Heller established a framework for analyzing Second Amendment cases.86 Under this framework, a determination must first be made as to whether the gun law at issue is within the scope of the right to keep and bear arms as it was publicly understood when it was codified in the Second Amendment.87 Judge

79 Heller I, 554 U.S. at 628.
80 See 304 U.S. 144, 153 n.4 (1938) (stating that an exception to the presumption of constitutionality may be made and a heightened standard of judicial review may be required where “legislation appears on its face to be within a specific prohibition of the Constitution” or is aimed at a “discrete and insular minorit[y]”).
81 Heller I, 554 U.S. at 626.
82 Skoien II, 587 F.3d at 808; see Heller I, 554 U.S. at 626 n.26.
83 Skoien II, 587 F.3d. at 808.
84 Id.
85 Id. (“[B]eyond [the Court’s reference to presumptively lawful regulatory measures], it is not entirely clear whether [the aforementioned language] should be taken to suggest that the listed firearms regulations are presumed to fall outside the scope of the Second Amendment right as it was understood at the time of the framing or that they are presumptively lawful under even the highest standard of scrutiny applicable to laws that encumber constitutional rights.”).
86 Id.
87 Id. at 809.
Sykes noted, “If the government can establish [that a gun law falls outside the public understanding of the right], then the analysis need go no further.”88 If, however, the law at issue regulated conduct falling within the scope of the right, Judge Sykes declared that the law will be upheld only if the government can satisfy the applicable level of scrutiny.89 The court reasoned that the level of scrutiny is dependent on “the degree of fit required between the means and the end [and] how closely the law comes to the core of the right and the severity of the law’s burden on the right.”90 Thus, the court in Skoien II established a nexus test to determine the applicable level of scrutiny that a court must apply if a law regulates conduct falling within the scope of the right to keep and bear arms under the Second Amendment.

Judge Sykes proceeded to employ the framework in Heller I to ascertain whether § 922(g)(9) violated Skoien’s Second Amendment right to keep and bear arms. The court stated that it would be difficult to argue that a traditional hunting shotgun falls outside the scope of the Second Amendment at the time of its adoption.91 The majority in Heller I highlighted the importance of long guns used for hunting during the founding era;92 ergo, Judge Sykes stated that the possession of standard hunting shotguns did not fall outside the parameters of the right as it was publicly understood when the Bill of Rights was ratified.93 However, the government did not try to justify § 922(g)(9) on a historical basis.94 Therefore, Judge Sykes proceeded to the second inquiry under Heller I, which required the court to determine

88 Id.
89 Id.
90 Id. (noting that this framework emphasizes the importance that the Supreme Court placed on the original meaning of the Second Amendment right to keep and bear arms, while simultaneously “attempt[ing] to reconcile the Court’s invalidation of the D.C. gun ban ‘under any standard of scrutiny’ with its reference to the existence of ‘presumptively lawful’ exceptions to the right to keep and bear arms.”).
91 Id.
92 Id.
93 Id.
94 Id. at 810.
whether the restriction on Skoien’s right to bear arms is justified under the applicable standard of review.\footnote{Id.} Noting that the Court in \textit{Heller I} rejected rational basis review,\footnote{\textit{Heller I}, 554 U.S. 570, 628 n.27 (2008).} the minimum level of scrutiny, Judge Sykes reasoned that gun laws that severely restrict the core right under the Second Amendment are subject to an exacting scrutiny.\footnote{\textit{Skoien II}, 587 F.3d. at 811.} Pointing to the Supreme Court’s dicta regarding presumptively lawful firearm laws, the court determined that strict scrutiny does not apply to § 922(g)(9).\footnote{Id. at 812 (“[T]he [Supreme] Court’s willingness to presume the constitutionality of various firearms restrictions—especially prohibitions on firearms [sic] possession by felons—gives us ample reason to believe that strict scrutiny does not apply here.”).} Judge Sykes stated, “The Second Amendment challenge in this case is several steps removed from the core constitutional right identified in \textit{Heller [I]}.\footnote{Id.; see \textit{Heller I}, 554 U.S. at 635 (holding that at the core of the Second Amendment is the “right of law-abiding, responsible citizens to use arms in defense of hearth and home.”).}”\footnote{Id. at 812.} Moreover, the court noted that Skoien based his constitutional challenge on the right to possess his shotgun for the purpose of hunting, and not on the right of self-defense.\footnote{\textit{Skoien II}, 587 F.3d. at 812.} Therefore, because § 922(g)(9) does not severely burden Skoien’s Second Amendment right to possess a firearm for self-defense, Judge Sykes held that intermediate scrutiny is the appropriate standard of review.\footnote{Clark v. Jeter, 486 U.S. 456, 461 (1988).} Under intermediate scrutiny, a challenged law will be upheld if the government establishes that the law is substantially related to an important governmental interest.\footnote{\textit{Skoien II}, 587 F.3d. at 812.} Here, the court held that reducing domestic violence qualifies as an important governmental interest.\footnote{\textit{Id.}} Furthermore, the court stated that a substantial nexus existed between the permanent disarmament of domestic violence misdemeanants under § 922(g)(9) and the government’s goal of preventing firear-
related violence against domestic partners. Therefore, the court vacated Skoien’s conviction and remanded the case for further proceedings consistent with the aforementioned opinion.

C. Rehearing En Banc

In Skoien III, the Seventh Circuit granted rehearing en banc and affirmed the district court’s decision, holding that the Lautenberg Amendment is constitutional. Chief Judge Easterbrook, writing for the majority, refused to address the “‘levels of scrutiny’ quagmire.” The Chief Judge thought it sufficient that the government’s goal of “preventing armed mayhem” is an important governmental objective. Furthermore, Chief Judge Easterbrook reasoned that “[b]oth logic and data” establish a substantial relationship between the Lautenberg Amendment and the government’s objective of “preventing armed mayhem.” Although the court declined to apply a specific standard of scrutiny, it is evident that the court in Skoien III implicitly applied intermediate scrutiny analysis to uphold the Lautenberg Amendment. Chief Judge Easterbrook, writing that “the goal of [the Lautenberg Amendment], preventing armed mayhem, is an important governmental objective,” and “[b]oth logic and data establish a substantial relation between [the Lautenberg Amendment]...
and [preventing armed mayhem], "112 used terms of art that indicate the application of intermediate scrutiny review.113

It is important to note that Skoien III, decided less than one month after McDonald, makes no mention of the Court’s holding that the Second Amendment is incorporated and fully applicable to the States by virtue of the Due Process Clause of the Fourteenth Amendment.114 This point is alluded to by Judge Sykes, the sole dissenting judge in Skoien III.115 By failing to address the Court’s decision in McDonald, Judge Sykes argued that “the pertinent question is how contemporary gun laws should be evaluated to determine whether they infringe the Second Amendment right [to keep and bear arms for self-defense].”116 In addition, the Seventh Circuit neglected to examine the corpus of case law that applies strict scrutiny where a law infringes upon a right that is fundamental to our scheme of ordered liberty.117

III. SECOND AMENDMENT JURISPRUDENCE AFTER HELLER I

Despite the perspicuous holding in Heller I, the Supreme Court’s unwillingness to delve into the “‘levels of scrutiny’ quagmire”118 has burdened the federal courts with the task of adjudicating Second Amendment challenges without a clear method for doing so. Consequently, courts inconsistently utilize a number of approaches to

\[112\] Id. (emphasis added).
\[113\] See Clark, 486 U.S. at 461.
\[114\] See McDonald v. Chicago, 130 S. Ct. 3020, 3050 (2010) (plurality opinion).
\[115\] Skoien III, 614 F.3d at 648 (Sykes, J., dissenting).
\[116\] Id.
\[118\] Skoien III, 614 F.3d at 641–42.
adjudicate Second Amendment challenges.119 In *Heller v. District of Columbia (Heller II)*, an action was brought challenging the Firearms Registration Amendment Act, which was enacted in response to the Court’s ruling in *Heller I*, on Second Amendment grounds.120 The plaintiffs challenged three provisions of the new act: the firearms registration procedures, the prohibition on assault weapons, and the prohibition on devices that feed large capacity ammunition into firearms.121

*Heller II* began with an overview of the various approaches used by courts to adjudicate Second Amendment challenges in the wake of *Heller I*.122 The court in *Heller II* determined that five approaches have been used by courts to review laws accused of violating the Second Amendment.123 The first method used by courts is to issue a ruling without applying a specific standard of scrutiny.124 Rather, these courts have simply determined whether the law at issue is a presumptively lawful longstanding prohibition as identified by *Heller I*.125 Other courts have attempted to tackle the judicial scrutiny quandary as it applies to Second Amendment challenges.126 A small number of courts have applied the doctrine of strict scrutiny to Second

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119 *See, e.g.*, United States v. Masciandaro, 648 F. Supp. 2d 779, 787–90 (E.D. Va. 2009) (holding that the challenged law is constitutional “under any elevated level of constitutional scrutiny”); United States v. Booker, 570 F. Supp. 2d 161, 162–63 (D. Me. 2008) (“A useful approach is to ask whether a statutory prohibition against the possession of firearms by felons and the mentally ill is similar enough to the statutory prohibition [at issue] to justify its inclusion in the list of ‘longstanding prohibitions’ [contained in the *Heller* dictum’].”).


121 *Id.* at 185.

122 *Id.*

123 *Id.*

124 *See supra* note 119.

125 *See id.*

126 *See, e.g.*, *Heller II*, 698 F. Supp. 2d at 185.
Amendment challenges, while the majority of courts have held that intermediate scrutiny is the proper standard of review. A fourth approach taken by courts involves applying elements of the undue burden test that is typically applied in the abortion context. Finally, a small number of courts have combined the above-mentioned approaches to form a hybrid method for reviewing Second Amendment challenges.

In Heller II, the court concluded that intermediate scrutiny is the appropriate standard of review. The court reasoned that the Court in Heller I “did not explicitly hold that the Second Amendment right is a fundamental right,” and therefore strict scrutiny did not apply. Although the majority in Heller I suggested that a heightened standard of review should be applied to laws that interfere with the Second Amendment right to keep and bear arms, the court in Heller II reasoned that “[i]f the Supreme Court had wanted to declare the Second Amendment right a fundamental right, it would have done so explicitly.”

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127 See, e.g., United States v. Engstrum, 609 F. Supp. 2d 1227, 1231 (D. Utah 2009) (upholding the constitutionality of the Lautenberg Amendment under strict scrutiny because it serves a compelling governmental interest and is narrowly tailored to serve this interest).


129 Heller II, 698 F. Supp. 2d at 185–86; see, e.g., Nordyke v. King, 563 F.3d 439, 459–60 (9th Cir. 2009), vacated on reh’g en banc, 611 F.3d 1015 (9th Cir. 2010); see also Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860 (1992).

130 Heller II, 698 F. Supp. 2d at 186; see e.g., Skoien II, 587 F.3d 803, 812 (7th Cir. 2009).

131 Id. at 187.

132 Id.

133 Id. (‘The court will not infer such a significant holding based on the Heller majority’s oblique references to the gun ownership rights of eighteenth-century English subjects.’); see United States v. Darlington, 351 F.3d 632, 635 (5th Cir. 2003) (“if [a court] intended to recognize that the individual right to keep and bear arms is a ‘fundamental right,’ in the sense that restrictions on this right are subject to
In *United States v. Yanez-Vasquez*, the defendant was charged with possession of a firearm in violation of 18 U.S.C. § 922(g)(5). The defendant argued that the statute, which prohibits the possession of a firearm by an illegal alien, violates his Second Amendment right to keep and bear arms. In *Yanez-Vasquez*, the court rebuffed the defendant’s contention that strict scrutiny should apply. The court declined to apply strict scrutiny because *Heller I* did not expressly declare that the Second Amendment right to keep and bear arms is a fundamental right.

In the wake of the Supreme Court’s decision in *Heller I*, it is evident that a number of courts, adjudicating cases challenging legislation under the Second Amendment, are engaging in a literal reading of the Court’s dictum. The *Heller I* dictum regarding presumptively lawful longstanding prohibitions has been interpreted by courts to disqualify the use of strict scrutiny review for Second Amendment claims. A second, related problem, illustrated by a handful of courts, is an unwillingness to engage in meaningful judicial scrutiny. Rather than engage in meaningful judicial review, a number of courts merely determine whether the Lautenberg Amendment is “presumptively lawful” under *Heller I*. In *United States v. White*, the court proclaimed that they were tasked with “decid[ing] whether the statutory prohibition against the possession of firearms by persons convicted of the misdemeanor crime of domestic violence . . . warrants inclusion on [Heller I’s] list of presumptively lawful longstanding prohibitions.” This approach is problematic because judicial scrutiny is disregarded. Rather than assessing whether the means and ends of a statutory prohibition are related to an important or

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136 Id.
137 Id. at *5.
138 Id.
139 See cases cited supra notes 119–20.
140 United States v. White, 593 F.3d 1199, 1206 (11th Cir. 2010).
compelling governmental interest, the court merely determines whether the prohibition at issue is analogous with the brief list of presumptively lawful longstanding prohibitions identified in *Heller I*. 142 Moreover, courts engaging in this unmethodical standard of review fail to heed the words of the Court in *Heller I*. The Court stated that there a number of “longstanding prohibitions on the possession of firearms,”143 and emphasized that these prohibitions are “presumptively lawful.”144 Yet the court in *White* and *Skoien III* appear to ignore the term “presumptively.”145 Neither court engaged in the heightened standard of review required by *Heller I*.145 Had the Court desired to establish a neoteric standard of review based on presumptively lawful longstanding prohibitions on the possession of firearms, it would have done so explicitly. In addition, the Court would not have referred to these longstanding prohibitions as being “presumptively lawful” in nature if it intended for this locution to serve as a standard of judicial review.

Expanding on *Heller I*, *McDonald v. City of Chicago* is a landmark Supreme Court case that places federal courts in a position to implement strict scrutiny review in the area of Second Amendment jurisprudence.146 Justice Alito, writing for the plurality, held that the Second Amendment right to keep and bear arms for self-defense is incorporated and fully applicable to the States by virtue of the Due Process Clause of the Fourteenth Amendment.147 The Court in *McDonald*, charged with determining whether the Second Amendment right to keep and bear arms applied to the States, exercised the legal doctrine of incorporation to hold that the Second Amendment is

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141 See, e.g., id. at 1205–06.
143 Id. at 627 n.26 (emphasis added).
144 Id.
145 See id. at 628 n.27; *Skoien III*, 614 F.3d 638, 641 (7th Cir. 2010).
146 See generally *McDonald v. City of Chicago*, Ill., 130 S. Ct. 3020 (2010).
147 Id. at 3050 (plurality opinion).
applicable to the States through the Due Process Clause of the Fourteenth Amendment. 148

The Due Process Clause of the Fourteenth Amendment states, in relevant part, that no state shall “deprive any person of life, liberty, or property, without due process of law.”149 Drawing largely on the historical record surrounding the framing and incorporation of the Fourteenth Amendment,150 Justice Alito held that the right to keep and bear arms for self-defense is fundamental to our scheme of ordered liberty.151

The Court’s decision in McDonald may have profound implications for the manner in which courts evaluate the constitutionality of laws prohibiting the possession of firearms. It is “widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right.”152 These rights are so “deeply rooted in this Nation’s history and tradition,”153 that they are fundamental to our scheme of ordered liberty.154 Accordingly, the

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148 Id.
149 U.S. CONST. amend. XIV.
150 McDonald, 130 S. Ct. at 3036–44.
151 Id. at 3042; see Duncan v. Louisiana, 391 U.S. 145, 149 (1968). But cf. McDonald, 130 S. Ct. at 3059–62 (Thomas, J., concurring) (Although Justice Thomas agreed with the Court that the right to keep and bear arms is applicable to the States through the Fourteenth Amendment, he argued that incorporation through the Privileges or Immunities Clause, rather than the Due Process Clause, is a more straightforward path. Justice Thomas stated that “fundamental” rights, some of which are not enumerated in the Constitution, are a legal fiction that arose in response to the marginalization of the Privileges or Immunities Clause following the Court’s decision in the Slaughter-House Cases); Slaughter-House Cases, 83 U.S. 36 (1873) (determining that there is a sharp distinction between the privileges and immunities of state and those of federal citizenship, and the Privileges or Immunities Clause protects only the latter category of rights from State infringement).
153 McDonald, 130 S. Ct. at 3023 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).
154 See supra note 146; Duncan v. Louisiana, 391 U.S. 145, 149 (1968).
Court reversed the judgment of the Seventh Circuit and remanded the case for further proceedings in accordance with their decision.155

IV. A CASE FOR THE ADOPTION OF STRICT SCRUTINY REVIEW

In light of McDonald, there is ample evidence to support the application of strict scrutiny review to legislation that infringes on the Second Amendment right to keep and bear arms for self-defense. Although the right is not unqualified, laws encumbering fundamental rights are often subjected to strict scrutiny review.156

Strict scrutiny was conceived by implication in a footnote of United States v. Carolene Products157 and is currently the most exacting form of judicial scrutiny. To withstand strict scrutiny review, the government has the burden of proving that the challenged law is narrowly tailored to further a compelling governmental interest.158

Supreme Court precedent often requires that laws restricting fundamental rights be evaluated under strict scrutiny,159 as intermediate scrutiny is an insufficient standard of review for legislation that infringes on fundamental rights. Intermediate scrutiny is a less exacting form of scrutiny and requires that a law be substantially related to an important governmental objective.160 In other words, a court need not find that the government’s purpose is compelling, but it must characterize the objective as important. In

155 McDonald, 130 S. Ct. at 3050.
156 See supra note 117. But see Burdick v. Takushi, 504 U.S. 428, 434 (1992) (holding that the First Amendment right to freedom of speech, while a fundamental right in nature, is subject to a flexible standard of review for ballot-access restrictions).
157 See supra note 80 and accompanying text.
159 See cases cited supra note 117.
order to trigger intermediate scrutiny, a law must “implicate an important, though not constitutional, right.”

Legal scholars and judicial opinions have suggested that strict scrutiny is an outcome-determinative standard of judicial review. According to legal scholar Paul Kahn, “[C]ontemporary equal protection law has essentially identified ‘exacting’ judicial scrutiny with judicial invalidation.” The Supreme Court has echoed these sentiments, noting that “[o]nly rarely are statutes sustained in the face of strict scrutiny.” In fact, this is an easy argument to make when reviewing Warren Court decisions. The Warren Court used strict scrutiny review to invalidate a number of laws and extend constitutional protections to various fundamental rights. “[O]nce the Court sorts the case into one or another constitutional bin [strict scrutiny or rational basis], the outcome is virtually foreordained.”

This argument has been reiterated in the wake of *Heller I*, but it remains unfounded.

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161 United States v. Coleman, 166 F.3d 428, 431 (2d Cir. 1999); see Eisenbud v. Suffolk County, 841 F.2d 42, 45 (2d Cir. 1988).


165 Winkler, *supra* note 164, at 807 (quoting JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* 55 (1997)).

166 E.g., *Skoien II*, 587 F.3d 803, 813 (7th Cir. 2009) (noting that strict scrutiny is a demanding standard of judicial review that is intentionally difficult to overcome, “in deference to the primacy of the individual liberties the Constitution secures.”);
Strict scrutiny is not “strict in theory, but fatal in fact.”168 The phrase “strict in theory and fatal in fact,”169 penned by Gerald Gunther, has become “one of the most quoted lines in legal literature”170 and has been parroted in numerous judicial opinions.171 Recently, the Supreme Court has attempted to expunge the belief that strict scrutiny is an outcome-determinative test, always resulting in invalidation of the challenged legislation. In Adarand Constructors, Inc. v. Pena, Justice O’Connor declared that the Court intended to “dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’”172 Justice O’Connor argued that requiring strict scrutiny is the most effective way to ensure that courts consistently engage in a detailed examination of both the ends and means of a challenged law.173 In Johnson v. California, Justice O’Conner again argued against the notion that strict scrutiny is fatal in fact, writing that “[t]he fact that strict scrutiny applies ‘says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny.’”174 In a recent case, Grutter v. Bollinger, the Supreme Court upheld the affirmative action admission policy at the University of Michigan Law School.175 Justice O’Connor, writing for the majority, declared that the school’s use of race in its admissions

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Dennis A. Henigan, The Heller Paradox, 56 UCLA L. REV. 1171, 1197 (2009) (arguing that the discussion of presumptively lawful longstanding prohibitions on the possession of firearms in Heller must be read as an implicit rejection of strict scrutiny review).

167 See supra note 158.

168 Adarand, 515 U.S. at 237 (quoting Gunther, supra note 163, at 8).

169 Gunther, supra note 163, at 8.


172 Adarand, 515 U.S. at 237.

173 Id.


policy was narrowly tailored to further a compelling interest in the unique education benefits that emanate from a diverse student body.\textsuperscript{176} A number of legal scholars have aligned themselves with Justice O’Connor. According to Adam Winkler, “[S]trict scrutiny exists precisely to permit regulation where ordinarily none is allowed.”\textsuperscript{177} Others have argued that strict scrutiny review is becoming less rigorous, as evidenced by the aforementioned decisions. Ashutosh Bhagwat argued that the relaxation of strict scrutiny review is due to a sudden willingness by the Court to engage in genuine inquiry of legislative purposes.\textsuperscript{178}

In \textit{Grutter}, Justice O’Connor asserted that “context matters” when strict scrutiny is applied.\textsuperscript{179} Context is equally relevant to a determination of the applicable standard of review in \textit{Skoien III}. In \textit{Skoien II}, Judge Sykes noted the importance of context in the First Amendment sphere. Judge Sykes, in an attempt to analogize the First Amendment right to freedom of speech with the Second Amendment, noted that “[i]n the First Amendment free-speech context, the rigor of this heightened form of review tends to fluctuate with the character and degree of the challenged law’s burden on the right”.\textsuperscript{180} In the realm of election regulations, laws that restrict the right to expressive association are subject to varying levels of scrutiny depending upon the nature and severity of the burden on the right; laws that impose severe burdens are subject to strict scrutiny, while regulatory measures imposing more modest burdens are reviewed more leniently.\textsuperscript{181} In the Second Amendment realm, while recent decisions have focused on the relationship between the right of “law-abiding, responsible citizens to

\textsuperscript{176} \textit{Id.} at 343.
\textsuperscript{177} Winkler, \textit{supra} note 164, at 805.
\textsuperscript{179} \textit{Grutter}, 539 U.S. at 327.
\textsuperscript{180} \textit{Skoien II}, 587 F.3d 803, 813 (7th Cir. 2009).
\textsuperscript{181} \textit{Id.}, see, e.g., Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008).
use arms in defense of hearth and home,”¹⁸² the Court in *Heller I*
stated that Americans valued the ancient right to keep and bear arms
for self-defense and hunting.¹⁸³ Judge Sykes acknowledged this
ancient right, but argued that the right to keep and bear arms for
hunting was not analogous to the core Second Amendment right
identified in *Heller I*.¹⁸⁴ However, the decisions in *Skoien II* and
*Skoien III* neglected to take context into account. While the court in
*Skoien II* failed to consider the legislative intent behind the enactment
of the Lautenberg Amendment, the court in *Skoien III* neglected to
evaluate the severity of the burden imposed by the amendment. The
Lautenberg Amendment imposes a severe burden on the right to keep
and bear arms for self-defense under the Second Amendment;¹⁸⁵ the
amendment “bars all persons who have been convicted of a domestic-
vio lence misdemeanor from ever possessing a firearm for any
reason.”¹⁸⁶ The court emphasized that “[i]t is a comprehensive lifetime
ban; . . . [t]here are no exceptions.”¹⁸⁷ This is a considerable burden
for an individual to bear. Irrespective of whether Skoien had focused
his constitutional challenge on the core Second Amendment right of
self-defense, as identified in *Heller I*,¹⁸⁸ his conviction under §
922(g)(9) will permanently bar Skoien from possessing a firearm “for
any reason,”¹⁸⁹ including self-defense.

When examined alongside *McDonald*, the nature of the
imposition and severity of the burden on the right to keep and bear
arms for self-defense under the Lautenberg Amendment necessitates
the use of strict scrutiny.

¹⁸³ Id. at 599.
¹⁸⁴ *Skoien II*, 587 F.3d at 812.
¹⁸⁵ See infra note 235.
¹⁸⁶ *Skoien II*, 587 F.3d at 811 (emphasis in original).
¹⁸⁷ Id.
¹⁸⁸ See id. at 812.
¹⁸⁹ Id. at 811.
A. Narrow Tailoring

To pass constitutional muster, legislation subject to strict scrutiny review must be narrowly tailored to further a compelling governmental interest.\(^1\) Narrow tailoring requires serious, good faith consideration of reasonable alternatives that would achieve the government’s legislative goal.\(^2\) Narrow tailoring does not, however, require an exhaustive review of every conceivable alternative.\(^3\) It is therefore imperative to evaluate the objective of the legislature in ratifying § 922(g)(9).

The Lautenberg Amendment to the Gun Control Act of 1968 is a sweeping regulatory statute that was enacted to prevent the use of firearms in violent domestic disputes.\(^4\) Amid a growing concern that permitting domestic aggressors to possess firearms would have grave consequences for domestic victims, the Lautenberg Amendment was enacted to disqualify individuals convicted of misdemeanor crimes of domestic violence from possessing firearms.\(^5\) Senator Lautenberg sought to disarm domestic aggressors because “[e]ven after a split, the individuals involved often by necessity have a continuing relationship of some sort.”\(^6\)

In *Heller I*, the Supreme Court noted that its decision does not cast doubt on a number of longstanding prohibitions on the possession of firearms by well-defined groups of individuals.\(^7\) The Lautenberg Amendment has been categorized as a lawful prohibition on the possession of firearms,\(^8\) and states in relevant part:

\(^{3}\) *Id.*
\(^{5}\) *Id.*
\(^{6}\) *Id.* at S2646-02.
\(^{8}\) See *Skoien III*, 614 F.3d 638, 642 (7th Cir. 2010).
It shall be unlawful for any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.198

While the provisions of 18 U.S.C. § 922(g) have been a source of legal controversy, the judiciary has upheld the constitutionality of the Lautenberg Amendment.199 In United States v. Hayes, the Supreme Court took the opportunity to examine the Lautenberg Amendment and inquire into the reasoning behind its enactment.200 In Hayes, the defendant was indicted and charged under § 922(g)(9) for possessing firearms after having been convicted of a misdemeanor crime of domestic violence.201 The defendant was originally charged and convicted in 1994 under a West Virginia statute that did not require a domestic relationship between the aggressor and victim, but rather was a common battery prohibition.202 The defendant moved to dismiss the indictment on the grounds that § 922(g)(9) applies only to individuals previous convicted of an offense that specifies, as an element, a domestic relationship between the offender and victim.203 Writing for the majority, Justice Ginsburg reasoned that construing § 922(g)(9) to exclude persons who engaged in domestic abuse and were convicted under a generic use-of-force statute—one that does not require a domestic relationship between the aggressor and victim—is not consistent with the legislative intent of the Lautenberg Amendment.204

199 See United States v. White, 593 F.3d 1199, 1205 (11th Cir. 2010) (holding that § 922(g)(9) warrants inclusion on the list of presumptively lawful longstanding prohibitions on the possession of firearms); In re United States, 578 F.3d 1195, 1200 (10th Cir. 2009) (order granting petition for writ of mandamus) (“Nothing suggests that the Heller dictum, which we must follow, is not inclusive of § 922(g)(9) involving those convicted of misdemeanor domestic violence.”).
201 Id. at 1087.
202 Id. at 1083.
203 Id.
domestic relationship—“would frustrate Congress’ manifest purpose.” The government must, however, prove the existence of a domestic relationship in order to establish that the underlying misdemeanor qualifies as a predicate offense. In order to substantiate her claim, Justice Ginsburg looked to § 921(a)(33)(A), which defines the term “misdemeanor crime of domestic violence” as an offense that:

(i) is a misdemeanor under Federal, State, or Tribal law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

Justice Ginsburg determined that the definition contained in § 922(a)(33)(A) contains two requirements: First, a misdemeanor crime of domestic violence must “[have], as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon”; and second, the crime must be “committed by” an individual who has a particular domestic relationship with the victim as identified by the statute. In her opinion, Justice Ginsburg noted that existing felon-in-

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204 Id. at 1087.
205 Id.
206 18 U.S.C. § 921(a)(33)(A) (2006); see United States v. White, 593 F.3d 1199, 1204 (11th Cir. 2010) (holding that the defendant’s relationship with his live-in girlfriend constituted a domestic relationship for the purposes of §§ 922(g)(9) and 921(a)(33)(A)); United States v. Shelton, 325 F.3d 553, 563 (5th Cir. 2003) (holding that defendant’s concession that he lived with his girlfriend was sufficient to satisfy the domestic relationship requirement under §§ 922(g)(9) and 921(a)(33)(A)).
208 Id.; Hayes, 129 S. Ct. at 1084.
possession laws failed to keep firearms out of the hands of persons who engaged in domestic abuse,\textsuperscript{209} writing that the language of § 921(a)(33)(A) does not require that the predicate offense include, as an individual element, the existence of a domestic relationship between the offender and victim.\textsuperscript{210} Rather, it is sufficient that the prior crime was an offense committed by the defendant against a domestic victim as proscribed by § 921(a)(33)(A)(ii).\textsuperscript{211} Accordingly, the Court in \textit{Hayes} held that “Congress defined ‘misdemeanor crime of domestic violence’ to include an offense ‘committed by’ a person who had a specified domestic relationship with the victim, whether or not the misdemeanor statute itself designates the domestic relationship as an element of the crime.”\textsuperscript{212}

Dissenting from the majority in \textit{Skoien III}, Judge Sykes reiterated many of the arguments made in \textit{Skoien II}. A number of these assertions are analogous with the Court’s holding in \textit{Hayes}.\textsuperscript{213} Judge Sykes noted that the statutory definition of misdemeanor crime of domestic violence limits the applicability of § 922(g)(9) to persons who used or attempted to use physical force, or threatened the use of a deadly weapon against a domestic victim.\textsuperscript{214} The statute thus applies only to a narrowly defined class of violent offender: “only those who have already used or attempted to use force or have threatened the use of a deadly weapon against a domestic victim are banned from possessing firearms.”\textsuperscript{215}

While attempting to analogize the Lautenberg Amendment to the list of presumptively lawful longstanding prohibitions on the possession of firearms in \textit{Heller I}, the court in \textit{White} inadvertently

\textsuperscript{209} \textit{Hayes}, 129 S. Ct. at 1093; see 142 CONG. REC. S2646-02 (1996) (statement of Sen. Frank Lautenberg).
\textsuperscript{210} \textit{Hayes}, 129 S. Ct. at 1084.
\textsuperscript{211} \textit{Id.}
\textsuperscript{212} \textit{Id.} at 1089.
\textsuperscript{213} \textit{See Skoien III}, 614 F.3d 638, 650 (7th Cir. 2010) (Sykes, J., dissenting).
\textsuperscript{215} \textit{Skoien II}, 587 F.3d at 816; \textit{see Skoien III}, 614 F.3d at 650 (Sykes, J., dissenting).
called attention to the narrow tailoring of the Lautenberg Amendment.\footnote{216} By noting that the Lautenberg Amendment was designed to “close [a] dangerous loophole” that permitted domestic abusers to possess firearms,\footnote{217} the court highlighted an element of the Lautenberg Amendment that exudes narrow tailoring: it was enacted to close a loophole. A ‘loophole’ is defined as “[a]n ambiguity, omission, or exception . . . that provides a way to avoid a rule without violating its literal requirements.”\footnote{218} In the eyes of Congress, domestic abusers were narrowly escaping felony convictions.\footnote{219} As a result, the Lautenberg Amendment was enacted to bring domestic violence misdemeanants under the scope of the felon-in-possession ban.

The \textit{White} court proceeded to note that the felon-in-possession ban, a presumptively lawful prohibition under \textit{Heller I},\footnote{220} results in both an armed robber and tax evader losing their right to possess a firearm under § 922(g)(1).\footnote{221} The court contrasted this outcome with that of an individual convicted under the Lautenberg Amendment.\footnote{222} For the Lautenberg Amendment to apply, an individual must have first acted violently toward a family member or domestic partner, a predicate offense demonstrated by a misdemeanor crime of domestic violence conviction.\footnote{223} Although the court illustrated this distinction to substantiate its claim that the Lautenberg Amendment warrants inclusion in the list of presumptively lawful prohibitions recognized in \textit{Heller I},\footnote{224} the court perfectly distinguished an overinclusive law from a law that is underinclusive. In determining whether challenged legislation is narrowly tailored, courts favor laws that are

\footnotesize{\begin{itemize}
\item \textit{See} United States v. White, 593 F.3d 1199, 1205–06 (11th Cir. 2010).
\item \textit{Id.} at 1205 (citing 142 CONG. REC. S2646-02 (1996) (statement of Sen. Frank Lautenberg)).
\item BLACK’S LAW DICTIONARY 962 (8th ed. 2004).
\item \textit{White}, 593 F.3d at 1205.
\item \textit{Id.} at 1206.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\end{itemize}}

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underinclusive rather than overinclusive.\textsuperscript{225} In \textit{White}, the court noted that the felon-in-possession ban in § 922(g)(1) “does not distinguish between the violent and non-violent offender.”\textsuperscript{226} Thus, the domestic violence misdemeanant ban under the Lautenberg Amendment, which applies only to a particular class of abusive misdemeanants, is narrowly tailored.

\textbf{B. Compelling Governmental Interest}

In \textit{Korematsu v. United States},\textsuperscript{227} an early Supreme Court case involving the application of strict scrutiny review, the Court determined that “[p]ressing public necessity” may sometimes warrant interference with constitutional rights.\textsuperscript{228} Courts are likely to uphold challenged legislation when there is a pressing public necessity, such as national security.\textsuperscript{229} A pressing public necessity must still be narrowly tailored, irrespective of the nature of the necessity.\textsuperscript{230} In \textit{Grutter}, Justice O’Connor noted that, in the area of race based classifications, “[w]here the Court has accepted only national security, and rejected even the best interests of a child, as a justification for racial discrimination, \textit{I conclude that only those measures the State must take . . . to prevent violence, will constitute a ‘pressing public necessity.’}”\textsuperscript{231} Today, “pressing public policy,” frequently termed

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\textsuperscript{225} See Williamson v. Lee Optical, 348 U.S. 483, 489 (1955) (“[Legislative] reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.”); Encore Videos, Inc. v. City of San Antonio, 330 F.3d 288, 293 n.6 (11th Cir. 2003) (“narrow tailoring . . . prohibits regulations [of adult businesses] that are \textit{substantially broader than necessary}”) (alteration in original) (emphasis added).
\textsuperscript{226} \textit{White}, 593 F.3d at 1206.
\textsuperscript{227} 323 U.S. 214, 216 (1944).
\textsuperscript{229} \textit{Korematsu}, 323 U.S. at 216.
\textsuperscript{230} \textit{Grutter}, 539 U.S. at 351.
\textsuperscript{231} \textit{Id.} at 353 (emphasis added).
\end{flushright}
“compelling governmental interest,” \(^{232}\) is still without a bright-line rule.

The Gun Control Act of 1968 has long prohibited the possession of a firearm by any individual convicted of a felony. \(^{233}\) In 2006, the 104th United States Congress saw the opportunity to extend the prohibition to include individuals convicted of a misdemeanor crime of domestic violence. \(^{234}\) Senator Frank Lautenberg of New Jersey, the sponsor of the provision, sought to close the dangerous loophole that enabled a person convicted of a crime involving domestic violence to possess a firearm. \(^{235}\) The senator recognized that existing prohibitions against felony possession failed to keep firearms out of the hands of domestic abusers because “many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies.” \(^{236}\) Senator Lautenberg referenced data from a New England Journal of Medicine report, indicating that a gun inside the residence of a home with a history of domestic abuse results in a five hundred percent increase in the likelihood that a woman would be murdered. \(^{237}\)

Crimes of domestic violence involve persons who share a history together, \(^{238}\) yet many who commit these heinous offenses are never prosecuted. \(^{239}\) One-third of individuals who commit crimes of domestic violence and are charged with misdemeanors would be charged as felons if the act were committed against a stranger. \(^{240}\)

Senators Patricia Murray and Dianne Feinstein joined Senator Lautenberg in supporting the amendment because “the gun is the key ingredient most likely to turn a domestic violence incident into a

\(^{232}\) Id.


\(^{235}\) Id. at S2646-02.

\(^{236}\) Id.

\(^{237}\) Id.

\(^{238}\) Id.


\(^{240}\) Id.
homicide.”241 Senator Feinstein cited ineffective and outdated laws as the reason many domestic violence offenders are not charged as felons.242 The senator also proclaimed that plea bargains and the reluctance of victims to cooperate, either out of fear of additional violence or an unwillingness to partake in an overwhelming trial, result in misdemeanor convictions for crimes that ordinarily are felonies.243

By enacting § 922(g)(9), it is evident that Congress endeavored to narrow the gap that permitted individuals convicted of misdemeanor crimes of domestic violence to possess a firearm. Senator Lautenberg and his colleagues were concerned that permitting aggressors to possess firearms would have parlous consequences for domestic violence victims.244 In the First Amendment free speech context, a federal statute banning the broadcast of indecent material during a specified period of time during the day passed constitutional muster because the government has a valid interest in supplementing parental supervision of children’s exposure to indecent material and promoting the well-being of minors.245

The Lautenberg Amendment satisfies two compelling governmental interests. The domestic violence misdemeanor firearm ban closes a dangerous loophole that previously allowed individuals who engaged in serious spousal or child abuse to possess a firearm. Were it not for mitigating circumstances, these individuals would be convicted as felons and subject to the felon-in-possession handgun ban under § 922(g)(9). By keeping firearms out of the hands of violent domestic offenders, the Lautenberg Amendment also serves the compelling governmental interest of preventing violence against spouses and children.246 Furthermore, based on the assertion that the

242 Id. at 10380 (statement of Sen. Dianne Feinstein).
243 Id.
246 See supra note 193.
government has both a legitimate and compelling interest in preventing crime, one would be hard-pressed to challenge the assertion that the government has a strong interest in preventing domestic abusers from possessing firearms.

CONCLUSION

Some may question the significance of debating the appropriate standard of scrutiny for laws that infringe on the Second Amendment right to keep and bear arms. However, in the absence of an explicit standard of review for Second Amendment jurisprudence, the federal courts are left without a clear standard for resolving challenges to existing firearm legislation.

The view of the Rehnquist Court, that strict scrutiny is strict in theory and not fatal in fact, should herald the use of strict scrutiny review in adjudicating challenges to laws that strike at the core Second Amendment right to keep and bear arms for self-defense. Shortly after the Supreme Court’s landmark decision in McDonald, wherein the Court held that the Second Amendment right to keep and bear arms for self-defense is incorporated and fully applicable to the States by virtue of the Due Process Clause of the Fourteenth Amendment, the Seventh Circuit was presented with the opportunity to address the “‘levels of scrutiny’ quagmire” left unanswered by Heller I.

252 Skoien III, 614 F.3d 638, 641–42 (7th Cir. 2010).
Rather than attempting to determine the appropriate standard of judicial scrutiny, the Seventh Circuit acknowledged that the Lautenberg Amendment need only satisfy heightened scrutiny to pass constitutional muster.254 Thus, by turning a blind eye to recent federal practice, the Seventh Circuit overlooked an opportunity to solidify its position as a dynamic, erudite court by pioneering the implementation of strict scrutiny review for legislation that unconstitutionally interferes with the core Second Amendment right.

254 See Skoien III, 614 F.3d at 641–42.