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ABOUT THE SEVENTH CIRCUIT REVIEW

Purpose

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

The SEVENTH CIRCUIT REVIEW Honors Seminar

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

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

This is an honors seminar. To enroll, students must meet one of the following criteria: (1) cumulative GPA in previous legal writing courses of 3.5 and class rank at the time of registration within top 50% of class, (2) recommendation of Legal Writing 1 and 2 professor and/or Legal Writing 4 professor, (3) Law Review membership, (4) Moot Court Honor Society membership, or (5) approval of the course instructor.
PREFACE

In the 2012–2013 academic year I had the pleasure of serving as the Executive Editor of the SEVENTH CIRCUIT REVIEW. This unique experience proved to be far more rewarding than I could have imagined. In my role as Executive Editor I had the honor of working closely with fifteen students through every step of the writing process.

Authors of the REVIEW write about current and important issues facing the Seventh Circuit. Each student chose a topic he or she was personally interested in, thoroughly researched it, and dedicated a significant portion of the semester to writing a publishable article that expresses a distinct opinion. Additionally, each author served as an editor. Students exchanged papers multiple times throughout the semester, providing feedback and support to one another.

Each class meeting required significant participation from every student. I was consistently impressed with the level of openness and collaboration in the classroom, which helped every student explore issues more deeply, consider new perspectives, and improve writing skills.

The authors should take pride in their contributions to Volume 8 of the SEVENTH CIRCUIT REVIEW. I can confidently say that because of everyone’s hard work, these articles will be useful to the legal community in the Seventh Circuit. I would like to thank the authors for their dedication throughout the semester and for their trust in me. I would also like to thank Professor Morris for his ongoing commitment to the SEVENTH CIRCUIT REVIEW. Professor Morris teaches a unique class, somehow entertaining students while helping to build legal research and writing skills. The SEVENTH CIRCUIT REVIEW has come far since Volume 1, and it is clear that with Professor Morris’ openness to student feedback and his enthusiasm for innovation, it will continue to grow in importance.

Serving as the Executive Editor of the SEVENTH CIRCUIT REVIEW has been one of my favorite law school experiences. I dedicated many
hours working with students in every stage of the writing and editing process, but more important, I learned from other students about interesting legal issues and editing in general, and even made new friends along the way.

Kathleen Mallon will be the new Executive Editor for the 2013–2014 academic year. I played an active role in selecting her for this position, and I was also part of the CHICAGO-KENT LAW REVIEW Board that selected Kathleen to be one of its Executive Articles Editors. I have complete confidence in Kathleen. I know she will take this role and run with it. I am looking forward to reading the product of the new authors with Kathleen’s oversight in Volume 9 of the SEVENTH CIRCUIT REVIEW.

Very respectfully,
Jennifer Nimry Eseed
Executive Editor, SEVENTH CIRCUIT REVIEW
THE FTAIA IN ITS PROPER PLACE: MERITS, JURISDICTION, AND STATUTORY INTERPRETATION IN MINN-CHEM, INC. V. AGRIUM INC.

DONALD R. CAPLAN


INTRODUCTION

For more than a century, extraterritorial application of United States antitrust laws has vexed federal courts. Although the Sherman Act—the statutory bedrock of antitrust law—outlaws restraints of trade or commerce with foreign nations, courts have traveled a circuitous route to determine the precise scope of foreign trade and commerce. In one of the earliest Supreme Court cases involving the intersection of foreign commerce and the Sherman Act, Justice Oliver Wendell Holmes applied the canon of statutory interpretation known as the “presumption against extraterritoriality” to the Sherman Act.1 He concluded that an exclusive link between the laws passed by

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1 American Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909) (“The foregoing considerations would lead, in case of doubt to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power.”).
Congress and the territory of the United States prevented the application of the Sherman Act to conduct occurring in foreign countries. Less than forty years later, Judge Learned Hand took a different approach, holding that the Sherman Act applies to foreign conduct that produces an “effect” on commerce in the United States.\(^2\)

In 1982, after seventy years of courts wrestling with this issue, Congress passed the Foreign Trade Antitrust Improvements Act (“FTAIA”) with the hope of providing a stable guide to the extraterritorial reach of the Sherman Act.\(^3\) Despite the passage of the FTAIA, the controversy over applying U.S. law to individuals and entities in foreign countries did not subside. Indeed, the FTAIA’s cumbersome language posed new problems for the courts. One particular issue that arose was whether the law stripped federal courts of their subject-matter jurisdiction over certain antitrust claims; or, alternatively, whether the law merely added an element to a cause of action brought under the Sherman Act, with no effect on a court’s jurisdiction.

This Case Note examines this “jurisdiction/element” divide through the lens of Minn-Chem, Inc. v. Agrium Inc., a recent case decided by the Seventh Circuit Court of Appeals sitting en banc during the summer of 2012.\(^4\) In Minn-Chem, the Seventh Circuit sided squarely with the interpretation that the FTAIA provides an element of an antitrust claim. The court’s holding has particular consequences on civil procedure, statutory interpretation, and the extraterritorial application of U.S. antitrust laws. The decision also is momentous, in part, because it overturns the Seventh Circuit’s 2003 holding in United Phosphorus Ltd. v. Angus Chemical Company, where the court held that the FTAIA proscribes subject-matter jurisdiction.\(^5\) The Minn-Chem decision also adopted a test to determine whether foreign

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\(^2\) United States v. Aluminum Co. Of America (Alcoa), 148 F.2d 416 (2d Cir. 1945).


\(^4\) Minn-Chem, Inc. v. Agrium Inc., 683 F.3d 845 (7th Cir. 2012) (en banc).

\(^5\) United Phosphorus Ltd. v. Angus Chemical Company, 322 F.3d 942 (7th Cir. 2003) (en banc).
antitrust conduct has a “direct” effect on United States domestic or import commerce. Under the Seventh Circuit’s definition, conduct that has a “proximate causal nexus” with an effect on United States commerce is “direct.” That definition conflicts with the one adopted by the Ninth Circuit Court of Appeals that requires conduct to have an “immediate consequence” in order for it to have a “direct” effect.  

This Note argues that the Seventh Circuit made the right decision in Minn-Chem. The rationale provided in Judge Diane Wood’s opinion goes a long way toward justifying the categorization of the FTAIA as an “element-establishing” statute. Among those reasons is the desire to establish a bright-line distinction between statutes addressing subject-matter jurisdiction and statutes regulating conduct. This distinction makes the judicial process more efficient because it guides courts and litigators on the proper application of the Rules of Civil Procedure. This Note also adds to those reasons by focusing on the global context of the extraterritorial enforcement of antitrust law. In particular, it argues that the Minn-Chem decision’s “direct” effect test adopted by the Seventh Circuit effectively serves the purpose of United States antitrust laws.

Part I of this Note introduces the Sherman Antitrust Act and the FTAIA, the two statutes at issue in the Minn-Chem decision. Part II then traces the Supreme Court’s interpretation of the FTAIA along with the “jurisdiction/element” distinction in statutory interpretation beginning with Justice Scalia’s dissent in Hartford Fire Insurance Co. v. California through the Court’s decision in Morrison v National Australia Bank. Part III reviews the Seventh Circuit’s experience with the FTAIA in United Phosphorus and in Minn-Chem. Part IV analyzes the Minn-Chem decision’s impact on civil procedure, statutory interpretation, and extraterritorial antitrust enforcement. A brief conclusion follows.

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6 U.S. v. LSL Biotechnologies, 379 F.3d 672, 681 (9th Cir. 2004).
I. THE STATUTORY FOUNDATION

A. The Sherman Act

The statutory basis for antitrust law in the United States begins with the Sherman Act of 1890. The text of §1 of the Sherman Act declares “restraints of trade” brought about through contracts, agreements, or conspiracies illegal. Similarly, § 2 of the Sherman Act applies to restraints of trade that arise from monopolistic abuses.

The law explicitly prohibited acts restraining trade in the course of “commerce among the several States, or with foreign nations.” However, what Congress meant by “commerce with foreign nations” was not entirely clear, even within the first few decades after the law’s enactment. Over the years courts wrestled with that phrase, and, in 1982, Congress eventually attempted to establish specific parameters on the extent of the Sherman Act’s extraterritorial reach with the FTAIA.

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8 See id. § 1.
9 See id. § 2.
10 See id. § 1.
11 See e.g., American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909) (holding that the Sherman Act does not apply to conduct in Costa Rica and Panama); but see, U.S. v. Pacific A & R & Nav. Co., 228 U.S. 87 (1913) (holding that the Sherman Act applied to a seafaring shipping company operating between the United States and Canada); Thomsen v. Cayser, 243 U.S. 66 (1917) (holding that the Sherman Act applied because antitrust violation occurred in United States territory despite the fact that company alleged to violate the Act was formed in a foreign country); U.S. v Sisal Sales Corp., 274 U.S. 268 (1927) (distinguishing American Banana on the fact that the Sherman Act applies where a “contract, combination, and conspiracy” was entered into in the United States as opposed to acts only occurring in foreign countries).
B. The Foreign Trade Antitrust Improvements Act of 1982

1. History of the Act

For over ninety years after the passage of the Sherman Act, federal courts were left with the task of determining the scope of foreign commerce covered by the law. In the late 1970s and early 1980s, Congress debated and then adopted a statutory definition in the Foreign Trade Antitrust Improvements Act of 1982.\footnote{12} The House Judiciary Committee report on the FTAIA explained that the impetus for the legislation was a perception among U.S. business leaders that American antitrust laws hindered American export commerce.\footnote{13} The Judiciary Committee also found concern among some commentators that the legal test used to determine whether American antitrust law applied to a foreign transaction was ambiguous, leading to inconsistent judicial decisions on what effects on the domestic economy warranted U.S. regulation over a foreign transaction.\footnote{14} Although the Judiciary Committee heard conflicting testimony regarding these two concerns, it nonetheless chose to adopt a law intended to clarify the matter.\footnote{15} According to the conference report, the standard articulated in the statute would remedy the perceived inconsistencies of the legal test formulated in the case law.\footnote{16}

2. Text of the Act

The text of the FTAIA is as follows:

Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

\begin{itemize}
  \item \footnote{12}{15 U.S.C. § 6a (2006).}
  \item \footnote{13}{H.R. Rep. No. 97-686, at 6 (1982).}
  \item \footnote{14}{Id.}
  \item \footnote{15}{Id.}
  \item \footnote{16}{Id.}
\end{itemize}
(1) such conduct has a direct, substantial, and reasonably foreseeable effect—
   (A) on trade or commerce which is not trade or commerce with foreign nations; or
   (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph 1(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.\textsuperscript{17}

A bit of translation is in order. The statute begins with a \textit{chapeau} expressing the blanket limitation on the reach of the Sherman Act as embodied in the United States Code.\textsuperscript{18} The relevant code sections do not apply to conduct affecting trade or commerce with foreign nations, markets, consumers, or producers.\textsuperscript{19} The \textit{chapeau} also includes a caveat in the parenthetical that the Sherman Act applies to import trade or commerce.\textsuperscript{20} The statute then defines the category of conduct in foreign commerce that is subject to the Sherman Act.\textsuperscript{21} If there is conduct regulated by the Sherman Act that involves foreign commerce, and that conduct has a “direct, substantial, and reasonably foreseeable effect” on commerce within the United States, or on export commerce from the United States, then the antitrust laws are applicable.\textsuperscript{22} In the situations where that conduct causes an injury to

\textsuperscript{18} PHILLIP E. AREEDA \& HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, § 272i (3d ed. 2006); \textit{see, e.g.}, F. Hoffman-LaRoche Ltd. v. Empagran S.A., 542 U.S. 155, 162 (2004).
\textsuperscript{19} AREEDA, \textit{supra} note 18, § 272i.
\textsuperscript{20} \textit{Id}.
\textsuperscript{21} \textit{Id}.
\textsuperscript{22} \textit{Id}.
export commerce, then the antitrust laws are only applicable to those injuries that occur in the United States.23

II. EXTRATERRITORIALITY AND JURISDICTION IN FEDERAL COURTS

At the heart of the legal dispute in Minn-Chem, Inc. v. Agrium Inc. is whether the FTAIA proscribes a federal court’s jurisdiction over extraterritorial applications of antitrust law, or, alternatively, whether the statute defines the merits upon which a cause of action may succeed.24 This section describes the lay-of-the-land regarding recent Supreme Court decisions aimed at refining precisely what is meant by the legal term “jurisdiction.” The starting point is Justice Scalia’s influential dissent in Hartford Fire Insurance Co. v. California,25 the first Supreme Court case to discuss the FTAIA. The next case is F. Hoffman-LaRoche Ltd. v. Empagran S.A.,26 the only Supreme Court case where the FTAIA was directly at issue. Discussion then turns to Arbaugh v. Y&H Corporation,27 a Title VII sex discrimination case28 that turned on whether certain threshold requirements defining “employer” implicated federal subject-matter jurisdiction.29 The section concludes with Morrison v. National Australia Bank,30 which dealt with whether § 10(b) of the Securities Exchange Act of 193431 could be applied extraterritorially.

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23 Id.
29 Arbaugh, 546 U.S. at 503.
A. Justice Scalia’s Dissent in Hartford Fire Insurance Co. v. California

What does “jurisdiction” mean? Justice Thomas provides a simple definition: “‘Jurisdiction’ refers to ‘adjudicatory authority.’”

This “authority” relates to the persons (personal jurisdiction) who are subject to a court’s authority, and the classes of cases (subject-matter jurisdiction) a court may decide. Without adjudicatory authority a court lacks the power to decide a case. Thus, when a federal court lacks subject-matter jurisdiction, Federal Rule of Civil Procedure 12(b)(1) permits a motion to dismiss a claim for that reason at any point during litigation, even after a jury returns a verdict.

This description of jurisdiction may be self-evident to anyone familiar with Federal Rules of Civil Procedures. But what may be clear in theory has become murky in practice because courts have been less than precise when deciding whether an issue is properly characterized as jurisdictional.

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33 Reed Elsevier, 130 S.Ct. at 1243. For the purposes of brevity and simplicity, this discussion of adjudicative jurisdiction is necessarily limited to these forms of jurisdiction. Other forms of adjudicative jurisdiction, including, but not limited to, diversity and supplemental jurisdiction, although important in their own right, are neither necessary nor particularly pertinent to the analysis in this Case Note.

34 Id.


36 Fed. R. Civ. P. 12(h)(3) (“If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”); see also 5B CHARLES ALAN WRIGHT ET AL., FED. PRAC. & PROC. CIV. § 1350 (3d ed. 2013).

For this discussion on jurisdiction, the pertinent issue in *Hartford Fire* was whether a federal court could decline to hear a case dealing with the extraterritorial application of the Sherman Act based on the principle of “international comity.” Under this principle, a United States court will abstain from adjudicating a cause of action because, among other reasons, foreign law may be better suited to address the matter, or an application of United States law might interfere with the application of the foreign country’s law. The petitioners, which included London-based reinsurers, argued that British insurance laws sufficiently regulated them such that the adjudication of the Sherman Act claims in a United States court would create a conflict of laws that the principle of international comity was meant to prevent. Writing for the majority, Justice Souter found no conflict between United States and British law in the matter before the Court. Thus, the majority held that the principle of international comity did not bar the district court from adjudicating the case. As to whether the FTAIA had any effect on the application of the principle of international comity, Justice Souter noted that the legislative history indicated that the FTAIA did not preclude such an inquiry. However, this aside on the FTAIA was merely dicta.

The portion of Justice Scalia’s dissent that addresses the extraterritorial application of the Sherman Act begins by agreeing with the majority that the federal district court had subject-matter

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39 See, e.g., 44B AM. JUR. 2D International Law § 8 (2007) (“The principle of international comity is an abstention doctrine, which at its base involves the recognition that there are circumstances in which the application of foreign law may be more appropriate than the application of United States law. Thus, under the doctrine of international comity, courts sometimes defer to laws or interests of a foreign country and decline to exercise the jurisdiction they otherwise have.”).
41 *Id.* at 799.
42 *Id.*
43 *Id.* at 798.
44 *Id.*
jurisdiction over the Sherman Act claims in the case.\footnote{Id. at 812 (Scalia, J., dissenting).} However, Justice Scalia parted company with the majority’s analysis by finding instead that “28 U.S.C. § 1331 vests district courts with subject-matter jurisdiction over cases ‘arising under’ federal statutes.”\footnote{Id.} Therefore, because the Sherman Act is a federal law, the district court could hear the Sherman Act claims made by the plaintiffs.\footnote{Id.}

The bone of contention between the dissent and the majority was whether the Court’s subject-matter jurisdiction had anything to do with the extraterritorial application of the Sherman Act.\footnote{Id.} For Justice Scalia, the proper investigation for the Court was not whether a court had the power to adjudicate, but rather to determine whether, and to what extent, Congress extended its power to regulate conduct occurring in foreign countries.\footnote{Id.} The practical implication of this distinction arises within the procedure litigants are to follow when addressing the FTAIA’s effect on a case.\footnote{Id. at 813.} A defendant in a civil antitrust suit who disputes a federal court’s subject-matter jurisdiction over a Sherman Act claim must move for dismissal under Federal Rule of Civil Procedure 12(b)(1).\footnote{Id. at 813.} Under a Rule 12(b)(1) motion, the judge acts as a neutral fact finder with discretion to consider facts outside of the pleadings pertaining to jurisdiction.\footnote{Id.} Instead, under Justice Scalia’s interpretation, what was once thought to be a “jurisdictional” issue is actually an issue of substantive law, requiring a ruling on whether the plaintiff has stated a cause of action.\footnote{Hartford Fire, 509 U.S. at 813; see also, AREEDA, supra note 18, § 272.1a.} This interpretation requires a defendant to dismiss under Rule 12(b)(6).\footnote{AREEDA, supra note 18, § 272.1a.} For a 12(b)(6) analysis, the judge must confine her analysis to the facts contained in the

\footnotesize{\begin{itemize}
\item Id. at 812 (Scalia, J., dissenting).
\item Id.
\item Id.
\item Id. at 813.
\item Id.
\item Id.
\item Id. at 813.\footnote{AREEDA, supra note 18, § 272.1a.}
\item Id.
\item Id.
\item Id.
\item Hartford Fire, 509 U.S. at 813; see also, AREEDA, supra note 18, § 272.1a.
\item AREEDA, supra note 18, § 272.1a.
\end{itemize}}
pleadings alone. Furthermore, the judge must examine the pleadings in the light most favorable to the non-movant, the plaintiff.

Justice Scalia argued that for any federal statute, not just the Sherman Act, a court should use canons of statutory construction to determine whether Congress’s legislative jurisdiction permits extraterritorial application of the law. The first canon he suggested a court should consider is the “presumption against extraterritoriality.” Under this canon, a court assumes that legislation passed by Congress only applies within the territory of the United States, unless a contrary intent appears. However, despite Justice Scalia’s misgivings, this presumption does not apply to the Sherman Act because precedent has established that the Sherman Act does apply to conduct occurring in foreign countries.

Second, Justice Scalia suggested that the court interpret a law so that it does not conflict with international law. Within the specific area of antitrust law, courts have stated fealty to this principle while nonetheless holding that the Sherman Act applies to conduct in foreign countries. It is within this form of statutory analysis—not an analysis of the court’s adjudicative authority—that the principle of “international comity” should enter into the picture. To Scalia, the

55 Id.
56 Id.
57 Hartford Fire, 509 U.S. at 814.
58 Id.; see, e.g., American Banana v. United Fruit, 213 U.S. 347, 357 (1909).
59 Hartford Fire, 509 U.S. at 814.
60 Id. (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S 574, 582, fn. 6 (1986); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704 (1962); see also United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416 (2d Cir. 1945)).
62 Hartford Fire, 509 U.S. at 816-17 (citing Alcoa, 148 F.2d at 443).
63 Hartford Fire, 509 U.S. at 817-18 (“Considering comity [as a matter of statutory construction] is just part of determining whether the Sherman Act prohibits the conduct at issue.”).
first question in *Hartford Fire*, therefore, was not whether a court should decline to exercise jurisdiction because the matter may be more appropriately adjudicated in a foreign court. Rather, it was whether the law enacted by Congress regulated conduct occurring in a foreign country.\(^{64}\) Once a court concludes that a law does reach extraterritorial conduct then an inquiry into international comity may begin. Justice Scalia then turned to the *Restatement (Third) of Foreign Relations Law of the United States* for guidance on whether international comity limits the Sherman Act’s extraterritorial reach.\(^{65}\) He concluded that it does,\(^{66}\) but not without expressing his dismay with the majority’s handling of the comity analysis:

> It is evident from what I have said that the Court’s comity analysis, which proceeds as though the issue is whether the courts should ‘decline to exercise . . . jurisdiction,’ . . . rather than whether the Sherman Act covers this conduct, is simply misdirected. . . . It is not realistic, and also not helpful, to pretend that the only really relevant issue in this litigation is not before us. In any event, if one erroneously chooses, as the Court does, to make adjudicative jurisdiction (or, more precisely, abstention) the vehicle for taking account of the needs of prescriptive comity, the Court still gets it wrong.\(^{67}\)

Justice Scalia’s critique of the varieties of jurisdiction and extraterritoriality did not languish. In subsequent cases, the Supreme Court went on to use the basic analytical framework in Scalia’s *Hartford Fire* dissent to reconsider how courts determine subject-

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\(^{64}\) *Id.* at 817-18.

\(^{65}\) *Id.* at 818 (citing *Restatement (Third) of Foreign Relations Law of the United States* § 403 (1987) [hereinafter *Restatement (Third)*]).

\(^{66}\) *Hartford Fire*, 509 U.S. at 819.

\(^{67}\) *Id.* at 820. The term “prescriptive comity” stands for the presumptive territorial limitation international law places on laws enacted by Congress. For Justice Scalia, the proper focus of the comity analysis is on this form of prescriptive comity, not adjudicative comity where a court declines to exercise jurisdiction.
matter jurisdiction and the extent of Congress’s prescriptive jurisdiction to enact laws regulating extraterritorial conduct.

B. Taking the FTAIA Head On: F. Hoffman-LaRoche Ltd. v. Empagran S.A.

For this Note’s narrative arc, Justice Scalia’s dissent in Hartford Fire serves as the point of embarkation for the journey to the Seventh Circuit’s en banc decision in Minn-Chem v. Agrium. However, the way there requires a few more stops at the Supreme Court. In 2004 the Supreme Court directly addressed the relationship between prescriptive comity and the FTAIA in F. Hoffmann-LaRoche Ltd. v. Empagran S.A. The case itself has a complicated history and requires a brief narrative. The original plaintiffs, both domestic and foreign purchasers of vitamin supplements, alleged that foreign and domestic manufacturers and distributors had violated the Sherman Act by entering into a price-fixing conspiracy that raised prices for consumers in the United States and in foreign countries. The defendant companies argued that the FTAIA precluded the district court from hearing the case solely as it pertained to foreign plaintiffs because the alleged antitrust violation occurred in the course of foreign commerce. The district court agreed with the defendants and dismissed that part of the case for lack of subject-matter jurisdiction.

On appeal to the District of Columbia Circuit, the foreign plaintiffs, now severed from the domestic plaintiffs, argued that the

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71 Id.

72 Id.
language of the FTAIA, specifically the phrase “gives rise to a claim” in § 6a(2) of the FTAIA, permitted a federal district court to exercise jurisdiction over their claims. The court agreed with the foreign plaintiffs, holding that the act permitted a foreign plaintiff’s claim so long as the alleged injurious conduct has “requisite effect on United States commerce.”

The court’s holding may be stated in a slightly more formulaic way: when a) anticompetitive conduct violates the Sherman Act; and b) produces a harmful effect on United States commerce; and c) the effect gives rise to a claim; then d) the FTAIA does not bar a foreign plaintiff from bringing suit in federal district court based on the anticompetitive conduct’s independent effect on foreign commerce. The court argued that this expansive interpretation of the FTAIA conformed to the structure of the Act itself, the legislative intent behind the Act, and the policy goal of deterring international price-fixing cartels.

The Supreme Court reversed. At the Court, the plaintiffs argued that the FTAIA prevented the Sherman Act’s application to United States export commerce. Under their interpretation, the Sherman Act still applied to antitrust conduct occurring in either import commerce or wholly foreign commerce. Therefore, because the plaintiffs’ claims arose from wholly foreign transactions, the FTAIA did not limit the application of the Sherman Act.

But the FTAIA restriction is not that narrow. Justice Breyer, writing for the Court, explained that the FTAIA barred antitrust claims

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73 Id. at 348-49.
74 Id. at 350.
75 Id.
76 Empagran I, 315 F.3d at 350-52.
77 Id. at 352-55.
78 Id. at 355-57.
80 Id. at 162.
81 Id.
82 Id.
arising from United States export commerce, as the plaintiffs had argued, as well as those claims arising from wholly foreign transactions. This conclusion not only had clear support in the legislative history, but it also conformed to the rule of statutory construction requiring the Court to interpret “ambiguous statutes to avoid an unreasonable interference with the sovereign authority of other nations.” The Court found that the chief harm potentially resulting from the lower court’s interpretation would be an improper application of an American law in conflict with considerations required by the principle of international comity.

Whether the FTAIA limited a federal court’s subject-matter jurisdiction was not an issue before the Court in Empagran. However, the Court recognized that the foreign plaintiffs were attempting to expand the reach of American law beyond the limit of Congress’s

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83 *Id.* at 163. For example, consider an international price-fixing cartel of widget manufacturers. The manufacturers are located all over the world except the United States. They sell their widgets in every country. The price-fixing conspiracy causes an antitrust injury to a widget-purchaser in the United States because the conspiracy violates § 1 of the Sherman Act. The transaction occurs in the course of U.S. import commerce. The FTAIA, therefore, does not bar a U.S. widget-purchaser from bringing an antitrust lawsuit to a federal district court. Now, consider a resident of Chile who purchases a widget from a manufacturer participating in the cartel. The FTAIA, especially after *Empagran II*, bars the Chilean purchaser from pursuing an antitrust lawsuit in U.S. federal court, either alone or along with the U.S. purchaser, because the Chilean purchaser’s injury occurred in wholly-foreign commerce, independent of the effect the conspiracy had in the United States.

84 *Id.*

85 *Id.* at 164.

86 *Id.* at 169 (“We conclude that principles of prescriptive comity counsel against the Court of Appeals’ interpretation of the FTAIA. Where foreign anticompetitive conduct plays a significant role and where foreign injury is independent of domestic effects, Congress might have hoped that America’s antitrust laws, so fundamental a component of our own economic system, would commend themselves to other nations as well. But, if America’s antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat.”).
prescriptive jurisdiction. Based on this analysis, the Court concluded that the FTAIA barred the foreign plaintiffs’ cause of action. This development is notable because Justice Breyer’s form of analysis echoed Justice Scalia’s position in his Hartford Fire dissent, which argued that statutory interpretation is the proper form of inquiry for an extraterritorial application of the Sherman Act. The Court’s method of reasoning in Empagran represented the most significant change in the Court’s thinking about the FTAIA after Hartford Fire. In a sense, the seeds planted in Justice Scalia’s Hartford Fire dissent had started to sprout.

C. Delineating Subject-Matter Jurisdiction and Merits: Arbaugh v. Y&H Corporation

In its 2006 decision, Arbaugh v. Y&H Corporation, the Court, in a unanimous opinion penned by Justice Ginsburg, adopted a bright line test for determining whether a statute grants a federal court subject-matter jurisdiction. This decision arose from a sexual harassment suit brought under Title VII. The case went to a jury trial in district court, where Arbaugh won and was awarded $40,000 in damages. Two weeks after the trial court entered judgment on the jury verdict, the defendant filed a motion to dismiss based on the premise that the court lacked subject-matter jurisdiction. The defendant argued that the court’s jurisdiction over the Title VII claim hinged on the statute’s definition of “employer.” For the purpose of the statute, an employer is defined as a person engaged in commerce having fifteen or more

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87 Id. at 165-66.
88 Id.
89 Hartford Fire Insurance Co. v. California, 509 U.S. 764, 817-18; see discussion supra Part II. A.
91 Id. at 503-04.
92 Id. at 504.
93 Id.
94 Id.
employees. Under this reading of the statute, Y&H claimed that because it had fewer than fifteen employees, the district court had no jurisdiction over the Title VII claim. The district court granted the defendant’s motion to dismiss for lack of subject-matter jurisdiction. The Fifth Circuit Court of Appeals affirmed.

At the Supreme Court, the issue in Arbaugh was “whether Title VII’s employee-numerosity requirement . . . is jurisdictional or simply an element of a plaintiff’s claim for relief.” The consequence of classifying the fifteen-employee requirement as jurisdictional would require setting aside the judgment entered on the jury verdict for the plaintiff. Alternatively, if the lower courts should have found that the requirement concerned the merits of the plaintiff’s case, then the defendant raised the issue too late to warrant setting aside the trial court’s judgment.

The Court held that the fifteen-employee requirement should not be construed as jurisdictional. Under the Court’s analysis, a district court’s jurisdiction comes from either constitutional or statutory grants of subject-matter jurisdiction. However, the grant of subject-matter jurisdiction does not categorically preclude a “numerical” threshold requirement. For example, the Court found that the “minimum amount in controversy” required as a prerequisite for diversity jurisdiction is properly characterized as a jurisdictional matter.

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95 Id. at 504 (citing 42 U.S.C. § 2000(e)(b) (2006)).
96 Id.
97 Id. at 509.
98 Id.
99 Id. at 510.
100 Id.
101 Id. at 516.
103 Arbaugh, 546 U.S. at 515.
105 Arbaugh, 546 U.S. at 514-15.
However, the difference between the minimum amount-in-controversy requirement and the fifteen-employee requirement under Title VII was their respective locations within the statutes. 106 On the one hand, the amount-in-controversy minimum is within a portion of the United States Code that explicitly vests jurisdiction in the federal courts over cases involving diversity of citizenship. 107 On the other hand, the fifteen-employee requirement lies in Title VII’s definitions section, 108 which is completely separate from the jurisdictional grant in Title VII. 109 Congress could amend Title VII to attach the fifteen-employee requirement to the jurisdictional grant, but until that happens the Court would hold that the numerical requirement fell squarely within the merits of the case. 110

After observing that, “this Court and others have been less than meticulous” when separating subject-matter jurisdiction from the elements of a claim for relief, 111 Justice Ginsburg went on to state the new legal rule:

If the Legislature clearly states that a threshold limitation on a statute’s scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. . . . But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character. 112

This rule is general, in that it does not concern Title VII alone, but rather it creates a signal for federal courts on how to interpret

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106 Id. at 515.
107 Id.
109 Arbaugh, 546 U.S. at 515 (citing 42 U.S.C. § 2000e-5(f)(5) (2006) (“Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter.”)).
110 Id. at 515.
111 Id. at 511.
112 Id. at 515-16.
For the courts, the rule requires an inquiry into whether a jurisdictional grant is expressly stated in a statute’s text. If the court finds such language, then the issue impacted by the statute is jurisdictional. Where no jurisdictional language is present, the statutory requirements automatically speak to the merits of a claim.

Meanwhile, for Congress, the rule provides guidance on how to write statutes. When Congress intends for a threshold requirement to determine whether a court has subject-matter jurisdiction, then the text establishing that requirement should accompany the explicit grant of subject-matter jurisdiction. Otherwise, gives Congress notice that courts will construe a statutory requirement as an element necessary to establish a cause of action.

D. Subject-Matter Jurisdiction, Merits, and Extraterritoriality: Morrison v. National Australia Bank Ltd.

Justice Scalia’s 2010 majority opinion in Morrison v. National Australia Bank Ltd. revisits the issues discussed in Hartford Fire, except that, instead of the FTAIA, the statutory provision at issue was § 10(b) of the Securities Exchange Act. The plaintiffs, all Australian residents, were shareholders of National Australia Bank.

113 See, e.g., Wasserman, supra note 37, at 953.
114 Id.
116 See Wasserman, supra note 37, at 953.
117 Id. at 954.
118 Id.
119 Securities and Exchange Act of 1934, 15 U.S.C. § 78(j) (2006) (original version at ch. 404, Title I, § 10, 48 Stat. 891 (1934)) (amended 2000). The version of the statute codified in 2000 was at issue in Morrison. This section was amended again in the Dodd-Frank Act of 2010, but that amended version was not at issue in this case.
They alleged that management executives of the bank had made false public statements in reference to a Florida-based subsidiary wholly owned by the bank. National also had other contacts with the United States through American Depository Receipts (“ADRs”) traded on the New York Stock Exchange. The plaintiffs filed suit against National and its management alleging violations of §§ 10(b) and 20(a) of the Securities Exchange Act and S.E.C. Rule 10b-5. The defendants moved to dismiss under Rules 12(b)(1) and 12(b)(6). The district court dismissed the case on the grounds that it lacked jurisdiction “because the acts in this country ‘were, at most, a link in the chain of an alleged overall securities fraud scheme that culminated abroad.’” The Court of Appeals for the Second Circuit affirmed on similar grounds.

Justice Scalia, now writing for the majority, found the same error he identified in Hartford Fire in the district and appellate courts’ decisions. Essentially, the lower courts treated a statute that regulates conduct as a statute that grants subject-matter jurisdiction to the courts. Subject-matter jurisdiction did not spring from § 10(b). Rather, the specific statutory provision that grants subject-matter jurisdiction did not spring from § 10(b).

121 Id.
122 Id. at 2875.
123 Id. at 2876 (citing 15 U.S.C. §§ 78j(b) and 78t(a), and 17 CFR § 240.10b-5 (2009)).
124 Morrison, 130 S.Ct. at 2876.
126 Id.
127 Id. at 2876-77.
128 Id. at 2877 (“But to ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question. Subject-matter jurisdiction, by contrast, ‘refers to a tribunal’s “power to hear a case.”’”) (quoting Union Pacific R. Co. v. Locomotive Eng'rs, 558 U.S. 67, 130 (2009), in turn quoting Arbaugh v. Y&H Corporation, 546 U.S. 500, 514 (2006), in turn quoting United States v. Cotton, 535 U.S. 625, 630 (2002)).
jurisdiction over a § 10(b) claim is 15 U.S.C. § 78aa. After concluding that § 10(b) was not jurisdictional, Scalia then considered whether the statute applies to extraterritorial conduct.

The opinion then follows with a discourse on the presumption against extraterritoriality in causes of action arising under § 10(b). Justice Scalia noted that, until 1967, the presumption consistently led the Second Circuit Court of Appeals to conclude that § 10(b) did not apply to stock transactions occurring in a foreign country.

However, in two decisions - Schoenbaum v. Firstbrook and Leasco Data Processing Equip. Corp. v. Maxwell - the Second Circuit formulated a two-prong test that, if satisfied, permitted

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129 Id. As part of the Dodd-Frank Act, Congress amended § 78aa in response to the Court’s decision in Morrison. As it reads, the amendment granted subject-matter jurisdiction to United States courts over cases, including those filed by foreign plaintiffs, involving extraterritorial conduct that has a foreseeable substantial effect in the United States. See Dodd-Frank Wall Street Reform and Consumer Protection Act (2010), Pub. L. 111-203, 124 Stat. 1376, 1865 (amending 15 U.S.C. § 78aa (1934)). Although, Congress passed the amendment intending to have § 10(b) apply extraterritorially, a literal reading of the statute might not change the subject-matter jurisdiction holding in Morrison, which states that the court already had jurisdiction over § 10(b) causes of action. Thus the amendment, in what may be a drafting error, reiterates the subject-matter jurisdiction holding in Morrison, leaving open the possibility that the presumption against extraterritoriality may still apply to § 10(b). In short, the possibility remains that courts still have jurisdiction – i.e., power to adjudicate – a § 10(b) case, but that does not necessarily imply that the law applies to conduct occurring in foreign countries. For a more thorough discussion of this peculiar situation, see Richard Painter, Douglas Dunham, & Ellen Quackenbos, When Courts and Congress Don’t Say What They Mean: Initial Reactions to Morrison v. National Australia National Bank and the Extraterritorial Jurisdiction Provisions of the Dodd-Frank Act, 20 MINN. J. INT’L L. 1, 14-25 (2011).

130 Id. at 2877-78.

131 Id. at 2877.


133 Schoenbaum, 268 F.Supp. at 206-09.

extraterritorial application of § 10(b). Under the Schoenbaum test, a court first had to ask whether the alleged violative conduct had a “substantial effect” in the United States or upon United States citizens. Leasco solidified the second prong, whether the alleged conduct occurred within the United States. After cataloging a series of circuit splits and commentaries critical of this test, Justice Scalia concluded that this test was invalid because courts should interpret congressional silence on extraterritoriality as automatically prohibiting extraterritorial application. “Rather than guess anew in each case,” wrote Justice Scalia, “we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects.” Thus ended the inquiry into whether § 10(b) applied extraterritorially.

The petitioners nonetheless argued that the presumption against extraterritoriality did not bar their claim because the deceptive conduct at issue occurred in Florida. This fact was of little consequence to the Court, however. Under Justice Scalia’s interpretation of the statute, a violation of § 10(b) requires deceptive conduct “in connection” with a purchase or sale of securities within the United States. He grounded this “transactional” test on two premises. First, transactions within the United States involving either domestic securities or exchanges fall under § 10(b)’s regulatory purview. Second, §§ 30(a) and (b) of the Securities Exchange Act regulate transactions occurring within the United States involving securities registered on foreign exchanges. These premises fall in line with the

135 Morrison, 130 S.Ct. at 2879.
136 Id.
137 Id. (citing SEC v. Berger, 322 F.3d 187, 192-93 (2d Cir. 2003)).
138 Id. at 2879-81.
139 Id. at 2881.
140 Id.
141 Id. at 2883-84.
142 Id. at 2884.
143 Id. at 2884-85.
144 Id. at 2885.
presumption against extraterritoriality because “the foreign location of the transaction . . . establishes (or reflects the presumption of) the Act’s inapplicability, absent regulations by the [Securities Exchange] Commission.”\textsuperscript{145} The final virtue of this test, and the presumption against extraterritoriality, is that it prevents conflicts and interference with foreign laws and securities regulators.\textsuperscript{146}

III. JURISDICTION, EXTRATERRITORIALITY, AND ANTITRUST AT THE SEVENTH CIRCUIT COURT OF APPEALS

Having established the backdrop, the stage is now set for Minn-Chem v. Agrium. Like the Supreme Court’s march from Hartford Fire to Morrison, the Seventh Circuit’s journey began in the muddled milieu of what did or did not define a federal court’s subject-matter jurisdiction. In United Phosphorus Ltd. v. Angus Chemical Company, its first decision interpreting the FTAIA, a divided Seventh Circuit sitting \textit{en banc} held that the FTAIA proscribed a district court’s subject matter jurisdiction.\textsuperscript{147} However, Judge Wood’s dissent\textsuperscript{148} in that case eventually served as the template for the unanimous decision that reversed the United Phosphorus holding, Minn-Chem, Inc. v. Agrium Inc.\textsuperscript{149} This section tells the story of these two cases.

A. Enter, United Phosphorus, Ltd. v. Angus Chemical Company

The U.S. Court of Appeals for the Seventh Circuit first encountered the FTAIA in United Phosphorus, Ltd. v. Angus Chemical Company.\textsuperscript{150} The plaintiffs were an American firm and two chemical manufacturers based in India, all three of whom participated in a joint

\textsuperscript{145} \textit{Id.}
\textsuperscript{146} \textit{Id.} at 2885-86.
\textsuperscript{148} \textit{Id.} at 953-65.
\textsuperscript{149} Minn-Chem v. Agrium, 683 F.3d 845 (7th Cir. 2012) (en banc).
\textsuperscript{150} United Phosphorus II, 322 F.3d at 944.
venture to manufacture certain chemicals used in making pharmaceuticals for the treatment of tuberculosis. The defendants included: Angus Chemical Company (“Angus”), a Delaware Corporation; its wholly-owned German subsidiary, Angus Chemie GmbH; and Lupin Laboratories, Ltd., an Indian chemical company. The plaintiffs’ complaint alleged that the “[d]efendants attempted to monopolize, monopolized, and conspired to monopolize the market for those chemicals in violation of § 2 of the Sherman Act.”

The plaintiffs argued that the § 2 violations occurred in the mid-1990s as a consequence of prior litigation Angus had initiated in the Circuit Court of Cook County, Illinois, to enjoin the American member of the joint venture from misappropriating its trade secrets. Two years into the litigation, when the Circuit Court issued a discovery ruling that required Angus to disclose the very trade secrets it had sued to protect, Angus voluntarily withdrew its complaint. According to the plaintiffs’ complaint, “but for Angus’s initiation of the Cook County Action,” the Indian co-plaintiffs would have sold the pharmaceutical chemicals for a profit. Also, but for Angus’s complaint, the American co-plaintiff would have sold the manufacturing technology. In a second amended complaint, the Indian plaintiffs argued that the defendants used anti-competitive means to restrain them from manufacturing the chemicals.

The defendants moved to dismiss under Rule 12(b)(1) for lack of subject-matter jurisdiction. The district court held that the FTAIA barred the plaintiffs’ complaint largely because any anticompetitive

152 Id. at 1006.
154 Id. at 1007.
155 Id.
156 Id.
157 Id.
158 Id.
159 Id. at 1008.
conduct would not have had a “demonstrable effect” on United States domestic commerce.\textsuperscript{160} The plaintiffs appealed to the Seventh Circuit, echoing the arguments Justice Scalia made in his \textit{Hartford Fire} dissent.\textsuperscript{161} On appeal, the plaintiffs argued that the district court erred in granting the motion to dismiss for lack of subject-matter jurisdiction because the FTAIA does not affect jurisdiction, but rather it only adds an element to the Sherman Act claim.\textsuperscript{162}

1. The Majority Opinion

Despite an evenly divided court, the Seventh Circuit sitting \textit{en banc} affirmed the lower court’s ruling.\textsuperscript{163} The rationale adopted by the majority took direct aim at Justice Scalia’s dissent in \textit{Hartford Fire}.\textsuperscript{164} Judge Evans, writing for the majority, drew the inference that the FTAIA confers subject-matter jurisdiction from the footnotes in Justice Souter’s majority opinion in \textit{Hartford Fire}.\textsuperscript{165} Because the tendency of other circuits had been to classify the FTAIA as “jurisdictional,” the majority argued that its interpretation followed the prevailing view.\textsuperscript{166}

\textsuperscript{160} \textit{Id.} at 1012 (“It is clear that Plaintiffs cannot carry their burden of showing a ‘direct, substantial, and reasonably foreseeable effect’ on domestic commerce under the FTAIA. A Plaintiffs’ own liability expert agreed, ‘any effect upon United States commerce, based on what [he has] seen with respect to AB sales’ would be ‘less than substantial.’”).

\textsuperscript{161} United Phosphorus, Ltd. v. Angus Chem. Co. (\textit{United Phosphorus II}), 322 F.3d 942, 946 (7th Cir. 2003) (en banc).

\textsuperscript{162} \textit{Id.} at 944.

\textsuperscript{163} \textit{Id.} at 952; see also, e.g., U.S. Court of Appeals for the Seventh Cir. Practitioner’s Handbook for Appeals 141 (2012), http://www.ca7.uscourts.gov/rules/handbook.pdf (“Thus, if the court en banc should be equally divided, the judgment of the district court and not the judgment of the panel will be affirmed.”).

\textsuperscript{164} \textit{United Phosphorus II}, 322 F.3d at 947-48. For discussion on Justice Scalia’s dissent in \textit{Hartford Fire}, see discussion \textit{supra} Part II.A.

\textsuperscript{165} \textit{Id.} (citing \textit{Hartford Fire}, 509 U.S. at 796 n. 22, 797 n. 24).

\textsuperscript{166} \textit{Id.} at 950-51. Referring to decisions made by the District of Columbia and Fifth Circuit Courts ruling on subject-matter jurisdiction and the FTAIA, Judge Evans states, “We simply cannot dismiss these cases as ‘drive-by’ jurisdictional rulings.”
Furthermore, legal commentators, the American Bar Association, and the government’s enforcement agencies also supported this classification. The court also found that the FTAIA’s legislative history lends itself to the court’s holding that the FTAIA is jurisdictional. Finally, as a matter of policy, because an extraterritorial application of United States antitrust law could have consequences on the conduct of United States foreign affairs and on foreign markets, classifying the FTAIA as jurisdictional permits a judge to dismiss a cause of action at an earlier stage than would be available were the FTAIA’s statutory requirements treated solely as an element of the cause of action.

2. The Dissent

In her dissent, Judge Wood couched the issue of whether the FTAIA is jurisdictional or instead lays out an element of the cause of action as a question pertaining to whether the FTAIA strips federal district courts of their subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1337. If the FTAIA’s requirement for “substantial, direct, and reasonably foreseeable effect” on United States commerce strips the applicability of those statutory sections to the Sherman Act, then the FTAIA limits a federal court’s subject-matter jurisdiction. If, however, the FTAIA states an element of a Sherman Act cause of action, then subject-matter jurisdiction should not have entered into the district court’s analysis of whether there is a required effect on United States commerce.

167 Id. at 949.
168 Id. at 951-52. (“The House Report says that satisfying FTAIA would be ‘the predicate for antitrust jurisdiction.’ It also says, ‘[t]his bill only establishes the standards necessary for assertion of United States Antitrust jurisdiction. The substantive antitrust issues on the merits of the plaintiffs’ claim would remain unchanged.’”) (citing H.R. REP. NO. 97-686 at 11).
169 Id. at 952.
170 Id. at 953 (Wood, J., dissenting).
171 Id.
172 Id.
In an argument that foreshadows her *en banc* opinion in *Minn-Chem*, Judge Wood gave four reasons for adopting an “element approach” instead of the majority’s interpretation that the FTAIA goes to a court’s subject-matter jurisdiction. First, the text of the FTAIA itself does not contain language suggesting that Congress altered the jurisdiction of federal courts over antitrust cases. Although the Supreme Court had treated some statutes containing jurisdictional language as “non-jurisdictional,” the Court had never treated a statute “phrased in terms of the scope of application of a statute” as jurisdictional. By way of comparison, Judge Wood argued that Congress has enacted statutes that explicitly restrict federal court jurisdiction. The FTAIA simply does not bear any textual resemblance to those jurisdiction-stripping statutes. It does not even contain the word “jurisdiction.”

Judge Wood considered this first textual argument enough to justify holding that the FTAIA presents an element of a cause of action; however, she continued by disputing the majority’s claim that *Hartford Fire* controlled the outcome in *United Phosphorus*. Judge Wood argued instead that the majority in *Hartford Fire* in fact found it unnecessary to address whether the FTAIA had any effect on the

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173 *Id.* at 953-54.
174 *Id.* at 954-955.
175 *Id.* at 954; *see also*, e.g., *Citizens for a Better Environment*, 523 U.S. 83, 90-2 (1998).
176 *United Phosphorus II*, 322 F.3d at 954.
177 *Id.* Judge Wood refers to 8 U.S.C. §§ 1252(a)(2)(B) and 1255, which bar judicial review of certain immigration decisions. Section 1252(a)(2)(B), in relevant part, states that “notwithstanding any other provision of law, no court shall have jurisdiction to review . . . any judgment regarding the granting of relief under” section 1255.
178 *Id.* at 955. (“Language like that of the FTAIA, stating that a law does not ‘apply’ in certain circumstances, cannot be equated to language stating that the courts do not have fundamental competence to consider defined categories of cases.”).
179 *See discussion supra* Part I. B. 2.
180 *United Phosphorus II*, 322 F.3d at 956.
outcome of that case.\footnote{Id.} In other words, the majority’s reliance on \textit{Hartford Fire} was misplaced because there was no holding on point from that case.\footnote{Id.} Instead, holding that the FTAIA presents an element of a cause of action better aligns the FTAIA with the Supreme Court’s more recent decision in \textit{Steel Co. v. Citizens for a Better Environment}.\footnote{Id. at 955.}

In \textit{Steel Co.} the Court underscored the distinction between statutes establishing subject-matter jurisdiction and those laying out the elements of a cause of action: “the power to adjudicate does not depend whether in the final analysis the plaintiff has a valid claim.”\footnote{Id. (citing Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 89-90 (1998)).} Without a reference to “jurisdiction” in the FTAIA, the court should have concluded, based on the holding in \textit{Steel Co.}, that Congress intended to define an element to a cause of action.\footnote{Id. at 956.} Thus the FTAIA permits recovery only if the plaintiffs can show the requisite effect in their case.\footnote{Id.} Without showing the effect, the plaintiffs lose the cause of action; the “required effect” simply has no effect on jurisdiction.\footnote{Id.}

The third reason countered the majority’s claim that, for policy reasons, it is better to characterize the FTAIA as conferring subject-matter jurisdiction.\footnote{Id. at 956.} Judge Wood contended that jurisdictional inquiries under §§ 1331 and 1332 at the outset of a case normally follow a routine review based on the facts alleged in the complaint;\footnote{Id. at 957.} however, whether there is a “direct, substantial, and reasonably foreseeable effect” on United States commerce always requires a more thorough inquiry.\footnote{Id. An inquiry into subject-matter jurisdiction could
turn into a “preliminary trial” just to determine whether the required effect is present.\textsuperscript{191} Instead, treating the FTAIA effect test as an element of the case permits resolving the issue on the pleadings, on summary judgment, or at the appellate level \textit{de novo}.\textsuperscript{192} Keeping the FTAIA within the realm of subject-matter jurisdiction, however, would invite abuse from losing parties who would continue to have the ability to move for dismissal under 12(b)(1) before, during, and after the completion of the case, thus leaving the possibility that the court could re-initiate at any time an inquiry into whether the effect test had been met.\textsuperscript{193}

Finally, Judge Wood argued that the history of the application of the antitrust laws to persons and conduct outside of the United States supports the conclusion that the FTAIA does not affect a district court’s subject-matter jurisdiction.\textsuperscript{194} Referring to both \textit{American Banana Company v. United Fruit Co.} and \textit{United States v. Aluminum Corporation of America (Alcoa)}, Judge Wood observed that the Supreme Court in the former, and the Second Circuit in the latter, spoke about extraterritorial application of the Sherman Act in terms of whether the law itself extended to parties and conduct abroad.\textsuperscript{195} Neither court questioned whether it, or the courts below, had adjudicatory power over the Sherman Act claims.\textsuperscript{196} Furthermore, the \textit{Restatement (Third) of Foreign Relations Law of the United States} addressed the jurisdictional dilemma presented to the Seventh

\textsuperscript{191} \textit{Id.} Judge Wood provides the twelve-year litigation in \textit{Timberlane Lumber Co. v. Bank of America N.T.}, 549 F.2d 597 (9th Cir. 1976) (reversing district court dismissal for lack of subject- matter jurisdiction), 574 F.Supp. 1453 (N.D. Cal. 1983) (dismissing for lack of subject-matter jurisdiction), \textit{aff’d on other grounds}, 749 F.2d 1378 (9th Cir. 1984), \textit{cert. denied}, 472 U.S. 1032 (1985), as an example of this jurisdictional inquiry run amok.

\textsuperscript{192} \textit{Id.} at 957.

\textsuperscript{193} \textit{Id.} at 958.

\textsuperscript{194} \textit{Id.} at 959.

\textsuperscript{195} \textit{Id.} at 959-61 (citing \textit{American Banana Co. v. United Fruit Co.}, 213 U.S. 347 (1909); \textit{United States v. Aluminum Co. Of America (Alcoa)}, 148 F.2d 416 (1945)).

\textsuperscript{196} \textit{Id.}
Circuit.\textsuperscript{197} The \textit{Restatement} rejects the use of the phrase “subject-matter jurisdiction” to describe the forms of jurisdiction recognized under international law.\textsuperscript{198} Instead, it recognized the concept of “prescriptive” jurisdiction as describing the power of the legislature to enact laws that regulate conduct beyond a country’s borders.\textsuperscript{199}

\textbf{B. Exit \textit{United Phosphorus}, Chased by Minn-Chem, Inc. v. Agrium Inc.}

And so an idea that began in a dissent in \textit{Hartford Fire}, and then returned only to face rejection in \textit{United Phosphorus}, returned triumphant in \textit{Minn-Chem}. This section concludes the story of the litigation that led to the Seventh Circuit’s \textit{en banc} decision in \textit{Minn-Chem}.

1. The Antitrust Case

Potash is a potassium-rich mineral and chemical salt, chiefly extracted for use in fertilizer, but also used as an ingredient in industrial manufacturing for glass, ceramics, soaps, and animal feed.\textsuperscript{200} The product is homogenous, meaning that potash supplied by one producer is indistinguishable from another producer’s supply.\textsuperscript{201} Thus, buyers base purchasing decisions almost entirely on price alone.\textsuperscript{202} Direct and indirect purchasers of potash in the United States brought class action lawsuits in the federal district courts of Minnesota and the Northern District of Illinois against domestic and foreign potash producers.\textsuperscript{203} At the end of 2008, the lawsuits were combined and

\textsuperscript{197} \textit{Id.} at 961-62.

\textsuperscript{198} \textit{Id.} at 961 (citing \textit{Restatement (Third)}, \textit{supra} note 65, § 401, cmt. c).

\textsuperscript{199} \textit{Id.} (citing \textit{Restatement (Third)}, \textit{supra} note 65, § 401 cmt. c).

\textsuperscript{200} In re Potash Antitrust Litigation, 667 F.Supp.2d 907, 915 (2009).

\textsuperscript{201} \textit{Id.}

\textsuperscript{202} \textit{Id.}

\textsuperscript{203} \textit{Id.} at 919. The six producers were Potash Corporation of Saskatchewan (Canada) Inc. and its U.S. subsidiary Potash Sales (USA), Inc.; Mosaic Company and Mosaic Crop Nutrition, a Delaware company headquartered in Minnesota; Agrium Inc. and Agrium U.S. Inc., a Canadian corporation and its wholly-owned
assigned to the Northern District of Illinois. The plaintiffs’ chief allegation was that the producers had engaged in a horizontal price-fixing conspiracy in violation of the Sherman Act.

To meet the pleading threshold set by the Supreme Court’s decision in *Bell Atlantic Corporation v. Twombly*, the plaintiffs’ complaint alleged that these producers formed a price-fixing cartel, which, since 2003, had been responsible for a 600% increase in the price of potash. The six firms accused of participating in the international cartel were located in Canada, Russia, and Belarus. Each firm had affiliates (either wholly-owned subsidiaries or joint-ventures) operating in the United States. In 2008, these firms were

U.S. subsidiary; Uralkali, a Russian joint venture headquartered in Moscow; Belaruskali, a Belarusian company, which together with Uralkali owned JSC Belarusian Potash Company, which acts as the distributor for Uralkali and Belaruskali; Silvinit, a Russian company that sells potash globally and in the United States; and IPC, a Russian company that is Silvinit’s exclusive distributor.

*Id.*

*Id.* at 919. The plaintiffs classified as “indirect purchasers” included in their complaint four other counts alleging that the defendants violated twenty-one state antitrust laws, twenty-three state consumer protection laws, fifty state law claims of unjust enrichment, and a restraint of trade claim under New York law. The state law claims were not at issue in the Seventh Circuit’s en banc proceedings. Furthermore, as a matter of federal antitrust law, the indirect purchasers were not entitled to seek damages. See *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 848 (7th Cir. 2012) (en banc) (citing *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 792 (1977)).

*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). *Twombly* requires the pleadings in a civil antitrust complaint to allege enough facts to state plausible grounds for a cause of action. Mere conclusory statements, without more, are not enough to survive a motion to dismiss under Rule 12(b)(6). In *Ashcroft v. Iqbal* (556 U.S. 662, 678 (2009)) the Supreme Court expanded the *Twombly* pleading requirements to all civil actions in federal law. In this Note, *Twombly* is used as shorthand for the pleading requirements established by both cases. See also, *e.g.*, 5 CHARLES ALAN WRIGHT ET AL., *FED. PRACT. & PROC. CIV. § 1216 (3d ed. 2013).*

*Potash*, 667 F.Supp.2d at 915.

*Minn-Chem*, 683 F.3d at 648-49.

*Id.*
responsible for over 71% of the world’s potash production.\textsuperscript{210} By 2008, when demand for potash started to decline, prices remained high and continued to increase while other fertilizer prices declined.\textsuperscript{211} Meanwhile, potash supply is relatively easy to manipulate, in part because there are no ready, cost-effective substitutes;\textsuperscript{212} purchasers tend to buy at the higher price rather than curtail the volume of their orders;\textsuperscript{213} production companies have variable costs and have little incentive to operate facilities at full capacity;\textsuperscript{214} and entry-barriers into the market are high, with new mines requiring an up-front expense of approximately $2.5 billion.\textsuperscript{215} In 2008, imports accounted for over 85% of U.S. potash consumption.\textsuperscript{216} The United States is one of the two largest consumers of potash.\textsuperscript{217}

The alleged cartel arose in the early 2000s, after a period of significant price depression during the 1990s, when post-Soviet producers released a glut of potash onto global markets.\textsuperscript{218} Beginning in mid-2003, potash prices began to rise.\textsuperscript{219} According to the plaintiffs’ complaint, the conspiracy worked through a series of coordinated supply restrictions that the producers blamed for price increases.\textsuperscript{220} Rather than fix specific prices for the American market, the producers raised prices on potash sales to China, India, and Brazil.\textsuperscript{221} The prices charged to purchasers in those three countries served as the benchmark.
for potash prices charged elsewhere in the world, including the United States.222

The plaintiffs also pointed to connections between the potash producers.223 Three of the producers in the western hemisphere were co-venturers and equal shareowners of Canpotex, Ltd., a Canadian corporation that sold potash throughout the world, except in the United States and Canada.224 Two potash producers located in the former Soviet Union also formed a joint-venture company to consolidate their sales and marketing for global sales.225 Further coordination among the defendants occurred through business meetings and conferences where representatives of the producers could meet and discuss future price movements.226 Under these alleged facts, the plaintiffs accused the defendants of violating the Sherman Act, violating various States’ antitrust and consumer protection laws, and unjust enrichment.227

2. The District Court Decision and Interlocutory Appeal to the Seventh Circuit

In district court, the Defendants moved to dismiss the plaintiffs’ complaint based on a variety of facial and procedural challenges.228 The focus in this discussion, however, is on the defendants’ motion to dismiss for lack of subject-matter jurisdiction. The defendants based

222 Id.
223 Id. at 917-19.
224 Id. at 917.
225 Id.
226 Id. at 919.
227 Id.
228 See Id. at 920-24 (class certification and Article III standing), 928-32 (Insufficient Service), 941-46 (State antitrust), 946-48 (State consumer protection), 948-49 (State unjust enrichment). The defendants filed motions to dismiss arguing, inter alia, that class certification, under Fed.R.Civ.P. 23, was improper; the Indirect Purchasers lacked Article III standing for claims brought under the laws of States where no named plaintiff resided; the Russian defendants had insufficient service of process (under Rules 12(b)(4) and 12(b)(5)); the plaintiffs failed to adequately plead State antitrust, consumer protection, and unjust enrichment claims.

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their motion to dismiss on the premise that the FTAIA excluded the foreign price-fixing conspiracy from the court’s subject-matter jurisdiction. According to the motion, the plaintiffs’ complaint failed to allege that the foreign antitrust conduct had a “direct, substantial, and foreseeable effect” (“direct effect test”) on United States commerce.229 More specifically, whatever effect the alleged conduct had on American commerce was “too attenuated” to be deemed “direct.”230 The defendants argued that, without this “direct” effect, the district court lacked subject-matter jurisdiction.231

The district court reviewed the motion under the rubric established in *United Phosphorus*, and held that the FTAIA stripped federal courts of subject-matter jurisdiction over foreign antitrust conduct.232 For the court, the issue turned not on whether there was a direct effect, but rather whether the plaintiffs had sufficiently alleged facts that showed the antitrust conduct fell under the FTAIA’s import commerce exception.233 The court concluded that a sufficient “nexus” existed between the alleged foreign conspiracy and the fact that the defendants “sold and distributed potash throughout the United States” so that the plaintiffs’ complaint fell under the import commerce exception.234 Because the complaint met the import exception, the court did not need to take up the direct effect test. Therefore, under the “jurisdictional” analysis (as opposed to one on the “merits”), the plaintiffs met the minimum threshold requirements to survive the motion to dismiss.235

229 *Potash*, 667 F.Supp.2d at 926.
230 *Id.*
231 *Id.*
232 *Id.* at 925.
233 *Id.* at 926. Recall that the FTAIA exception for import commerce means that the Sherman Act continues to regulate conduct occurring in import commerce.
234 *Id.* at 927.
235 *Id.*

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The district court certified its order for immediate review in an interlocutory appeal to the Seventh Circuit. The three-judge panel ("Panel") reversed the lower court’s order, holding that the FTAIA barred the complaint because the court lacked subject-matter jurisdiction. At this stage of the litigation, the plaintiffs argued that the Panel should call United Phosphorus into question and instead subject the FTAIA to the rule expressed by the Supreme Court in Arbaugh.

In response, the defendants gave two arguments as grounds for reversal. First, the FTAIA is distinguishable from Arbaugh because the FTAIA’s primary concern is international comity. The Panel found that following this interpretation would put the court’s decision in tension with the holding in Morrison.

Second, the defendants stated that there was no need for the Panel to reconcile the holding in United Phosphorus with Arbaugh because dismissal was required under both cases. The Panel agreed.

In its analysis, the Panel gave a twofold critique of the lower court’s interpretation of the FTAIA. First, the Panel found that, under the district court’s interpretation, the direct effect test becomes superfluous. Under the lower court’s reasoning, any importer of a product into the United States who happens also to engage in a price-fixing conspiracy aimed at a foreign country would be subject to antitrust suits in the United States. The Panel claimed that this

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236 Minn-Chem, Inc. v. Agrium Inc., 657 F.3d 650, 652 (7th Cir. 2011), vacated, 683 F.3d. 845 (2012) (en banc) [hereinafter Minn-Chem I]. See 28 U.S.C. § 1292(b) (2006). A district court judge has the authority to grant a right to immediately appeal an order when the judge is of the opinion that the order concerns a controlling question of law that is likely to engender a substantial difference of opinion.

237 Minn-Chem I. at 659. See discussion supra Part II.C.

238 Id.

239 Id.

240 Id.

241 Id.

242 Id. at 660-63.

243 Id. at 660.

244 Id. at 660-61.
interpretation went beyond Congress’s intent to limit extraterritorial applications of antitrust law through the FTAIA.\textsuperscript{245} According to the Panel, the better interpretation would not conflate the import exception with the direct effect test, but instead it would require the direct effect test to apply specifically to the conduct aimed at foreign countries.\textsuperscript{246} If the foreign-directed conduct created a “direct, substantial, and reasonably foreseeable effect” on United States import or interstate commerce, then the court would have subject-matter jurisdiction.\textsuperscript{247}

Next the Panel applied a \textit{Twombly} analysis to the facts alleged by the plaintiffs to determine whether the litigation could continue into pre-trial discovery.\textsuperscript{248} Although the Panel found that the plaintiffs explained the price-fixing conspiracy aimed at China, India, and Brazil with sufficient facts, the complaint provided only a conclusory statement to connect that conspiracy to any effect in the United States.\textsuperscript{249} Furthermore, any connection between the conspiracy aimed at foreign countries and import or domestic commerce in the United States had to be “direct.”\textsuperscript{250} For this analysis, the Panel referred to \textit{United States v. LSL Biotechnologies}, a Ninth Circuit decision that defined an effect as “direct” under the FTAIA if “it follows as an immediate consequence of the defendant’s activity.”\textsuperscript{251} If the conduct occurs in a foreign country, but there are “uncertain intervening

\begin{itemize}
\item \textsuperscript{245} \textit{Id.} at 661.
\item \textsuperscript{246} \textit{Id.} at 660.
\item \textsuperscript{247} \textit{Id.} at 661.
\item \textsuperscript{248} \textit{Id.} at 661-63. \textit{See supra} text accompanying note 206.
\item \textsuperscript{249} \textit{Id.} at 661 (“The problem with these generalized allegations is the absence of specific factual content to support the asserted proposition that prices in China, India, and Brazil serve as a ‘benchmark’ for prices in the United States and that this benchmark, if it exists, has a strong relationship with the domestic potash market to raise a plausible inference that the defendants’ foreign anticompetitive conduct has a ‘direct, substantial, and reasonably foreseeable effect’ on domestic or import commerce.”).
\item \textsuperscript{250} \textit{Id.} at 661.
\item \textsuperscript{251} \textit{Id.} at 662 (quoting \textit{United States v. LSL Biotechnologies}, 379 F.3d 672, 680 (9th Cir. 2004; citing Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 618 (1992)). The Ninth Circuit case derives the definition of “direct” from the \textit{Weltover} decision, where the Foreign Sovereign Immunities Act was at issue.
\end{itemize}
developments” before there is an effect on import or domestic commerce, then the effect is not direct. “Ultimately,” the Panel concluded, “the connection asserted in the complaint between the alleged cartelized prices of potash overseas and the domestic price of potash is too speculative and indirect to state an actionable claim under the FTAIA’s direct-effects exception.”

The Panel vacated the lower court’s ruling based on its Twombly analysis. However, it refused to upset the precedent in United Phosphorus, and remained silent on whether the FTAIA affected a court’s jurisdiction or established an element of an antitrust claim. This decision occurred despite the court’s acknowledgement that the Third Circuit Court of Appeals in Animal Science Products, Inc. v. China Minmetals Corp. had applied the Arbaugh bright-line test and held that the FTAIA only establishes an element of an antitrust claim. The decision to revisit United Phosphorus was left to the plaintiffs’ subsequent appeal to the Seventh Circuit sitting en banc.

3. The en banc Decision

The Seventh Circuit’s en banc panel found that the “nascent idea” expressed in Judge Wood’s dissent in United Phosphorus had “now become a firmly established principle of statutory construction.” The series of decisions that led to the bright-line test in Arbaugh convinced the en banc panel that the time had come to reconsider its holding in United Phosphorus. The Supreme Court’s decision in

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252 Id.
253 Id. at 663.
254 Id. at 663-64.
255 Id. at 659.
256 Id. 659 n.3 (citing Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462 (3d Cir. 2011)). In its footnote, the Panel acknowledges that the Third Circuit based its decision, in part, on the dissent in United Phosphorus.
257 Minn-Chem, Inc. v. Agrium Inc., 683 F.3d 845, 852 (7th Cir. 2012) (en banc) [hereinafter Minn-Chem II].
Morrison presented a compelling factor. Judge Wood, this time writing for the unanimous en banc panel, referred to the Court’s finding that “limitations on the extraterritorial reach of a statute describe what conduct the law purports to regulate and what lies outside its reach.” By way of analogy, the FTAIA, like § 10(b) of the Securities Exchange Act, lacks language in the text of the statute that explicitly references a federal court’s jurisdiction. Therefore, under the Arbaugh test, the court should infer that that the statute’s provisions regulate the conduct the statute purports to regulate, not the ability of the court to adjudicate the matter before it. Henceforth, in the district and appellate courts of the Seventh Circuit, the FTAIA establishes an element of an antitrust cause of action.

With that matter behind it, the en banc panel was left with the task of determining whether the plaintiffs’ complaint could survive a motion to dismiss. The first issue for the court was to determine precisely what forms of commerce the FTAIA excluded from the reach of the Sherman Act. The district court and the three-judge panel presented interpretations that did not completely satisfy the en banc panel. However, between the two courts, the interpretation offered


259 Id. at 852 (“We can see no way to distinguish this case from Morrison.”).
260 Id.
261 Id.
262 Id. (“When Congress decides to strip the courts of subject-matter jurisdiction in a particular area, it speaks clearly. The FTAIA, however, never comes close to using the word ‘jurisdiction’ or any commonly accepted synonym. Instead, it speaks to the ‘conduct’ to which the Sherman Act (or the Federal Trade Commission Act) applies. This is the language of elements, not jurisdiction.”).
263 Id.
264 Id. at 853.
265 See discussion supra Part III.B.2.
by the three-judge panel proved, for the most part, to be more attractive.\footnote{266}{Minn-Chem II, 683 F.3d 853-54.}

Under the 
\textit{en banc} panel’s interpretation, the FTAIA categorizes two forms of commerce: foreign and import. If antitrust conduct occurs within “import trade or import commerce,” then the Sherman Act applies. As a general matter, the Sherman Act does not cover antitrust conduct “involving trade or commerce with foreign nations.” However, if the antitrust conduct occurring in foreign commerce has a “direct, substantial, and reasonably foreseeable effect” on import trade or commerce, then the Sherman Act does apply to that conduct. All of this is in line with \textit{Empagran}.\footnote{267}{Id. at 854; see discussion \textit{supra} Part II.B.}

Having established the proper interpretive framework, the \textit{en banc} panel then narrowed its analysis and defined certain terms within the FTAIA with more specificity.\footnote{268}{Minn-Chem II, 683 F.3d. at 855.} First, the court defined a test for the kinds of transactions that constitute “pure import commerce.”\footnote{269}{Id.} Under the situation in \textit{Minn-Chem}, “[t]hose transactions that are directly between the plaintiff purchasers and defendant cartel members are the import commerce of the United States in this sector.”\footnote{270}{Id.} This conclusion follows logically from the fact that the plaintiff purchasers were U.S. entities, and all of the defendant producers were located outside of the United States.\footnote{271}{Id.}

Because the facts in the plaintiffs’ complaint alleged that part of the price-fixing conspiracy occurred through transactions specifically not occurring with the United States or Canada, the court next questioned what constituted “trade or commerce with foreign nations.”\footnote{272}{Id. at 655-56. The court refers to Canpotex, the Canadian marketing and sales agent for Agrium, Mosaic, and Potash Corp. of Saskatchewan, and the fact that it specifically did not sell to purchasers in the United States and Canada. The court presumes that Canpotex was included in the complaint because it was “jointly and
that alleged the existence of an international cartel that raised prices for potash sold directly to U.S. purchasers.\footnote{Id. at 656.} Those sales were “plainly” foreign commerce.\footnote{Id.} The next step was to determine whether that foreign commerce had a “direct, substantial, and reasonably foreseeable effect” on United States import or interstate commerce.\footnote{Id.}

As to whether the cartel’s foreign conduct had a substantial and reasonably foreseeable effect on domestic or import commerce, the court quickly concluded that the facts alleged by the plaintiffs, if true, satisfied those requirements.\footnote{Id.} What was in dispute, and where the en banc panel disagreed with the three-judge panel, was what showing must be made to show “direct” effects.\footnote{Id.} The en banc panel thought that the lower court’s reliance on the Ninth Circuit’s “immediate consequence” definition, itself derived from an interpretation of the Foreign Sovereign Immunities Act, was “misplaced.”\footnote{Id. at 657.} The Antitrust Division of the Department of Justice advocated an alternative definition for “direct,” meaning instead, “a reasonably proximate causal nexus” (“nexus test”).\footnote{Id. (citing Makan Delrahim, Drawing the Boundaries of the Sherman Act: Recent Developments in the Application of the Antitrust Laws to Foreign Conduct, 61 N.Y.U. ANN. SURV. AM. L. 415, 430 (2005) (remarks of the Deputy Assistant Attorney General)).} The court found this definition comported with the language of the FTAIA better than “immediate consequence” because an immediate effect from foreign commerce would likely, if not necessarily, impact import commerce.\footnote{Id.} Such a

\begin{footnotesize}
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\item \footnote{Id. at 656.}{Id. at 656.}
\item \footnote{Id.}{Id.}
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\item \footnote{Id.}{Id.}
\item \footnote{Id. at 657.}{Id. at 657.}
\end{itemize}
\end{footnotesize}
reading is either redundant or ignores the fact that the FTAIA already excludes import commerce from its coverage.\textsuperscript{281}

The nexus test also avoids the concern expressed by the three-judge panel that any foreign company that has import business in the United States would be at risk of violating the Sherman Act simply by participating in a foreign joint-selling arrangement, which may or may not affect United States import or domestic commerce.\textsuperscript{282} First, as a direct participant in United States import commerce, this hypothetical foreign company would already have to comply with U.S. law.\textsuperscript{283} Second, the company’s foreign sales would still need to meet the threshold for “effects” on interstate commerce established in the case law;\textsuperscript{284} if that threshold is not met, then the foreign company’s conduct will not face scrutiny under the Sherman Act.\textsuperscript{285} Finally, if the foreign company’s conduct is foreign commerce usually excluded by the FTAIA, then that conduct must cause a “direct, substantial, and reasonably foreseeable effect” before the Sherman Act applies.\textsuperscript{286}

The court next turned to whether the plaintiffs’ complaint plausibly alleged that the defendants’ conduct fell either into the category of import commerce, or the category of foreign commerce, thus meeting the direct effect test.\textsuperscript{287} On the facts before the court, the \textit{en banc} panel concluded that much of the complaint alleged import transactions.\textsuperscript{288} Under \textit{Hartford Fire}, the Sherman Act applies to those transactions if the conduct was meant to produce, and did in fact produce, a “substantial” effect on United States domestic commerce.

\textsuperscript{281} Id.
\textsuperscript{282} Id.
\textsuperscript{283} Id.
\textsuperscript{285} Id. at 857-58.
\textsuperscript{286} Id.
\textsuperscript{287} Id. at 858.
\textsuperscript{288} Id.
commerce. The import transactions, according to the court, met these requirements, and therefore were subject to the Sherman Act.

As for the defendants’ conduct alleged to have occurred in foreign commerce, the court repeated its finding that the facts presented by the plaintiffs sufficiently alleged a substantial and reasonably foreseeable effect on domestic or import commerce. The specific allegations that the defendants negotiated production levels among themselves; set prices for the Chinese, Indian, and Brazilian markets; and then used those cartel-determined prices to serve as a benchmark for prices charged to purchasers in the United States were sufficient to meet the “direct” effect test. Judge Wood compared the “benchmark” practice allegedly employed by the defendants to the common uses of benchmarks like, among other examples, the London Interbank Offer Rate (LIBOR) for interest rates in the credit market. The court concluded that the plaintiffs’ complaint plausibly pleaded facts that supported the inference that the defendants’ cartel activity was a proximate cause of the price increases in the United States.

IV. Analysis

A. Ramifications for the Courts and Attorneys

What perhaps appeared, at the time of the Hartford Fire decision, to be a marginal squabble over subject-matter jurisdiction eventually inspired a careful reconsideration of how the entire federal judiciary evaluates adjudicatory authority. As articulated in Arbaugh, the test

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289 Id.
290 Id. at 858-59. (“The inference from these allegations is not just plausible but compelling that the cartel meant to, and did in fact, keep prices artificially high in the United States.”).
291 Id.
292 Id.
293 Id.
294 Id. (“It is no stretch to say that the foreign supply restrictions, and the concomitant price increases forced upon Chinese purchasers, were a direct – that is, proximate – cause of the subsequent price increases in the United States.”).
that determines whether a federal statute grants a court subject-matter jurisdiction is formal: does the statute’s text explicitly refer to a court’s jurisdiction? After examining the text of the statute at issue, a simple “yes” or “no” will suffice. Answer “yes,” and challenges to that particular statute will require a motion to dismiss under Rule 12(b)(1). Answer “no,” and challenges will require a motion to dismiss under Rule 12(b)(6), or later a call for summary judgment under Rule 56.295

A federal court contemplating an antitrust claim has an elegant method for determining subject-matter jurisdiction through 28 U.S.C. § 1331.296 This method provides litigators with a clear delineation between what defines jurisdiction and what constitutes the elements of an antitrust cause of action. Attorneys can work more efficiently because this delineation reduces confusion and uncertainty over which motions and procedures to follow in a lawsuit. Furthermore, as Judge Wood noted in her dissent in United Phosphorus, it reduces the potential that a jurisdictional inquiry will result in the consumption of “enormous judicial resources.”297

As a matter of fairness, the Minn-Chem decision strikes the proper balance between plaintiffs and defendants. A district court’s determination of whether an antitrust plaintiff’s complaint meets the FTAIA’s requirements now requires an inquiry under a 12(b)(6) motion. This requirement gives an advantage to plaintiffs because the inquiry is limited to the pleadings, and the facts are read in the light most favorable to the non-moving party. However, balance occurs at

295 United Phosphorus Ltd. V. Angus Chemical Company (United Phosphorus II), 322 F.3d 942, 959 (7th Cir. 2003) (en banc) (Wood, J. dissenting) (“We should not adopt a perverse decision just because parties have chosen to file motions under Rule 12(b)(1) instead of 12(b)(6) or Rule 56, or because courts have unquestioningly adopted the diction of ‘subject-matter jurisdiction’ without careful examination.”).

296 See, e.g., Jean Ford Brennan, The Elegant Solution. xi (1967) (“In the world of mathematics, when the solution to a problem exhibits precision, neatness and simplicity, it is said to be ‘elegant.’”). Thanks to Kevin McClure, Research Librarian, Chicago-Kent College of Law Library, for tracking down the preceding definition. In United Phosphorus, Judge Evans recognized a level of “purity” to the rationale behind finding jurisdiction through § 1331; see United Phosphorus II, 322 F.3d at 950. “Elegant,” as defined here, is perhaps a better description.

297 United Phosphorus II. 322 F.3d at 957 (Wood, J. dissenting).
the appellate level, because review of a trial court’s disposition of a motion to dismiss under 12(b)(6), or for summary judgment, is *de novo*. This procedural distinction is important because an appellate court would not have to defer to the district court’s findings of fact. Furthermore, the appellate court would be able to raise its own inquiry into whether the principle of international comity would have any bearing on the case. Review under Rule 12(b)(1), however, would require deference on the part of the appellate court toward the district court’s findings of fact, and it would limit the appellate court’s ability to examine the effect of the principle of international comity on the case.

**B. Ramifications on the Principle of International Comity and the Presumption Against Extraterritoriality**

Filed under the category of “unfinished business” left over from Justice Scalia’s dissent in *Hartford Fire*, the Seventh Circuit did not rule on whether the principle of international comity counseled against an extraterritorial application of the Sherman Act in *Minn-Chem*. This avoidance was due, in part, because the defendants did not raise the issue on appeal. However, now that challenges to subject-matter jurisdiction are off the table, *vis-à-vis* the FTAIA, foreign defendants would be well advised to argue in their pleadings that a comity analysis limits the Sherman Act’s applicability.

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298 *Id.* at 963.
299 *Id.* at 958.
300 *Id.*
301 *Id.*
303 *Minn-Chem II*, 683 F.3d at 860.
304 *Id.*
305 See, *e.g.*, *Hartford Fire*, 509 U.S. at 818-19 (citing Restatement (Third), supra note 65, §§ 403(1), 403(2)(a)-(c), 403(2)(g)-(h) (describing the inquiry a court should make to determine whether the principle of international comity bars an extraterritorial application of the Sherman Act)).
The presumption against extraterritoriality also received no attention from the Seventh Circuit, again because the defendants did not raise the issue on appeal.\footnote{Minn-Chem II, 683 F.3d. at 860.} This omission might signal that, so far as the FTAIA and the Sherman Act are concerned, the presumption has been thoroughly rebutted by nearly seventy years of extraterritorial application of the Sherman Act in federal courts. However, the Supreme Court’s recent decision in \textit{Kiobel v. Royal Dutch Petroleum}\footnote{Kiobel v. Royal Dutch Petroleum, 569 U.S. __ at (slip op., at 1) (2013), 2013 WL 1628935 *1.} may give pause to those ready to consider the matter settled. The issue in \textit{Kiobel} was whether the 224-year-old Alien Tort Statute\footnote{28 U.S.C. § 1350 (2006). The text of the statute: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” N.B.: This Case Note substitutes “international law” for the phrase “law of nations”; for the purposes of this Note, the terms are interchangeable.} (“ATS”) granted federal courts subject-matter jurisdiction over tort claims arising from violations of international law committed in a foreign country.\footnote{Kiobel, 569 U.S. __ at (slip op., at 3), 2013 WL 1628935, at *4. The plaintiffs, Nigerian-born residents of the United States, alleged that oil companies operating in the Niger River delta had aided and abetted the Nigerian Government in committing crimes in violation of international law. The plaintiffs alleged that the Nigerian government committed these violations of international law: extrajudicial killings; crimes against humanity; torture and cruel treatment; arbitrary arrest and detention; violations of the rights of life, liberty, security, and association; forced exile; and property destruction. \textit{Id.} at (slip op., at 1), at *3.} This case was novel because the ATS is “strictly jurisdictional.”\footnote{\textit{Id.} at 569 U.S. __ at (slip op., at 5), at *5 (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 713 (2004)).}

To determine whether the ATS granted jurisdiction over the conduct that had occurred in a foreign country, the Court invoked the presumption against extraterritoriality.\footnote{\textit{Id.} at 569 U.S. __ at (slip op., at 4-6), at *5-*6.} This was the first application of the presumption to a jurisdictional statute since the Court’s decision...
in *Morrison*.

The Court reasoned that the policy concerns justifying the application of the canon to a "merits question" also applied to a jurisdictional statute like the ATS. Armed with the presumption, Chief Justice Roberts found that nothing in the text or the historical background of the ATS rebutted the presumption. Because all of the relevant conduct took place outside of the United States, the plaintiffs’ case could not proceed in federal court.

The Court nevertheless adopted a legal test that left open the possibility that the presumption against extraterritoriality may be overcome. Chief Justice Roberts wrote that:

> … even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. … Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required.

This test suggests that the prerequisite facts upon which a federal court may exercise ATS jurisdiction must show that the torts resulting from a violation of international law have some discernible effect upon the territory of the United States. The minimum size of that effect is more than one arising from corporate presence. Presumably, without

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312 See discussion *supra* Part II.D.
313 *Kiobel*, 569 U.S. __ at (slip op., at 4-5), 2013 WL 1628935, at *5 (citing *Morrison v. National Australia Bank*, 130 S.Ct. 2869, 2877 (2010)) ("... [to] ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches.").
314 *Id.* at 569 U.S. __ at (slip op., at 6), at *6.
315 *Id.* at 569 U.S. __ at (slip op., at 7-12), at *6-*9.
316 *Id.* at 569 U.S. __ at (slip op., at 13-4), at *10.
317 *Id.* at 569 U.S. __ at (slip op., at 14), at *10 (citing *Morrison*, 130 S.Ct 2883-8).
Congressional action to revise the ATS, future cases will determine the sufficient quantum of effect to trigger ATS jurisdiction.\textsuperscript{318}

Another way of looking at the Kiobel test is as an echo of the FTAIA. Like the FTAIA, the Kiobel test divides claims into two categories. Federal courts have subject-matter jurisdiction over only one category: those tort claims arising from a violation of international law occurring solely in the United States. The court justifies jurisdiction over this first category of claims by citing the history of the passage and early application of the ATS.\textsuperscript{319} The second category consists of those tort claims arising from a violation of international law occurring in a foreign country. For these claims, the ATS does not grant subject-matter jurisdiction to federal courts. However, claims may be moved from the second category and placed in the first, so long as they “touch and concern” the territory of the United States with “sufficient force” to justify the assertion of a federal court’s jurisdiction.

The FTAIA and Minn-Chem reenter the discussion here because what may be “sufficient force” to knock out the presumption against extraterritoriality in the context of the ATS may have consequences on whether the presumption still applies to antitrust laws. Although a reasonable interpretation of the FTAIA’s direct effect test suggests that the test implies “sufficient force,” a Supreme Court wanting to reassert the presumption to the FTAIA could make a “sufficient force” requirement a separate inquiry, as it did for the ATS in Kiobel. If the bar for achieving sufficient force is set high enough, the Supreme Court could curtail extraterritorial applications of U.S. antitrust laws so that they occur only in the most extraordinary circumstances.

\textsuperscript{318} See, e.g., Kiobel, 569 U.S. __ at (slip op., at 1), 2013 WL 1628935, at *11 (Kennedy, J., concurring).

\textsuperscript{319} Id., 569 U.S. __ at (at slip op., at 8-10), 2013 WL 1628935 at *7. Chief Justice Roberts recounts two cases occurring shortly before Congress passed the ATS as giving impetus for the passage of the law. Each involved a foreign diplomat and violations of “the rights of ambassadors,” one of three areas of “international law” recognized in that era. The violations of international law occurred within the territory of the United States. Two cases invoked the ATS shortly after it was passed and also concerned conduct within United States territory.
This possibility may not be completely farfetched, especially in light of Justice Scalia’s Hartford Fire dissent. There, he referred to EEOC v. Arabian American Oil Co. (“Aramco”), where the Court found that “boilerplate language” indicating Title VII’s scope over a variety of forms of commerce did not overcome the presumption against extraterritoriality. By way of comparison, Scalia wrote: “The Sherman Act contains similar ‘boilerplate language,’ [to that contained in Title VII of the Civil Rights Act of 1964] and if the question [of whether the Sherman Act applied extraterritorially] were not governed by precedent, it would be worth considering whether that presumption controls the outcome here.”

CONCLUSION

The Minn-Chem decision provides the counter-argument to reapplying the presumption to the Sherman Act. This is, in part, a consequence of the Seventh Circuit’s endorsement of the nexus test to show direct effect. If the court had adopted the “immediate consequence” test, it would have given foreign companies a blueprint on how to construct a price-fixing cartel that the Sherman Act could not reach. Foreign companies would simply agree to control production and fix prices for sales to any country that has no, or at most a weak, antitrust enforcement regime; then they could use those prices to set the benchmark for prices charged to American customers. The nexus test ensures that this method of conspiracy will be subject to U.S. antitrust laws.

Judge Wood also argued, at the close of the Minn-Chem decision, that reliance on the countries where the foreign potash producers were located to put a stop to the cartel would be misplaced. Canada,

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321 Id.

322 Minn-Chem II, 683 F.3d 845, 860 (7th Cir. 2012) (en banc).
Russia, and Belarus have no incentive to stop the cartel so long as the benefit of extracting monopoly rents from customers outside of their countries outweighed any potential losses.\textsuperscript{323} “It is the U.S. authorities or private plaintiffs,” she wrote, “who have the incentive—and the right—to complain about overcharges paid as a result of the potash cartel, and whose interests will be sacrificed if the law is interpreted not to permit this kind of case.”\textsuperscript{324} After \textit{Minn-Chem}, the Sherman Act can continue what it was meant to do: protect United States consumers, deter anticompetitive conduct, and maintain a free and fair market.

\textsuperscript{323} Id.
\textsuperscript{324} Id.
ANOTHER GLANCE AT VANCE: EXAMINING THE SEVENTH CIRCUIT’S ABOUT-FACE ON BIVENS IMMUNITY AND THE MILITARY

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INTRODUCTION

The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land. This is not a novel concept. To the contrary, it is as old as government.1

Donald Vance and Nathan Ertel are American citizens who worked as private defense contractors in Iraq beginning in 2005 after


1 Reid v. Covert, 354 U.S. 1, 5-6 (1957) (holding that the military could not constitutionally extend its court-martial jurisdiction to non-military civilians overseas).
the United States’ invasion. In April of 2006, they were detained by the United States military, based on suspicions they were helping their employer supply weapons to Iraqi insurgent groups. Vance and Ertel were, in fact, covertly working with the Federal Bureau of Investigation, voluntarily gathering information concerning the alleged misdeeds of their employer. Vance and Ertel alleged that during their detainment, they were subjected to “threats of violence and actual violence, sleep deprivation and alteration, extremes of temperature, extremes of sound, light manipulation, threats of indefinite detention, denial of food, denial of water, denial of needed medical care, yelling, prolonged solitary confinement, incommunicado detention, falsified allegations and other psychologically-disruptive and injurious techniques.” After it was determined they posed no threat, Vance and Ertel were cleared for release; however, they were still held in solitary confinement by the military for another 18 and 52 days, respectively. Upon their return to the United States, the pair filed suit against then-Secretary of Defense Donald Rumsfeld and other military officials, alleging that the detainment and torture they experienced were violations of the United States Constitution. However, their sought remedy—money damages—was not authorized by any federal statute.

The Supreme Court has long held that federal courts have both the authority and the duty to craft judicial remedies to ensure that violations of federally protected rights are redressed, even in the absence of statutory authority to do so. These remedies—creations of federal common law—are referred to as Bivens remedies, named after

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3 Id. at 196.
4 Id.
5 Id.
6 Id.
7 Id. at 198.
8 See Bell v. Hood, 327 U.S. 678 (1946) (“where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief”).
the Supreme Court decision from which they originated.\textsuperscript{9} Both the district court and a three-judge panel of the Seventh Circuit Court of Appeals determined that Vance and Ertel’s lawsuit could potentially allow for the awarding of money damages under \textit{Bivens}.\textsuperscript{10} A comment previously published in this \textit{Seventh Circuit Review} disagreed with these decisions.\textsuperscript{11} However, the case was reheard \textit{en banc} by the full Seventh Circuit, and the lower court decisions were reversed and vacated.\textsuperscript{12} The \textit{en banc} majority posed the question as “whether to create an extra-statutory right of action for damages against military personnel who mistreat detainees,”\textsuperscript{13} and determined that both Supreme Court precedent and respect for the military in matters of national security foreclosed a \textit{Bivens} remedy in such circumstances.\textsuperscript{14} A petition for writ of certiorari was filed on February 5, 2013, but was denied on June 10, 2013.\textsuperscript{15}

This Note argues that the Seventh Circuit \textit{en banc} decision dismissing Vance and Ertel’s complaint not only mischaracterized the relevant \textit{Bivens} case law, but also abandoned the crucial role of the federal courts as guardians of constitutional rights in times of war. Part I of this Note details the underlying facts of \textit{Vance v. Rumsfeld} as derived from the complaint—which the Seventh Circuit was obligated to accept as true\textsuperscript{16}—to fully demonstrate the egregiousness of the

\begin{itemize}
\item \textsuperscript{10} \textit{Vance v. Rumsfeld}, 694 F.Supp.2d 957 (N.D. Ill. 2010) [hereinafter “Vance I”], aff’d, 653 F.3d 591 (7th Cir. 2011) [hereinafter “Vance II”], vacated and rev’d, Vance III, 701 F.3d at 195-96.
\item \textsuperscript{11} \textit{See John Auchter, Big Boy Rules, or How I Learned to Stop Worrying and Love “Special Factors,” 7 SEVENTH CIRCUIT REV. 1 (2011), at http://www.kentlaw.edu/7cr/v7-1/auchter.pdf} (arguing that Congress, not the courts, is the proper forum for determining whether \textit{Bivens} remedies are available for plaintiffs whose constitutional rights are violated in a warzone).
\item \textsuperscript{12} \textit{Vance III}, 701 F.3d at 205.
\item \textsuperscript{13} \textit{Id.} at 198 (emphasis added).
\item \textsuperscript{14} \textit{Id.} at 199-200.
\item \textsuperscript{15} \textit{Vance v. Rumsfeld}, No. 12-976, 2013 WL 488898 (U.S. June 10, 2013).
\item \textsuperscript{16} \textit{Vance III}, 701 F.3d at 196.
\end{itemize}
alleged conduct. Part II summarizes the history and progression of *Bivens* jurisprudence, placing particular emphasis on the cases involving allegations of misconduct by military officials. Part III returns to the Vance litigation, summarizing all three opinions and their treatment of the applicability of *Bivens*. Part IV then analyzes the *en banc* majority opinion and argues the decision errs in three major respects: (1) the court improperly interpreted *Bivens* precedent involving military plaintiffs to preclude Vance and Ertel’s claim despite their status as non-military civilians; (2) the court’s decision disregards the significance of qualified immunity, which already shelters government officials from suit so long as they execute their duties in good faith; and (3) the court was reluctant to scrutinize alleged violations of civil liberties during times of war, punting such scrutiny to other branches of government as a matter of “national security.” Such scrutiny is particularly crucial in situations such as Vance, which involve “a right so basic as not to be tortured by our government.”

I. THE FACTS

After the United States’ invasion of Iraq in 2004, Donald Vance, a Chicago native and veteran of the United States Navy, began working as a security consultant for Shield Group Security (“SGS”), an Iraqi security company in Baghdad. Nathan Ertel, a Virginia native, was also hired by SGS to work in Baghdad as a contract manager. During their employment, Vance and Ertel observed allegedly corrupt payments “being made by SGS agents to certain Iraqi sheikhs.” In October 2005, while in Chicago, Vance informed the FBI of the strange observed activities taking place at SGS, and upon his return to

17 *Id.* at 211 (Hamilton, J. dissenting).
18 Second Amended Complaint at 8-10, Vance I, 694 F.Supp.2d 957 (N.D. Ill. 2010) (No. 06-CV-06964) [hereinafter “Complaint”].
19 *Id.*
20 *Id.* at 11.
Iraq began gathering such information as an informant for the FBI.\(^\text{21}\) Ertel assisted Vance in gathering this information.\(^\text{22}\) As their undercover efforts progressed, so did the number of observed improprieties, expanding to SGS’ “dealings with the Iraqi government, other companies and contractors, and the sheiks . . . as well as on high-level officials in the Iraqi government.”\(^\text{23}\) Notably, Vance and Ertel provided the FBI with information regarding their supervisor at SGS who was allegedly running a “Beer for Bullets” program, in which he would sell liquor to American soldiers in exchange for weapons and ammunition, which SGS would then sell for a profit.\(^\text{24}\) This practice led to SGS possessing an “unnecessary and alarming” stockpile of weapons.\(^\text{25}\) Vance became suspicious that SGS was supplying weapons to the United States’ enemies in Iraq.\(^\text{26}\)

Vance and Ertel alleged that on an unspecified date, a “high-ranking” SGS employee confiscated both men’s Common Access Cards, leading the two men to believe that their cover had been blown. These cards were their Department of Defense issued identification badges, which allowed them to freely move about the military compound and other United States properties in Iraq.\(^\text{27}\) This confiscation in effect trapped the two inside the SGS compound.\(^\text{28}\) Vance called their FBI contacts in the United States, who said they should consider themselves hostages and advised the two to barricade themselves inside their room with weapons until they could be rescued by the military.\(^\text{29}\) They were in fact rescued, upon which Vance and Ertel were transported to the United States Embassy.\(^\text{30}\) They were then

\(^{21}\) Id. at 11-12. \\
^{22}\) Id. at 12. \\
^{23}\) Id. \\
^{24}\) Id. at 19-20. \\
^{25}\) Id. at 20. \\
^{26}\) Vance III, 701 F.3d 193, 196 (7th Cir. 2012). \\
^{27}\) Complaint, supra note 18, at 23. \\
^{28}\) Id. at 24. \\
^{29}\) Id. at 25. \\
^{30}\) Id. at 25.
questioned by United States officials, to whom they explained their status as FBI informants assisting in documenting the misdeeds of SGS.31

After their questioning and a few hours of sleep, Vance and Ertel were suddenly awoken by armed guards, placed under arrest, and taken to an unknown United States military compound in Iraq (believed to be Camp Prosperity), where they were placed in a cage, strip-searched, and given jumpsuits.32 They remained there for approximately two days, where they were held in separate, perpetually lit solitary confinement cells and fed twice per day.33 After two days they were shackled, blindfolded, and transported to Camp Cropper, where they were again placed in solitary confinement in cold, cramped cells that had “bugs and feces” on the walls.34 The lights were always on, and the cells were filled with music “at intolerably-loud volume;” if they fell asleep they were awoken by guards.35 They were “often denied food and water completely, sometimes for an entire day.”36 They were also denied treatment for basic medical care and hygiene.37 For example, Vance continually requested aid for a severe toothache; the tooth was eventually pulled in a “hurriedly and covertly” performed procedure in which Vance was denied painkillers or antibiotics.38

For a week, Vance and Ertel were not allowed to go outdoors at any time; guards “constantly threatened” the use of “excessive force” if they did not “immediately and correctly comply with every instruction given them.”39 They were also not allowed any contact

31 Id. at 25-26.
32 Id. at 28.
33 Id. at 28-29.
34 Id. at 29.
35 Id. at 30.
36 Id.
37 Id.
38 Id. at 30-31.
39 Id. at 31.
with the outside world for several weeks.\textsuperscript{40} While at Camp Cropper they were continually interrogated regarding their knowledge of the inner-workings of SGS, and were repeatedly threatened that they would “never be allowed to leave” if they did not properly comply.\textsuperscript{41} At all times they were denied legal counsel.\textsuperscript{42} Eventually both Vance and Ertel were informed there would be a proceeding before a “Detainee Status Board” to determine their status as either “enemy combatants,” “security internees,” or “innocent civilians.”\textsuperscript{43} Shortly thereafter, they were told they had been initially classified as “security internees” because of their “work for a business entity that possessed one or more large weapons caches on its premises and may be involved in possible distribution of these weapons to insurgent/terrorist groups”—precisely the activities the two had been reporting to the FBI.\textsuperscript{44} Both Vance and Ertel were provided with an opportunity to defend themselves of such accusations before the Detainee Status Board, albeit without access to requested evidence; the right to counsel; the right to call witnesses, including each other; the right to see the evidence against them; the right to remain silent; or the right to cross-examine adverse witnesses.\textsuperscript{45} At the end of the proceedings, both were returned to solitary confinement to await the Board’s findings.\textsuperscript{46} After about one month following the hearing, Ertel’s release was authorized, though his actual release occurred eighteen days later.\textsuperscript{47} He was put on a bus to the Baghdad airport without any necessary documentation to leave Iraq.\textsuperscript{48} He was only able to leave after encountering a friend at the airport who arranged his departure through

\begin{itemize}
\item \textsuperscript{40} Id. at 32.
\item \textsuperscript{41} Id. at 33-35.
\item \textsuperscript{42} Id. at 33.
\item \textsuperscript{43} Id. at 35.
\item \textsuperscript{44} Id. at 35-36.
\item \textsuperscript{45} Id. at 38.
\item \textsuperscript{46} Id. at 42.
\item \textsuperscript{47} Id.
\item \textsuperscript{48} Id.
\end{itemize}
the U.S. Air Force. Vance was held for an additional two months after Ertel’s release, and his interrogations continued. He too was eventually dropped off at the Baghdad airport without any documentation to return to the United States. He eventually secured a flight home on his own.

Neither man was ever formally charged by the military with any wrongdoing.

II. THE LAW: BIVENS AND IMPLIED CONSTITUTIONAL RIGHTS

Upon their return to the United States, Vance and Ertel sued former Secretary of Defense Donald Rumsfeld in his individual capacity, as well as a number of unidentified defendants at Camp Cropper whose identities were unknown, seeking money damages. However, there is no federal statute that provides a remedy of money damages for the alleged conduct. While Congress has passed legislation that authorizes federal courts to grant monetary relief for violations of constitutional rights by state and local officials (commonly referred to by its placement in the U.S. Code as “Section 1983”), there is no analogous statutory provision that allows such suits against federal officers. The origins of Section 1983 date back to Reconstruction, providing a private enforcement mechanism to vindicate many of the newly guaranteed rights granted by the Civil

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49 Id.
50 Id.
51 Id. at 43.
52 Id.
53 Id.
54 Vance II, 653 F.3d 591, 598, fn. 4 (7th Cir. 2011).
55 Vance III, 701 F.3d 193, 198 (7th Cir. 2012).
56 See 42 U.S.C. § 1983 (2006) (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State... subjects, or causes to be subjected, any citizen of the United States... the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[,]”).
War Amendments and civil rights acts. Section 1983 was “an important part of the basic alteration in our federal system wrought in the Reconstruction era... [that clearly established] the role of the Federal Government as a guarantor of basic federal rights against state power[.]” Congress’ decision not to include federal officials within the scope of Section 1983 raises numerous questions about the respective roles of the legislature and the courts when such private remedies are sought.

With that said, federal courts have in the past found it proper to create causes of action and award relief even in the absence of explicit statutory authority. For example, the Supreme Court has previously held that courts may imply private rights from federal statutes if such rights are necessary to accomplish Congressional intent, although the Court in recent decades has admittedly retreated from this approach.

Additionally, in the context of constitutional violations, federal courts

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60 The Court first adopted a broad approach embracing implied rights of action if such a right would be “necessary to make effective the congressional purpose” of the statute. See J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964) (implying a private cause of action under § 14(a) of the Securities Exchange Act of 1934). The Court would later mandate a more detailed inquiry into Congressional intent before implying a private right of action by creating a restrictive four-factor test. See Cort v. Ash, 422 U.S. 66, 78 (1975). But even with this new restrictive test in place, the Court still found a private cause of action when necessary to effectuate a statute’s objective. See Cannon v. Univ. of Chicago, 441 U.S. 677 (1979) (creating a private right of action under Title IX of the Educational Amendments of 1972). The modern approach, however, is that private rights of action may be implied only if there is affirmative evidence that Congress intended to create such a right of action and private remedy. See Alexander v. Sandoval, 532 U.S. 275, 286-87 (2001). While the modern standard is more demanding, it has not entirely eliminated courts’ ability to imply rights of action under federal statutes. The desirability of the Court’s shift has also created passionate debate amongst legal scholars. ERWIN CHERMINSKY, FEDERAL JURISDICTION 400 (5th ed. 2007); see also FALLON, JR., supra note 59, at 705-08 (documenting the Court’s shift in this area).
have long held in favor of the ability to provide injunctive relief against federal officials who may commit future violations.\footnote{CHEMERINSKY, supra note 60, at 606 (citing Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) (denying injunctive relief against the head of the federal War Assets Administration but acknowledging such relief is available against a federal officer who acts outside the scope of constitutional authority or delegated statutory authority)).} In this manner the Constitution acts as a shield, protecting the litigant against future deprivations of his or her rights before they even occur. But what of using the Constitution instead as a sword, arming the litigant with a post-deprivation weapon to avenge violations after they occur? As the old adage says, sometimes the best defense is a good offense.

The ability of federal courts to provide litigants with a sword—money damages—for infringements of constitutional rights was not contemplated by the Supreme Court until 1946. In \textit{Bell v. Hood}, the plaintiff sought $3000 in monetary damages against the FBI for alleged unconstitutional arrests and searches in violation of the Fourth and Fifth Amendments.\footnote{Bell v. Hood, 327 U.S. 678, 680-81 (1946).} Although no particular statute authorized the suit, the Court held that federal subject matter jurisdiction existed because the case “arose under” the Constitution.\footnote{Id. at 685.} The Court left the lower court to determine if the plaintiff had pleaded a valid cause of action under federal law.\footnote{Id. On remand, the district court dismissed, finding no cause of action.} It would take another twenty-five years, in its landmark \textit{Bivens} decision,\footnote{Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).} for the Court to return to the issue of whether “a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct.”\footnote{Id. at 389.}
A. Bivens v. Six Unknown Named Agents

In November of 1965, federal agents entered the apartment of Webster Bivens and arrested him in front of his wife and children for alleged narcotics violations. The federal agents did so without a warrant and allegedly utilized excessive force in making the arrest. Bivens sought damages from each of the officers, alleging that the arrest violated the Fourth Amendment’s prohibition against unreasonable searches and seizures; however, his complaint was dismissed by the district court for a failure to state a claim, as no federal statute authorized suit against the federal officers for their conduct.

In reversing the dismissal of the complaint, the Bivens court reiterated its holding from Bell v. Hood that “where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.” Although no particular statutory provision allowed relief, the Court nonetheless proclaimed that awarding damages “should hardly seem a surprising proposition,” because “[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.”

However, the Court did articulate two situations in which implying a non-statutory cause of action would be inappropriate, although neither applied in the Bivens case. First, where “special factors counseling hesitation in the absence of affirmative action by Congress” were present, the Court stated it would refuse to create a non-statutory remedy. Additionally, the Court stated where there is an “equally effective [remedy] in the view of Congress” to aggrieve a wronged plaintiff, implying a non-statutory cause of action would also

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67 Id.
68 Id.
69 Id. at 389-90.
70 Id. at 392 (quoting Bell v. Hood, 327 U.S. at 684).
71 Bivens, 403 U.S. at 395.
72 Id. at 396.
be improper.\textsuperscript{73} The Court, however, did not elaborate what would constitute either “special factors” or an “equally effective” alternative remedy.

\textit{Bivens} has been controversial since its inception because it gives the federal courts the power to create federal causes of action, a role that is typically thought to be reserved solely to the legislative branch. Dissenting in \textit{Bivens}, Chief Justice Burger stated:

We would more surely preserve the important values of the doctrine of separation of powers—and perhaps get a better result—by recommending a solution to the Congress as the branch of government in which the Constitution has vested the legislative power. Legislation is the business of the Congress, and it has the facilities and competence for that task—as we do not.\textsuperscript{74}

Other dissenters in subsequent \textit{Bivens} actions have similarly argued that the judicial branch undermines the constitutional system each time it creates a damages remedy without legislative authorization.\textsuperscript{75} Proponents of this view often argue that courts are inherently powerless to create such remedies—a formalist view of separation of powers—or that courts simply should not foray into the legislative domain and make their own policy decisions—a prudential concern.\textsuperscript{76} But if a guaranteed constitutional right has been violated

\textsuperscript{73} \textit{Id.} at 397.
\textsuperscript{74} \textit{Id.} at 411-12 (1971) (Berger, C.J., dissenting).
\textsuperscript{75} \textit{See} Carlson v. Green, 446 U.S. 14, 40 (1980) (Rehnqust, J., dissenting) (“it is obvious that when Congress has wished to authorize federal courts to grant damages relief, it has known how to do so and has done so expressly”); Corr. Serv. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., dissenting) (“\textit{Bivens} is a relic of heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be ‘implied’ by the mere existence of a statutory or constitutional prohibition.”).
\textsuperscript{76} Susan Bandes, \textit{Reinventing Bivens: The Self-Executing Constitution}, 68 S. Cal. L. Rev. 289, 312 (1995); \textit{see also}, e.g., Auchter, \textit{supra} note 11, at 24-27 (arguing that \textit{Vance II} was incorrectly decided because Congress should be the one to fashion remedies for violations of constitutional rights in a warzone).
with no available legislative remedy, an overly formalistic view risks missing the “forest” of the document’s promise of individual liberty amongst the “trees” of its literal text.\textsuperscript{77}

One of [the Constitution’s] important objects is the designation of rights. . . [T]he judiciary is clearly discernible as the primary means through which these rights may be enforced. . . . Unless such rights are to become merely precatory, [litigants with] no effective means other than the judiciary to enforce these rights[,] must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.\textsuperscript{78}

Since \textit{Marbury v. Madison}, the American constitutional structure has required that federal courts allow “every individual to claim the protection of the laws, whenever he receives an injury.”\textsuperscript{79} Enforcement of constitutional rights cannot be dependent on the affirmative assent of the political branches of government, for “the Constitution is meant to circumscribe the power of government where it threatens to encroach on individuals.”\textsuperscript{80} If that were not the case, the Constitution’s system of checks and balances amongst its coexisting three branches would be eviscerated. When viewed in this manner, \textit{Bivens} does not offend separation of powers: it reinforces it.

\textbf{B. Carlson v. Green}

Nine years after \textit{Bivens}, the Court held in \textit{Carlson v. Green} that a \textit{Bivens} remedy was appropriate for a violation of the Eighth Amendment’s prohibition against cruel and unusual punishment, even

\begin{itemize}
  \item \textsuperscript{78} Davis v. Passman, 442 U.S. 228, 241-42 (1979) (allowing a \textit{Bivens} action brought by a former congressional staff member alleging she had been fired on the basis of sex in violation of the Fifth Amendment).
  \item \textsuperscript{79} Marbury v. Madison, 5 U.S. 137, 163 (1803).
  \item \textsuperscript{80} Bandes, \textit{supra} note 76, at 292.
\end{itemize}
though the Federal Tort Claims Act ("FTCA") created a parallel remedy. In *Carlson*, a mother had sued federal prison officials on behalf of her deceased son, alleging he had died from personal injuries while in the prison. In allowing her to proceed with her *Bivens* action, the majority opinion unequivocally stated that, "victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right."

*Carlson* was an important *Bivens* decision in two respects. First, the decision expanded *Bivens* liability to allegations of prisoner abuse. Second, the *Carlson* Court articulated several reasons why *Bivens* was an effective avenue for remedying certain constitutional violations. Although the FTCA provided an alternative remedy against the United States generally, the Court found the FTCA to be a "counterpart" to individual *Bivens* liability, and not preemptive. The greater deterrent effect of personal liability, the possibility of punitive damages, and the option for a jury trial, were all found to be justifications for extending *Bivens* protection for victims of prison abuse.

**C. Chappell v. Wallace**

The Supreme Court first considered *Bivens* liability in the military context in *Chappell v. Wallace*, in which five black Navy servicemen sued several of their superior officers, alleging intentional acts of unconstitutional racial discrimination. The Ninth Circuit had authorized the award of damages based on *Bivens*, but the Court reversed in a unanimous decision. In doing so, the Court cited *Feres*

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82 Id. at 16.
83 Id. at 18.
84 Id. at 20.
85 Id. at 21-22.
87 Id. at 298.
v. United States,\(^88\) which had previously addressed the question of “whether soldiers could maintain tort suits [under the FTCA] against the government for injuries arising out of their military service.”\(^89\) While the FTCA’s language was broad enough to permit such recovery, \(Feres\) held that “the peculiar and special relationship of the soldier to his superiors” precluded such an award.\(^90\) Put another way, the \(Feres\) Court held that civilian courts should not award FTCA damages to members of the military without explicit congressional authorization to do so.

Although the \(Chappell\) Court acknowledged that the question of \(Bivens\) liability was distinct from the question of FTCA liability in \(Feres\), the Court still relied heavily on \(Feres’\) analysis to determine whether a “special factor” that precluded a \(Bivens\) remedy was present.\(^91\) The Court ultimately held that, based on the “unique disciplinary structure of the military establishment,” as well as Congress’ establishment of an internal military system for review of complaints and grievances, it would be “inappropriate to provide enlisted military personnel a \(Bivens\)-type remedy against their superior officers.”\(^92\)

**D. United States v. Stanley**

\(Chappell\) created confusion in the lower courts as to whether all \(Bivens\) suits arising out of military service were barred or just suits involving an officer-subordinate relationship.\(^93\) In \(United States v. Stanley\), the Court addressed this confusion, expressly precluding all \(Bivens\) suits “arising out of or in the course of activity incident to

\(^89\) \(Chappell\), 462 U.S. at 299.
\(^90\) \(Id.\) (internal citations omitted).
\(^91\) \(Id.; see also id.\) at 304 (“Here, as in Feres, we must be concerned with the disruption of the peculiar and special relationship of the soldier to his superiors’ that might result if the soldier were allowed to hale his superiors into court.”) (internal punctuation and citations omitted).
\(^92\) \(Id.\) at 304.
\(^93\) CHEMERINSKY, supra note 60, at 621.
[military] service.” In Stanley, a former Army sergeant plaintiff had been secretly administered doses of LSD without his knowledge or consent. He filed suit under the FTCA, but his complaint was dismissed as barred by the aforementioned Feres doctrine. However, the lower court ruled the plaintiff could still seek damages under Bivens. The Court reversed, reiterating that “uninvited intrusion by the judiciary” into military affairs is inappropriate. The Court clarified that the “special factor counseling hesitation” articulated in Chappell was not limited to the military officer-subordinate context. Rather, the “special factor” was as extensive as the one articulated in Feres, where the Court held that the FTCA does not apply to “injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.” Thus, because the Stanley plaintiff’s injury was one that had occurred in the course of activity incident to service, no Bivens remedy was available.

E. Current Status of Bivens

The Court in the last several decades has “consistently refused to expand, and indeed has substantially limited, the availability of Bivens suits.” For example, in Correctional Services Corp. v. Malesko, a Bivens case denying recovery against a private corporation operating in conjunction with the federal Bureau of Prisons, then Chief Justice Rehnquist stated:

95 Id. at 671.
96 Id. at 672.
97 Id.
98 Id. at 683.
100 Stanley, 483 U.S. at 683-84.
101 CHEMERINSKY, supra note 60, at 613.
Since [Carlson v. Green] we have consistently refused to extend Bivens liability to any new context or new category of defendants. . . . In 30 years of Bivens jurisprudence we have extended its holding only twice, to provide an otherwise nonexistent cause of action against individual officers alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked any alternative remedy for harms caused by an individual officer’s unconstitutional conduct. Where such circumstances are not present, we have consistently rejected invitations to extend Bivens[].

In its 2007 decision of Wilkie v. Robbins, the Court cautioned that Bivens is not an “automatic entitlement” to non-statutory damages; rather, the application of Bivens must “represent a judgment about the best way to implement a constitutional guarantee.” Most recently, in Minneci v. Pollard, the Court held that a Bivens action brought against the employees of a privately operated federal prison was impermissible because state tort law provided an adequate alternative remedy. In a concurring opinion, Justices Scalia and Thomas characterized Bivens as “a relic of heady days in which this Court assumed common-law powers to create causes of action by constitutional implication.” But despite this increased hesitancy to apply the doctrine in new settings, Bivens has never been overruled.

III. THE LITIGATION

Upon their return to the United States, Vance and Ertel sued former Secretary of Defense Donald Rumsfeld in his individual capacity, as well as a number of unidentified defendants at Camp

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103 Id. at 68-70.
104 Wilkie v. Robbins, 551 U.S. 537, 550 (2007) (denying a Bivens remedy to a rancher who alleged he was intimidated and harassed by the government into granting an easement).
106 Id. at 626 (Scalia, J., concurring) (quoting Corr. Serv. Corp., 534 U.S. at 75) (internal punctuation omitted).
Cropper whose identities were then unknown.\textsuperscript{107} Rumsfeld responded with a motion to dismiss for failure to state a claim.

\textit{A. Vance I – The District Court}

In determining whether to grant former Secretary Rumsfeld’s motion to dismiss, Judge Wayne Anderson of the Northern District of Illinois first confronted the question of whether Rumsfeld was entitled to qualified immunity, which would extinguish the right to seek a remedy under \textit{Bivens}.\textsuperscript{108} This analysis required a two-step inquiry: (1) “whether the facts alleged show that the official’s conduct violated a constitutional right,” and if so, (2) whether that right was “clearly established” at the time of the alleged conduct.\textsuperscript{109} After lengthy examination, Judge Anderson answered both in the affirmative and denied Rumsfeld’s qualified immunity defense.\textsuperscript{110} Judge Anderson found the plaintiffs had sufficiently alleged conduct that cumulatively was enough to “shock the conscience of those belonging to a civilized system of justice[.]”\textsuperscript{111} Judge Anderson also found that relevant precedent had established that “American citizens do not forfeit their core constitutional rights when they leave the United States, even when their destination is a foreign war zone,”\textsuperscript{112} and concluded it was “recogn[ized] that federal officials may not strip citizens of well-settled constitutional protections against mistreatment simply because they are located in a tumultuous foreign setting.”\textsuperscript{113}

After determining the defendants did not possess qualified immunity, Judge Anderson next conducted a \textit{Bivens} analysis to

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\textsuperscript{107} Vance II, 653 F.3d 591, 598, fn. 4 (7th Cir. 2011).
\textsuperscript{108} Vance I, 694 F.Supp.2d 957, 965 (N.D. Ill. 2010).
\textsuperscript{109} \textit{Id.} at 966 (citing Saucier v. Katz, 533 U.S. 194, 200-01 (2001)).
\textsuperscript{110} Vance I, 694 F.Supp.2d at 966-71.
\textsuperscript{111} \textit{Id.} at 966 (quoting Rochin v. California, 342 U.S. 165, 174 (1952)) (internal punctuation omitted).
\textsuperscript{112} Vance I, 694 F.Supp.2d at 970.
\textsuperscript{113} \textit{Id.} at 971.
\end{flushleft}
determine whether that remedy was available.\textsuperscript{114} In his analysis, Judge Anderson gave little attention to whether adequate alternative remedies existed, as both sides had apparently agreed that the only arguably applicable federal statute under the alleged facts (the Detainee Treatment Act) provided no remedy.\textsuperscript{115} Judge Anderson found the absence of an alternative remedy “strong support” for the application of \textit{Bivens}, for “litigants who allege that their own constitutional rights have been violated, who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.”\textsuperscript{116}

As to whether any “special factors counseled hesitation,” Judge Anderson analyzed three arguments offered by Rumsfeld: “separation of powers, misuse of the courts as a weapon to interfere with the war effort, and other serious adverse consequences for national defense.”\textsuperscript{117} Judge Anderson proclaimed that “a state of war is not a blank check . . . when it comes to the rights of the American citizens, and therefore, it does not infringe on the core role of the military for the courts to exercise their-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.”\textsuperscript{118} Rather, “[w]hen an American citizen sets out well-pled allegations of torturous behavior by executive officials abroad,” courts have a duty to examine the individual circumstances rather than issue blanket protection, which would risk “condens[ing] power into a single branch of government.”\textsuperscript{119} Therefore, finding there were no “special factors counseling hesitation” precluding a \textit{Bivens} remedy, Judge Anderson denied Rumsfeld’s motion to dismiss.\textsuperscript{120}

\textsuperscript{114} \textit{Id.}
\textsuperscript{115} \textit{Id.} at 972.
\textsuperscript{116} \textit{Id.} (quoting \textit{Davis v. Passman}, 442 U.S. 228, 242 (1979)).
\textsuperscript{117} \textit{Id.} at 973.
\textsuperscript{118} \textit{Id.} at 974 (citing \textit{Hamdi v. Rumsfeld}, 542 U.S. 507, 535 (2004)) (internal quotations omitted).
\textsuperscript{119} \textit{Id.} at 975 (quoting \textit{Hamdi}, 542 U.S. at 535-36).
\textsuperscript{120} \textit{Id.}
Also of note in Judge Anderson’s opinion was the rejection of Rumsfeld’s argument that the Supreme Court’s consistent refusal to extend Bivens in “any new context or category of defendants” was itself a reason to dismiss.\textsuperscript{121} While Judge Anderson acknowledged there had been an increased hesitancy to apply Bivens, he believed “it can hardly be said [that the Court has] adopted a steadfast rule against” the application of Bivens by “federal courts tasked with adjudicating distinct constitutional violations.”\textsuperscript{122}

\textbf{B. Vance II – The Seventh Circuit Panel}

On appeal, a three-member panel of the Seventh Circuit affirmed Judge Anderson’s decision, finding that “a Bivens remedy should be available to civilian U.S. citizens in a war zone, at least for claims of torture or worse,” and that Vance and Ertel had adequately pled such a claim against Rumsfeld, who was not entitled to qualified immunity.\textsuperscript{123} Notably, regarding Rumsfeld’s personal responsibility, the majority panel found not only that the “plaintiffs have sufficiently alleged that Secretary Rumsfeld acted deliberately in authorizing interrogation techniques that amount to torture,” but also went further than Judge Anderson and found that Vance and Ertel sufficiently pled facts showing “deliberate indifference” by Rumsfeld in failing to stop the torture despite actual knowledge of the unconstitutional abuse.\textsuperscript{124} Qualified immunity was denied because, for much the same reasons articulated by Judge Anderson, “a reasonable official in Secretary Rumsfeld’s position in 2006 would have realized that the right of a United States citizen to be free from torture at the hands of one’s own

\textsuperscript{121} Id. at 972.

\textsuperscript{122} Id.

\textsuperscript{123} Vance II, 653 F.3d 591, 598-99 (7th Cir. 2012).

\textsuperscript{124} Id. at 600; see also id. at 601-04 (detailing the Complaint’s allegations that Secretary Rumsfeld “devised,” “authorized,” “directed,” and “supervised” policies that permitted the use of unlawful torture in Iraq and ignored “specific direction from Congress” and “took no action” to stop such policies).
government was a ‘clearly established’ constitutional right and that the techniques alleged by plaintiffs add up to torture.”

As to the appropriateness of a Bivens remedy, the majority began by asserting that there would be “no doubt that if a federal official, even a military officer, tortured a prisoner in the United States, the tortured prisoner could sue for damages under Bivens.”

As to whether any special factors counseled hesitation, the majority first noted that Rumsfeld’s asserted immunity would effectively immunize all military personnel in a war zone from civil liability for acts of “deliberate torture and even cold-blooded murder of civilian U.S. citizens,” an immunity the court characterized as “truly unprecedented.” In questioning the appropriateness of this expansive immunity, the majority explicitly rejected the applicability of Chappell and Stanley, finding it was “well established under Bivens that civilians may sue military personnel who violate their constitutional rights.”

As to the constitutional implications of the alleged violations occurring in a war zone on foreign soil, the majority stated that even outside our nation’s borders the United States’ powers are still subject to constitutional restrictions, and “when civilian U.S. citizens leave the United States, they take with them their constitutional rights that protect them from their own government.”

125 Id. at 611.
126 Id.
127 The majority did briefly address whether an alternative remedy existed for the plaintiffs—which Rumsfeld had conceded at the trial level was not the case—because it received an amicus brief from former Department of Defense officials offering alternatives for relief such as internal military detainee complaint procedures, the Geneva Conventions, or the Uniform Code of Military Justice. Id. at 613. The majority found none of the proposed alternative remedies sufficiently meaningful in the Bivens context. Id.
128 Id. at 615.
129 Id. at 616, fn. 17.
130 Id. at 616.
131 Id. at 617 (quoting Boumediene v. Bush, 553 U.S. 723, 765 (2008)).
132 Id. at 616 (citing Reid v. Covert, 354 U.S. 1 (1957)).
With these considerations in mind, the majority rejected the two special factors proffered by Rumsfeld. First, Rumsfeld argued that courts should not interfere with military decision-making out of respect for the Executive’s constitutional role in such matters. However, the majority believed the plaintiffs were simply seeking redress for individual wrongs, not seeking an inappropriately broad challenge to military policy through the courts. Additionally, the majority believed its role in reviewing statutory and constitutional claims of torture by the executive reinforced the separation of powers doctrine rather than undermined it, protecting against unchecked abuse of authority by one branch of government. Secondly, Rumsfeld argued that because Congress had passed legislation regarding detainee treatment without providing a statutory private right of action, it did not intend for such a right to exist and thus Bivens remedies were inappropriate. The majority rejected this argument on the basis that Bivens is a well-known legal doctrine that Congress assuredly was aware might apply when enacting such legislation, and thus taking no steps to foreclose Bivens remedies actually supported their application. The majority concluded its Bivens discussion as follows:

If we were to accept the defendant’s invitation to recognize the broad and unprecedented immunity they seek, then the judicial branch—which is charged with enforcing constitutional rights—would be leaving our citizens defenseless to serious abuse or worse by another branch of their own government. . . . Relying solely on the military to police its own treatment of civilians . . . would amount to an

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133 Id. at 618.
134 Id.
135 Id. at 619.
136 Id. at 619.
137 Id. at 622.
extraordinary abdication of our government’s checks and balances that preserve Americans’ liberty.  

C. Vance III – The En Banc Reversal

Rumsfeld was then granted a rehearing en banc, which vacated the panel opinion. 139 At the outset, the en banc majority noted that the Supreme Court “has not created another [Bivens action] during the last 32 years—though it has reversed more than a dozen appellate decisions that had created new actions for damages.” 140 Operating under the assumption that Bivens was generally disfavored, the majority stated the Supreme Court had “never created or even favorably mentioned the possibility of non-statutory right of action for damages against military personnel . . . [and had] never created or even favorably mentioned a nonstatutory right of action for damages on account of conduct that occurred outside the borders of the United States.” 141

Unlike the panel opinion, the en banc majority found the Chappell and Stanley decisions relevant in that their “principal point was the civilian courts should not interfere with the military chain of command . . . without statutory authority.” 142 The majority expressed the belief that the judiciary’s inexperience in the area of military discipline meant that the executive branch and Congress were best suited to weigh the “essential tradeoffs” and make the difficult decisions regarding the appropriateness of damages awards against soldiers and their superiors. 143 The majority then noted that Congress had recently enacted or amended several statutes affecting the interests and rights of military detainees, none of which provided for personal

138 Id. at 625-26.
139 Vance III, 701 F.3d 193, 197 (7th Cir. 2012).
140 Id. at 198.
141 Id. at 198-99.
142 Id. at 199.
143 Id. at 200.
damages remedies against military personnel or their superiors.\textsuperscript{144} While the relief provided by these statutes is both capped and discretionary—and thus not a full substitute for a \textit{Bivens} remedy—the majority believed it signaled Congressional intent to provide compensatory relief for claims against military personnel from the public treasury rather than private pockets.\textsuperscript{145}

After quickly dispensing with the civilian status of the plaintiffs as irrelevant,\textsuperscript{146} the majority then proceeded to find Vance and Ertel’s status as American citizens immaterial as well, stating that the Court “has never suggested that citizenship matters to a claim under \textit{Bivens}.”\textsuperscript{147} After holding that “the choice of remedies for military misconduct belongs to Congress and the President rather than the judicial branch”\textsuperscript{148}—thus granting the blanket immunity expressly repudiated by the vacated panel opinion as “truly unprecedented”\textsuperscript{149}—the court proceeded to unnecessarily determine Rumsfeld could not have been held liable anyway, as the Supreme Court decision of \textit{Ashcroft v. Iqbal} made clear that Cabinet officials are not vicariously liable for the actions of their subordinates if they only possess “mere knowledge” of such actions.\textsuperscript{150}

\textsuperscript{144} \textit{Id.} at 200-01.  
\textsuperscript{145} \textit{Id.} at 201.  
\textsuperscript{146} \textit{Id.} at 199 (“Plaintiffs say that [\textit{Chappell} and \textit{Stanley}] are irrelevant because [Vance and Ertel] were not soldiers. That is not so clear. They were security contractors in a war zone, performing much of the same role as soldiers. . . . But we need not decide whether civilians doing security work in combat zones are soldiers by another name, because \textit{Chappell} and \textit{Stanley} did not entirely depend on the relation between the soldier and the superior officer.”)  
\textsuperscript{147} \textit{Id.} at 203.  
\textsuperscript{148} \textit{Id.}  
\textsuperscript{149} \textit{Vance II}, 653 F.3d 591, 615 (7th Circuit 2012).  
\textsuperscript{150} \textit{Vance III}, 701 F.3d at 203 (citing \textit{Ashcroft v. Iqbal}, 556 U.S. 662, 677 (2009)). Rather, the majority asserted, Vance and Ertel would have been required to plead that “Rumsfeld knew of a substantial risk to security contractors’ employees, and ignored that risk because he wanted plaintiffs (or similarly situated persons) to be harmed,” an allegation the majority acknowledged as implausible. \textit{Vance III}, 701 F.3d at 204.
Judge Wood concurred in the judgment (believing that Rumsfeld was entitled to qualified immunity), but disagreed with the majority’s blanket immunity for the military personnel “who actually committed these heinous acts.”¹⁵¹ Judges Hamilton, Rovner, and Williams each dissented, parts of which will be addressed in conjunction with Part IV below. A petition for writ of certiorari was filed with the Supreme Court on February 8, 2013, but was denied on June 10, 2013.¹⁵²

IV. ANALYSIS

The en banc decision was incorrect in three major respects. First, the majority improperly interpreted two major Supreme Court decisions involving Bivens in the military context to exempt all military personnel from Bivens liability to civilian plaintiffs, an “extraordinary result” that “the Court would not have casually embraced” without being more explicit.¹⁵³ Second, the majority failed to appreciate how the existing doctrine of qualified immunity already alleviates one of the primary concerns used to justify granting absolute immunity. Third, the majority neglected its necessary role as guardians of constitutional liberties—particularly in times of war—by deferring scrutiny of the necessity of such dreadful acts to other branches of government.

A. Failure to Differentiate from Chappell and Stanley

The en banc majority opinion plays a game of misdirection with the Chappell and Stanley precedents. It does so by first stretching Chappell and Stanley as broadly as possible to help cast doubt on the plaintiffs’ claim, which then allows the majority to more easily dismiss the critical factual differences of Chappell and Stanley as irrelevant. The majority first introduces Chappell and Stanley as sweeping Supreme Court proclamations holding that it is inappropriate to create

¹⁵¹ Vance III, 701 F.3d at 206 (Wood, J., concurring).
¹⁵³ Vance III, 701 F.3d at 211 (Hamilton, J., dissenting).
non-statutory claims for damages against military personnel, using this characterization to create a presumption against the plaintiffs’ claims:

The Supreme Court has never created or even favorably mentioned the possibility of a non-statutory right of action for damages against military personnel, and it has twice held that it would be inappropriate to create such a claim for damages. [Chappell, Wallace.] . . . Yet plaintiffs propose a novel damages remedy against military personnel who acted in a foreign nation—and in a combat zone no less. 154

However, the majority is then confronted with the actual, narrower holdings of Chappell and Stanley—that members of the military cannot recover from other members of the military under Bivens for incidents arising out of military service—and dismisses this critical factual difference in the case before it as irrelevant:

Chappell and Stanley hold that it is inappropriate for the judiciary to create a right of action that would permit a soldier to collect damages from a superior officer. Plaintiffs say that these decisions are irrelevant because they were not soldiers. That is not so clear. They were security contractors in a war zone, performing much the same role as soldiers. . . . But we need not decide whether civilians doing security work in combat zones are soldiers by another name, because Chappell and Stanley did not entirely depend on the relation between the soldier and the superior officer. 155

The majority’s obfuscation of Chappell and Stanley is necessary because a correct reading of those two precedents clearly demonstrates they are not controlling. Aside from the obvious factual difference that, unlike Vance and Ertel, the Chappell and Stanley plaintiffs were military servicemen, the decisions in Chappell, Stanley, and Feres

154 Id. at 198-99.
155 Id. at 199 (emphasis added).
(upon which the Chappell and Stanley decisions heavily relied) are clearly concerned with civilian courts interfering with intra-military discipline. They are not blanket proclamations that "civilian courts should not interfere with the military chain of command," regardless of the military or civilian status of the plaintiff.

In Feres, the Supreme Court held that the FTCA does not apply to "injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." The Court came to this conclusion by focusing on Congress’ enactment of compensation schemes for service members who are injured or killed, and the peculiar difficulties faced by soldiers who bring litigation outside of intra-military channels. The Court did not say or make any inference that civilian courts inappropriately interfering with military matters was a primary concern.

In Chappell, in which the Supreme Court specifically stated that Feres guided its analysis, the Court declared that, "no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting." It further elaborated that "[t]he inescapable demands of military discipline and obedience to orders cannot be taught on battlefields . . . but combat inevitably reflects the training that precedes combat[.]

Thus:

[C]enturies of experience has developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns. Civilian courts must, at the

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156 See Chappell, 462 U.S. at 299 (“[T]he Court’s analysis in Feres guides our analysis in this case.”); Stanley, 483 U.S. at 683-84 (reaffirming Chappell as “require[ing] abstention in the inferring of Bivens actions as extensive as the exception to the FTCA established by Feres[.]”).
157 Vance III, 701 F.3d at 199.
158 Feres, 340 U.S. at 146 (emphasis added).
159 Id. at 144-45.
160 Chappell, 462 U.S. at 299.
161 Id. at 300.
162 Id.
very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment.\textsuperscript{163}

A plain reading of \textit{Chappell} shows that the Court was concerned with civilian courts improperly interfering with the command and disciplinary structure between enlisted military personnel and their superior officers. Yet the \textit{Vance} majority fleetingly interprets this same passage in \textit{Chappell} as a general observation that “military efficiency depends on a particular command structure, which civilian judges could mess up without appreciating what they were doing.”\textsuperscript{164} It avoids any mention that the Court was referring to interfering with the intra-military command structure.

The \textit{Vance} majority also mischaracterizes the holding of \textit{Stanley} in order fit \textit{Vance} within its purview. In \textit{Stanley}, the Supreme Court “reaffirm[ed] the reasoning of \textit{Chappell}” and stated that \textit{Chappell’s} holding—no \textit{Bivens} recovery for injuries arising out of military service—“extend[s] beyond the situation in which an officer-subordinate relationship exists[.]”\textsuperscript{165} The Seventh Circuit viewed this statement as reason to extend \textit{Chappell’s} bar on \textit{Bivens} recovery to non-military civilians.\textsuperscript{166} However, when the \textit{Stanley} Court made that statement, it was responding to the \textit{Stanley} plaintiff’s argument that “the defendants in this case were not Stanley’s superior military officers . . . and that the chain-of-command concerns at the heart of \textit{Chappell} . . . are not implicated.”\textsuperscript{167} Put another way, the plaintiff in \textit{Stanley} unsuccessfully argued that \textit{Chappell} was inapplicable because

\begin{itemize}
\item \textsuperscript{163} \textit{Id.} (emphasis added).
\item \textsuperscript{164} \textit{Vance III}, 701 F.3d at 200.
\item \textsuperscript{165} \textit{Stanley}, 483 U.S. at 683.
\item \textsuperscript{166} \textit{Vance III}, 701 F.3d at 199 (“[W]e need not decide whether civilians doing security work in combat zones are soldiers by another name, because \textit{Chappell} and \textit{Stanley} did not entirely depend on the relation between the soldier and the superior officer.”)
\item \textsuperscript{167} \textit{Stanley}, 483 U.S. at 679.
\end{itemize}
the defendants were not his superior officers. The Supreme Court rejected this argument because Feres, upon which Chappell relied, “did not consider the officer-subordinate relationship crucial,” but rather was concerned with “injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.”169 When the Stanley court said Chappell’s holding “extends beyond the officer/subordinate context,” it clearly meant that a military plaintiff was still prohibited from suing persons other than a superior officer for injuries arising from military service. Stanley is entirely silent with regards to civilian plaintiffs.

Thus, while the Seventh Circuit read Chappell and Stanley as broadly precluding civilians from obtaining a Bivens remedy against the military, neither case involved such a claim, neither case articulates such a holding, and both cases’ reasoning relied on intra-military concerns. Furthermore, as Judge Hamilton and Judge Williams each pointed out in dissent, if the Vance majority were correct in its broad interpretation of Chappell and Stanley, the Supreme Court would have demonstrated such in Saucier v. Katz. In that case, the plaintiff was a non-military U.S. citizen who brought a Bivens claim for excessive force against a military police officer. The Court went through a lengthy analysis of whether the military officer was entitled to qualified immunity, but made no mention nor gave any inference that a civilian was precluded from bringing a Bivens action against the military under Chappell or Stanley. In fact, Saucier fails to even mention Chappell or Stanley. Although the qualified immunity analysis utilized in Saucier was eventually scrapped, Saucier is still

\[168\] Id. at 680.
\[169\] Feres, 340 U.S. at 146 (emphasis added).
\[170\] Vance III, 701 F.3d at 212-13.
\[171\] Id. at 228, n. 2.
\[173\] Id. at 198-99.
\[174\] See Pearson v. Callahan, 555 U.S. 223, 236 (2009) (holding that courts may start with either prong of the two-step analysis used to determine qualified immunity, abandoning the mandatory sequential procedure adopted in Saucier); see also Section IV.B, infra, discussing qualified immunity.
an important decision that the Vance majority only mentions in a procedural context. Judge Hamilton’s dissent also brings attention to a Seventh Circuit decision from 2003 in which a civilian brought a Bivens claim against military officers for violating his Fourth and Fifth Amendment rights. The Seventh Circuit barred the plaintiff’s claim, but made no reference to Chappell or Stanley or military personnel’s general immunity from Bivens liability.

In sum, the Seventh Circuit had the opportunity to distinguish the facts before it in Vance from the Supreme Court’s Chappell and Stanley precedents—which “[s]cholars are virtually unanimous in strongly criticizing”—but instead stretched Chappell and Stanley to preclude relief for a class of plaintiffs not considered in either decision.

**B. Failure to Appreciate the Existing Significance of Qualified Immunity**

The en banc majority expressed concern that the potential for Bivens liability could “divert[] Cabinet officers’ time from management of public affairs to the defense of their bank accounts.” However, the existing doctrine of qualified immunity—thoroughly analyzed by both the district court and appeals panel—already provides a proper balance to assuage the majority’s worry that the nation’s leaders will act to defend their bank accounts to the detriment

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175 See Vance III, 701 F.3d at 197 (citing to Saucier when determining the court is “authorized to address the merits” of Rumsfeld’s immunity defense).
176 Id. at 213 (Hamilton, J. dissenting) (citing Case v. Milewski, 327 F.3d 564 (7th Cir. 2003)).
177 Case, 327 F.3d at 568-69.
178 CHEMERINSKY, supra note 60, at 622, fn. 88.
179 Vance III, 701 F.3d at 202.
180 Vance I, 694 F.Supp.2d 957, 965-971 (N.D. Ill. 2010); Vance II, 653 F.3d 591, 605-11 (7th Cir. 2011).
of the nation’s security. Even when a cause of action is recognized under *Bivens*, defendants may still raise qualified immunity as an affirmative defense. Qualified immunity “balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” Qualified immunity is a sizeable hurdle for *Bivens* plaintiffs to clear. The existence of qualified immunity in a *Bivens* suit makes the Seventh Circuit’s granting of absolute immunity from *Bivens* for the military even more puzzling, as federal officials who act in good faith executing their duties under the Constitution are already not subject to liability under *Bivens*.

If anything, modern qualified immunity jurisprudence already tilts in favor of protecting public officers from meritless litigation at the expense of ensuring actually injured plaintiffs receive compensation. The qualified immunity doctrine protects government officials “from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” That is, even if a government official violates someone’s constitutional rights, the official is liable for damages only if it would have been “clear to a reasonable officer that his conduct was unlawful in the situation he

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181 Judge Wood found this concern to be “disrespectful of both the dedication of those who serve in government and the serious interests that the plaintiffs are raising.” *Vance III*, 701 F.3d at 193, 210 (Wood, J., concurring).
182 Pearson v. Callahan, 555 U.S. 223, 231 (2009) (holding that police officers who conducted a warrantless search of the plaintiff’s home were entitled to qualified immunity from Section 1983 liability). Qualified immunity of federal officers is identical to the qualified immunity afforded to state and local officials under Section 1983. See *Harlow v. Fitzgerald*, 457 U.S. 800, 809 (1982).
183 CHEMERINSKY, *supra* note 60, at 606-07.
184 *Id.* at 548.
185 *Harlow*, 457 U.S. at 818.
While there need not be a prior court decision precisely on point in order to place a government official “on notice” that his or her conduct violates clearly established law, if the government official still has some objectively reasonable justification that the specific act they undertook was not unconstitutional, he or she is entitled to qualified immunity.

This highly deferential qualified immunity doctrine already provides government officials who execute their duties in good faith with more than enough protection from Bivens liability when it comes to matters of national security. For example, in Mitchell v. Forsyth, Attorney General John Mitchell had authorized a warrantless wiretap of a member of an antiwar group he believed to be planning to detonate bombs in Washington, D.C. and possibly to kidnap National Security Advisor Henry Kissinger. After the wiretap had been placed, the Supreme Court issued a decision prohibiting the use of such warrantless wiretaps, even in cases involving domestic threats to national security. The Forsyth Court nonetheless extended qualified immunity to Attorney General Mitchell for authorizing the warrantless wiretap because the legality of such conduct was “an open question” at

186 Saucier v. Katz, 533 U.S. 194, 202 (2001) (holding that military police officer who arrested demonstrator protesting at a public event featuring Vice President Gore was entitled to qualified immunity from Bivens liability).
187 Hope v. Pelzer, 536 U.S. 730, 741 (2002) (holding that prison guards who handcuffed an inmate to a hitching post for several hours without water or access to a bathroom were not entitled to qualified immunity from Section 1983 liability despite there being no cases with “materi
d
al similarity” facts to put them “on notice” that their conduct was unconstitutional); but see Brosseau v. Haugen, 543 U.S. 194, 201 (2004) (holding that a lack of “on point” cases may aid in demonstrating that a government official’s conduct was not a “clearly established” constitutional violation).
188 Anderson v. Creighton, 483 U.S. 635, 639-41 (1987) (holding that an FBI agent who conducted a warrantless search of the plaintiff’s home was entitled to qualified immunity if a reasonable officer could have believed such a warrantless search to be lawful based on the information the FBI agent possessed at the time).
the time it occurred, and the Court refused to determine qualified immunity on the basis of “hindsight-based reasoning.”¹⁹¹

For a more recent example of the power of qualified immunity in the context of the War on Terror, one need only look at the Ninth Circuit’s decision in Padilla v. Yoo.¹⁹² In that case, an American citizen detained as an enemy combatant after the 9/11 attacks alleged he was unconstitutionally tortured while in military detention.¹⁹³ He sought civil damages from John Yoo, the Deputy Assistant Attorney General in the Department of Justice’s Office of Legal Counsel who allegedly drafted a series of memoranda that justified his unlawful treatment.¹⁹⁴ The Supreme Court’s decision in Hamdi v. Rumsfeld¹⁹⁵ called into question the constitutionality of all these practices, but the decision was not issued until after all of Yoo’s memoranda.¹⁹⁶ While there were certainly “clearly established” constitutional rights for prisoners subject to ordinary criminal process at the time of Yoo’s memoranda, the Ninth Circuit held that because of Padilla’s unusual status of “enemy combatant” as designated by the President, a government

¹⁹¹ Forsyth, 472 U.S. at 535.
¹⁹² Padilla v. Yoo, 678 F.3d 748 (9th Cir. 2012).
¹⁹³ Id. at 751. In a familiar set of allegations, Padilla claimed he suffered “gross physical and psychological abuse . . . including extreme isolation; interrogation under threat of torture, deportation and even death; prolonged sleep adjustment and sensory deprivation; exposure to extreme temperatures and noxious odors, denial of access to necessary medical and psychiatric care; substantial interference with his ability to practice his religion, and incommunicado detention for almost two years, without access to family, counsel or the courts. Id. at 752.
¹⁹⁴ Id. For example, Yoo authored memoranda that stated “the Fourth Amendment had no application to domestic military operations”; that “restrictions outlined in the Fifth Amendment simply do not address actions the Executive takes in conducting a military campaign against the nation’s enemies”; that interrogation techniques are only considered torture if they cause damage rising “to the level of death, organ failure, or the permanent impairment of a significant body function”; that approved aggressive interrogation techniques not permitted by the military field manual; and approved the use of mind-altering drugs during interrogations. Id. at 753.
¹⁹⁶ Padilla, 678 F.3d at 760-61.
official “could have had some reason to believe that Padilla’s harsh treatment fell within constitutional bounds.”\textsuperscript{197} Additionally, even though the Ninth Circuit found that “the unconstitutionality of torturing a United States citizen was ‘beyond debate’ by 2001,”\textsuperscript{198} Yoo was still entitled to qualified immunity because there was “considerable debate” at the time as to whether the specific interrogation techniques promoted by Yoo amounted to “torture.”\textsuperscript{199} Thus, Yoo was entitled to qualified immunity on all claims.\textsuperscript{200}

If not already apparent, qualified immunity is a difficult obstacle to surpass when seeking civil liability against a government official. But that is by design; courts must balance the interest of insulating public figures from frivolous lawsuits against the equally weighty public interest in deterring unlawful conduct. Both the district court and appeals panel in \textit{Vance} carefully evaluated this balance and determined that Rumsfeld was not entitled to such immunity.\textsuperscript{201} Yet the \textit{en banc} majority makes this inquiry—much less its conclusion—irrelevant by providing absolute immunity for all military personnel, up to and including “those who actually committed these heinous acts.”\textsuperscript{202}

\textbf{C. Failure to Appreciate the Historic Role of the Judiciary as a Wartime Constitutional Guardian}

As an additional factor in its opinion, the \textit{en banc} majority quoted the Supreme Court’s 1981 decision in \textit{Haig v. Agee}, in which the Court stated that “[m]atters intimately related to . . . national security are rarely proper subjects for judicial intervention.”\textsuperscript{203} Notwithstanding

\textsuperscript{197} \textit{Id.} at 762.

\textsuperscript{198} \textit{Id.} at 763-64.

\textsuperscript{199} \textit{Id.} at 767-68.

\textsuperscript{200} \textit{Id.} at 768.

\textsuperscript{201} \textit{Vance I}, 694 F.Supp.2d 957, 965-971 (N.D. Ill. 2010); \textit{Vance II}, 653 F.3d 591, 605-11 (7th Cir. 2011).

\textsuperscript{202} \textit{Vance III}, 701 F.3d 193, 206 (7th Cir. 2012) (Wood, J., concurring).

\textsuperscript{203} \textit{Id.} at 200 (quoting \textit{Haig v. Agee}, 453 U.S. 280, 292 (1981)).
the glaring factual differences between the two cases—Phillip Agee was a former undercover CIA agent who was challenging the Secretary of State’s administrative decision to revoke his passport\textsuperscript{204}—the Seventh Circuit’s acquiescence to Congress and the military command structure in *Vance* is a disappointing abdication. There is undoubtedly a delicate balance to be had when weighing civil liberties against matters of national security, especially in times of war. Such balancing has been a recurring theme in our nation’s history, from the Alien and Sedition Acts of 1798\textsuperscript{205} to the War on Terror of the 21st century. However, when viewing this recurring theme in hindsight, it is clear that the United States “has had a long and unfortunate history of overreacting to the perceived dangers of wartime.”\textsuperscript{206} Federal courts should be wary of this long and unfortunate trend when balancing constitutionally guaranteed rights against claims of military necessity or national security, so as not to be found on the wrong side of history.

The Supreme Court was certainly on the wrong side of history regarding its treatment of Japanese-American citizens during World War II. In *Hirabayashi v. United States*,\textsuperscript{207} the Supreme Court upheld the constitutionality of a military order imposing a curfew on all citizens of Japanese ancestry on the west coast, stating:

> Since the Constitution commits to the Executive and to Congress the exercise of the war power . . . it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger[.]. . . Where . . . the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of warmaking, it is not for any court to sit in review of the

\textsuperscript{204} *Haig*, 453 U.S. at 285-86.

\textsuperscript{205} Act of July 14, 1798, ch. 74, 1 Stat. 596 (criminalizing certain criticism of government and public officials in the aftermath of the French Revolution).

\textsuperscript{206} GEOFFREY R. STONE, WAR AND LIBERTY xvii (2007).

\textsuperscript{207} *Hirabayashi v. United States*, 320 U.S. 81 (1943).
wisdom of their action or substitute its judgment for theirs.\(^{208}\)

A year later in the more well-known decision of *Korematsu v. United States*,\(^{209}\) the Court upheld the constitutionality of a military order that compelled nearly 120,000 persons of Japanese descent to leave their homes for government detention camps.\(^{210}\) In doing so, the Court stated:

>[P]roperly constituted military authorities feared and invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and . . . because Congress, reposing its confidence in this time of war in our military leaders—as it inevitably must—determined they should have the power to do just this. . . . We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.\(^{211}\)

*Hirabayashi* and *Korematsu* have since been heavily derided, and also formally denounced by the President of the United States on two separate occasions.\(^{212}\) These unfortunate decisions were creatures of the hysteria of war, with the Court in each case deferring to the

\(^{208}\) *Id.* at 93 (emphasis added).

\(^{209}\) *Korematsu v. United States*, 323 U.S. 214 (1944).

\(^{210}\) STONE, *supra* note 206, at 66.

\(^{211}\) *Korematsu*, 323 U.S. at 223-24.

\(^{212}\) See STONE, *supra* note 206, at 82-84 (citing President Ford’s Presidential Proclamation No. 4417 which acknowledges the evacuation and internment of loyal Japanese American citizens as “wrong” and a “sad day in American history,” and the Civil Liberties Act of 1988, signed by President Reagan, which “officially declared the Japanese internment a ‘grave injustice’ that was ‘carried out without adequate security reasons’” and “offered an official presidential apology and reparations” to those who had suffered as a result).
judgment of the “war-making” branches of government at the expense of our citizen’s constitutional values.

Beyond these “constitutional pariahs,” however, there are shining examples of the judiciary rejecting unchecked government wartime powers in the name of individual liberty. During the Vietnam era, for example, the Supreme Court unanimously rejected the Nixon administration’s claim that it could lawfully wiretap American citizens on American soil without complying with the Fourth Amendment:

Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch. . . . The Fourth Amendment contemplates a prior judicial judgment. . . . [and] [t]his judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the difference branches and levels of Government. . . . We cannot accept the Government’s argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. . . . Although some added burden will be imposed upon the Attorney General, this inconvenience is justified in a free society to protect constitutional values.

Even in the more modern context of the “war on terror,” the Supreme Court has prominently sided with constitutionally guaranteed liberties for American citizens and rejected an expansive assertion of

213 Id. at 82.
wartime authority. In *Hamdi v. Rumsfeld*, the Supreme Court held that due process guaranteed citizens who were challenging their status as “enemy combatants” the right to receive notice of the basis for their classification and a fair opportunity to refute the classification before a neutral decision maker.\(^{215}\) Justice O’Connor, writing for the plurality, stated:

> Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shift to the values that this country holds dear or to the privilege that is American citizenship. It is during out most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad. . . . We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens. **Whatever power the United States Constitution envisions for the Executive in its exchanges with . . . enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.**\(^ {216} \)

The above *Hamdi* dicta advocates a more thorough than deferential role for federal courts when balancing the deprivation of civil liberties against claims of executive war authority. By dismissing Vance and Ertel’s complaint, the Seventh Circuit neglected this responsibility.

It is worth noting that the Seventh Circuit is not alone in doing so. In reaching its decision in *Vance*, the majority at the outset noted that two other circuit courts of appeals—the Fourth Circuit and D.C. Circuit—had recently refused to “create a right of action for damages


\(^ {216} \) *Id.* at 532-36 (emphasis added) (internal citations omitted).
against soldiers . . . who abusively interrogate or mistreat military prisoners[].” However, the Seventh Circuit had ample opportunity to differentiate the facts of Vance from this nonbinding precedent.

For example, in Lebron v. Rumsfeld, the plaintiff was an American citizen seeking a judicial declaration that his designation as an “enemy combatant” was unconstitutional, an injunction prohibiting such future designation, and nominal damages. Unlike in Vance, the Lebron plaintiff was foremost attempting to use Bivens to influence military policy, as opposed to obtaining redress for the wrongful acts committed. Moreover, Lebron raised significantly greater constitutional questions—challenging the President’s ability to designate “enemy combatants” under Congress’ Authorization for Use of Military Force—that were not present in Vance.

In Doe v. Rumsfeld, the plaintiff seeking Bivens relief against the military was technically a civilian military contractor like Vance and Ertel, but was detailed to a United States Marine Corps team. The Doe plaintiff was eminently more “quasi-military” than Vance and Ertel; the Doe plaintiff actually accompanied military troops on the ground of the Iraqi-Syrian border, obtaining military intelligence and diagnosing potential threats, which arguably makes the reasoning behind Chappell and Stanley applicable when precluding Bivens. And, in Ali v. Rumsfeld, the plaintiffs seeking a Bivens remedy were Afghan and Iraqi citizens, raising unique constitutional challenges not

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217 Vance III, 701 F.3d 193, 195 (7th Cir. 2012) (citing Lebron v. Rumsfeld, 670 F.3d 540 (4th Cir. 2012); Doe v. Rumsfeld, 683 F.3d 390 (D.C.Cir. 2012); Ali v. Rumsfeld, 649 F.3d 762 (D.C.Cir. 2011)).
218 Lebron, 670 F.3d at 544.
220 Doe, 683 F.3d at 392.
221 See Vance III, 701 F.3d at 199; Auchter, supra note 11, at 23 (opining that Vance and Ertel were “much the same” as soldiers, or “analogous to a member of the military,” respectively).
222 Doe, 683 F.3d at 392.
present in *Vance*.\(^{224}\) In any event, none of these cases went so far as the *Vance* majority, which “in effect creates a new absolute immunity from *Bivens* liability for all members of the U.S. military.”\(^{225}\)

**CONCLUSION**

In *Marbury v. Madison*, Chief Justice John Marshall stated that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”\(^{226}\) In dismissing Vance and Ertel’s complaint at the pleading stage based on an imprecise reading of the relevant Supreme Court precedent, as well as an unfortunate willingness to defer to the war-making branches of government, the Seventh Circuit has left two American citizens who suffered cruel constitutional abuses at the hands of the military undefended. The court erred in vacating and reversing the well-reasoned district court and appeals panel decisions. While the Supreme Court has limited the availability of *Bivens* in new contexts in recent years,\(^ {227}\) the doctrine has yet to be formally overruled. The Seventh Circuit’s expansive holding in *Vance*, which now shields “military mistreatment of civilians not only in Iraq but also in Illinois, Wisconsin, and Indiana,”\(^ {228}\) is a disturbing jolt in the otherwise gradual descent of *Bivens*.

\(^{224}\) *See Vance III*, 701 F.3d at 221 (Hamilton, J., dissenting) (“Other federal courts have faced difficult issues when alien enemy combatants have sought protection in civilian U.S. courts. . . . We do not need to decide those difficult issues in this case, which was brought not by members of al Qaeda or designated enemy combatants, but by U.S. citizens[.]”).

\(^{225}\) *Id*. (Hamilton, J., dissenting).

\(^{226}\) *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

\(^{227}\) *See supra* Part II.E.

\(^{228}\) *Vance III*, 701 F.3d at 211 (Hamilton, J., dissenting).
KEYS, WALLET, AND PISTOL: THE SEVENTH CIRCUIT ESTABLISHES A CONSTITUTIONAL RIGHT TO CARRY FIREARMS OUTSIDE OF THE HOME

K. L. DANIELS*


INTRODUCTION

The recent shooting in Newtown, Connecticut, brought the need for comprehensive firearms regulation to the forefront of American politics. This shooting has received more attention than previous mass shootings because of the ages of the victims. Currently, Congress is fighting voraciously, with no compromise in sight. While this battle wages in the national political arena, individual state legislatures are also wrestling with the implementation of new firearms laws. But, before the Newtown murders, the judiciary began placing restraints on a legislature’s ability to regulate private use of firearms.

Most recently, in Moore v. Madigan, the Seventh Circuit held that citizens have a right to carry firearms in public. That decision overturned Illinois’s ban on private citizens carrying firearms in public. Until Moore, no court had held that there is a constitutional

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right to carry firearms outside in public. Moore is the lineal result of the Supreme Court’s holding in District of Columbia v. Heller, which held that the Second Amendment provides a private right to self-defense, which includes the keeping of operable firearms in the home.\(^2\) In Heller, the Supreme Court couched the right to bear arms in what it called a core right of self-defense,\(^3\) thereby setting the stage for the Seventh Circuit’s decision in Moore.

This Comment will explain, that although untimely, the Seventh Circuit’s decision in Moore is consistent with the Supreme Court’s recent Second Amendment holdings. The Seventh Circuit decision gave short shrift to the Illinois firearms law, and faulted that legislation because of its broad scope.\(^4\) However, the Seventh Circuit decision is supported by the emerging Second Amendment test that courts had adopted after the Supreme Court held in D.C. v. Heller that the Second Amendment confers an individual right to self-defense.\(^5\)

Part I of this Comment will first provide a brief background of the Supreme Court’s recent Second Amendment cases and the Seventh Circuit’s Moore decision. Moore did not provide an in depth analysis, leaving to the lower courts the task of determining the scope of the right to self-defense. Therefore, in Part II, the Comment will explain that lower federal courts have begun to use a First Amendment corollary to analyze Second Amendment cases. That corollary was not applied in the Moore decision, but it will be applied here post hoc. Part III of this Comment will show that based on this framework Moore was decided correctly, and will conclude by explaining how future courts should continue to apply this standard to Second Amendment cases.

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\(^3\) Id. at 628.

\(^4\) Moore, 702 F. 3d at 933.

\(^5\) Heller, 554 U.S. 570; McDonald v. City of Chicago, Ill., 130 S.Ct. 3020 (2010).
I. THE SUPREME COURT FINDS A PRIVATE RIGHT TO SELF DEFENSE

The Supreme Court decided District of Columbia v. Heller in 2008, holding that the Second Amendment embodies an individual right to bear arms in the home. Further, the Court singled out the handgun as the “quintessential self-defense weapon.” Calling this right fundamental, the Court found that the Second Amendment merely codified what the founders knew as a natural right. The federal government cannot infringe this right. Moreover, the Court held that this right to self-defense is greatest in the home. Heller was authored by Justice Scalia and shows originalist analysis and interpretation of historical evidence. This decision has faced criticism for its refusal to declare a standard that subsequent courts could apply in Second Amendment cases.

In 2010, the Court expanded its Heller ruling to include state regulations as well. In McDonald v City of Chicago the Supreme Court held that the Fourteenth Amendment makes the Second Amendment applicable to the states. However, aside from acknowledging that legislative action would require more than a rational basis review, neither of these Supreme Court cases applied a clear framework for further judicial interpretation.

Dick Anthony Heller was a District of Columbia special policeman who sought to keep a loaded firearm in his home for self-defense. However, the District of Columbia banned unlicensed

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6 Heller, 554 U.S. at 570.
7 Id. at 629.
8 Id.
9 Id.
12 Id.
13 Heller, 554 U.S. at 574.
handguns and made it unlawful to register a handgun.\textsuperscript{14} Furthermore, the District required that firearms kept in the home be made nonfunctional by use of a trigger lock, or other means. The Court of Appeals for the District of Columbia found that the city’s total ban was unconstitutional. On appeal, the Supreme Court upheld that ruling; and further, the Court held that the law requiring that lawful firearms be made inoperable was unconstitutional.\textsuperscript{15}

The crux of the Supreme Court’s analysis was divorcing the Second Amendment’s operative clause, “the right of the people to bear Arms, shall not be infringed” from the prefatory clause, “[a] well regulated Militia being necessary to the security of a free State.”\textsuperscript{16} The majority opinion stated that the prefatory clause did not limit the operative clause grammatically, and therefore, the two clauses should be understood independently.\textsuperscript{17} By framing its reasoning in this manner, the Court could narrow its analysis to the meaning of the operative clause. In this analysis, the Court distinguished militias, which Congress can “call forth,” from Armies and Navies, which Congress can raise and provide.\textsuperscript{18} According to the Court, Article I assumes that militias are already in existence, essentially that citizens would already own the weapons that they would use when the militia was called forth.\textsuperscript{19}

The majority held that “apart from the clarifying function, a prefatory clause does not limit or expand the scope of the operative clause.”\textsuperscript{20} The court found support for this reasoning in the historical evidence presented in amicus briefs and scholarly works.\textsuperscript{21} After

\begin{footnotesize}
\begin{enumerate}
\item[14] Id. at 570.
\item[15] Id. at 635.
\item[16] Id. at 576.
\item[17] Id.
\item[18] Id. at 596; see also U.S. Const. art. I, § 8.
\item[19] Heller, 554 U.S. at 596.
\item[20] Id. at 578.
\end{enumerate}
\end{footnotesize}
analyzing the operative clause, the majority’s opinion returned to the prefatory clause in order to “ensure that [their] reading of the operative clause is consistent with the announced purpose.”

The Court then determined that the Second Amendment protects an individual’s right to armed self-defense in the home. The Court found that the major flaw with the District of Columbia’s law was that it banned “the quintessential self-defense weapon [the handgun] in the place Americans hold most dear—the home.” Accordingly, the Court held that the ban was unconstitutional.

In his dissent, Justice Stevens argued that the prefatory clause should be understood as a preamble that limits the scope of the Amendment and explains its purpose. In support of this reading, Justice Stevens looked to various state declarations that were adopted contemporaneous to the Declaration of Independence. He pointed to these provisions in an attempt to show that the founding generation felt that state militias were important to defense, and to indicate that they were the main reason for adaptation of the Second Amendment. Justice Stevens concluded that the preamble sets forth the object of the Amendment and provides its meaning; “[i]t cannot be presumed that any clause in the constitution is intended to be without effect.”

According to Justice Stevens, the majority’s opinion conducted its analysis in an unusual manner, and therefore denigrates the importance of the prefatory clause. In a separate dissent, Justice

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22 *Heller*, 554 U.S. at 578.
23 *Id.* at 592.
24 Kachalsky v. County of Westchester, 701 F.3d 81, 89 (2012).
25 *Heller*, 554 U.S. at 642.
26 *Id.*
27 *Id.*
28 *Id.*
29 *Id.* at 643 (quoting *Marbury v. Madison*, 5 U.S. 137 (1803)).
30 *Id.* at 644.
31 *Heller*, 554 U.S. at 128.
Breyer whole-heartedly accepted Justice Stevens’ interpretation and proposed an interest balancing approach.  

A. The Right to Self-Defense Cannot be Impinged by State Regulation

In a 2010 decision, *McDonald v. City of Chicago*, the Supreme Court made *Heller* applicable to the states, holding that the Due Process clause of the Fourteenth Amendment makes the Court’s Second Amendment holding applicable to the states. In *McDonald*, the plaintiffs challenged a city ordinance that banned private ownership of handguns within city limits. This case was the Supreme Court’s first Second Amendment case post *Heller*, and in the majority opinion, the court reiterated its previous holding and stated that “[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day… self-defense is the “central component” of the Second Amendment right.”

Once again, the Court reviewed historical evidence, and recommitting itself to *Heller*, held that the core of the Second Amendment is a right to bear arms in self-defense and that this right is applicable to the States. Likewise, the Court looked to the legislative history surrounding the Fourteenth Amendment and concluded that post-civil war legislation indicated that a main reason for the Fourteenth Amendment was to guarantee that the newly freed slaves would have the right to defend themselves. Because the Court had determined that the right to bear arms is a fundamental right, “then unless *stare decisis* counsels otherwise, that guarantee is fully binding on the states and thus limits (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and

32 *Id.*
33 *McDonald v. City of Chicago*, Ill., 130 S.Ct. 3020 (2010).
34 *Id.* at 3036.
35 *Id.*
36 *Id.* at 3040.
Moreover, the Court rejected an interest balancing approach for Second Amendment cases. While stating that the right to bear arms is a fundamental right and thus applicable to the states, the Court also acknowledged that this right has limits. Quoting *Heller*, the Court stated, “that the right to keep and bear arms is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” Furthermore, the Court acknowledged that circumstances exist where even the core of the right could be infringed or limited: “our holding [in *Heller*] did not cast doubt on such longstanding regulatory measures as prohibitions…forbidding the carrying of firearms in sensitive places such as schools and government buildings.” However, the Court did not make any rulings on whether the right to self-defense extended outside of the home. The Court declined to articulate the precise meets and bounds of the Second Amendment, and therefore left much of the decision for lower courts to decide.

**B. The Seventh Circuit Extends Heller**

In *Moore v. Madigan*, the Seventh Circuit held that a right to self-defense is as compelling outside of the home as inside. In so holding, the Seventh Circuit held that an Illinois law that banned private citizens from carrying firearms in public was unconstitutional. Under Illinois law, citizens were restricted from carrying firearms outside of the home unless they were police officers or licensed security guards. There was no way for a private citizen to obtain a permit to carry a firearm for protection, no matter how compelling her need for it might have been. The appellants in that case argued that the states’ ban violated the holdings of *D.C. v. Heller* as made applicable to the

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37 *Id.* at 3046.
38 *Id.*
40 *Heller*, 554 U.S. at 625-26.
42 *Id.*; see also ILL. Crim. Code. tit. 720 § 5/24-1 (2012).
states by *McDonald v. City of Chicago*.\(^{43}\) The question before the court was whether the Second Amendment confers a right to self-defense outside of a person’s home.\(^{44}\) The court began its analysis with the Supreme Court’s pronouncement that the Second Amendment protects an individual’s right to self-defense, and concluded that a right to self-defense is equally compelling outside of the home.\(^{45}\) The court specifically faulted the scope of the ban, which prohibited most classes of citizens from carrying firearms under most circumstances.\(^{46}\) Finding that, “a ban as broad as Illinois [could not] be upheld merely on the ground that it was not irrational.”\(^{47}\) Therefore, the court gave Illinois 180 days to implement legislation in compliance with its ruling. Although the Illinois Attorney General petitioned for an *en banc* rehearing, that petition was denied. The state had until July 9, 2013 to adopt complying legislation; and on that day the legislature managed to implement a bill over the Governor’s attempt to veto.

In *Moore v. Madigan* the Seventh Circuit expanded *Heller*, holding that a right to self-defense is also applicable on the streets.\(^ {48}\) Until the Seventh Circuit’s decision rendered Illinois’ ban void, Illinois was the only state to have a complete ban on carrying firearms in public.\(^ {49}\)

The Seventh Circuit’s opinion declared that the Second Amendment’s right to bear arms does not end when a person leaves their home, but instead follows them into the streets and throughout their daily lives. Ironically, this ruling came only two years after Justice Stevens dissented in *McDonald* and proclaimed that, “[t]hankfully, the Second Amendment right identified in *Heller* and its newly minted Fourteenth Amendment analogue are limited, at least for

\(^{43}\) *Moore*, 702 F.3d at 935.

\(^{44}\) *Id.*

\(^{45}\) *Id.* at 933.

\(^{46}\) *Id.*

\(^{47}\) *Moore*, 702 F.3d at 941.

\(^{48}\) *Id.* at 937.

\(^{49}\) *Id.* at 940.
now, to the home.” In expanding *Heller*, Judge Posner, the author of the *Moore* opinion, held that citizens have a constitutional right to carry firearms for protection, stating that:

Twenty-first century Illinois has no hostile Indians. But a Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than his apartment on the 35th floor of the Park Tower. A woman who is being stalked or has obtained a protective order against a violent ex-husband is more vulnerable to being attacked while walking to or from her home than when inside. She has a stronger claim to be allowed to carry a gun in public than the resident of a fancy apartment building (complete with doorman) has a claim to sleep with a loaded gun under her mattress.

Although it can be argued that *Moore* was merely the logical extension of the right to self-defense, the holding was far from a foregone conclusion. Even Judge Posner, who authored the *Moore* decision, had earlier expressed doubts regarding the soundness of the *Moore* decision. In an article written for the *New Republic* shortly after the *Heller* decision was handed down, Judge Posner lambasted the Supreme Court’s decision, arguing that it was improvident, and the situation was better suited for individual legislators to make:

The differences in attitudes toward private ownership of pistols across regions of the country and, outside the South, between urban and rural areas, are profound (mirroring the national diversity of views about gay marriage, and gay rights in general, as well as about abortion rights). A uniform rule is neither necessary nor appropriate. Yet that is what the *Heller* decision will produce if its rule is held applicable to the states.

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51 Moore, 702 F.3d. at 937.
as well as to the District of Columbia and other federal enclaves.\textsuperscript{52}

Judge Posner further stated that, “Heller gives short shrift to the values of federalism, and to the related values of cultural diversity, local preference, and social experimentation. A majority of Americans support gun rights. But if the District of Columbia (or Chicago or New York) wants to ban guns, why should the views of a national majority control?”\textsuperscript{53} Although he initially criticized the Supreme Court’s decision, when presented with the opportunity to limit what he had called \textit{Heller’s} judicial interference with legislative intent, Judge Posner chose instead to expand that holding. Although the Seventh Circuit was bound by \textit{stare decisis} to uphold the right to self-defense in the home, there was no such precedent stating that the right to self-defense extends outside of the home.

With its most recent holdings, the Supreme Court has established a fundamental right to self-protection in the home and has stated that that this right applies to the states through the Due Process clause of the Fourteenth Amendment.\textsuperscript{54} However, these decisions left significant room for interpretation by stating that the textual elements of the Second Amendment “guarantee the individual right to possess and carry weapons in case of confrontation,”\textsuperscript{55} while also acknowledging that legislatures could place limits on possession and the carrying of firearms.\textsuperscript{56}

As this Comment will show, the court in \textit{Moore} arrived at the correct holding, but did not go far enough in its analysis. In \textit{Moore}, the Seventh Circuit explained that individuals are more likely to face confrontation outside of the home than inside of it,\textsuperscript{57} and thus the court

\begin{footnotesize}
\begin{enumerate}
\item Richard Posner, \textit{supra} note 10.
\item Id.
\item \textit{Heller}, 554 U.S. at 591.
\item Id.
\item Moore v. Madigan, 702 F. 3d 933, 940 (2012).
\end{enumerate}
\end{footnotesize}
was compelled to expand the Supreme Court’s previous rulings. While the court did not mandate whether carry could be concealed or open or which time, place or manner requirements would be acceptable, it left no doubt that there must be a legal means for citizens to carry firearms in public. Ultimately, the court found that a blanket ban against any form of carry, concealed or otherwise, is unconstitutional, thus establishing for the first time a right to carry firearms in public.

The crux of the courts decision was Illinois’s complete ban. The court was fully cognizant of the dangerous implications that may result if citizens are given freedom to carry firearms in all circumstances. And, in rejecting the state’s empirical evidence, the court presumed that Illinois will implement stricter requirements than the ones that the state had cited to show the dangers of allowing public carry: “there is no reason to expect Illinois to impose minimal permit restrictions on carriage of guns outside the home, for obviously this is not a state that has a strong pro-gun culture.” Likewise, the court listed permissible instances where the invalidation of the law would have little effect on carry. Specifically, the court mentioned the usual prohibitions of gun ownership by children, felons, illegal aliens, lunatics and in sensitive places. The court also stated that the state may implement application requirements and that private institutions are free to ban guns from their premises.

Neither the Supreme Court nor the Seventh Circuit articulated a coherent approach for Second Amendment jurisprudence. In the case of the Supreme Court, this was done purposefully—leaving the

58 Id. at 942.
59 Id.
60 Id. at 940.
61 Id. at 939.
62 Id. at 938, 39.
63 Id. at 939.
64 Id. at 940.
65 Id.
66 Id. at 941.
judicial scrutiny to be determined by the lower courts. Likewise, *Moore* did not clearly state a method for Second Amendment interpretation; instead, it hinted at a *per se* unconstitutionality by stating, “our analysis is not based on degrees of scrutiny, but on Illinois’s failure to justify the most restrictive gun law of any of the 50 states.”67 In *Moore*, the court should have utilized the emerging Second Amendment framework to reach its ultimate holding. Prior to *Moore* federal courts had begun to implement a Second Amendment test based off of the *Heller* and *McDonald* opinions.68 When this test is applied to the *Moore* decision the result is the same: Illinois ban is unconstitutional.

II. PRIOR TO *MOORE* COURTS HAD ADOPTED A TWO PRONGED TEST TO RESOLVE SECOND AMENDMENT CHALLENGES

Neither *McDonald* nor *Heller* established a specific judicial test or standard of review.69 However, the Supreme Court did provide some general guidance, stating that more than rational basis review would be necessary: “If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.”70 Moreover, the Court specifically rejected the interest balancing approach that Justice Breyer suggested in his separate dissent, stating:

“[w]e know of no other enumerated constitutional right whose core protection has been subjected to a freestanding interest balancing approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case by case basis whether the right is really worth insisting upon. A

67 Id.
69 D.C. v. Heller, 554 U.S. 570, 635 (2008); see Ezell, 651 F.3d at 705.
70 *Heller*, 554 U.S. at 628.
constitutional guarantee subjected to future judges’ assessments of its usefulness is no constitutional guarantee at all.”

Finally, the Court analogized its Second Amendment holding in *Heller* to other First Amendment rulings: “[I]ke the First [the Second Amendment] is the very product of an interest-balancing by the people—which Justice Breyer would now conduct for them anew. And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” The Court used this analogy to respond to Justice Breyer’s dissent, stating that:

Justice Breyer chides us for leaving so many applications of the right to keep and bear arms in doubt, and for not providing extensive historical justification for those regulations of the right that we describe as permissible. But since this is case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field, any more than…our first in-depth Free Exercise Clause case, left that area in a state of utter certainty. And there will be time enough to expound upon the historical justification for the exceptions we have mentioned if and when those exceptions come before us.

Evidently, subsequent courts saw this repeated reference to the First Amendment as a signpost guiding them through new and uncharted territory. Therefore, despite the sparse guidance from the Supreme Court, lower courts have begun to flesh out the levels of scrutiny that apply in Second Amendment cases by using applicable First Amendment analysis.

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71 Id. at 634.
72 Id. at 635.
73 Id.
A. The First Amendment as an Analogy to the Second Amendment

Similar to Heller, in Ezell v. City of Chicago, the Seventh Circuit analogized the Second Amendment’s freedoms to those of the First Amendment.\(^74\) Noting that Heller did not specify “any doctrinal test for resolving future claims,”\(^75\) the Seventh Circuit used the Supreme Court’s prior First Amendment holdings in order to determine the proper doctrinal test applicable to the Second Amendment.\(^76\) Ezell was brought after the Supreme Court’s decision in McDonald, and it involved a challenge to the City of Chicago’s initial legislative response to McDonald. Amongst other things, the city’s new ordinance banned private gun ranges within its borders, while simultaneously making range training a mandatory condition for handgun ownership.\(^77\) The lower court held that the plaintiffs did not have standing because they were not irreparably harmed and because they could not succeed on the merits. However, the Court of Appeals reversed, finding that the plaintiffs had standing to bring this cause of action before the court.\(^78\)

On appeal, the Seventh Circuit had to first determine whether the plaintiffs stated a sufficient cause of action before proceeding on the merits. Turning to the merits, the court first addressed the issue of what standard or doctrinal test to use in its Second Amendment analysis. Paraphrasing McDonald, the court reasoned that:

> when state-or local government action is challenged the focus of the original-meaning inquiry is carried forward in time; the Second Amendment’s scope as a limitation on the States depends on how the right was understood when the Fourteenth Amendment was ratified...this wider historical lens is required if we are to follow the Court’s lead in

\(^74\) Ezell v. City of Chicago, 651 F.3d 684, 702 (2011).
\(^75\) Id. at 701.
\(^76\) Id. at 702, 704.
\(^77\) Id. at 705.
\(^78\) Id. at 693.
resolving questions about the scope of the Second Amendment by consulting its original public meaning as both a starting point and an important constraint on the analysis.\textsuperscript{79} For the court, original meaning acted both as a starting point and as a constraint on its analysis.\textsuperscript{80}

Looking to \textit{Heller} for guidance, the court found that the case lacked “any doctrinal test for resolving future claims.”\textsuperscript{81} And analogizing the Second Amendment to the First Amendment, the court determined that because the Supreme Court had already laid a framework for a “scope” inquiry in some First Amendment\textsuperscript{82} challenges to state action, this framework could also serve to analyze “scope” in Second Amendment cases.\textsuperscript{83} Therefore, in \textit{Ezell}, the court applied this First Amendment framework to analyze the facts of a Second Amendment case.

Applying this analysis, the Seventh Circuit first looked at Supreme Court precedent. The Supreme Court had previously determined that certain “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problems,” exist.\textsuperscript{84} Among these unprotected classes of speech are fraud, defamation, incitement and speech integral to criminal conduct.\textsuperscript{85} Moreover, when the Court has “identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis.”\textsuperscript{86} Rather, the Court used history and legal tradition to determine whether a type of speech falls within the First Amendment’s

\textsuperscript{79} \textit{Id.} at 702.
\textsuperscript{80} \textit{Id.}.
\textsuperscript{81} \textit{Id.} at 701.
\textsuperscript{82} \textit{Id.} at 702.
\textsuperscript{83} \textit{Id.} at 701.
\textsuperscript{84} U.S. v. Stevens, 130 S.Ct 1577, 1584 (2010).
\textsuperscript{85} \textit{Id.}.
\textsuperscript{86} \textit{Id.} at 1586.
protection. Historically, speech that was obscene or defamatory has never fallen within the scope of the First Amendment’s protections.

Applying that same historical analysis to the Second Amendment, the Ezell court found that both Heller and McDonald suggest that some gun laws will survive Second Amendment challenges because they fall outside of the scope of the right as publically understood when the Bill of Rights was ratified. But, the onus is on the government to show that the challenged law:

...regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant historical moment- 1791 [ratification of the Bill of Rights] or 1868 [ratification of the Fourteenth Amendment]- then the analysis can stop there and the regulated activity is categorically unprotected." If however, the government cannot meet this burden, the court must then “evaluate the regulatory means the government has chosen and the public-benefits end it seeks to achieve.” Courts must determine how close the law comes to the core of the Second Amendment right and the severity of the law’s burden on the right.

In Ezell, the court determined that the city could not produce historical evidence clearly indicating that the regulation was beyond the scope of the Second Amendment’s protection. The court cited two Seventh Circuit cases that applied intermediate scrutiny after first determining that the state action infringed upon the Second

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87 Ezell, 651 F.3d at 702.
88 Id.
89 Id. at 702, 703.
90 Id. at 703.
91 Id.
92 Id.
Amendment right. The court added that this general framework had been followed by the Third, Fourth and Tenth Circuits.

In applying this framework to the facts before it, the court held that firing ranges did fall within the “scope” of the Second Amendment. Drawing on *Heller* and *McDonald*, “[t]he Court emphasized in both cases that the central component of the Second Amendment is the right to keep and bear arms for defense of self, family, and home.” In *Ezell*, the court held that the core right to possess firearms for protection implicates a further right to training with those weapons. After completing this two-prong analysis, the court then turned to the proper standard of scrutiny.

The court synthesized the standards of scrutiny for First Amendment cases into a framework for analyzing Second Amendment cases:

[W]e can distill this First Amendment doctrine and extrapolate a few general principles to the Second Amendment context. First, a severe burden on the core Second Amendment right of armed self-defense will require an extremely strong public-interest justification and a close fit between the government’s means and its end. Second, laws restricting activity lying closer to the margins of the Second Amendment right, laws that merely regulate rather than restrict, and modest burdens on the right may be more easily justified. How much more easily depends on the relative severity of the burden and its proximity to the core of the right.

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93 *See* U.S. v. Skoien, 614 F.3d 638 (2010); *see also* U.S. v Williams, 616 F.3d 685 (2010).
94 *Ezell*, 651 F.3d at 703.
95 *Id.* at 709.
96 *Id.* at 704 (paraphrasing *Heller* and *McDonald*) (internal quotations omitted).
97 *Id.*
98 *Id.* at 708.
Further, the court stated that reviewing the city’s ban on all firing ranges would require “not quite strict scrutiny.”\textsuperscript{99} Rather, in order to overcome its burden, the city would have to show that civilian target practice at a firing range creates such genuine and serious risks to public safety that prohibiting range training throughout the city is justified.\textsuperscript{100} The fact that the plaintiffs were all law-abiding citizens whose Second Amendment rights were entitled to full solicitude under \textit{Heller} was integral to the court’s reasoning.\textsuperscript{101} Ultimately, the court held that the right to self-defense also implies a right to remain proficient in the use of firearms, and to have access to training facilities.\textsuperscript{102 103} Moreover, a right to have a firing range so that a citizen may remain proficient implicates a right to travel with your firearm to get to the firing range. It also implicates a right to have and to use a firearm outside of the home. Therefore, utilizing this test in \textit{Moore} would require heightened scrutiny. Extrapolating this holding to carrying firearms in public, the Illinois concealed carry ban affected every class of citizen. This was not a modest burden on the right to self-defense; it was a severe burden on the core right because it prohibited law-abiding citizens from protecting themselves outside of the home.

\textit{Ezell} is not the only federal case that has articulated a two-prong approach to Second Amendment cases. While confirming the defendant’s conviction for possessing a firearm with an obliterated serial number, the Third Circuit Court of Appeals found that Heller suggests:

\begin{quote}
...a two-pronged approach to Second Amendment challenges. First we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendments guarantee...If it does, we evaluate the law under some form
\end{quote}

\textsuperscript{99} Id.  
\textsuperscript{100} Id.  
\textsuperscript{101} Id.  
\textsuperscript{102} Id.  
\textsuperscript{103} Id. at 709.
of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails it is invalid.\footnote{U.S. v. Marzzarella, 614 F.3d 85, 87 (3d Cir. 2010); \textit{see also} U.S. v. Chester, 628 F. 3d 85, 89 (2010).}

Therefore, taking these precedents into account, one would assume the Seventh Circuit would have used a similar test in deciding Moore. Similar to \textit{Ezell}, the \textit{Moore} court was faced with a blanket prohibition and a challenge on Second Amendment grounds.\footnote{Moore v. Madigan, 702 F. 3d 933, 941 (2012).} Like gun ranges in \textit{Ezell}, the prohibition in \textit{Moore} effected citizens irrespective of their standing in the community.\footnote{\textit{Id.}} Felons and law-abiding citizens were treated alike in Illinois’s ban on carrying firearms. However, while the \textit{Moore} court acknowledged \textit{Ezell}, it did not utilize the framework adopted by the \textit{Ezell} court.\footnote{\textit{Id.} at 939.} And, while holding that more than rational basis review would be required, the court did not attempt to explain what level of scrutiny should be applied.\footnote{\textit{Id.}} Below, the facts in \textit{Moore} will be reanalyzed using the more thorough two pronged analysis used by other federal courts.

\subsection*{B. Scrutinizing the Moore Decision}

The court in \textit{Moore} arrived at the correct ruling; however, the opinion did not provide a clear method for emulation. In \textit{Moore}, the court seemed to rely predominately upon basic logic rather than thorough analysis. The Supreme Court has interpreted the Second Amendment to “guarantee the individual right to posses and carry weapons in case of confrontation.”\footnote{D.C. v. Heller, 128 S.Ct. 2783, 2797 (2008).} However, the Court has never explicitly found a right to carry weapons in public. Yet, the Seventh Circuit inferred a right to carry weapons in public, stating that “[t]he Supreme Court has decided that the amendment confers a right to bear
arms for self-defense, which is as important outside the home as inside . . . [t]he Supreme Court’s interpretation of the Second Amendment therefore compels us to reverse.”110 Because the Supreme Court has indicated that the Second Amendment confers an individual right to self-defense, the court stated that therefore “we can’t…ignore the implication of the analysis that the constitutional right of armed self-defense is broader than the right to have a gun in ones home.”111

As stated, the Seventh Circuit’s Moore decision did not articulate any level of judicial scrutiny, opting instead to base its decision on “Illinois’s failure to justify the most restrictive gun law of any of the 50 states.”112 However, the court did state that Illinois would have to provide more than a rational basis and show that its “sweeping ban” was justified by an increase in public safety.113 Although the majority in Moore did hint at many of the factors that were articulated in Ezell and other cases, it did not do so systematically. In its opinion, the court tersely passed over the empirical data and the history of the amendment without specifically adopting it to the framework that had been established. The remainder of this article will apply the judicial test established in Ezell to the facts presented in Moore.

C. Carry Falls within the Scope of the Second Amendment

According to Ezell, the first step in Moore should have been to determine whether the Second Amendment protects the carrying of firearms by individuals.114 As previously mentioned, scope is determined by looking to the amendment at the time that it was

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110 Moore, 702 F. 3d at 942.
111 Id. at 935.
112 Id. at 941.
113 Id.
114 Ezell v. City of Chicago, 651 F.3d 684, 693, 701 (7th Cir. 2011). The court acknowledged that the first step in some Second Amendment cases would be a “scope” question.
enacted. Here it is important to note some confusion created by McDonald. In Ezell, the court stated that “when a state- or local-government action is challenged the focus of the original meaning inquiry is carried forward in time; the Second Amendment’s scope as a limitation on the states depends on how the right was understood when the Fourteenth Amendment was ratified.” However, in Moore, the court states that 1791, the year that the Second Amendment was ratified, is the relevant year. The reason for this apparent disagreement is likely due to the Supreme Court’s expansive opinion in McDonald.

After declaring that it would be incongruous to apply different standards depending on whether the claim was asserted in a state or federal court, the Supreme Court then spends a large portion of its opinion in McDonald discussing the post-civil war implications of the Fourteenth Amendment. The relevant year of inquiry is 1791; however, in this circumstance it actually matters very little. This fact is made clear by McDonald, first when the Court stated that “incorporated Bill of Rights protections are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment” and second when the Court introduces evidence that both the framers of the Constitution and the drafters of the Fourteenth Amendment believed that self-defense was an important reason for their respective actions. This history implies that the relevant historical inquiry should focus on the drafting of the Second Amendment, but the Court spends a significant portion of its opinion discussing the post-civil war reasons for drafting the Fourteenth

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115 Moore, 702 F. 3d at 935.
116 Ezell, 651 F.3d at 702.
117 Moore, 702 F. 3d at 935.
118 McDonald v. City of Chicago, Ill., 130 S.Ct. 3020, 3035 (2010).
119 Id. at 3035.
121 Id. at 3038.
Amendment.122 Regardless of the year of inquiry, the underlying right remains the same and is applied on the federal and state level with the same level of scrutiny.123

An article written for the Washington Post’s blog is useful to elucidate the changing interpretation of the Second Amendment over time. The author, Ezra Klein, shows two photographs that were pointed out to him by Professor Akhil Reed Amar of Yale Law.124 Professor Amar is a constitutional scholar whose work had been cited in McDonald.125 According to Professor Amar, these paintings illustrate the changing landscape of the Second Amendment’s interpretation.126 And although he does not agree with the Supreme Court’s interpretation of the Founder’s understanding of the right to bear arms, he does ultimately conclude that “[h]aving guns in homes for self protection is a very deep part of American culture.”127 The first painting is by John Trumball, entitled “Death of General Warren at Bunker Hill,” and it shows the founders battling the British at Bunker Hill. Professor Amar claims that this painting depicts the original vision of the Second Amendment:

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122 Id. at 3038, 3048.
123 McDonald, 130 S.Ct. at 3098.
125 McDonald, 130 S.Ct. at 3020, 3029, 3074, 3041, 3039.
126 Id.
127 Id.
The second illustration shows the Freedman’s Bureau where newly freed slaves faced off against a mob of angry Klansmen with a reconstruction officer standing in between them:

These illustrations help to clarify that although the actors may have changed, each generation felt that the bearing of arms was a necessary tool for an individual’s self-defense.

The Supreme Court reviewed the historical record in *Heller* and stated that the right to self-defense is the core of the Second
Amendment. Because this core right is fundamental, the right does not shift. If a right is fundamental, then the only relevant period of inquiry is when that right was written into law. Thus, the Court’s use of historical evidence from a later time did nothing more than elucidate the nature of that right.

Establishing the appropriate historical period focuses the inquiry, but it does not end it. In Moore, the court then should have identified the “scope” of the right as understood by the Framers when the Second Amendment was enacted. In deciding Heller, the Supreme Court was faced with a regulation that forbade operable firearms in the home. Therefore, its holding was appropriately limited to self-defense in the home. However, in its analysis, the Court did make note of two historical pieces of evidence that point to the proposition that the carrying of firearms was understood to be included within the original meaning of the Second Amendment. The court pointed to a Louisiana case from 1850, State v. Chandler, holding that citizens had a right to carry firearms openly: “[t]his is the right guaranteed by the constitution of the United States, and which is calculated to incite men to a manly and noble defense of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations.” Likewise, the Court cited to a Georgia statute that implored men that qualified for military service to carry firearms to places of worship. These cases show that when the Second Amendment was ratified, at least some people believed that it conferred a right to carry firearms outside of the home. And as stated by the Moore court, “one doesn’t have to be a historian to realize that a right to keep and bear arms for personal self-defense in the eighteenth century could not rationally have been limited to the home. . . One would need from time to time to leave one’s home to obtain supplies from the nearest trading post, and en route one would be as much

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129 Id. at 616 (holding that the right to keep and bear arms was considered fundamental to the drafters of the Bill of Rights).
130 Id. at 613 (citing State v. Chandler, 5 La. Ann. 489 (1850)).
131 Id. at 601.
(probably more) at risk if unarmed as one would be in one’s home unarmed.”

If the respondents in Moore raised an alternative historical analysis it was not repeated in the opinion. However, some evidence mentioned in McDonald indicates that there was a belief that the right to carry firearms outside of the home was envisioned by the Second Amendment.

**D. The Appropriate level of Judicial Scrutiny**

Determining the appropriate level of scrutiny to apply in Second Amendment cases has caused the most differentiation between the circuits when applying this test. Similar to the Supreme Court’s previous holdings, the Moore court purposively eschewed judicial scrutiny in arriving at its decision, stating that, “our analysis is not based on degrees of scrutiny, but on Illinois’s failure to justify the most restrictive gun law of any of the 50 states.” However, in its opinion, the court did address a previous Second Amendment decision that had been made by the Second Circuit. That decision held New York’s requirement that individuals show “proper cause” when applying for concealed carry licenses constitutional. In upholding the law, the Seventh Circuit opined that Second Amendment cases require a sliding scale of scrutiny based on the nature of the offending legislations burden on the Second Amendment right. Although New York’s law was one of the strictest in the nation, I would imagine second only to Illinois’s, that ban was upheld using intermediate scrutiny.

Rather than delineating a specific degree of scrutiny, in U.S. v. Chester the Fourth Circuit argued that a sliding scale is the most appropriate way to determine the applicable level of scrutiny. In Chester, the Court rejected the defendant’s argument for strict scrutiny,
stating “the level of scrutiny we apply depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right.”\textsuperscript{136} The court referred to First Amendment cases as illustrative examples, noting “a content based speech restriction on non-commercial speech is permissible only if it satisfies strict scrutiny. But, courts review content-neutral time, place, and manner regulations using an intermediate level of scrutiny.”\textsuperscript{137} The court then held that intermediate scrutiny was most appropriate; however, the court found that Chester’s claim was not within the scope of the Amendment because he had a previous conviction for domestic violence.\textsuperscript{138} According to the Fourth Circuit, in keeping with the First Amendment corollary, the decision to apply intermediate or strict scrutiny is determined by the nature of the challenged regulation. Although, the Seventh Circuit differentiated Chester, if it had applied the sliding scale analysis it would have determined that Illinois’s ban required strict scrutiny.

Thus, in \textit{Moore}, the court should have determined whether the restriction was most similar to a content based restriction—requiring strict scrutiny—or if it was closer to a time place and manner limitation, which would require intermediate scrutiny. Reasonable minds may differ, but facially a regulation that forestalls all law-abiding citizens from carrying firearms seems to favor a content-based strict scrutiny analysis. Moreover, in \textit{Kachalsky v. County of Westchester}, the Second Circuit Court of Appeals indicated that this type of ban would require strict scrutiny. There, the court stated, “heightened scrutiny is triggered only by those restrictions that (like the complete prohibition in handguns struck down in \textit{Heller}) operate as a substantial burden on the ability of law abiding citizens to posses and use a firearm for self defense (or for other lawful purposes).”\textsuperscript{139}

In \textit{Kachalsky}, the Second Circuit also applied intermediate scrutiny to New York State’s handgun licensing scheme that required a

\textsuperscript{136} \textit{Id.} \\
\textsuperscript{137} \textit{Id.} \\
\textsuperscript{138} \textit{Id.} at 683. \\
\textsuperscript{139} \textit{Kachalsky}, 701 F.3d at 93.

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showing of "proper cause" before a license would be issued. \textsuperscript{140} New York issued four types of carry permits; the first two were "shall issue" permits limited to the home or a merchant’s place of business. \textsuperscript{141} The third type of permit was also a "shall issue" permit that was limited to certain professions. \textsuperscript{142} The final type of permit – the one challenged in this case – was also a "shall issue" permit but it required a showing of "proper cause." \textsuperscript{143} Proper cause was not defined in the statute but it had been judicially defined as "a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession." \textsuperscript{144} For those seeking the permit for hunting or target practice the license was issued on a limited basis. \textsuperscript{145} However, for those seeking a general carry permit the application process was rigorous. \textsuperscript{146} The plaintiffs’ applications had all been denied, despite the fact that one of the plaintiffs claimed that her status as a transgender female put her at great risk of violence. \textsuperscript{147}

\textit{Kachalsky} helps to clarify three important issues. First, it supports the Seventh Circuit’s opinion by stating that carrying firearms outside of the home must have some bearing in the Second Amendment. \textsuperscript{148} Second, the court acknowledged, but did not fully adopt, the First Amendment analogy. \textsuperscript{149} The court noted that this analogy has existed before it was articulated in \textit{Heller}, \textsuperscript{150} but stated that it would be imprudent to apply the analogy equally. \textsuperscript{151} The court was specifically referring to the plaintiff’s contention that New York law required prior

\begin{itemize}
  \item \textsuperscript{140} \textit{Id.} at 84.
  \item \textsuperscript{141} \textit{Id.} at 86.
  \item \textsuperscript{142} \textit{Id.}
  \item \textsuperscript{143} \textit{Id.}
  \item \textsuperscript{144} \textit{Id.}
  \item \textsuperscript{145} \textit{Id.}
  \item \textsuperscript{146} \textit{Id.} at 87.
  \item \textsuperscript{147} \textit{Id.} at 88.
  \item \textsuperscript{148} \textit{Id.} at 89 (analyzing the scope of the right).
  \item \textsuperscript{149} \textit{Id.} at 92.
  \item \textsuperscript{150} \textit{Id.}
  \item \textsuperscript{151} \textit{Id.}
\end{itemize}
restraint–censorship–analysis. 152 Third, this case presented an apt analysis of the level of judicial scrutiny to be applied to Second Amendment challenges.

Essentially, in Kachalsky, the court established that when a law imposes a substantial burden on core Second Amendment rights, “heightened scrutiny is triggered.”153 The court explained that heightened scrutiny may be akin to strict scrutiny when it is applied to laws that burden core rights,154 but that it is less than strict scrutiny, or intermediate scrutiny, when the regulation does not touch upon the core right.155 After citing historical evidence to support this holding, the court found that carrying firearms outside of the home did not touch the core of the Second Amendment, and used intermediate scrutiny to uphold the New York regulation.156

Kachalsky misconstrues the Supreme Court’s holding in Heller. Kachalsky held that because New York’s licensing scheme regulates carrying weapons outside of the home, Heller is not completely relevant because it only applied to a ban inside of the home.157 While it is true that Heller held that the need for self-defense is most acute in the home,158 it is a stretch to presume that Heller means that the core right of self-defense is limited to the home. In Heller the Court referred to the Districts handgun ban and stated, “[t]his makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional.”159 And although Kachalsky is correct that the Court’s ultimate holding was limited to the challenged activity -- self-defense in the home -- the opinion is replete with language implicating a broader scope. In fact, the Court stated that the

152 Id.
153 Id. at 93.
154 Id. at 93.
155 Id. at 93-96.
156 Id.
157 Id. at 94.
159 Id. at 630 (emphasis added).
meaning of the operative clause is to “guarantee the individual right to posses and carry weapons in case of confrontation.”

In Moore, Judge Posner distinguished Kachalsky and stated that:

Our principal reservation about the Second Circuit’s analysis (apart from, disagreement, unnecessary to bore the reader with, some historical analysis in the opinion—we regard the historical issues as settled by Heller) is its suggestion that the Second Amendment should have much greater scope inside the home than outside simply because other provisions of the Constitution have been held to make that distinction. For example the opinion states that “in Lawrence v. Texas, the [Supreme] Court emphasized that the state’s efforts to regulate private sexual conduct between consenting adults is especially suspect when it intrudes into the home.” Well of course the interest in having sex inside one’s home is much greater than the interest in having sex on the sidewalk in front of ones home. But the interest in self-protection is as great outside as inside the home.  

Here, it is important to further distinguish Kachalsky and the regulation that the case addressed. New York’s law did not ban handgun registration, but rather placed the burden upon citizens to prove the need for carrying firearms. Even with the rigorous application process, that law was less restrictive than the Illinois law. Although the petitioners in that case were unable to obtain unrestricted permits, there was no evidence that all citizens had been denied such permits. While the opinion does not indicate so, there could be individuals who were able to show the appropriate level of proper cause. Perhaps—like Judge Posner’s Moore hypothetical—

160 Id. at 592; see also id. at 584 (quoting Justice Ginsburg’s interpretation of the Second Amendments meaning of “bear”).
162 Id.
163 Id. at 937.
there is a female stalking victim that was able to obtain an unrestricted permit.\textsuperscript{164} As Judge Posner points out, although New York’s law is one of the most restrictive in the nation, it was still less restrictive than Illinois’s law.\textsuperscript{165} In New York, citizens retain the right to carry firearms, despite the difficulties that the registration process entails. In Illinois, no citizen was allowed to legally carry a firearm in public no matter how compelling their need. Arguably, the state has a compelling interest to protect the public; however, the means used were not narrowly tailored to meet its ends. Illinois’s regulation placed a severe burden on the core right of self-defense by prohibiting the public from carrying firearms indiscriminately by all citizens. Although the state did have a compelling interest to protect, the law was not narrowly tailored to achieve that end because the restriction burdened all citizens, not just those who presented a specific risk. Therefore it would have failed heightened scrutiny had that analysis been applied.

\textbf{E. The Supreme Court Cases Settled the Question of Historical Meaning}

\textit{Heller} left much to be determined by lower courts. However, historical evidence was not one of those things. Although \textit{Heller} has been criticized for an overreliance on historical interpretation, most notably by Judge Posner,\textsuperscript{166} the Court needed to determine the historical record in order to give lower courts discretion to create a judicial test, rather than constantly reevaluating the historical understanding of the Amendment. Although judges are not historians,\textsuperscript{167} in \textit{Heller} it was necessary to interpret historical evidence in order to determine that the Second Amendment stands for an individual right to self-defense.

\textsuperscript{164} \textit{Id.} \\
\textsuperscript{165} \textit{Id.} at 931. \\
\textsuperscript{166} Richard Posner, \textit{supra} note 10. \\
\textsuperscript{167} Moore, 702 F. 3d at 943 (Judge Williams, dissenting).
In both *Heller* and *McDonald* the court conducted extensive historical analysis, and gave no indication that it wished for lower courts to replicate or interpret that analysis. In *Moore*, the parties and the amici presented the court with a wealth of historical evidence, which according to the court, sought to repudiate the historical record utilized in the two Supreme Court cases. In response to this evidence, the court states that “[s]imilar evidence…had of course been presented in [] *Heller*” and that “[t]he Supreme Court rejected [those arguments]. The appellees ask us to repudiate the Court’s historical analysis. That we cannot do.”

Accordingly, by refusing to review the historical evidence anew, the *Moore* court gave appropriate judicial deference to the Supreme Courts opinion. Likewise, subsequent courts should only look to the historical evidence when absolutely necessary, and only when the Supreme Court has not previously defined the challenged legislation. While the dissent in *Moore* urged that courts must look at history for every new Second Amendment challenge: “*Heller*’s approach suggests that judges are to examine the historical evidence and then make a determination as to whether the asserted right…is within the scope of the Second Amendment.” Although that statement may be true, *Heller* had already indicated that public carry is consistent with the right to self-defense.

In *Ezell v. City of Chicago*, the Seventh Circuit had already conducted an analysis as to when it is necessary for courts to review history in Second Amendment cases. In *Ezell*, a city ordinance disallowed private handgun ranges (even though the Chicago Police Department and federal agencies did have ranges within the borders of the city). The court urged that historical analysis hinges upon the scope of the regulated activity: “*McDonald* confirms that if the claim

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168 Id. at 935.
169 Id.
170 Id.
171 Id.
173 Id. at 693-701.
concerns a state or local law, the “scope” question asks how the right was publically understood when the *Fourteenth* Amendment was proposed and ratified. Accordingly, if the government can establish that a challenged firearms law regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant historical moment . . . then the analysis stops there; the regulated activity is categorically unprotected.”^174 The court also stated that when the historical evidence is inconclusive, then the courts must look to the strength of the government’s justification.^175 As previously stated, *Ezell* misconstrued the relevant historical period; never the less, the inquiry is still pertinent.

In *Moore*, the dissent admits that the historical record is inconclusive, while still claiming that history supports a ban on carrying firearms. In her dissent, Judge Williams urges that all courts should interpret the historical record when faced with new Second Amendment challenges.^176 She urges the court to rehash the historical arguments made in *Heller*, while at the same time conceding that there was not a historical consensus on the issue of bearing arms in public. Judge Williams explains: “So while there are a variety of other sources and authorities, the ones I have discussed suggest that there was not a clear historical consensus that persons could carry guns in public for self-defense.”^177 The dissent further concedes: “I do not mean to suggest that the historical evidence definitively demonstrates that there was not a right to carry arms for public self-defense at the time of the founding. The plaintiffs point to other authorities that they maintain reveal the opposite. At best, the history might be ambiguous as to whether there is a right to carry loaded firearms for potential self-defense outside the home.”^178

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^174*Id.* at 703 (quoting *McDonald v. City of Chicago, Ill.*, 130 S.Ct. 3020, 3047 (2010) and *D.C. v. Heller*, 554 U.S. 570, 628-35 (2008)).

^175*Id.*


^177*Id.* at 946.

^178*Id.* at 947.
Without definitive historical evidence indicating that the right to self-defense ends in the home, the majority was bound to a reasonable inference based on the Supreme Court’s holding that there exists a constitutional right to self-defense. The Supreme Court has settled the historical questions regarding the core right of self-defense, and by refusing to uphold Illinois’s blanket ban on carrying firearms based solely on conflicting historical interpretations, the majority correctly decided this case.

F. Determining Future Second Amendment Cases

The Second Amendment protects an individual’s right to self-defense. This right extends to the states, and does not end when an individual steps out of her home. When deciding Second Amendment cases that call into question government regulations, courts should first determine whether the challenged activity falls within the scope of the Second Amendment and, if the activity does not fall within that scope, the court’s inquiry ends, and the legislation is valid. However, if the regulated activity does fall within the scope of the Second Amendment, courts must look to the restriction and determine the level of the burden placed upon the Second Amendment. The courts should apply heightened scrutiny; closer to strict scrutiny in cases where a severe burden is present and intermediate scrutiny when the burden is less severe. But this too will allow courts wide discretion to determine how severe the burden is. Although the Seventh Circuit did not adhere to this standard when deciding Moore v. Madigan, the court did arrive at the right result. Applying this standard to the facts of Moore, we see that Illinois’s ban was a severe burden on the right to self-defense. This regulation was not narrowly tailored nor the least restrictive means to reach the compelling governmental interest of preventing crime.\(^\text{179}\)

Recently, a Tenth Circuit court decision held that the Second Amendment did not protect concealed carry. In Peterson v. Martinez, the court upheld a Colorado law forbidding non-residents from

\(^{179}\) Id. at 941.
receiving concealed carry permits. However, non-residents could openly carry firearms. The court acknowledged that a two-step analysis is necessary, and found that the historical scope of the Amendment is to be determined first. The court then found support in Heller for its ruling that the Colorado regulation was constitutional. In Heller, the Court stated “the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.” This holding does not conflict with Moore. In Colorado, non-residents could exercise their right to self-defense by openly carrying firearms, and the right protected by the Second Amendment is a right to self-defense, not to a particular form of carry. Nothing prohibits states from placing reasonable limitations on where the right is exercised, but they may not completely outlaw the exercise of the right. When conducting this inquiry courts should avoid a reanalysis of historical evidence, as Heller has settled this issue.

**CONCLUSION**

The meaning of the Second Amendment has changed over time and for many it is still changing. Recently, the Supreme Court has found that the Second Amendment was drafted in order to protect an individual’s right to bear arms in self-defense. While acknowledging that this right has limits, the Court left it to lower courts to determine the boundaries of those limitations. The Seventh Circuit greatly expanded that Supreme Court holding by finding an Illinois law that banned all forms of concealed carry unconstitutional. However, the Seventh Circuit eschewed any in depth analysis of the constitutional implications, instead relying solely on the over-breadth of the

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181 Id. at 1209.
182 Id. at 1211.
183 Id.
offending law. But, the decision finds support when a coherent analysis is derived from the emerging Second Amendment jurisprudence confirming the Seventh Circuit’s holding.

Given the present national debate over gun regulation, it is certain that Second Amendment challenges will continue to be litigated. Perhaps soon, the Supreme Court will grant certiorari in a case to further define or place limits upon the scope of the Second Amendment.
FRIEND REQUEST PENDING: DOES A RARE VICTORY BEFORE THE SEVENTH CIRCUIT MEAN SEX OFFENDERS WILL FINALLY RECEIVE FAIR TREATMENT FROM COURTS?

MATT DILLINGER *

Cite as: Matt Dillinger, Friend Request Pending: Does a Rare Victory Before the Seventh Circuit Mean Sex Offenders Will Finally Receive Fair Treatment from Courts?, 8 SEVENTH CIRCUIT REV. 374 (2013), at http://www.kentlaw.iit.edu/Documents/Academic Programs/7CR/v8-2/dillinger.pdf.

INTRODUCTION

That sex offenders as a group have few friends is an understatement. Of all members of society, they are perhaps the most despised and the least pitied. As such, sex offenders are prime targets for “tough-on-crime” legislators, and new laws imposing ever greater restrictions and burdens on this subset of criminal have proliferated rapidly in the last two decades. These laws often stretch constitutional

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1 See Richard G. Wright, Sex Offender Post-Incarceration Sanctions: Are There Any Limits?, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 17 (2008) (“American society has decided that there is no greater villain than the sex offender.”); Texas Sex Offenders in Sight of Rare Policy Win, CBS LOCAL (March 30, 2013 9:33 AM), http://dfw.cbslocal.com/2013/03/30/texas-sex-offenders-in-sight-of-rare-policy-win (quoting two Texas Congressmen who have “no sympathy” for sex offenders).

2 See also Jamey Dunn, Sex offender legislation is often more about politics than justice, ILLINOIS ISSUES (September 2011), http://illinoisisssues.uis.edu/archives/2011/09/state.html.
boundaries and occasionally verge on the absurd. What is especially troubling is that these restrictive laws may be all for naught. Recent studies suggest that many of these laws are based more on urban legend and reactionism than actual research, and do little to keep the public safe. There is no reason to think the new laws, based on the same principles, will be any more effective. Further complicating things, lawmakers frequently refer to offenders as “monsters,” muddling whether the motivation behind new legislation is actually to protect the public or if lawmakers are merely acting out of individual fear, anger or revulsion.

3 For instance, Illinois recently passed a law prohibiting certain classes of sex offenders from participating “in a holiday event involving children under 18 years of age, including but not limited to distributing candy or other items to children on Halloween, wearing a Santa Claus costume on or preceding Christmas, being employed as a department store Santa Claus, or wearing an Easter Bunny costume on or preceding Easter.” 720 ILCS 5/11-9.3, as amended, June 22, 2012, effective January 1, 2013; see also Jamie Lee Curtis Taete, Sex Offenders in Florida Now Have Warning Signs Outside Their Homes, VICE (last visited June 17, 2013), http://www.vice.com/read/sex-offenders-in-florida-now-have-warning-signs-outside-their-homes (discussing Florida Sheriff’s new policy of posting warning signs in front of the homes of sexual predators).


5 “I questioned whether or not I was the ideal person to bring this [bill], because of the just revulsion I feel for people who have these convictions. Revulsion is not too strong a word. I mean these are not criminals that we're angry at. These are people that are just frightening to me and all of us, and I think rightfully so, and I don't have a lot of faith in our ability to rehabilitate people who would engage in this type of conduct.” Doe v. Nebraska, 898 F. Supp. 2d 1086 (D. Neb. 2012)(quoting Neb. Sen. Lautenbaugh from floor debate on recent sex offender legislation); see also Convicted Sex Offender Tells His Story as the Governor Tries to Get New Laws

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Like elsewhere in society, sex offenders have generally found no great friend in the courts. Statutes prohibiting sex offenders from parks and other public places, creating permanent public registries, and requiring the release of offenders’ online identifiers have all been upheld as constitutional. These laws are often based on misconception and myth, such as the idea that sex offenders frequently target strangers in public places, or that the rate of sex offender recidivism is practically 100 percent. Furthermore, courts have relied on the same unsupported hearsay in upholding these laws that legislatures relied on in drafting them. However, the Seventh Circuit recently made clear that there are in fact limits on how far states can go in regulating even this particularly detested subset of society.

On January 23, 2013, the Seventh Circuit in Doe v. Prosecutor, Marion County, Indiana held that an Indiana statute prohibiting sex offenders from using social networking websites violated the First Amendment. With this decision, registered sex offenders may at last have found a court sympathetic to their unique position in the legislative crosshairs. Additionally, the Seventh Circuit’s decision

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*Passed, WAFB (Apr. 07, 2008 7:07 PM CDT), http://www.wafb.com/Global/story.asp?S=8132017; see also Dan Gunderson, When Getting Tough Backfires, MPR NEWS (June 18, 2007), http://minnesota.publicradio.org/standard/display/project_display.php?proj_identifier=2007/06/12/sexoffenders (“Sometimes what happens is lawmakers don't want to know the facts, or the facts don't make any difference," says [Minnesota Senator Tim Mathern]. “There really are two things that affect public policy. One is the facts. The other is the feelings and political pressure. There are legislators who will say, 'Don't confuse me with the facts. I've made up my mind.'

6 See Smith v. Doe, 538 U.S. 84, 105 (2003) (holding that Alaska’s Sex Offender Registration Act was constitutional); Kansas v. Hendricks, 521 U.S. 346, 350, 117 (1997) (holding that Kansas Sexual Predator Act, which allowed for indefinite civil confinement of certain sex offenders, was constitutional); Doe v. Shurtleff, 628 F.3d 1217, 1220 (10th Cir. 2010) (holding that Utah law requiring registration of all online identifiers and websites owned by sex offenders was constitutional); Doe v. Moore, 410 F.3d 1337, 1339 (11th Cir. 2005) (holding that Florida’s sex offender notification/registration scheme and sex offender DNA registration statute were constitutional).

7 See Doe v. Prosecutor, Marion Cnty., Ind., 705 F.3d 694, 695 (7th Cir. 2013).

8 See id.

9 See id.
may just be the tip of the iceberg—part of an increasing trend towards requiring rationality in sex offender legislation, an area where states and localities have historically been able to do just about anything they wanted. Doe and its ilk may be a judicial death knell for irrational sex offender legislation, including statutes that have previously been ruled constitutional. With the increasing availability of information on sex offenders, outdated models of regulation may no longer meet even lower standards of review. At the very least, Doe is a sorely needed lesson for legislatures—hopefully one that will prompt more responsible lawmaking in the future.

Part I of this comment provides some background on sex offender legislation and its treatment in court, and also introduces the Indiana law. Part II discusses the Doe case including both the district court decision and the Seventh Circuit decision. Part III examines the Seventh Circuit’s reasoning in further detail and argues that Doe is part of a larger movement among courts to be more critical of sex offender legislation. It also discusses why sex offender legislation is misguided, what impact this may have on future court decisions, and suggests guidelines for drafting constitutional legislation.

I. BACKGROUND

A. Brief History of Sex Offender Legislation

Sex offender regulation is a relatively new phenomenon. Despite its occasionally draconian undertones, what can be termed modern sex offender legislation did not appear until the early 1990s. However, that is not to say that there were no previous attempts to curb sex offenses with special laws. Surprisingly, however, the earlier legislation tended to focus much more on mental health treatment for

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12 See id.
offenders and ensuring public safety than today’s laws, which focus primarily on shame and punishment.\textsuperscript{13}

Sex offender legislation can be divided into three historical periods.\textsuperscript{14} The first period, from the 1930s to the 1950s, mostly involved civil commitment statutes, which allowed for indefinite confinement of certain offenders.\textsuperscript{15} The second period, beginning in the 1970s and running into the late 1980s, can be characterized by increased penalties, greater awareness, and a continued focus on treatment.\textsuperscript{16} The final period, and the one most relevant to this comment, began in the early 1990s, and it is notable for post-incarceration regulation of offenders, including registry schemes, public notification and residency restrictions.\textsuperscript{17}

Legislative efforts in the first period sought to respond to the problem of “sexual psychopaths.”\textsuperscript{18} In what has by now become standard operating procedure for enactment of sex offender legislation, these laws were passed in the wake of a few highly publicized sex crimes.\textsuperscript{19} The first of these laws was enacted in Michigan in 1935, and allowed a judge or jury to commit individuals charged with sex offenses to state hospitals or mental institutions if they were deemed to be “sexual psychopaths” posing a danger to society.\textsuperscript{20} This type of law authorizing civil commitment combined with psychiatric treatment typified early sex offender laws.\textsuperscript{21} Although sexual psychopath laws

\textsuperscript{13} See id.\
\textsuperscript{14} See id.\
\textsuperscript{15} See id.\
\textsuperscript{16} See id. at 54.\
\textsuperscript{17} See id.\
\textsuperscript{18} See id. at 55.\
\textsuperscript{19} See Tamara Rice Lave, Only Yesterday: The Rise and Fall of Twentieth Century Sexual Psychopath Laws, 69 La. L. Rev. 549, 571 (2009).\
\textsuperscript{20} Id.\
\textsuperscript{21} See People v. Smith, 275 N.W.2d 466, 469-70 (1979) (“The criminal sexual psychopath statutes enacted in various jurisdictions were substantially the same, particularly with respect to their definition of a criminal sexual psychopathic person. Essentially, a sexual psychopath was defined as a person who, while not insane or feeble-minded, had a mental disorder coupled with propensities toward the commission of criminal sex offenses. Although the various sexual psychopath statutes were substantially consistent in defining a sexually psychopathic person,
created the possibility of indefinite civil commitment, the focus of the laws was prevention, treatment, and public safety, more than simply punishment.\textsuperscript{22}

The next wave of laws appeared in the 1970s as women’s groups led campaigns to increase awareness of date rape and other common types of sexual offenses that had previously received little attention.\textsuperscript{23} Laws passed in this period often increased penalties for sex crimes, yet they also included treatment-based sentencing, demonstrating that rehabilitation was still an important goal.\textsuperscript{24}

While many laws are reactions to some perceived problem, modern sex offender legislation is exceptionally reactionary—almost always following soon after an especially notorious and shocking sex crime.\textsuperscript{25} Modern laws are wide-ranging, and include post-conviction civil confinement, registration and public notification laws, residency restrictions and other limitations on freedom.\textsuperscript{26} These laws apply to people convicted of a broad range of offenses from indecent exposure and statutory rape to sexual assault of a child.\textsuperscript{27} The first modern sex offender law was enacted in Washington State in 1990 after a particularly brutal and highly publicized attack on a young boy.\textsuperscript{28} The

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\textsuperscript{22} The two rationales of treatment-based sentencing were encouraging reporting and preventing recidivism. Lieb, \textit{supra} note 11, at 54.

\textsuperscript{23} \textit{Id.} at 53.

\textsuperscript{24} See \textit{id.}

\textsuperscript{25} See \textit{id.} (noting that in most instances, new sex offender legislation is preceded by the sexual murder of a woman or child by a person with a history of sexual violence).

\textsuperscript{26} \textit{Id.} at 70-75.

\textsuperscript{27} \textit{See generally} BRENGA V. SMITH, FIFTY STATE SURVEY OF ADULT SEX OFFENDER REGISTRATION REQUIREMENTS (2009), available at ssrn.com.

\textsuperscript{28} \textit{See id.} at 66.
public was outraged after a man raped and almost murdered a 7-year-old boy just two years after his release from prison and after prison officials had specifically warned that they knew he would reoffend.\textsuperscript{29} Shortly thereafter, Washington State’s Community Protection Act, unanimously approved, increased sentences for all sex offenses, implemented registration and notification programs, and created the nation’s first modern civil commitment laws for sex offenders.\textsuperscript{30} The Washington law quickly became a model for other states, and in 1994 Congress passed the first major national sex offender regulation – the Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act.\textsuperscript{31} This landmark act, named after a 9-year-old Minnesota boy who was abducted at gun-point and never found, required states to register and track sex offenders.\textsuperscript{32} Soon after, in response to the sexual assault and murder of seven-year-old Megan Kanka by a man previously convicted of sexual offenses against children, New Jersey enacted a particularly tough piece of legislation—dubbed “Megan’s Law”—requiring registration and community notification of offenders’ names, addresses and physical descriptions.\textsuperscript{33} By 1996, every state, the District of Columbia, and the Federal Government had enacted some variation of Megan’s Law.\textsuperscript{34}

For every federal sex offender law that was enacted,\textsuperscript{35} state legislatures enacted many more.\textsuperscript{36} Between 2008 and 2012, over 550

\textsuperscript{29} Id.  
\textsuperscript{32} Id.  
\textsuperscript{33} See Richard G. Wright, \textit{supra} note 1, at 30.  
\textsuperscript{34} Smith v. Doe, 538 U.S. 84, 90 (2003).  
\textsuperscript{35} After the Jacob Wetterling Act, the federal legislation continued with the Pam Lyncher Sex Offender Tracking and Identification Act of 1996, the Jacob Wetterling Improvements Act in 1997, the Protection of Children from Sexual Predators Act in 1998, the Campus Sex Crimes Prevention Act in 2000, the Adam Walsh Child Protection and Safety Act in 1996, and the Sex Offender Registration and Notification Act also in 2006. U.S. DEPT. OF JUSTICE, OFF. OF SEX OFFENDER
new laws governing sex offenders were enacted by states, territories, and D.C.\textsuperscript{37} These new statutes restricted where sex offenders could live, work, and travel; increased penalties; mandated stricter and more extensive registration with state and local authorities; prohibited sex offenders from designated places, jobs and activities; and expanded upon community notification requirements.\textsuperscript{38} The new laws spread so quickly that some commentators characterize the rush to regulate sex offenders as a legislative epidemic.\textsuperscript{39} Unfortunately, with this mad rush to show the public that something was being done, little time was spent figuring out whether the laws being created would actually make the public safer.

\textbf{B. Challenges to Modern Offender Statutes}

These tough new laws quickly faced legal challenges.\textsuperscript{40} Despite scant justification for the modern laws’ heavy burdens on offenders’ constitutional rights, these challenges met with little long-term success in court. One of the first such challenges, \textit{Smith v. Doe}, objected to the retroactive application of sex offender registration laws.\textsuperscript{41} The plaintiffs in \textit{Smith v. Doe} argued that Alaska’s version of Megan’s Law violated the Ex Post Facto Clause of the Constitution, which prohibits retroactive punishment.\textsuperscript{42} The law in question, which required both registration and notification of sex offenders, applied retroactively to all Alaskans convicted of sex offenses or child kidnapping.\textsuperscript{43} The Ex

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\textsuperscript{37} Id.
\textsuperscript{38} See Id.
\textsuperscript{39} Catherine L. Carpenter, Legislative Epidemics: A Cautionary Tale of Criminal Laws That Have Swept the Country, 58 BUFF. L. REV. 1, 2 (2010).
\textsuperscript{40} See U.S. DEPT. OF JUSTICE supra note 35.
\textsuperscript{41} See id.
\textsuperscript{43} Id.
Post Facto Clause concerns only penal statutes.\textsuperscript{44} Accordingly, the court reviewed the legislation to determine if it was akin to a penal statute, weighing “whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose.”\textsuperscript{45} The Court then found that “the stigma of Alaska's Megan's Law results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public.”\textsuperscript{46} The Court also found that the remaining factors suggested the statute was not punitive in nature, and therefore reversed the Ninth Circuit’s decision.\textsuperscript{47} However, Justices Stevens, Ginsberg, and Breyer all dissented from the majority’s opinion because “Alaska's Act imposes onerous and intrusive obligations on convicted sex offenders; and it exposes registrants, through aggressive public notification of their crimes, to profound humiliation and community-wide ostracism.”\textsuperscript{48} The dissent also argued that the Act was excessive in its non-punitive purpose, imposing significant restrictions and burdens upon offenders without regard for their risk of recidivism.\textsuperscript{49} Similarly, in Cutshall v. Sundquist, the Sixth Circuit held that Tennessee’s registration and notification statute did not violate the Fifth Amendment’s Double Jeopardy Clause or any other part of the Constitution.\textsuperscript{50} The plaintiff argued that the statute was punitive and thus punished him twice for the same offense. In support of this proposition he cited evidence that Tennessee legislators, in discussing the Act, had specifically said its purpose was to punish offenders and

\textsuperscript{44} California Dept. of Corrections v. Morales, 514 U.S. 499, 505 (1995).
\textsuperscript{45} Id. at 97.
\textsuperscript{46} Id. at 98.
\textsuperscript{47} See id. at 106.
\textsuperscript{48} See id. at 115 (Ginsburg, J., dissenting).
\textsuperscript{49} See id. at 116 (Ginsburg, J., dissenting).
\textsuperscript{50} See Cutshall v. Sundquist, 193 F.3d 466, 472 (6th Cir. 1999).
drive them from the state.\textsuperscript{51} He also argued that the ten-year registration was arbitrary and capricious and that the statute’s published location in the criminal code was itself evidence of the statute’s punitive nature.\textsuperscript{52} Furthermore, he argued, the public disclosure of registry information did not serve the state’s stated purpose of helping law enforcement, but instead merely subjects offenders to “stigmatization, ridicule, and harassment.”\textsuperscript{53}

The court analyzed the statute using seven factors articulated by the U.S. Supreme Court in \textit{Kennedy v. Mendoza-Martinez}.\textsuperscript{54} The court then concluded without serious consideration that pretty much every factor showed that the statute was non-punitive. For example, despite historical use of pillories to shame criminals, the court concluded that the notification statute serves as a safety tool rather than a scarlet letter.\textsuperscript{55} Furthermore, the court ignored entirely the evidence of the legislature’s intent that the plaintiff produced and took for granted the state’s claim that the notification statute makes the public safer.\textsuperscript{56}

Civil commitment statutes that allowed for potentially indefinite confinement were also held not to violate the Eighth Amendment’s prohibition of cruel and unusual punishment because they were not punitive in nature but rather forms of non-punitive detention.\textsuperscript{57} More recently, the North Carolina Supreme court upheld a statute that required global positioning tracking of sex offenders because the statute was enacted “with the intent to create a civil, regulatory scheme to protect citizens of our state from the threat posed by the recidivist

\begin{itemize}
\item \textsuperscript{51} See id.
\item \textsuperscript{52} Id.
\item \textsuperscript{53} Id.
\item \textsuperscript{54} Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963); \textit{Cutshall}, 193 F.3d at 473.
\item \textsuperscript{55} See \textit{Cutshall}, 193 F.3d at 475.
\item \textsuperscript{56} See id. at 474-77.
\item \textsuperscript{57} See Kansas v. Hendricks, 521 U.S. 346, 371 (1997) (holding that Kansas’s civil commitment statute violated neither the Ex Post Factor Clause nor the Double Jeopardy Clause); see also United States v. Comstock, 130 S. Ct. 1949, 1965, 176 L. Ed. 2d 878 (2010) (holding that the Necessary and Proper Clause granted Congress the authority to pass a federal civil commitment statute).
\end{itemize}
tendencies of convicted sex offenders." 58 Again, the court found that the statute was not punitive in nature and therefore did not violate the Ex Post Facto Clause. 59

Thus, the precedential landscape leading up to Doe made the plaintiff’s chances look rather bleak. Although the Indiana law ventured into somewhat uncharted legal territory given the effect on expression, the state had every reason to feel good about its chances.

C. The Indiana Law

On July 1, 2008, Indiana Code Section 35-42-4-12 took effect. 60 The law prohibited certain registered sex offenders from using social networking sites, instant messaging programs, and chat rooms that allow access to persons under the age of 18. 61 Indiana’s law should not

58 See State v. Bowditch, 700 S.E.2d 1, 13 (2010).
59 See id.
Sec. 12. (a) This section does not apply to a person to whom all of the following apply:
(1) The person is not more than:
(A) four (4) years older than the victim if the offense was committed after June 30, 2007; or
(B) five (5) years older than the victim if the offense was committed before July 1, 2007.
(2) The relationship between the person and the victim was a dating relationship or an ongoing personal relationship. The term “ongoing personal relationship” does not include a family relationship.
(3) The crime:
(A) was not committed by a person who is at least twenty-one (21) years of age;
(B) was not committed by using or threatening the use of deadly force;
(C) was not committed while armed with a deadly weapon;
(D) did not result in serious bodily injury;
(E) was not facilitated by furnishing the victim, without the victim’s knowledge, with a drug (as defined in IC 16-42-19-2(1)) or a controlled substance (as defined in IC 35-48-1-9) or knowing that the victim was furnished with the drug or controlled substance without the victim’s knowledge; and
(F) was not committed by a person having a position of authority or substantial influence over the victim.

(b) This section applies only to a person required to register as a sex or violent offender under IC 11-8-8 who has been:

(1) found to be a sexually violent predator under IC 35-38-1-7.5; or
(2) convicted of one (1) or more of the following offenses:
   (A) Child molesting (IC 35-42-4-3).
   (B) Child exploitation (IC 35-42-4-4(b)).
   (C) Possession of child pornography (IC 35-42-4-4(c)).
   (D) Vicarious sexual gratification (IC 35-42-4-5(a) or IC 35-42-4-5(b)).
   (E) Sexual conduct in the presence of a minor (IC 35-42-4-5(c)).
   (F) Child solicitation (IC 35-42-4-6).
   (G) Child seduction (IC 35-42-4-7).
   (H) Kidnapping (IC 35-42-3-2), if the victim is less than eighteen (18) years of age and the person is not the child’s parent or guardian.
   (I) Attempt to commit or conspiracy to commit an offense listed in clauses (A) through (H).
   (J) An offense in another jurisdiction that is substantially similar to an offense described in clauses (A) through (H).

(c) As used in this section, “instant messaging or chat room program” means a software program that requires a person to register or create an account, a username, or a password to become a member or registered user of the program and allows two (2) or more members or authorized users to communicate over the Internet in real time using typed text. The term does not include an electronic mail program or message board program.

(d) As used in this section, “social networking web site” means an Internet web site that:

(1) facilitates the social introduction between two (2) or more persons;
(2) requires a person to register or create an account, a username, or a password to become a member of the web site and to communicate with other members;
(3) allows a member to create a web page or a personal profile; and
(4) provides a member with the opportunity to communicate with another person.

The term does not include an electronic mail program or message board program.

(e) A person described in subsection (b) who knowingly or intentionally uses:

(1) a social networking web site; or
(2) an instant messaging or chat room program;

that the offender knows allows a person who is less than eighteen (18) years of age to access or use the web site or program commits a sex offender Internet offense, a Class A misdemeanor. However, the offense is a Class D felony if the person has a prior unrelated conviction under this section.
have come as a surprise to anyone. With the increasing promulgation of post-incarceration sex offender regulation and the rise of the Internet and social media, it was only a matter of time before states began targeting sex offenders’ online activities. Fears of sex offenders grooming children via social networking sites such as Facebook and MySpace or otherwise engaging in cyber stalking are understandable, yet the actual incidence of sex offenders meeting children over the internet is extremely low. Indiana’s law and laws like it are a win-win for politicians like the Indiana law’s sponsors Jim Merrit and John Wasserman because there is no sex offender lobby to worry about upsetting and, because the laws are generally low-cost, most voters see no downside. New legislators are especially prone to

(f) It is a defense to a prosecution under this section that the person:
    (1) did not know that the web site or program allowed a person who is less than eighteen (18) years of age to access or use the web site or program; and
    (2) upon discovering that the web site or program allows a person who is less than eighteen (18) years of age to access or use the web site or program, immediately ceased further use or access of the web site or program.


63 See Erin Mulvaney, State lawmakers move to restrict sex offenders, HOU S TON CHRON., (April 4, 2013), http://www.houstonchronicle.com/news/houston-texas/houston/article/State-lawmakers-move-to-restrict-sex-offenders-4407867.php (quoting Texas Rep. Trey Martinez Fisher as saying, “[w]ith the evolving technology and increasing number of cyber crimes and crimes committed against the vulnerable, the goal is to extend the same policy we have for sex offenders now to the Internet.”).

64 See Janis Wolak et al., Online “Predators” and their Victims: Myths Realities and Implications for Prevention and Treatment, AMERICAN PSYCHOLOGIST 63, 111-128 (2008), http://www.unh.edu/ccrc/pdf/Am%20Psy%202008.pdf (arguing that “publicity about online “predators” who prey on naive children using trickery and violence is largely inaccurate”).


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this kind of “get tough on crime” legislation because “nobody wants to be seen as being soft on sexual perversion.”

The Indiana law was presumably to be applied in conjunction with related legislation which required registered sex offenders not only to provide all online identifiers, such as email addresses and user names, but also to consent to a search of personal computers and any device with online access at any time, and to the installation of monitoring software or hardware. The latter two sections of this law were struck down in 2008 as a violation of the Fourth Amendment. However, the social networking law survived another five years.

II. Doe v. Prosecutor, Marion County, Indiana

A. The District Court Decision

On March 14, 2012, John Doe filed a motion for a preliminary injunction preventing enforcement of the Indiana law on the basis that the law impermissibly infringed upon his First Amendment Rights; however, both parties agreed to treat the motion as for a permanent injunction and postponed the decision until after a full bench trial could be held.

Doe, who was allowed to file suit under a pseudonym so as not to face unnecessary public exposure and harassment during the pendency of the lawsuit, was a sex offender required to register on Indiana’s sex and violent offender registry. He was arrested in Marion County, Indiana in 2000 and later convicted of two counts of child

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68 Doe v. Prosecutor, Marion Cnty., Ind., 566 F. Supp. 2d at 867.
69 See Doe v. Prosecutor, Marion Cnty., Ind., 705 F.3d 694, 695 (7th Cir. 2013).
70 Id.
71 Doe v. Prosecutor, Marion Cnty., Ind., No. 1:12-cv-00062-TWP-MJD (S.D. Ind. Feb. 27, 2012) (order on plaintiff’s motion to proceed by anonymous name and motion to seal affidavit containing actual name).
72 Id.
exploitation.Released from prison in 2003, Doe completed probation in 2004. Doe is the father of a teenage son of whom he has custody and whose activities on Facebook and other websites he wishes to be able to monitor like any other parent. Doe brought this lawsuit alleging the unconstitutionality of the Indiana Law because he wishes to use social media to monitor his son’s internet use, as well as to stay in touch with friends and comment on the news.

District Court Judge Tanya Walton Pratt held that Indiana’s law was constitutional and denied both Doe’s Motion for Preliminary Injunction and his request for permanent relief in the form of a declaratory judgment and a permanent injunction. Although the court conceded that the law implicated speech protected by the First Amendment, it nevertheless found the statute constitutional. To do so, the court applied the Supreme Court’s test from Ward v. Rock against Racism, which determines the constitutionality of regulations that restrict the “time, place, and manner” of expression, as opposed to statutes that prohibit specific forms of expression. In Ward, the Court held that New York City’s restrictions on volume at an outdoor concert venue did not target a specific type of expression—i.e. were content neutral—and therefore needed to satisfy only intermediate scrutiny. The Court’s test asks whether a regulation is “narrowly-tailored to serve significant government interests” and if the regulation “leaves open ample alternative channels of communication.”

Applying the Ward standard, the court found the Indiana law constitutional because Doe failed to offer any alternative means through which Indiana could have achieved the same goal of

74 Id.
75 Id.
76 Id.
77 Id. at 11.
78 Id. at 5.
80 See Doe v. Prosecutor, Marion Cnty., Ind., 2012 WL 2376141, at *7.
81 See 491 U.S. at 781.
82 See id. at 803.
deterrence and prevention of online sexual exploitation of minors without violating his First Amendment rights. However, by placing this burden on Doe, the court confused who possessed the burden in the first place. While acknowledging the importance of social networking in society, Judge Pratt expressed concern over the use of new technologies as a “virtual playground” for criminals, in this case sexual predators. Even with the law, she stated, “the vast majority of the internet is still at Mr. Doe’s fingertips.”

The court next addressed Doe’s contention that the law was unnecessary and therefore not narrowly tailored because a separate law already existed in Indiana that prohibits online solicitation of children. While conceding that this argument had some appeal, the court stated that the two statutes serve different purposes; the challenged statute aimed to prevent and deter the sexual exploitation of minors because it punished conduct before minors were victimized, while the other aimed to punish those who have already committed the crime of solicitation. “The government need not wait until a crime was again committed in order to act to prevent criminal sexual acts,” said the court. Like so many before it, the court relied upon the Supreme Court’s characterization of recidivism by sex offenders as “frightening and high” rather than requiring the state to produce actual studies that show such a recidivism rate. The court also found that Doe had sufficient alternative channels of communication to satisfy the second half of the constitutional test, noting with some pop culture

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83 See Doe v. Prosecutor, Marion Cnty., Indiana, 705 F.3d 694, 701 (7th Cir. 2013) (explaining the state bears the burden of showing that the statute leaves open ample alternative channels of communication); Doe v. Prosecutor, Marion Cnty., Ind., 2012 WL 2376141 at *7.
84 Doe v. Prosecutor, Marion Cnty., Ind., 2012 WL 2376141, at *2.
85 Id. at 7.
86 Id.
87 Id. at 8.
88 Id. at 9.
89 Id. at 8 (quoting Smith v. Doe 538 U.S. 84, 103, 123 (2003) (in which the court was quoting itself from McKune v. Lile, 536 U.S. 24, 34 (2002))).
savvy that “communication does not begin with a ‘Facebook wall post’ and end with a ‘140-character Tweet.’”

Lastly, the court distinguished this case from *Doe v. Jindal*, in which the federal district court in Louisiana held a similar Louisiana statute unconstitutional. The court in *Jindal* held that the statute in question was overbroad in that it would prohibit offenders from accessing a substantial amount of websites that did not actually present a risk, such as the site of the court. Unlike the Indiana statute, the statute at issue in *Jindal* imposed a sweeping ban on common websites, not just social networking sites, and the *Jindal* court failed to use the proper content-neutral framework. *Doe*, dissatisfied with the district court’s decision, appealed to the Seventh Circuit.

B. The Seventh Circuit Decision

On appeal, Doe got the ruling he was looking for. The Seventh Circuit, reviewing *de novo*, reversed the district court’s decision, finding the Indiana law unconstitutional on its face. The court found that Mr. Doe’s First Amendment rights, as incorporated against the states through the Fourteenth Amendment, were clearly infringed by Indiana’s law. Specifically, the law precluded Doe from “expression through the medium of social media” and limited “his right to receive information and ideas.” However, the court found the law to be content neutral, as had the district court. Therefore, Indiana was

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90 *See Doe v. Prosecutor, Marion Cnty., Ind., 2012 WL 2376141, at *10.*
92 *See Doe v. Prosecutor, Marion Cnty., Ind., 2012 WL 2376141, at *11.*
93 *See Doe v. Jindal, 853 F. Supp. 2d at 604.*
94 *Id.*
95 *See Doe v. Prosecutor, Marion Cnty., Ind., 705 F.3d 604, 604 (7th Cir. 2013).*
96 *See id.*
97 *Id.* (Judge Flaum and Tinder were joined in the decision by Judge Tharp who sat by designation).
98 *See id. at 695.*
99 *Id. at 697-98.*
100 *Id. at 698.*
entitled to place reasonable “time, place, or manner restrictions” on offenders’ expression so long as the statute met the Ward standard.\(^{101}\) Under Ward,\(^ {102}\) as the District Court had noted,\(^ {103}\) such content neutral restrictions must be “narrowly tailored to serve a significant governmental interest” and “leave open ample alternative channels for communication of the information.”\(^ {104}\) Unlike the district court, however, the Seventh Circuit never reached the second half of the test because they determined that the statute was not narrowly tailored.\(^ {105}\)

In its analysis, the court relied on a series of Supreme Court cases that clarify when a law that infringes the freedom of speech may still be considered constitutional, starting with Frisby v. Schultz.\(^ {106}\) In Frisby, abortion protestors challenged a municipal law that forbade picketers from engaging in picketing directed at a single residence.\(^ {107}\) The protesters had been intent on letting a local doctor know how they felt about abortion, and the legislature responded to protect the doctor and other private residents from harassment.\(^ {108}\) Applying the content neutral test, the Court held that the law was narrowly tailored because it targeted only speech that was within the scope of the city’s significant interest in protecting residents from “targeted picketing” which, it said, “inherently and offensively intrudes on residential privacy.”\(^ {109}\)

The Seventh Circuit then discussed City of L.A. v. Taxpayers for Vincent,\(^ {110}\) in which the Supreme Court upheld a city ordinance that prohibited posting signs on public property.\(^ {111}\) The Court in Vincent held the statute did not violate the First Amendment rights of the

\(^{101}\) Id.
\(^{104}\) Doe v. Prosecutor, Marion Cnty., Ind., 705 F.3d at 798.
\(^{105}\) Id.
\(^{107}\) Id. at 476.
\(^{108}\) Id.
\(^{109}\) Id. at 486.
\(^{111}\) Id. at 817.
plaintiffs who had wished to post cardboard candidate signs on public property. The court determined that because the substantive evil which the city sought to address—visual blight—was not merely a possible by-product of the activity prohibited but was created by the medium of expression itself, the statute was narrowly tailored.

Next, the court examined two cases where statutes had been struck down because the states involved had alternative means of combating the evil that their laws were designed to prevent. First, the court looked at *Schneider v. Town of Irvington*. In this 1939 Supreme Court decision, the Court struck down a series of laws that banned outright, or banned without permission, the distribution of any handbills or fliers, or door-to-door canvassing. According to the Seventh Circuit, the Court in *Schneider* reached its decision because the evil the state sought to address—littering—was only indirectly being addressed by the law, and the state had numerous alternative ways to address the problem, i.e. going after the litterers themselves. Similarly, in *Martin v. City of Struthers*, the Court invalidated a law prohibiting all door-to-door solicitations or distributions because the evil targeted by the law could be easily prevented by traditional methods, such as no trespassing signs.

The court then compared the foregoing case law to the Indiana statute. Neither party disputed that “there is nothing dangerous about Doe’s use of social media as long as he does not improperly communicate with minors.” And because illicit communication is a small part of overall social network activity, the Indiana law covered “substantially more activity than the evil it seeks to redress.”

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112 *Id.*
113 *Id.* at 810.
114 *See* *Doe v. Prosecutor, Marion Cnty., Ind.*, 705 F.3d 604, 698-99 (7th Cir. 2013).
116 *Id.*
117 *Id.*
119 *See* *Doe v. Prosecutor, Marion Cnty., Ind.*, 705 F.3d at 699.
120 *Id.*
121 *Id.*
According to the court, like the legislatures in *Martin* and *Schneider*, Indiana had “other methods to combat unwanted and inappropriate communication between minors and sex offenders.”\(^{122}\) Specifically, the state already had in place laws making it a felony for persons over 21 to “solicit” children,\(^{123}\) prohibiting “inappropriate communication with a child,” and communication “with the intent to gratify the sexual desires of the person or the individual,”\(^{124}\) all of which included enhanced punishments for acts performed over a computer network.\(^{125}\) The court praised these “alternative options” as better methods for advancing Indiana’s goals and “refusing to burden benign Internet activity.”\(^{126}\) The court also disagreed with the district court judge’s characterization of the challenged law and the preexisting laws as possessing different purposes—one being to “prevent and deter” and one to “punish.”\(^{127}\) All laws are for the purpose of punishing activities after they’ve occurred, said the court.\(^{128}\) All Indiana’s law would do is increase sentences for online solicitation by providing another statute under which to convict offenders.\(^{129}\) If they want to increase sentences, said the court, the legislature should just do so without disguising it in this manner.\(^{130}\) The court’s reasoning seems to ignore the point that the statute would, if effectively administered, prevent sex offenders who might be at risk of recidivism from placing themselves in positions where they might be enticed to do so—thus preventing injury before it occurs. However, the state also bore the burden of explaining how its legislation directly alleviates specific harms it seeks to cure and it failed to do so.\(^{131}\)

\(^{122}\) *Id.*

\(^{123}\) *Id.* (citing Ind. Code § 35-42-4-6 (2008)).


\(^{126}\) *See* Doe v. Prosecutor, Marion Cnty., Ind., 705 F.3d at 699.

\(^{127}\) *See id.* (citing Doe v. Prosecutor, Marion Cnty., Ind., No. 1:12-CV-00062-TWP, 2012 WL 2376141, at *8 (S.D. Ind. June 22, 2012)).

\(^{128}\) *Id.*

\(^{129}\) *See id.*

\(^{130}\) *See id.*

\(^{131}\) *See id.*
After hammering the Indiana law’s overbreadth, the court reeled in its criticism somewhat, noting that they “. . . must be careful not to impose too high a standard on Indiana.”\(^{132}\) Ward introduced an “administratability exception” which provides that “the requirement of narrow tailoring is satisfied ‘so long as the [state interest] would be achieved less effectively absent the regulation.’”\(^{133}\) The court said that some level of over-inclusiveness might be justified where legislatures face a “great difficulty” in targeting only the “exact source” of evil.\(^{134}\) In determining how to apply this exception, the court looked to a test from \textit{Colorado v. Hill}, wherein the Supreme Court upheld a statute that prohibited anyone from approaching people within a 100-foot radius of a healthcare facility “for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with [an]other person on public property.”\(^{135}\) According to the Court’s test, a statute may be constitutional if “(1) the prohibited expression that did not further the state interest was minimal, and (2) its inclusion stemmed from the difficulty in carving a rule that covered precisely the evil contemplated by the legislature.”\(^{136}\) However, the court found the \textit{Colorado} exception to be inapplicable here, theorizing that Indiana could have, “with little difficulty,” better targeted the problem with the pre-existing statutes or a law solely banning communication between minors and sex offenders through social media.\(^{137}\) Leaving some room for future legislative action, the court suggested that a constitutional law that accomplishes Indiana’s goals is feasible, but declined to say exactly what it would look like.\(^{138}\)

Near the end of the opinion, the court cautiously suggested that if Indiana chooses to try again, it might be beneficial if they can develop an argument that the statute allows law enforcement to “swoop in”

\(^{132}\) \textit{Id.}
\(^{134}\) See Doe v. Prosecutor, Marion Cty. Ind., 705 F.3d 604, 700 (7th Cir. 2013) (citing Hill v. Colo., 530 U.S. 703, 729 (2000)).
\(^{136}\) Doe v. Prosecutor, Marion Cnty., Ind., 705 F.3d at 698-99 (citing Hill v. Colo., 530 U.S. at 729).
\(^{137}\) See \textit{id.} at 700.
\(^{138}\) See \textit{id.}
before any solicitation occurs.\textsuperscript{139} Perhaps, added the court, a potential new law could be tailored so as to apply only to certain especially risky persons.\textsuperscript{140} The court concluded that “subsequent Indiana statutes may well meet [the narrow tailoring requirement], but the blanket ban on social media in this case regretfully does not.”\textsuperscript{141} The Seventh Circuit then remanded the case to the district court with instructions to enter judgment in favor of Doe.\textsuperscript{142}

III. \textit{Doe’s Impact Today and Tomorrow}

A. \textit{What makes Doe Different?}

\textit{Doe} made clear that sex offenders have a right to surf the web and that states may not infringe upon this right without strong justification; yet, offenders have for years been barred from surfing the waves at California’s famous Huntington Beach—apparently constitutionally.\textsuperscript{143} They have also been banned from public libraries in multiple cities and states, preventing access to books and the Internet.\textsuperscript{144} A majority of states now have statutes that forbid registered sex offenders from living within 500 to as much as 2,500 feet from schools or other areas children are likely to congregate.\textsuperscript{145} Florida’s residency restrictions are so strict that some sex offenders in Miami-Dade County have been forced to live in a makeshift colony under the Julia Tuttle Causeway,

\begin{itemize}
  \item \textsuperscript{139} See id. at 701.
  \item \textsuperscript{140} See id. at 702.
  \item \textsuperscript{141} Id. at 703.
  \item \textsuperscript{142} Id.
  \item \textsuperscript{144} See Iowa Code Ann. § 692A.113 (West) (banning certain sex offenders from being “present upon the real property of a public library without the written permission of the library administrator”).
  \item \textsuperscript{145} Sinha, \textit{supra} note 4, at 346.
\end{itemize}
which connects Miami to Miami Beach. Unlike Indiana’s law that prohibits only online activity, none of these laws that restrict actual physical activity have been held to be unconstitutional. The question thus arises: why are states able to drastically limit where registered sex offenders can live, work and travel, yet at the same time, according to the Seventh Circuit, states are constitutionally forbidden from passing laws which impede only digital expression? Indeed, common sense makes this dichotomy hard to fathom.

The clearest answer, of course, is speech. What immediately differentiates the Doe statute from other regulations that have been upheld as constitutional is that it implicated the First Amendment, specifically, the rights of speech, association, and, by implication, expression. Without a doubt, the Indiana law’s direct and substantial impact upon online speech gave the court what it needed to overturn the law. Laws which infringe upon rights guaranteed by the First Amendment must satisfy the strictest standard of review, known as “strict scrutiny,” which requires that the law be narrowly tailored to further a compelling governmental interest. However, content neutral First Amendment restrictions must only satisfy the intermediate standard of review set out in Ward. As discussed previously, the court in Doe applied the intermediate standard of review to the Indiana social networking law because the court found it was a content neutral limitation upon expression. However, if another fundamental right were to be infringed by a statute, the reviewing court would generally apply strict scrutiny.

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However, where there is no fundamental or constitutional right implicated, a law must only satisfy rational basis review.\textsuperscript{153} Rational basis review is the most deferential standard used by reviewing courts and requires only that the governmental action be "rationally related" to a "legitimate" government interest.\textsuperscript{154} In most challenges to sex offender laws courts have applied this lesser standard of review.\textsuperscript{155} For instance, in \textit{Doe v. City of Lafayette}, a city park district banned a registered sex offender from all of the city's parks, long after he had completed probation and without a hearing, after learning that he had been seen sitting in his car at parks, seemingly observing the children playing there.\textsuperscript{156} The Seventh Circuit upheld the city's actions.\textsuperscript{157} Despite Mr. Doe's contentions otherwise, the court held that the First Amendment was not implicated because Mr. Doe was going to the parks merely to watch children and not to engage in expressive protected activity.\textsuperscript{158} The court then held that the ban implicated no fundamental right because a fundamental right to enter public areas to loiter or for other innocent purposes does not exist.\textsuperscript{159} Thus, because no fundamental interest was implicated, the court applied rational

\textsuperscript{153} \textit{See generally} 16B C.J.S. CONST. LAW § 1120.
\textsuperscript{154} \textit{See} Doe v. City of Lafayette, Ind., 377 F.3d 757, 773 (7th Cir. 2004).
\textsuperscript{155} \textit{See, e.g.}, Smith v. Doe, 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003) (holding that the Alaska Sex Offender Registration Act did not violate the Ex Post Facto Clause); Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003) (holding that the public disclosure provision of Connecticut's sex offender registration law did not violate the Due Process Clause); Doe v. City of Lafayette, Ind., 377 F.3d at 758-59; Doe v. Miller, 405 F.3d 700 (8th Cir.2005) (holding residency restriction within two thousand feet of school or child care facility constitutional under rational basis review).
\textsuperscript{156} \textit{See} Doe v. City of Lafayette, Ind., 377 F.3d at 758-59.
\textsuperscript{157} \textit{Id.}
\textsuperscript{158} \textit{See id.} at 763 ("He did not go to the park to advocate the legalization of sexual relations between adults and minors. He did not go into the park to display a sculpture, read a poem or perform a play celebrating sexual relations between adults and minors. He did not go into the park for some higher purpose of self-realization through expression. In fact, he did not go into the park to engage in expression at all.").
\textsuperscript{159} \textit{Id.} at 769 ("The historical and precedential support for a fundamental right to enter parks for enjoyment is, to put it mildly, oblique.").
basis review, asking whether the ban was “rationally related” to “a legitimate government interest.” Noting that the city banned a single sex offender who had a history of sexually predatory actions towards children, and who had shown a potential to relapse, the court held that the city’s actions would have satisfied even strict scrutiny.

Similarly, in Doe v. Miller, the Eighth Circuit upheld a 2002 Iowa law that prohibited certain sex offenders from residing within 2,000 feet of schools or childcare facilities. Several sex offenders affected by the law brought suit in federal district court, asserting that the law was unconstitutional on its face. The district court in Doe v. Miller agreed with the plaintiffs, and noted that the law often made entire towns off limits to offenders. The district court, applying strict scrutiny, held that the residency restriction violated both procedural due process and substantive due process because it infringed on the plaintiffs’ fundamental right to travel and to “privately choose how they want to conduct their family affairs.” However, the Eighth Circuit concluded that even if they were to recognize the right to intrastate travel as a fundamental right, this right would not be infringed by a law which restricted only where sex offenders could live, not where they could travel. Therefore, the court determined that the law was rationally related to the goal of preventing sex offender recidivism, and thus constitutional. Despite the fact that the state’s own witness testified that “life-long restrictions like [the Iowa law] do not aid in the treatment process, and could even foster negative attitudes toward authority and depression in offenders,” and the Does’ contention that no scientific study backs the effectiveness of residency restrictions in preventing sex offense recidivism, the court held that the law was rationally related to that goal. According to the

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160 Id. at 773.
161 Id.
163 Doe v. Miller, 405 F.3d 700, 705 (8th Cir. 2005).
164 See id.
165 Id. at 706.
166 Id.
167 Id. at 723.
court, the Does’ argument understated “the authority of a state legislature to make judgments about the best means to protect the health and welfare of its citizens in an area where precise statistical data is unavailable and human behavior is necessarily unpredictable.” However, that authority can go only so far. The next section discusses some of the many common misconceptions about sex offenders.

B. Separating Fact from Fiction

In the early 1990s, when modern sex offender regulation began to appear, there was little reliable research on sex offenders, and none on the efficacy of modern legislation. In fact, even today the public perception of sex offenders is so skewed that numerous state and federal enforcement agencies have deemed it necessary to create “myths about sex offenders” websites in order to correct these misconceptions. Although concerns about sex offenders are valid, there are numerous myths that turn legitimate concerns into a blinding hysteria that leads to overzealous lawmaking and ineffective laws. Much has been previously written debunking the “facts” about sex offenders; however, it is worth reviewing this topic briefly given its relevance to all sex-offender-related legislation and to show the vast difference between the actual truth and the perceived truth.

One of the most common misconceptions, and one that has special relevance to statutes like Indiana’s, is that strangers perpetrate sex offenses. In fact, the vast majority of sex offenses are committed by a

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168 Id. at 714.
170 See 43 No. 6 CRIM. LAW BULL. Art. 1.
person known to the victim, often a relative, friend, or authority figure. The numbers are even higher when it comes to sexual assaults on children, where over 90 percent of offenses are committed by someone known to the victim. Despite this, most legislation targets only the minority of offenses that are committed by strangers; yet, residency restrictions, registration and notification, and social networking bans do little to prevent those 80 to 90 percent of offenses that are committed by people the victim already knows. Misguided efforts like this suggest that legislators that push through sex offender regulation are more preoccupied with politics and getting elected than with actually keeping the public safe.

Another common myth is that sex offenders are virtually guaranteed to reoffend. Again, the facts do not support this condemnation. In comparison with recidivism rates of other types of criminals, sex offenders are actually significantly less likely to reoffend. A very small subset of offenders—adult males who abuse male children—are the most likely to reoffend. Although there is a surprising lack of comprehensive studies, and the studies that do exist

171 See Wright, supra note 1, at 21; see also Lieb, supra note 11, at 50.
173 See also Jamey Dunn, Sex Offender Legislation is often more about politics than justice, ILL. ISSUES, http://illinoisissues.uis.edu/archives/2011/09/state.html (September 2011) (“Illinois for a long time has every new set of legislators come in, and they pass bills on crime because it looks good when you go back home and you say, ‘I’m tough on crime.’ So what happens is, we’re now layered with bill after bill after bill,” Rep. Rosemary Mulligan, a Park Ridge Republican, said in the last days of the spring legislative session while debating a bill that pertained to sex offenders. “Most of us will vote for it because it looks bad if you don’t, which is a mistake that happens when we continue to pass these kinds of laws.” Mulligan and 90 of her House colleagues voted in favor of the bill.”).
174 See id.
175 Id.
176 Wright, supra note1, at 27 (“A study of Massachusetts prisoners released in 1999 found that 28% of sex offenders were re-incarcerated within three years of their release. This was the lowest rate of recidivism (as measured by re-incarceration) when compared with other groups of non-sexual criminal offenders.”).
177 See id.
often offer conflicting results, it does not seem to be the case that sex
offenders in general are nearly as likely to commit another sex offense
in the future as politicians would make them out to be.\textsuperscript{178} Indeed, it
bears noting that recidivism rates vary drastically based upon what
category of offender is being measured and how the recidivism rate is
being measured.\textsuperscript{179}

A third and extremely pertinent myth is that residency restrictions
and other common legislative action directed at sex offenders are
effective in protecting the public.\textsuperscript{180} There is in fact little if any
evidence that this is the case.\textsuperscript{181} Rather than preventative, these
measures appear to be punitive in nature, satisfying the public’s desire
for revenge on an especially reviled subset of criminals.\textsuperscript{182} Some
commentators have even argued that, rather than deterring future sex
offenses, residency restrictions and other legislation that prevent sex
offenders from reintegrating with society actually increase the risk of
recidivism.\textsuperscript{183}

Furthermore, not all sex offenders pose the same danger to the
public. One of the many criticisms of modern sex offender laws is that
they indiscriminately target all offenders regardless of their individual
risk. Indeed, this was part of the Seventh Circuit’s reasoning in \textit{Doe}.
For instance, individuals convicted of Romeo and Juliet relationships,
public indecency, or consensual sex by a teacher with a teenage

\textsuperscript{178} See id.
\textsuperscript{179} See id.
\textsuperscript{180} See Myths and Facts Current Research on Managing Sex Offenders, N.Y.
ST. DIVISION OF CRIM. JUSTICE SERVICES (April 2008),
\textsuperscript{181} See Margaret Troia, \textit{Ohio’s Sex Offender Residency Restriction Law: Does It
Protect the Health and Safety of the State’s Children or Falsely Make People Believe
\textsuperscript{182} See Peter Whoriskey, \textit{Some Curbs on Sex Offenders Called Ineffective,
Inhumane}, WASH. POST (Wednesday November 22, 2006),
http://www.washingtonpost.com/wp-dyn/content/article/2006/11/21/AR2006112101468.html (quoting Georgia House
Majority Leader as describing his goal in sex offender residency legislation as “. . . to
make it so onerous on those that are convicted of these offenses . . . they will want
to move to another state.”).
\textsuperscript{183} See Troia, \textit{supra} note 182, at 344.
student can hardly be equated with violent rapists and offenders whose
victims were children.\textsuperscript{184}

As some modern legislation nears a quarter century of existence,
studies are beginning to appear examining the efficacy of these laws.
These studies overwhelmingly show modern sex offender legislation
to be ineffective. For instance, a study by the Minnesota Department
of Corrections that examined 224 recidivist sex offenders determined
that residency restrictions would have likely had no preventative effect
in any of the cases studied.\textsuperscript{185} Studies in Iowa, California and
Colorado all concluded the same thing.\textsuperscript{186} A 2011 study focusing on
the effects of notification laws nationally concluded that they actually
increased recidivism because they made illegal activity more attractive
by increasing social and financial costs to offenders attempting to
rejoin society.\textsuperscript{187} Another recent study of registration laws on a
national level led the authors to conclude that sex offender registry
statutes not only failed to reduce recidivism but actually increased
rates of re-offense.\textsuperscript{188} Studies like these should influence court rulings
in the future.

\textsuperscript{184} See Doe v. Sex Offender Registry Bd., 697 N.E.2d 512, 522 (1998)(quoting
New York Times Co. v. United States, 403 U.S. 713, 729 (1971) (Stewart, J.,
concurring)(“Requiring the government to assemble and present clear evidence of a
sex offender's dangerousness would ensure that limited adjudicatory and police
enforcement resources would be concentrated on those individuals who realistically
may pose threats to young children and other vulnerable populations. As observed in
an altogether different context but oddly apropos of this classification system as
well, “when everything is classified, then nothing is classified, and the system
becomes one to be disregarded by the cynical or the careless.”).\textsuperscript{185}

\textsuperscript{185} Sinha, \textit{supra} note 4, at 347 (“Only 79 (35 percent) of the cases involved
offenders who established direct contact with their victims. Of these, 28 initiated
victim contact within one mile of their own residence, 21 within 0.5 miles (2,500
feet), and 16 within 0.2 miles (1,000 feet). A juvenile was the victim in 16 of the 28
cases. But none of the 16 cases involved offenders who established victim contact
near a school, park, or other prohibited area. Instead, the 16 offenders typically used
a ruse to gain access to their victims, who were most often their neighbors.”).

\textsuperscript{186} Id. at 348.

\textsuperscript{187} See Matthew Phillips, \textit{Are Sex Offender Laws Backfiring},
\textsc{Freakonomics.com} (Sept. 1, 2011, 11:25 a.m.),
\textit{http://www.freakonomics.com/2011/09/01/are-sex-offender-laws-backfiring/}.

\textsuperscript{188} Id.
Acknowledging these facts and fictions is extremely important in the constitutional review of statutes governing sex offenders. However, for the most part, courts have not done so. In 2002, the Supreme Court in *McKune v. Lile*\(^{189}\) remarked that sex offenders had a “frightening and high risk of recidivism,” and despite a lack of actual research justifying this statement, courts have cited this decision as evidence of sex offenders’ high rates of recidivism ever since.\(^{190}\)

Recently, the Ninth Circuit, in just one sentence, determined that California had a rational basis for its sex offender notification laws, saying: “[s]ex offenders pose a threat to the public, and when they reenter society, they are much more likely to be re-arrested than other offenders.”\(^{191}\)

In *Doe*, the Seventh Circuit took an important step towards treating sex offender legislation like any other type of legislation, and away from the self-perpetuating reliance on myth that has dominated sex offender jurisprudence for many years/decades. Just how much effect this move will have in litigating the constitutionality of sex offender laws is directly related to the type of statute at issue and what type of review the courts apply. The next section discusses the importance of these distinctions.

### C. A Changing Tide in the Courts?

While challenges to sex offender legislation have almost universally failed in the past,\(^{192}\) recently courts have been more

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\(^{190}\) *See* *Smith v. Doe*, 538 U.S. 84, 103 (2003) (citing McKune to justify a finding that Alaska’s Sex Offender Registration Act was non-punitive and thus not a violation of the Ex Post Facto Clause).

\(^{191}\) *Johnson v. Terhune*, 184 F. App’x 622, 624 (9th Cir. 2006).

\(^{192}\) *See* *Smith v. Doe*, 538 U.S. 84, 105 (2003) (holding that Alaska’s Sex Offender Registration Act was constitutional); *Kansas v. Hendricks*, 521 U.S. 346, 350, 117 (1997) (holding that Kansas Sexual Predator Act, which allowed for indefinite civil confinement of certain sex offenders, was constitutional); *Doe v. Shurtleff*, 628 F.3d 1217, 1220 (10th Cir. 2010) (holding that Utah law requiring registration of all online identifiers and websites owned by sex offenders was constitutional); *Doe v. Moore*, 410 F.3d 1337, 1339 (11th Cir. 2005) (holding that
inclined to review such legislation closely and to strike down laws that do not meet constitutional standards. This increased skepticism comes as studies increasingly suggest that existing laws are ineffective despite their ubiquity. Several recent cases illustrate this change in the judicial review of sex offender legislation.

In January 2012, in *Doe v. City of Albuquerque*, the Tenth Circuit struck down an Albuquerque law that banned sex offenders from public libraries. The court first chastised the city for failing to offer a justification for the law; however, it then provided one itself, stating that, “it is evident that the ban seeks to provide a safe environment for library patrons, including children.” Nevertheless, the court held that the law was unconstitutional because the city had failed to show that the law was narrowly tailored or that it left open ample alternative channels of communication. In fact, the City erroneously concluded that it had no burden to prove the existence of these alternatives and thus presented no evidence. Accordingly, while the outcome of the case is encouraging, it does not stand for the premise that library bans are unconstitutional, but merely that the government must present at least some justification for such a law if it is to be upheld.

In *Doe v. Jindal*, nine prostitutes convicted under Louisiana’s Crimes Against Nature by Solicitation statute, which makes a separate offense for those who solicit oral or anal sex, challenged the statute’s requirement that they register as sex offenders as a violation of the 14th

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Florida’s sex offender notification/registration scheme and sex offender DNA registration statute were constitutional).


194 *Doe v. City of Albuquerque*, 667 F.3d at 1134.

195 *Id.*

196 *Id.* at 1133-1136.

197 *Id.* at 1115 (“Complicating our inquiry is the fact that the City, relying on a mistaken interpretation of case law regarding facial challenges, erroneously contended that it had no burden to do anything in response to Doe’s summary judgment motion.”).

198 See *id.* at 1135.
Amendment’s Equal Protection Clause because it treated them differently from those convicted under the regular prostitution statute.\footnote{199} In 2012, the U.S. District Court held that there was no rational basis for treating those convicted under the former statute differently from those convicted under the latter and granted summary judgment to the plaintiffs.\footnote{200}

Again in Louisiana, on June 14, 2011, Governor Bobby Jindal signed into law a statute very similar to Indiana’s.\footnote{201} The law, like

\begin{itemize}
\item[(1)] The using or accessing of social networking websites, chat rooms, and peer-to-peer networks by a person who is required to register as a sex offender and who was previously convicted of R.S. 14:81 (indecent behavior with juveniles), R.S. 14:81.1 (pornography involving juveniles), R.S. 14:81.3 (computer-aided solicitation of a minor), or R.S. 14:283 (video voyeurism) or was previously convicted of a sex offense as defined in R.S. 15:541 in which the victim of the sex offense was a minor.
\item[(2)] The provisions of this Section shall also apply to any person previously convicted for an offense under the laws of another state, or military, territorial, foreign, tribal, or federal law which is equivalent to the offenses provided for in Paragraph (1) of this Subsection, unless the tribal court or foreign conviction was not obtained with sufficient safeguards for fundamental fairness and due process for the accused as provided by the federal guidelines adopted pursuant to the Adam Walsh Child Protection and Safety Act of 2006.
\item[(3)] The use or access of social media shall not be considered unlawful for purposes of this Section if the offender has permission to use or access social networking websites, chat rooms, or peer-to-peer networks from his probation or parole officer or the court of original jurisdiction.
\end{itemize}

\footnote{200} Id. at 1008.
A. The following shall constitute unlawful use or access of social media:
\begin{enumerate}
\item[(1)] The using or accessing of social networking websites, chat rooms, and peer-to-peer networks by a person who is required to register as a sex offender and who was previously convicted of R.S. 14:81 (indecent behavior with juveniles), R.S. 14:81.1 (pornography involving juveniles), R.S. 14:81.3 (computer-aided solicitation of a minor), or R.S. 14:283 (video voyeurism) or was previously convicted of a sex offense as defined in R.S. 15:541 in which the victim of the sex offense was a minor.
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\item[(3)] The use or access of social media shall not be considered unlawful for purposes of this Section if the offender has permission to use or access social networking websites, chat rooms, or peer-to-peer networks from his probation or parole officer or the court of original jurisdiction.
\end{enumerate}

C. For purposes of this Section: (1) “Chat room” means any Internet website through which users have the ability to communicate via text and which allows messages to be visible to all other users or to a designated segment of all other users. (2) “Minor” means a person under the age of eighteen years. (3) “Peer-to-peer network” means a connection of computer systems whereby files are shared directly between the systems on a network without the need of a central server. (4) “Social networking website” means an Internet website that has any of the following capabilities: (a) Allows users to create web pages or profiles about themselves that are available to the general public or to any other users. (b) Offers a mechanism for
Indiana’s, prohibited certain sex offenders, specifically those whose crimes involved children, from accessing “social networking websites, chat rooms, and peer-to-peer networks.” John and James Doe challenged the statute (pseudonymously, as is standard in such cases) as facially overbroad and unconstitutionally affecting their First Amendment rights. The plaintiffs contended that the law would prohibit them not only from accessing many websites, including Facebook, but also, “NOLA.com, CNN.com, FoxNews.com, ESPN, BBC or Reuters, NYTimes.com, Politico.com, Newsweek, The Economist, National Geographic, YouTube, Getagameplan.org (Louisiana's official hurricane preparedness website), Gmail, Yahoo, Hotmail, AOL, LinkedIn, Monster, USAJOBS.gov (the federal government’s employment database), eBay, Zagat, and Amazon” because the sites “have a mechanism for communication among users.”

The court acknowledged that the states have a legitimate interest in protecting children from sex offenders; however, relying on Hill v. City of Houston, the court held that the Louisiana Act was not crafted narrowly or precisely enough to pass constitutional muster.

The strongest condemnation came in a recent decision by the United States District Court for Nebraska that held unconstitutional a communication among users, such as a forum, chat room, electronic mail, or instant messaging.

D. (1) Whoever commits the crime of unlawful use or access of social media shall, upon a first conviction, be fined not more than ten thousand dollars and shall be imprisoned with hard labor for not more than ten years without benefit of parole, probation, or suspension of sentence. (2) Whoever commits the crime of unlawful use or access of social media, upon a second or subsequent conviction, shall be fined not more than twenty thousand dollars and shall be imprisoned with hard labor for not less than five years nor more than twenty years without benefit of parole, probation, or suspension of sentence.


Id.

Hill v. City of Houston, 789 F.2d 1103, 1113 (5th Cir.1986) (holding that a statute that made it unlawful to “in any manner oppose, molest, abuse or interrupt” a police officer in the execution of his duty was unconstitutionally overbroad).

Doe v. Jindal, 853 F. Supp. 2d at 605 (the court also found the Act to be unconstitutionally vague).
Nebraska law which, for all its similarities with the Indiana law, could have been the product of bi-state cooperation. Judge Kopf remarked in the opening of the opinion that if the people of Nebraska want to go to hell it is his job to get them there; however, he chided, they must get there constitutionally and Nebraska’s sex offender legislation “violently swerved from that path.”

The Nebraska statutes at issue in Doe v. Nebraska criminalized certain use of social networking sites by sex offenders, required them to provide all identifiable internet information, such as email addresses, passwords, blogs, screen-names, etc., and required them to consent to searches of their computers and electronic devices by law enforcement. The court held that the statute that banned access to social networking sites was not narrowly tailored and did not leave open ample alternative channels. Instead, the court said that the legislation went too far and covered too much, admonishing lawmakers to “use a scalpel rather than a blunderbuss” in crafting laws. The really shocking ruling, however, was yet to come.

The court found that the intent of the legislature in passing these statutes was to punish sex offenders rather than to protect the public, and that the bill’s sponsor had acted out of “rage” and “revulsion.” Accordingly, the court held that the statutes were unconstitutional because they violated the state and federal prohibitions of ex post facto laws. The court, noticeably troubled, stated:

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208 Id. (“The age of the triggering conviction does not matter. The fact that the offender has a clear record since the conviction does not matter. The fact that the offender is not under court supervision does not matter. The fact that the offender legitimately needs access to the banned sites to make his or her living does not matter. The fact that the offender legitimately needs access to the banned sites to obtain news that probably cannot be obtained in another way does not matter. The fact that the offender legitimately needs access to the banned sites to check on the health and well being of his children while they are in a distant hospital does not matter. The fact that the offender did not use any of the banned sites to commit his or her crime does not matter.”).

209 Id. at 20.

210 See id. at 4.
These statutes retroactively render sex offenders, who were sentenced prior to the effective date of these statutes, second-class citizens. They are silenced. They are rendered insecure in their homes. They are denied the rudiments of fair notice. In Nebraska’s “rage” and “revulsion,” they are stripped of fundamental constitutional rights. In short, sex offenders who were sentenced prior to the enactment of these laws are punished.\textsuperscript{211}

This language goes beyond where the Seventh Circuit or any other court has gone, actively accusing the state of acting improperly in enacting such laws. Unlike previous courts, the court refused to uphold sex offender legislation on possibility and tradition alone.

State courts have also begun to reject sex offender legislation as unconstitutional on both state and federal grounds.\textsuperscript{212} For instance, four state supreme courts recently held that sex offender legislation violated the respective state constitutional prohibitions against ex post facto laws.\textsuperscript{213} However, \textit{Doe}, as the first big federal appellate decision,\textsuperscript{214} stands at the forefront of the recent decisions that have confirmed that sex offenders are still deserving of constitutional rights despite their previous actions, and that legislatures cannot create statutes without some justification for doing so. The next section examines what the \textit{Doe} ruling means for the future of sex offender legislation and litigation.

\textsuperscript{211} \textit{Id.} at 34.


\textsuperscript{214} Just three days before the Seventh Circuit’s decision, the Tenth Circuit struck down an Albuquerque law prohibiting registered sex offenders from accessing public libraries. However, rather than a meaningful ruling, the decision was likely due to an error on the part of the City’s attorneys who thought they had no burden in the case. \textit{See} \textit{Doe v. City of Albuquerque}, 667 F.3d 1111, 1115 (10th Cir. 2012).
D. Moving Forward

After Doe, it is clear that where First Amendment rights are implicated, state sex offender laws do not pass constitutional muster just because the state claims an interest in protecting children.\textsuperscript{215} Furthermore, Doe suggests certain existing laws may be vulnerable to challenge. For instance, the Illinois “Santa Clause statute” states as follows:

(c-2) It is unlawful for a child sex offender to participate in a holiday event involving children under 18 years of age, including but not limited to distributing candy or other items to children on Halloween, wearing a Santa Claus costume on or preceding Christmas, being employed as a department store Santa Claus, or wearing an Easter Bunny costume on or preceding Easter. For the purposes of this subsection, child sex offender has the meaning as defined in this Section, but does not include as a sex offense under paragraph (2) of subsection (d) of this Section, the offense under subsection (c) of Section 11-1.50 of this Code. This subsection does not apply to a child sex offender who is a parent or guardian of children under 18 years of age that are present in the home and other non-familial minors are not present.\textsuperscript{216}

The Santa Claus statute restricts expressive conduct protected by the First Amendment because non-verbal communication is protected by the First Amendment, especially where “[a]n intent to convey a particularized message [is] present” and “the likelihood [is] great that the message would be understood by those who viewed it.”\textsuperscript{217} The statute prevents offenders from being employed as mall Santas, which it is hard to find fault with. However, it would also prevent an offender from performing in a play or comedic holiday performance

\textsuperscript{215} See Doe v. Prosecutor, Marion Cnty., Ind., 705 F.3d 694, 695 (7th Cir. 2013).
\textsuperscript{216} 720 ILCS § 5/11-9.3 (2013).
that involved dressing like one of these characters. Furthermore, and more worrisome, the law also prevents a child sex offender from participating in a holiday event involving children under the age of 18.” This provision could potentially prohibit substantial expression. For instance, it would arguably prevent offenders from participating in church activities, such as Christmas or Hanukkah services, attending an Earth Day or Labor Day rally, taking part in a New Year’s Eve celebration, or a Thanksgiving dinner. Even putting aside any void for vagueness arguments,\(^{218}\) this statute is on shaky ground. Although the Santa Claus statute, unlike the Indiana law, limits its application only to sex offenders who committed offenses involving minors, given the massive potential limitation on expression and the lack of evidence that it would be successful, a strong argument could be made that it is not narrowly tailored to serve a compelling governmental interest. Like many sex offender laws, the Santa Clause statute is based upon myth and fear rather than empirical evidence or rational debate.\(^{219}\) Thus, just as the state in Doe failed to show any evidence that individuals covered by the law posed the specific risk sought to be alleviated, Illinois would likely be unable to show a legitimate risk of offenses on the dates, times, or places covered by the law.

Relatedly, laws forbidding sex offenders from public libraries are becoming increasingly popular.\(^{220}\) Although a library ban was very

\(^{218}\) A “holiday event” is not clearly defined in the statute and could be unconstitutional on that ground alone. See United States v. Harriss, 347 U.S. 612, 617 (1954)(“The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.”).

\(^{219}\) See M. Benjamin Snodgrass, The Specter of Sex Offenders on Halloween: Unmasking Cultural, Constitutional, and Criminological Concerns, 71 OHIO ST. L.J. 417, 419 (2010) (despite a desire to restrict what sex offenders can do, research has uncovered only one incident of a person who victimized a child during the course of trick-or-treating.”).

\(^{220}\) See Jennifer Ekblaw, Not in My Library: An Examination of State and Local Bans of Sex Offenders from Public Libraries, 44 IND. L. REV. 919 (2011)(“ . . . political leaders in Albuquerque, New Mexico, New Bedford, Massachusetts, Quincy, Massachusetts, Methuen, Massachusetts, Stephenville, Texas, Rowan County, North Carolina, and the State of Iowa have attempted to protect children by prohibiting sex offenders from entering public libraries.”).
recently struck down as unconstitutional by the Tenth Circuit, the court strongly hinted that its decision was based on the state’s error to appreciate its burden, and that a future statute could easily pass muster. Thus, it is not yet clear how courts will react to challenges to such statutes when actually defended by the state. However, based on Doe, there is a strong argument that this type of statute is unconstitutional. The First Amendment includes not just a right to speak but also to receive information. Therefore, the library bans should receive the same intermediate review as the Indiana statue in Doe. Under this intermediate review, most such statutes would clearly fail unless they targeted only those offenders who the state had reason to believe were at a high risk of recidivism. Furthermore, a state would have to show a real risk rather than “simply posit the existence of the disease sought to be cured,” which may be hard considering the relative rarity of attacks on children by strangers and the fact that the number of such attacks that have taken place likely number in the single digits in the entire United States. Doe would be a persuasive case to sight in a challenge to any such statute.

The Seventh Circuit indicated in Doe that a constitutional reworking of Indiana’s law was possible. However, for a new law to be constitutional, Indiana “must do more than simply posit the existence of the disease sought to be cured,” and “the regulation

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221 See Doe v. City of Albuquerque, 667 F.3d 1111, 1115 (10th Cir. 2012) (“Complicating our inquiry is the fact that the City, relying on a mistaken interpretation of case law regarding facial challenges, erroneously contended that it had no burden to do anything in response to Doe’s summary judgment motion. Consequently, the City failed to present any evidence as to the reasons or justification for its ban, whether the ban was narrowly tailored to address the interest sought to be served, or whether the ban left open alternative channels for receiving information. Had the City done so, it is not difficult to imagine that the ban might have survived Doe’s challenge, for we recognize the City’s significant interest in providing a safe environment for its library patrons, especially children.”).

222 See id.

[must] in fact alleviate those harms in a direct and immediate way.”

The next section discusses what future laws might look like.

E. Indiana Legislators Respond to the Seventh Circuit’s Ruling

The Doe decision had scarcely been published when Hoosier legislators began scrambling to enact a constitutional version of the recently rejected law. The bill, which is currently pending, limits applicability of the act to those sex offenders convicted of either class A felony child molestation or child solicitation. In addition, the Act makes direct solicitation of a minor via social networking sites a crime. Although the second provision is likely constitutional, the legislators’ effort to render constitutional the first provision is insufficient. Indiana must “present some evidence, beyond conclusory assertions,” in order to justify legislation limiting access to social networking sites. The revised Indiana bill, although certainly narrower than its predecessor, will fail for some of the same reasons that the initial attempt did, particularly that there is little to no evidence to show that this regulation would actually make Hoosier children safer. State senators Jim Merrit and John Wasserman merely amended the previous statute to apply to a slightly narrower group of offenders. However, studies have shown that not only are sex offenses much more likely to be committed by a person already

224 See Doe v. Prosecutor, Marion Cnty., Ind., 705 F.3d 694, 701 (7th Cir. 2013).
226 See id.
227 Id.
228 It does; however, appear to be a mere backdoor way of increasing potential prison terms as the court mentioned in its decision. See Doe v. Prosecutor, Marion Cnty., Ind., 705 F.3d 694, 701 (7th Cir. 2013).
229 See Doe v. Prosecutor, Marion Cnty., Ind., 705 F.3d at 702.
231 See id.
known to the victim, but that when sex offenders do meet their “victims” over the internet they are almost always between the ages of 13 and 17 and the sex is consensual. Thus, if sex offenders grooming child victims over the internet is not the problem legislators and the media make it out to be, then Indiana’s law will have to be even narrower to justify such a substantial abridgement of First Amendment rights. The Seventh Circuit suggested that a similar law that applies only to those “individuals whose presence on social media impels them to solicit children” would be constitutional. For instance, if the law prohibited only those registered sex offenders whose triggering offense involved minors and the Internet, it would likely be constitutional. That is not what the senators have proposed. Another solution for Indiana would be to hold individualized hearings on individuals deemed likely to pose a high risk of online recidivism. Unfortunately, Indiana’s revised statute would likely fail a constitutional challenge because its proponents are relying on the same reactionary political motivations that have created most of our modern sex offender laws, rather than attempting a serious examination of the issues.

In the coming years, there is no doubt that legislatures, like Indiana’s, will target sex offenders’ online activities. Furthermore, some of these laws will pass constitutional muster. In crafting new laws, legislatures should take the following approach: (1) determine

232 See Janis Wolak et al., *Online “Predators” and their Victims: Myths Realities and Implications for Prevention and Treatment*, # AMERICAN PSYCHOLOGIST 63, 111-128 (2008), available at http://www.unh.edu/ccrc/pdf/Am%20Psy%202008.pdf (“Many of the media stories and much of the Internet crime prevention information available suggest that it is naïve and inexperienced young children who are vulnerable to online child molesters (e.g., Blustein, 2007; Boss, 2007; Crimaldi, 2007; Manolatos, 2007). However, 99% of victims of Internet-initiated sex crimes in the N-JOV Study were ages 13 to 17 (M = 14.46, SD = .14), and none were younger than 12 (Wolak, et al., 2004)”).

233 Doe v. Prosecutor, Marion Cnty., Ind., 705 F.3d 694, 702 (7th Cir. 2013).

234 See id.

235 See id.

236 Press Release, supra note 231.
the exact evil that needs preventing; (2) hold hearings on how to best target that evil emphasizing empirical data and serious discussion and discouraging invective;\(^{237}\) and (3) craft a law based on the hearings that targets the exact evil. If these steps are followed, not only will the outcome likely be constitutional, but it also will be much more likely to actually protect children and, in general, to keep society safer.

CONCLUSION

_Doe_, along with its brethren, may not signal a sea change in the courts’ approach to constitutional challenges to sex offender legislation, but there is an undeniable shift in the courts towards more sensible review of sex offender legislation, an area where irrational legislation has historically been upheld almost without question. While the First Amendment is not as clearly implicated in the majority of sex offender regulation as it was in _Doe_, First Amendment analysis can reasonably be argued to apply to some existing regulations, such as those prohibiting sex offenders from public libraries. Additionally, because much of modern sex offender legislation is crafted based on gut reaction rather than serious study, some statutes may well fail even rational basis review in the future. As studies increasingly show the inefficiency of current laws and break down the misconceptions surrounding sex offenders, there may be cause to revisit challenges to existing legislation.

Additionally, legislatures should take heed of both the courts’ recent skepticism and the emergence of new data exposing the misconceptions surrounding sex offenders, and they should use these tools as motivation to craft better laws. If a safe society is the goal, states should focus on enacting laws that actually prevent recidivism and educate society on real risks, rather than creating laws based on emotion, tradition and politics. _Doe_ is a victory not only for the plaintiff in the case, but also for society, as it means that constitutional rights still exist even for the least popular members of society. While

Doe probably does not mean that sex offenders have found a friend in the courts, they may have one fewer enemy.
THE RIGHT TO SPEAK WITH ANOTHER’S VOICE—WHY THE SEVENTH CIRCUIT SHOULD CHARACTERIZE THE RIGHT TO RECORD AS THE LIMITED RIGHT TO GATHER INFORMATION UNDER THE FIRST AMENDMENT

PRAVA PALACHARLA


INTRODUCTION

Recognizing the ease with which oral communication can be recorded and distributed in an increasingly technological society, the Illinois General Assembly enacted the Illinois Eavesdropping Law (IEL) to protect an individual’s right not to be recorded without her permission.¹ The IEL, most recently amended in 1994, prohibits recording oral communication between conversing parties without both parties’ consent.² Notably, the IEL criminalizes recording without consent, regardless of whether the conversing parties intended the communication to be private.³

Tension between eavesdropping statutes and the First Amendment brought similar statutes under review in numerous

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² Id.
³ Id.
circuits throughout the country. In 2012, the Seventh Circuit addressed this issue in *American Civil Liberties Union v. Alvarez*. In *Alvarez*, the American Civil Liberties Union ("ACLU") sought declaratory and injunctive relief from enforcement of the IEL over its police accountability program, in which ACLU members would publish audiovisual recordings of police officers performing their duties. Overturning the district court's dismissal of the ACLU’s amended complaint, Judge Sykes, writing for the majority, granted the ACLU injunctive relief and analyzed in detail the constitutionality of the IEL under the First Amendment. In doing so, the majority held that the ACLU would likely succeed on the merits of its claim that the IEL violates rights protected by the First Amendment. Judge Posner dissented, arguing that the IEL survives the intermediate scrutiny test under the First Amendment because it protects the legitimate government interest of privacy.

This Comment proposes that while the Seventh Circuit correctly found that the IEL is likely unconstitutional under the First Amendment, the court incorrectly characterized the right to record as the expansive right of expression guaranteed by the plain text of the First Amendment. Instead, the Seventh Circuit should have found that the right to record falls within the more narrow right to gather information under the First Amendment, which the Supreme Court of the United States first dictated in *Branzburg v. Hayes*. Part I of this Comment provides an overview of the IEL and the Seventh Circuit’s decision in *Alvarez*. Part II of this Comment analyzes how the Supreme Court of the United States and other federal circuits have characterized the right to record as a right to gather information under the First Amendment. Finally, Part III of this Comment argues that the

4 Glik v. Cuniffee, 212 F.3d 1332, 1333 (11th Cir. 2000).
6 Id.
7 Id.
8 Id.
9 Id. at 610 (Posner, J., dissenting).
10 Id. at 586 (majority opinion); *Branzburg v. Hayes*, 408 U.S. 665, 679-680 (1972).
Seventh Circuit should adopt this narrower interpretation of the First Amendment and characterize the right to record as the limited right to gather information under the First Amendment.

I. BACKGROUND

A. The evolution of the Illinois Eavesdropping Law

In 1961, the Illinois General Assembly enacted the original IEL, which prohibited the use of “an eavesdropping device to hear or record all or part of any oral conversation without the consent of any party thereto.”\(^{11}\) An eavesdropping device is defined as any device that may be used to hear or record an oral conversation for the purpose of eavesdropping.\(^{12}\) The committee comment notes of the 1961 statute indicate a clear intent to protect the privacy of conversation between individuals.\(^{13}\) However, the statute was amended in 1976, emphasizing the legislature’s concern for consent over privacy.\(^{14}\)

The 1976 amendment required the consent of all parties to the conversation before the conversation could be recorded legally.\(^{15}\) However, in 1986, the Illinois Supreme Court in People v. Beardsley narrowly interpreted the 1976 amendment to prohibit recording only those conversations that were intended to be private, regardless of consent.\(^{16}\) In Beardsley, the defendant was convicted under the IEL for recording two police officers from the back of their squad car.\(^{17}\) The Illinois Supreme Court reversed the defendant’s conviction under the IEL, despite the fact that the defendant did not have permission to record either police officer, as required by the 1976 amendment.\(^{18}\) Instead, the court interpreted the IEL statute to apply only to those

\(^{11}\) Illinois Eavesdropping Law, 720 ILCS § 5/14-1(a) (1994).
\(^{12}\) Id.
\(^{14}\) § 5/14-2(a)(1).
\(^{15}\) Id.; Gamrath, supra note 13, at 363-64.
\(^{16}\) People v. Beardsley, 115 Ill.2d 47, 49 (1986).
\(^{17}\) Id. at 50.
\(^{18}\) Id.
situations where the conversing parties had an expectation of privacy. Because the police officers conversed in front of the defendant, the court held they had no expectation of privacy from his recording. Accordingly, the court reversed the defendant’s conviction, finding that there was no violation of the IEL.

Eight years later, the Illinois Supreme Court reaffirmed its interpretation that recording a conversation was only punishable under the IEL if the conversing parties had an expectation of privacy. In People v. Herrington, a defendant was found not to have violated the IEL where she secretly recorded a conversation she had with a suspect without his consent. Like in Beardsley, the court in Herrington found that the suspect had no expectation of privacy from the person he was conversing with, whether or not that person previously obtained his consent.

In response to the Illinois Supreme Court’s reluctance to give weight to the consent requirement of the 1976 amendment, the Illinois legislature amended the IEL once again in 1994. This time the legislature unequivocally contradicted the Illinois Supreme Court’s precedent by prohibiting the recording of conversations “regardless of whether one or more of the parties intended their communication to be of a private nature,” thus overriding the Beardsley and Herrington decisions. In doing so, the Illinois legislature gave teeth to the 1976 consent amendment, and explicitly eliminated a privacy requirement under the IEL.

19 Id. at 56.
20 Id. at 64.
21 Id. at 65.
22 People v. Herrington, 163 Ill.2d 507, 510 (1994).
23 Id. at 511-12.
24 Beardsley, 115 Ill.2d at 50; Herrington, 163 Ill.2d at 510.
25 Illinois Eavesdropping Law, 720 ILCS § 5/14-1(d) (1994); Beardsley, 115 Ill.2d at 65; Herrington, 163 Ill.2d at 511.
26 § 5/14-1(d); Beardsley, 115 Ill.2d at 65; Herrington, 163 Ill.2d at 511.
27 720 ILCS §§ 5/14-1(d)-2(a)(1); Gamrath, supra note 13, at 363-64.
B. American Civil Liberties Union v. Anita Alvarez

In 2012, the American Civil Liberties Union challenged the constitutionality of the Illinois legislature’s amendment to the IEL through a preliminary injunction. In Alvarez, the Seventh Circuit, in evaluating the likelihood of the plaintiff’s success on the merits, conducted a detailed analysis of the constitutionality of the IEL, noting that in First Amendment cases, “the likelihood of success on the merits will often be the determinative factor.” The court also noted that appellate review of an injunction is appropriate where the case “raises only a legal question,” like in Alvarez.

The district court found the ACLU lacked standing for two reasons, but the first was cured before appeal. The second reason was the basis for the district court’s dismissal of the ACLU’s complaint. The district court dismissed the plaintiff’s complaint because it found that the First Amendment does not protect a right to audio record, and thus the ACLU could not allege a constitutional injury. However, on appeal, the majority held that the right to audio record is expression protected by the First Amendment, so the court allowed the case to proceed.

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29 Am. Civil Liberties Union of Ill. v. Alvarez, 679 F.3d 583, 590 (7th Cir. 2012) (citing Wis. Right to Life State PAC v. Barland, 664 F.3d 139, 151 (7th Cir. 2006)) (holding that plaintiff’s injunction was properly decided on appeal because it raised a pure legal question under the First Amendment).
30 After the ACLU amended its complaint, the District Court found the ACLU had standing based on a credible threat of prosecution. Alvarez, 679 F.3d at 591.
31 Id.
32 Id.
33 Id. at 590.
1. The Majority’s Analysis

The majority began its analysis by discounting the district court’s reading of Potts v. City of Lafayette. The district court had based its dismissal of the ACLU’s complaint on the Seventh Circuit’s language in Potts, which stated “there is nothing in the Constitution which guarantees the right to record a public event.” However, the Seventh Circuit found the district court’s reading of Potts to be too narrow, and pointed to other language within the opinion which stated that the right to record, or the right to gather information, may be limited under proper time, place or manner restrictions applicable to content-neutral regulations. The court cited this language as evidence that, even in Potts, the court considered the right to record to be protected, at least in part, by the First Amendment.

The district court also dismissed the ACLU’s complaint because it found there could be no reciprocal right to receive speech without a willing speaker. However, the Seventh Circuit reasoned that Alvarez does not implicate the “willing speaker doctrine” because the speech has already taken place, been heard, or been “received.” The court noted that anyone standing within earshot of an officer can hear what he says, so the speech has been received, and it requires no “presupposed willing speaker.” Therefore, the remaining question is only whether the government can restrict the way in which speech is received. Accordingly, the Seventh Circuit centered its analysis in Alvarez on this issue. The court analyzed the right to audio record as

34 Alvarez, 679 F.3d at 591 (citing Potts v. City of Lafayette, 121 F.3d 1106, 1111 (7th Cir. 1997)).
35 Id.
36 Potts, 121 F.3d at 1111 (holding that an officer may refuse entry to an onlooker at a Ku Klux Klan rally for bringing a video camera onsite because the camera could be used as a weapon or projectile in a volatile situation).
37 Alvarez, 679 F.3d at 590-91.
38 Id. at 592.
39 Id.
40 Id.
41 Id. at 595.
42 Id. at 595.
two protected First Amendment rights: a) the right of free expression; and b) the right to gather information. First, the court argued that audio recording is an integral step in the speech process, such as note taking, and should be equated with free expression. Next, the court explored the narrower right to gather information under the First Amendment.

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\[45\] a. The Seventh Circuit's characterization of the right to record as free expression.

The majority stated that audiovisual recordings are media of expression commonly used for the preservation and dissemination of information and ideas and thus are “included within the free speech” guarantee of the First and Fourteenth Amendments. The court reasoned that by prohibiting audiovisual recording, the IEL “forecloses an entire medium of expression,” preventing individuals from disseminating audio recordings, and in turn, limiting free expression.

The court cited various examples to illustrate this notion, including an individual’s ability to take notes, write, or paint a public event without the consent of those participating. The majority found these actions to be part of a process of expression, which if regulated, would ultimately regulate free expression. The Seventh Circuit referred to the Supreme Court’s campaign-finance cases to further illustrate this point. In *Buckley v. Valeo*, the Supreme Court held that restricting how money can be spent on political communication necessarily reduces the quantity and quality of expression. Similarly, the Seventh Circuit argued that restricting the medium of audiovisual

\[43\] Id. at 598.
\[44\] Id. at 595-98.
\[45\] Id. at 598.
\[46\] Id. at 595.
\[47\] Id. at 596.
\[48\] Id. at 595-96.
\[49\] Id.
\[50\] Id. at 596-97.
\[51\] Id. at 596 (citing *Buckley v. Valeo*, 424 U.S. 1, 4 (1976)).
recording would also limit the breadth and depth of topics, which would otherwise be discussed after the distribution of these recordings.\textsuperscript{52} More specifically, the court reasoned that the ACLU’s intent to record police officers would spark discussion, criticism, and speech about government conduct, speech that lies at the core of the First Amendment.\textsuperscript{53} The court held that because the IEL restricts a medium of expression, it restricts an integral step in the speech process.\textsuperscript{54}

\textit{b. The Seventh Circuit’s characterization of the right to record as the narrower right to gather information.}

The majority then transitioned from its argument that audiovisual recording is a step in the overall process of expression to exploring the narrower right to gather information under the First Amendment.\textsuperscript{55} The court cited the Supreme Court opinion \textit{Branzburg v. Hayes}, where a journalist was compelled to reveal his confidential source to a grand jury despite the burden this revelation had on his newsgathering function.\textsuperscript{56} Despite the outcome of \textit{Branzburg}, the Supreme Court acknowledged within the opinion that newsgathering qualifies for First Amendment protection, noting, “Without some protection for seeking out the news, freedom of the press could be eviscerated.”\textsuperscript{57} However, the Court in the same opinion cautioned against an expansive right to gather information.\textsuperscript{58} Ultimately, the Seventh Circuit relied on \textit{Branzburg} to establish that some, at least limited, right to gather information exists under the First Amendment.\textsuperscript{59}

\begin{footnotes}
\footnoteref{52}{\textit{Alvarez}, 679 F.3d at 596-97.}
\footnoteref{53}{\textit{Id.} at 597.}
\footnoteref{54}{\textit{Id.} at 599.}
\footnoteref{55}{\textit{Id.} at 597.}
\footnoteref{56}{\textit{Id.} at 598; \textit{Branzburg} v. Hayes, 408 U.S. 665, 667 (1972).}
\footnoteref{57}{\textit{Alvarez}, 679 F.3d at 598; \textit{Branzburg}, 408 U.S. at 681.}
\footnoteref{58}{\textit{Alvarez}, 679 F.3d at 598-99.}
\footnoteref{59}{\textit{Id.} at 597-98.}
\end{footnotes}
c. The Seventh Circuit applies its analysis to find that the statute is likely unconstitutional under the First Amendment.

The court then analyzed which standard of scrutiny should be applied to the IEL. Because content-specific regulations are presumptively invalid, they are subject to strict scrutiny. Contrarily, content-neutral regulations are subject to intermediate scrutiny, requiring that a statute’s means reasonably achieve a significant governmental interest. Thus, a content-neutral regulatory measure may be permissible as a reasonable “time, place, or manner restriction.”

In Alvarez, the court found it “unlikely that strict scrutiny will apply” because the IEL restricts all audio recordings regardless of what is recorded and thus is content-neutral on its face. In holding so, the court rejected the ACLU’s argument that because a court would have to hear the recording to determine if it violated the IEL, it must be content specific. On the contrary, the court acknowledged that it is often necessary for a judicial body to hear or see speech to determine if it violates a law, but that need alone does not make the law a content-specific regulation. Accordingly, the court applied the intermediate standard of scrutiny and found that the statute is likely unconstitutional under even this lower standard.

Although the court acknowledged that the government has a significant interest in privacy, it held that the 1994 amendment to the IEL does not reasonably achieve this interest. Because the 1994 amendment criminalizes recording conversation without the consent of all the parties, regardless of the fact that the speech was said publicly,

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60 Id. at 603.
61 Id.
62 Id. at 604-605.
63 Id. at 605.
64 Id. at 604.
65 Id. at 603-604.
66 Id.
67 Id. at 607.
68 Id. at 605.
out-loud, and without any secrecy, the court reasoned that it is overly broad, and thus overly restricting of a protected First Amendment right.\footnote{Id. at 607.} Under the 1994 amendment, if a person did not obtain the consent of a public speaker, she could be prosecuted under the IEL for recording conversation that was \textit{intended} to be public. As such, the court went to great lengths to distinguish a statute that criminalizes the recording of private conversation from a statute that criminalizes the recording of any conversation.\footnote{Id. at 605-06.} Accordingly, the Seventh Circuit found that the IEL is likely unconstitutional under the First Amendment, and granted the ACLU’s preliminary injunction.\footnote{Id. at 608.}

2. Judge Posner’s Dissent

Judge Posner, in his dissent, cited three main reasons for dissenting from the majority’s analysis: 1) people retain an expectation of privacy even in public forums; 2) there is a significant government interest in ensuring the safety of officers, informants, and witnesses; and 3) the majority’s interpretation will have a chilling effect on speech.\footnote{Id. at 610.} For these reasons, Judge Posner would have affirmed the decision of the District Court and held for the defendant in this case.\footnote{Am. Civil Liberties Union of Ill. v. Alvarez, 679 F.3d 583, 610 (7th Cir. 2012), \textit{cert. denied}, 133 S. Ct. 651 (2012) (Posner, J., dissenting).}

First, Judge Posner went to great lengths to establish that people retain some expectation of privacy even in public settings. He cited various examples to illustrate this point, including a situation where a police officer may be speaking with a victim in a low voice on a crowded sidewalk.\footnote{Id. at 610.} He argued that even though there are people within earshot, as the IEL requires, the conversing parties might still have a reasonable expectation of privacy.\footnote{Id.} Civilians speaking to police officers might also retain an expectation of privacy when they

\footnotesize\begin{itemize}
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\item \footnote{Id. at 607.}
\item \footnote{Id. at 605-06.}
\item \footnote{Id. at 608.}
\item \footnote{Id. at 610.}
\item \footnote{Id.}
\item \footnote{Id.}
\end{itemize}
are conversing with an officer. This holds particularly true when the civilian is a victim, witness, or informant trying to communicate urgently, but privately, with the police. Judge Posner asserted that public spaces still include speakers with reasonable privacy expectations. Moreover, he argued that the IEL seeks to protect exactly this privacy by requiring consent of the conversing parties. Thus, he suggested that there is a governmental interest in protecting private conversation that occurs in public places. As such, under his analysis, a consent requirement is a regulation within the means of the legislature to proscribe.

Second, Judge Posner cautioned the majority on the dangerous effect the Alvarez decision may have on future police activity. He painted a picture where both civilians and officers are put at risk when private information is released to the public. He also stated that distracting officers from their duties by requiring them to anticipate a recording in a society where almost every individual regularly carries a recording device in their phone is detrimental to the safety of the officer and the people he seeks to protect.

Third, and finally, Judge Posner used both of these compelling governmental interests to illustrate that the majority’s attempt to protect First Amendment rights will have the exact opposite effect, and will instead chill free expression. Judge Posner discussed the significant impact that a recording has on the credibility of an individual, much more of an impact than note taking or recitation. He emphasized that this is particularly true in a society where things are uploaded to the Internet and distributed within seconds. Judge Posner argued that allowing individuals to take audio recordings of

76 Id. at 611-612.
77 Id. at 610.
78 Id. at 610.
79 Id.
80 Id. at 611.
81 Id. at 612-13.
82 Id. at 610.
83 Id. at 610.
84 Id. at 614.
85 Id. at 612.
people without their consent will make people overly cautious about what they can say, thus deterring free expression. Consequently, Judge Posner dissented from the majority, and found that the ACLU would not likely succeed on the merits.

II. SUPREME COURT AND FEDERAL CIRCUITS INTERPRET THE RIGHT TO RECORD AS THE RIGHT TO GATHER INFORMATION

Though the Supreme Court has never ruled on the right to take an audiovisual recording of a police officer, it has more broadly acknowledged a First Amendment right to gather information. Various circuits, in interpreting the right to audio record officers, have ruled in conjunction with the Supreme Court’s analysis in Branzburg, and found that the right to record stems from a limited First Amendment right to gather information.

A. Supreme Court

As discussed in Section B of this Comment, the Supreme Court of the United States first recognized the right to gather information in Branzburg v. Hayes. In that case, the Court reasoned that in order for the press, or people, to have the right to speak, they must first have some smaller right to seek out information. Consequently, the Supreme Court interpreted the First Amendment to protect at least some right to gather information.

However, the Court has also cautioned against finding that the right to speak and publish carries with it the unrestrained right to gather information. Instead, the Court acknowledged that the right to gather information, if interpreted too broadly, would have detrimental effects on government functions, such as judicial, administrative, and

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86 Id. at 613-14.
88 Glik v. Cuniffee, 212 F.3d 1332, 1333 (11th Cir. 2000).
89 Branzburg, 408 U.S. 665 at 708.
even military operations. The right to gather information, when characterized as a narrow First Amendment right, can be weighed properly against other governmental interests, such as privacy. However, as the Seventh Circuit noted in Alvarez, the Supreme Court has not clarified the scope of the right to gather information since Branzburg.

B. Other Circuits

Since Branzburg, other federal circuits have relied upon the Supreme Court’s delineation of the First Amendment right to gather information when evaluating the validity of eavesdropping statutes. The First Circuit in Glik v. Cuniffee held that police officers were not entitled to qualified immunity for arresting the plaintiff for recording the officers performing their public duties. Under a qualified immunity analysis, a plaintiff must demonstrate that an officer violated a clearly established constitutional right. In Glik, the court held that the officers violated the plaintiff’s clearly established right to record matters of public concern. Notably, the court reasoned that the right to record matters of public concern derives from the limited right to gather information under the First Amendment, rather than the expansive right of free expression.

Similarly, the Eleventh Circuit in Smith v. City of Cumming held that the right to photograph and videotape police conduct is protected by the First Amendment right to gather information about what public officials do on public property. The court further held that the right to gather information is a limited First Amendment right that is subject to reasonable time, place and manner restrictions.

Though the Third Circuit Court of Appeals has not heard this issue, its district courts have also reasoned in Robinson v. Fetterman

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91 Branzburg, 408 U.S. 665 at 706.
92 Alvarez, 679 F.3d at 599-600.
93 Glik, 212 F.3d at 1333.
94 Id.
95 Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000).
96 Id. at 1332-1333.
and *Pomykacz v. Borough of West Wildwood* that the right to film police officers in the performance of their public duties is derived from the right to *gather information* under the First Amendment.  

The Supreme Court of the United States has recognized a limited First Amendment right to gather information. When presented with eavesdropping statutes, several circuits, including the First, Third, and Eleventh Circuits, have all interpreted the right to audio record as a right to gather information under the First Amendment, subject to reasonable time, place and manner restrictions. Similarly, the Seventh Circuit should also find that the right is derived from a limited right to gather information under the First Amendment, rather than equating audiovisual recording to free expression.

III. SEVENTH CIRCUIT SHOULD INTERPRET THE RIGHT TO AUDIO RECORD AS A LIMITED FIRST AMENDMENT RIGHT TO GATHER INFORMATION

A. The Seventh Circuit’s Flawed Legal Reasoning

The Supreme Court of the United States has not yet decided whether the right to audio record officers is free speech. Instead, the Court has set out a limited right to gather information under the First Amendment. The circuits have interpreted the right to audio record government officials as a right to gather information under the First Amendment. The Seventh Circuit should follow the precedent outlined by the Supreme Court and other federal circuits and find that the First Amendment right raised by the IEL is the right to gather information, rather than free expression itself.

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98 *Branzburg*, 408 U.S. 665 at 706.

99 Id.

100 Id.

101 Id.
As the First Circuit noted in *Glik*, the right to audio record police officers is central to an individual’s ability to collect information about the government and its activities.\(^{102}\) As the majority noted in *Alvarez*, the reason the IEL violates the First Amendment is because it prevents individuals from exercising their ability to collect and disseminate information about the police.\(^{103}\) Moreover the ACLU, in its challenge to the constitutionality of the statute, centered its arguments on the notion that citizens have a right to ensure that police officers are held accountable for their actions in performing their public duties.\(^{104}\) However, as the Supreme Court indicated in *Branzburg*, though collecting information about the government is central to the protections of the First Amendment, it is not equal to the right of free expression. Here, the IEL prohibits the act of recording, not the act of speaking. In fact, the IEL puts no restriction on an individual repeating a conversation she hears, or publishing the contents of that information.\(^{105}\) Thus, the Seventh Circuit incorrectly equates the right to record someone else’s speech as the right to express one’s own speech.\(^{106}\) This analysis returns us to the district court’s reasoning that free expression cannot exist without a willing speaker.\(^{107}\) While the Seventh Circuit was correct in its assertion that the “unwilling speaker doctrine” is not implicated where the speech has already been received, the court incorrectly dismissed the district court’s argument without acknowledging that there is something inherently different about reusing the speech of a person who does not wish her voice to be shared.\(^{108}\) This forced dissemination of expression implicates rights that are much more similar to the right of an individual to forcibly gather information about governmental activities. Contrary to the

\(^{102}\) *Glik v. Cuniff*, 212 F.3d 1332, 1333 (11th Cir. 2000).
\(^{104}\) *Id.* at 608.
\(^{106}\) *Alvarez*, 679 F.3d at 590.
\(^{107}\) *Id.*
\(^{108}\) *Id.*
majority’s assertion, limiting the extent to which an individual may record speech does not raise the same vexing concerns that prohibiting a person from freely expressing their own thoughts would have.\textsuperscript{109}

Specifically, the majority analogized the right to record to many actions that qualify as free expression under the First Amendment.\textsuperscript{110} For example, an individual enjoys the right to take notes during governmental committee meetings.\textsuperscript{111} However, this analogy fails to account for the fact that taking notes still requires independent thought, and disseminating the information requires independent expression. In contrast, recording a police officer’s voice and distributing it simply regurgitates speech. Moreover, even if a person were to take notes verbatim, this transcript is still less egregious than the voice recording of a person because the recording damages credibility in a way that notes could not. With an audio recording a person cannot simply deny the allegations made against her, and her credibility is impeached in an irreversible way. The ACLU seeks to use audio recordings because they have a unique ability to, as Judge Posner indicated in his dissent, damage the credibility of an individual. Thus, this uniqueness must be acknowledged when evaluating its nature under the First Amendment.

The majority also analogized the right to record to the right to donate campaign funds.\textsuperscript{112} However, the fatal flaw in this analogy is that donating campaign funds still involves willing free expression. Campaign donations provide individuals with the ability to use money as an instrument of expression to promote their own ideas. In contrast, an audio recording promotes ideas that often times the speaker does not want promoted. The act of recording a conversation at its most basic level involves gathering information, without any expression. Even if we adopt the majority’s view that recording speech is only an integral step in the process of sharing that recording, recording speech

\textsuperscript{109} Id. at 589-90.
\textsuperscript{110} Id. at 590.
\textsuperscript{111} Iacobucci v. Boulter, 193 F.3d 14, 27 (1st Cir. 1999) (holding that the right to record a government committee meeting is a clearly established First Amendment right).
\textsuperscript{112} Id.
is still the forced dissemination of expression rather than the free dissemination of it. While this audio recording may still enjoy First Amendment protection, it does so under the First Amendment right to gather information from an unwilling source.

All of the examples cited by the majority, the right to take notes, the right to paint, the right to donate campaign funds, necessarily involve free and willing expression. Contrarily, disseminating an audio recording against the speaker’s wishes involves the forced dissemination of speech. In equating audio recording to free expression the majority failed to give this meaningful distinction its due weight. As such, the majority’s delineation may negatively impact future First Amendment analysis.

B. Detrimental Policy Implications

The majority’s mischaracterization of the right implicated by the IEL will likely impact future First Amendment analysis. By equating audio recording with the vast First Amendment right of free expression, the majority has given audio recording an unbridled scope of protection. While it is important to acknowledge that people have a right to acquire information about their government, and to hold police officers accountable for their actions, this right is limited, and must be weighed against other governmental interests.

As Judge Posner indicated in his dissent, it is important to weigh the state’s interest in protecting the safety of its officers and citizens with the need to protect the privacy of its inhabitants. This Comment does not assert the state’s interests were reasonably achieved by the IEL statute, but it does suggest that there are other governmental interests which should be weighed with a limited First Amendment right to gather information, rather than the expansive First Amendment right to speak freely.

\[113\] Id. at 588.
\[114\] Id.
\[115\] Id. at 610 (Posner, J., dissenting).
In the *Branzburg* opinion, the Court acknowledged the very concerns that are implicated by the IEL.\(^{116}\) In *Branzburg*, the Court held that recognizing an overly broad right to gather information might negatively impact governmental functions.\(^{117}\) That is exactly the concern raised by the State in this case. As Judge Posner indicated, permitting audio recording, even in public places, may still chill speech because it makes a person weary to express their thoughts for fear of the distribution of her ideas.\(^{118}\) It also distracts police officers from their duties, and places both their lives and the lives of Illinois’ citizens at risk.\(^{119}\) Because the nature of the right in question in *Alvarez* raises many of the same concerns that the Supreme Court considered in *Branzburg*, it is more suitable to evaluate audio recording under *Branzburg*’s categorization of First Amendment rights. By acknowledging that the right to audio record is a limited First Amendment right, the Seventh Circuit would be able to more accurately balance the state’s compelling interest in protecting the privacy of its citizens with the safety of its law enforcement.

**Conclusion**

Though the Seventh Circuit correctly found that the IEL was likely unconstitutional under the First Amendment, the court mischaracterized the right implicated by audio recording. The Seventh Circuit should rule consistently with the First, Third, and Eleventh Circuits and find that the right to audio record is a limited First Amendment right to gather information, as stated by the Supreme Court in *Branzburg*. By acknowledging the limits of this right, the Seventh Circuit will be able to more accurately weigh the various governmental interests asserted by the State against the rights implicated by the IEL.

\(^{117}\) *Id.*
\(^{118}\) *Alvarez*, 679 F.3d at 610 (Posner, J., dissenting).
\(^{119}\) *Id.*
THE FOREIGN SOVEREIGN IMMUNITIES ACT:
THE ROADBLOCKS TO RECOVERY

SIVONNIA L. HUNT*


INTRODUCTION

When U.S. citizens, like photographers and journalists, are killed by acts of terrorism abroad while performing their jobs, it sends shockwaves through the American home front. “[I]n the long term, the sudden death of a loved one may manifest itself as ‘a deep inner feeling of pain and anguish often borne in silence.’”1 Thus, the pain and anguish of a loved one may manifest itself as the Intentional Infliction of Emotional Distress (IIED) although individuals react differently under like circumstances.2

Foreign nationals face many challenges when filing civil claims, like IIED, in U.S. courts against foreign states.3 Foreign nationals are faced with the difficult task of breaking through jurisdictional roadblocks under the Foreign Sovereign Immunities Act (“FSIA”) in an effort to hold the foreign state liable for conduct that seriously

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1 Flatow v. Islamic Republic of Iran, 999 F.Supp. 1, 31 (D.C. Cir. 1998) (citing Connell v. Steel Haulers, Inc., 455 F.2d 688 (8th Cir. 1972)).
2 Id. at 31.
3 Id.
harmed or caused death to a U.S. citizen relative. Remedies, such as the ability to sue a foreign state for supporting terrorist acts, help to maintain uniformity in U.S. courts and conformity with international law litigation.

Before a U.S. state or federal court can hear a case, it has to exercise jurisdiction over the claim. The court is able to resolve the issue if there is a “case or controversy” between adverse parties with legal standing to bring the suit. Specifically, U.S. federal courts “shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” The FSIA, a federal statute, provides the “sole basis” for asserting jurisdiction over foreign states. The FSIA allows a court to remove an essential state law claim from state to federal court through subject matter jurisdiction. Moreover, the FSIA provides that “in personam jurisdiction over a foreign state defendant has been accommodated inherently in the statute for the acts enumerated in 28 U.S.C. § 1605(a)(7).” Under this statute, U.S. courts have the power to exercise personal jurisdiction over claims against foreign state sponsors of terrorism that cause personal injury or death to U.S. citizens.

Regardless of the United States’ jurisdiction, foreign states enjoy sovereign immunity under the FSIA unless the foreign national (or

4 Leibovitch v. Islamic Republic of Iran, 697 F.3d 561, 562 (7th Cir. 2012).
9 Id.
10 Levin v. Islamic Republic of Iran, 529 F. Supp. 2d 1, 15 (D.C. Cir. 2007).
11 Id. (citing Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 19-23 (D.C. Cir. 1998)).
claimant) asserts an exception, such as the state-sponsored terrorism exception.\textsuperscript{13} Foreign states are treated like the U.S. under the FSIA.\textsuperscript{14} Neither sovereign can have a default judgment entered against it—or a political subdivision, agency or instrumentality of it—unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.\textsuperscript{15} Essentially, the claimant must plead a cause-of-action that the court can redress.

If a cause-of-action is properly plead by showing substantial evidence that the claimant or the victim was, at the time of the terrorist act, a United States citizen, and the foreign state was designated as a state sponsor of terrorism, U.S. federal courts can exercise subject-matter jurisdiction over claims which cause death or injury to U.S. citizens.\textsuperscript{16} Subject-matter jurisdiction created a roadblock to recovery for the Leibovitch family during their suit against the Republic of Iran in U.S. federal court.\textsuperscript{17}

In that case, the Seventh Circuit analyzed the FSIA and its state-sponsored terrorism exception to determine whether subject matter jurisdiction over essential state law claims against a foreign state existed.\textsuperscript{18} In \textit{Leibovitch v. Islamic Republic of Iran}, foreign family members brought suit in a U.S. federal court for injuries that resulted from Iran’s material support of terrorist actions.\textsuperscript{19} The district court dismissed the claims brought by the other members of the Leibovitch family, asserting that it lacked subject matter jurisdiction over their claims because they were not U.S. citizens.\textsuperscript{20} The Leibovitches appealed to the Seventh Circuit, arguing that subject matter

\begin{footnotes}
\footnotetext[13]{28 USC § 1605(a)(7)(2008).}
\footnotetext[14]{Id.}
\footnotetext[16]{\textit{Leibovitch}, 697 F.3d at 570.}
\footnotetext[17]{Id. at 561-62.}
\footnotetext[18]{Id. at 561.}
\footnotetext[19]{Id. at 562-63.}
\footnotetext[20]{Id. at 563.}
\end{footnotes}
jurisdiction existed over their IIED claims arising from S.L.’s injuries under Israeli law because of S.L.’s status as an American citizen.21

This article analyzes the FSIA and the state-sponsored terrorism exception to determine whether the Seventh Circuit correctly reversed the district court. This Comment proposes that the Seventh Circuit correctly reversed the district court and found that the court had subject matter jurisdiction to hear the Leibovitch’s case. Moreover, this Comment argues that S.L. could recover because she is a victim under the state-sponsored terrorism exception. The Comment will proceed as follows. Part I provides an overview of the FSIA. Part II addresses case law that helped shape the current state-sponsored terrorism exception. Then, Part III will analyze the current effect of the state-sponsored terrorism exception, and explain why the Seventh Circuit correctly reversed the district court’s ruling. However, to comprehend the court’s decision, one must understand the FSIA and the basis for asserting an exception under the Act.

I. FOREIGN SOVEREIGN IMMUNITIES ACT & U.S. JURISDICTION

A. The FSIA

The FSIA originated in 1976 when foreign states could easily bypass civil liability to personal injury suits by raising foreign sovereign immunity.22 Specifically, there were “uncertainties [of] then current American judicial practices and Department of State policies with regard to a foreign nation's sovereign immunity.”23 Because of those uncertainties, U.S. courts refused to extend the sovereign immunity exception beyond commercial activities to reach public acts...

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21 Id.
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23 Wright, supra note 5.
outside the U.S.\textsuperscript{24} As a result, “foreign states [used] the FSIA as a shield against civil liability for violations of the law of nations committed against [U.S.] nationals overseas.”\textsuperscript{25} “Consequently, American victims of International terrorism were deterred from suing foreign states that supported terrorist organizations” if they could not point to the commercial activities exception under the FSIA.\textsuperscript{26} To combat against international terrorism against U.S. citizens, the state-sponsored terrorism exception was enacted.

\textbf{B. The State-Sponsored Terrorism Exception\textsuperscript{27} and Subject Matter Jurisdiction.}

To disassemble the FSIA’s shield, victims needed a sword that would pierce the FSIA’s protection and permit subject matter jurisdiction over their claims. In 1996, as part of the Anti-Terrorism and Effective Death Penalty Act, (AEDPA), Congress passed a terrorism exception to the FSIA that granted American citizens the right to sue foreign states designated as “State Sponsors of Terrorism.”\textsuperscript{28} Congress’s purpose in lifting the sovereign immunity

\begin{thebibliography}{99}
\bibitem{25} Flatow v. Islamic Republic of Iran, 999 F.Supp. 1, 1 (D.C. Cir. 1998).
\bibitem{26} Israel Law Center, \textit{FSIA} (February 4, 2013, 3:00 PM), http://www.israelawcenter.org/hebrew/page.asp?id=334\&show=reports#Foreign.
\bibitem{27} 28 U.S.C.A. § 1605A(h)(6) (2008); see Michael Rosenhouse, J.D., \textit{Annotation, State-Sponsored Terrorism Exception to Immunity of Foreign States and their Property under Foreign Sovereign Immunities Act of 1976, 176 A.L.R. Fed. 1, § 2.1 (2002)} (State-Sponsored Terrorism means “a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S. C. App. 2405(j), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism.”).
\bibitem{28} \textit{Id.} (citing 28 U.S.C.A. § 1605A(a)(1) (2008)) (a “foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case to otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an
under the AEDPA was to “affect the conduct of terrorist states outside the U.S. [by promoting] safety of U.S. citizens who travel overseas.”

As a result of the AEDPA, raising sovereign immunity as a shield against U.S. jurisdiction was eradicated. Foreign states could not assert sovereign immunity where a victim claims money damages for personal injuries or death caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment or agency, except that the court shall decline to hear a claim under this paragraph.

30 Id.
31 28 U.S.C.A. § 1605(e)(1) (2008) (defines “torture” pursuant to the Torture Victim Protection Act of 1991, §3(a) 28 U.S.C. § 1350 (b), as “any act, directed against an individual in the offender’s custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person or for any reason based on discrimination of any kind.”).
32 See id. (defining extrajudicial killing pursuant to the Torture Victim Protection Act of 1991, §3(a) 28 U.S.C. § 1350 (a) as “a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” This term “does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.”).
33 Suppression of Unlawful Acts against the Safety of Civil Aviation art. I, Sept. 23, 1971, 24 U.S.T. 565(1) (defining aircraft sabotage and declaring that if any person commits an offence unlawfully and intentionally, such as:
(a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or
(b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or
material support or resources\textsuperscript{35} “for such an act if the act or provision is engaged in by an [official] or agent of [the] foreign state while acting within the scope of his or her office [] or agency.”\textsuperscript{36} Essentially, the state-sponsored terrorism exception dismantled jurisdictional roadblocks by giving U.S. federal courts the power to exercise subject-matter jurisdiction over claims against foreign states.\textsuperscript{37}

\begin{itemize}
\item[(c)] places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or
\item[(d)] destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or
\item[(e)] communicates information which he knows to be false, thereby endangered the safety of an aircraft in flight.
\end{itemize}

This article also makes an individual liable if under subsection 2(b), that individual “is an accomplice of a person who commits or attempts to commit any such offence” as stated in section 1.

\textsuperscript{34} See Terrorism Taking of Hostages Convention Between the United States and other Governments, art. 1, June 3, 1983, T.I.A.S. No. 11081 (stating that “[any] person who seizes or detains and threatens to kill, to injure or to continue to detain another person ([“hostage”]), in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of person, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages within the meaning of this Convention.”).

\textsuperscript{35} 28 U.S.C.A. § 2339A (2009) (\textit{material support or resources} “means currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.”).


\textsuperscript{37} See Fisher v. Great Socialist People’s Libyan Arab Jamahiriya, 541 F. Supp. 2d 46 (D.C. Cir. 2008) (conferring subject matter jurisdiction over Libya in an action arising out of a bombing of an airliner over Scotland); see also Kilburn v. Islamic Republic of Iran, 699 F. Supp. 2d 136 (D.C. Cir. 2010) (where the court had subject matter jurisdiction over a plaintiff’s claims for personal injury and wrongful death after victim of terrorist actions was kidnapped and ultimately killed in Iran).
Moreover, the district court exercises original jurisdiction as to any nonjury civil action against a foreign state where the court has jurisdiction over the person with respect to which the foreign state is not entitled to immunity either under Sections 1605-1607 of the FSIA or under any international agreement.\(^{38}\) The FSIA protects a foreign state from the jurisdiction of U.S. courts unless a specified exception applies; only then will the federal court exercise subject-matter jurisdiction over a claim against a foreign state.\(^ {39} \) However, once a court has the power to exercise subject matter jurisdiction over the suit, it may exercise all powers necessary to resolve the suit and enforce whatever judgment it deems proper.\(^ {40} \)

In *Oveiszi v. Islamic Republic of Iran*, the former chief of the Iranian armed forces was assassinated by Hezbollah, a terrorist organization operating under the Islamic Jihad.\(^ {41} \) His grandson brought a suit on his behalf suing both the Islamic Republic of Iran and the Iranian Ministry of Information and Security (MOIS) in the U.S. District Court of D.C., claiming IIED and wrongful death.\(^ {42} \) The grandson further alleged that Iran and the MOIS materially supported the Islamic Jihad by funding the terrorist group, and thus could not assert sovereign immunity.\(^ {43} \) The district court agreed and found that Iran and MOIS were liable for the former chief’s murder.\(^ {44} \) However, after analyzing the grandson’s IIED claim, the district determined that he lacked standing to bring suit.\(^ {45} \) The court further determined that because the former chief could not have brought an action if he was still alive, the court had to dismiss the grandson’s wrongful-death

\(^{38}\) Sampson v. Federal Republic of Germany, 240 F.3d 1145, 1149 (7th Cir. 2001) (citing 28 U.S.C. § 1330(a) (1976)).

\(^{39}\) *Id.* at 1149 (citing Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993)).


\(^{41}\) *Id.*

\(^{42}\) *Id.*

\(^{43}\) *Id.*

\(^{44}\) *Id.* at 839 (citing Oveiszi v. Islamic Republic of Iran, 498 F.Supp.2d 268, 279 (D.C. Cir. 2007)).

\(^{45}\) *Id.* (citing Oveiszi, 498 F.Supp.2d at 283).
claim. The grandson appealed and the D.C. Circuit determined that subject-matter jurisdiction existed over the grandson’s claims because (1) Iran was designated as a state sponsor of terrorism; (2) the grandson was U.S. citizen, and thus able to bring the claim on behalf of his grandfather; and (3) his grandfather was assassinated in France.

Altogether, the FSIA confers jurisdiction over a plaintiff’s claims presuming the plaintiff pleads an enumerated exception, such as the state-sponsored terrorism exception. However, because the FSIA only confers jurisdiction for the court to hear the plaintiff’s claim, the plaintiff is obligated to plead a sufficient cause of action by pointing to a viable state law claim like wrongful death and IIED.

II. CAUSE-OF-ACTION AGAINST A FOREIGN STATE

A. Liability under § 1605(a)(7)—the Flatow Amendment & Ciccioppio-Puelo.

A viable claim must be asserted to hold a foreign state liable once U.S. courts have the power to exercise jurisdiction: “[T]he FSIA is not generally intended to affect the substantive law of liability or to affect the primary conduct of foreign states.” Therefore, failing to assert a viable cause of action could result in the foreign national’s claims being dismissed. The FSIA does not provide for a substantive cause of action or a choice-of-law provision once jurisdiction has been asserted. However, section 1606 under the FSIA provides that where a “foreign state [is] stripped of its immunity [*it] shall be liable in the same manner and to the same extent as a private individual under like circumstances.” Therefore, where sovereign immunity is annulled, the plaintiff may bring “state law claims that they could have brought

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46 Id. at 839 (citing Oveissi, 498 F.Supp.2d at 279).
47 Id. at 844.
48 Leibovitch v. Islamic Republic of Iran, 697 F.3d 561, 565 (7th Cir. 2012).
49 Oveissi, 573 F.3d at 841.
50 Id. (citing 28 U.S.C. § 1606 (2002)).
if the defendant were a private individual.\textsuperscript{51} Since plaintiffs are required to indicate a specific substantive law, the FSIA is a conduit of state-law principals, thus creating a pass-through effect on liability.

This section explores the legal impact that the Flatow Amendment and \textit{Cicippio-Puleo v. Islamic Republic of Iran} had on the state-sponsored terrorism exception. The Flatow Amendment, applied in \textit{Flatow v. Islamic Republic of Iran}, allowed for increased compensatory damages for terrorist victims and made punitive damages available against foreign states. \textit{Cicippio-Puleo}, contrarily, refused to recognize a federal right to sue a foreign state without pleading a state law claim.

1. The Flatow Amendment and its Role.

The Flatow Amendment played a huge role in expanding the FSIA subsequent to the AEDPA.\textsuperscript{52} The Flatow Amendment was enacted under the Omnibus Consolidated Appropriations Act. It was enacted on September 30, 1996 after Alisa Flatow, a Brandeis University student who was killed by a suicide bombing in the Gaza strip.\textsuperscript{53} The Flatow Amendment expressly provided for punitive damages in hopes of combating terrorism.\textsuperscript{54} Furthermore, with the Flatow Amendment, Congress sought to advance the broader goal of the terrorism exception by altering a foreign state’s conduct that engaged in terrorism.\textsuperscript{55} Congressman Saxton, an active player in enacting the Flatow Amendment, believed that “the only way to achieve the goal of altering state conduct was to impose massive civil liability on foreign

\textsuperscript{51} \textit{Id.} at 841.
\textsuperscript{52} \textit{Leibovitch}, 697 F.3d at 563 (citing 28 U.S.C. § 1605(a)(7) (repealed 2008)).
\textsuperscript{53} \textit{Id.} at 565 (one purpose of the Flatow Amendment was to increase the measure of damages for terrorist victims. After enacting the Flatow Amendment, it was essential for Congress to ensure the availability of receiving punitive damages against agents of state sponsored terrorism to victims who died as a result of terrorist acts, or who were severely injured).
\textsuperscript{55} \textit{Leibovitch}, 697 F.3d at 565.
state sponsors of terrorism whose conduct results in the death or
personal injury of United States citizens” by increasing punitive
damages. Therefore, the Flatow Amendment sought to expand the
state-sponsored terrorism exception by increasing punitive damages as
a means of altering a foreign state’s conduct that materially supports
terrorist organizations.

Flatow v. Islamic Republic of Iran was the first case to apply the
Flatow Amendment. In Flatow, Alisa Flatow, a U.S. citizen and
university student, was killed when a suicide bomber in Israel attacked
her tourist bus. Alisa was severely injured by a piece of shrapnel that
pierced into her skull casing and lodged into her brain. Alisa
eventually died from her injuries. Her family brought a wrongful
death action on her behalf against Iran and its officials. The court
held that, inter alia, the Flatows could recover under a state law theory
for wrongful death. In addition, the Flatow Amendment provided a
federal cause of action by expressly providing for punitive damages in
wrongful death cases.

The Flatow court explained that the Flatow Amendment was a
departure from the prior state-sponsored terrorism exception because
the FSIA completely prohibited the recovery of punitive damages
against a foreign state. However, the Flatow Amendment
disregarded that prior prohibition by expressly providing for a cause of
action for punitive damages because the FSIA was silent on the type of
remedies available. Where a terrorism victim brings a claim directly
against a foreign state under the state sponsored exception and the

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56 Id. at 566.
57 Id. at 566.
59 Leibovitch, 697 F.3d at 565; see Flatow, 999 F.Supp at 1.
60 Flatow, 999 F.Supp. at 7.
61 Id.
62 Id. at 7-8.
63 Id. at 1.
64 Id. at 16, 18.
65 Id. at 25.
66 Id.
Flatow Amendment, a foreign state can be indirectly liable for punitive damages under the *respondeat superior* doctrine.\(^\text{66}\) *Respondeat superior* applies where a foreign state “materially supports” a terrorist organization because its tortious actions are the fault of the individual foreign state.\(^\text{67}\)

Providing “material support or assistance to a terrorist group” is defined as providing currency or other financial securities, financial services, lodging, training, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, but does not include humanitarian assistance to persons not directly involved in such violations.\(^\text{68}\)

Consequently, if a foreign state provides routine financial assistance to a terrorist group to help advance their terrorist activities, that foreign state is vicariously liable for the personal injuries caused by that terrorist group.\(^\text{69}\)

The *Flatow* court determined that the Flatows’ were entitled to punitive damages in addition to compensatory damages.\(^\text{70}\) In addition to finding subject matter and personal jurisdiction, the court found that Iran and MOIS were liable because they materially supported and provided resources to the terrorist group that caused Alisa’s death. After *Flatow* and the Flatow Amendment, those injured by terrorist organizations were afforded a federal cause of action to receive

\(^{66}\) *Id.* at 25-26.

\(^{67}\) *Id.* at 18.


\(^{69}\) *See* Wachsman ex rel Wachsman v. Islamic Rep. of Iran, 537 F. Supp. 2d 85 (D.C. Cir. 2008) (where the “Islamic Republic of Iran and the Iranian Ministry of Information and Security were not immune from suit under [FSIA] for the extrajudicial killing a U.S. citizen who was abducted and executed by members of terrorist group while residing in Israel; victim’s survivors established that Iran’s material support to terrorist group proximately caused victim’s kidnapping and execution, that Iran provided sanctioned support for terrorism through the [MOIS], and that United States had designated Iran a state sponsor of terrorism.”).

\(^{70}\) *Flatow*, 999 F.Supp. at 33-34.
punitive damages in addition to large compensatory damages. Punitive damages were sought as a measure of deterrence to illustrate to foreign states that their conduct will not be tolerated against U.S. citizens. The following cases are examples of how the Flatow Amendment’s large punitive damage awards were applied.

For example, in Wultz v. Islamic Republic of Iran, the court held that $300,000,000 in punitive damages was an appropriate award against Iran and Syria where several people were seriously injured during a suicide bombing attack. The suicide bombing attack took place at Rosh Ha'ir restaurant in Tel Aviv, Israel. A sixteen-year-old boy, Daniel Wultz, and his father, Yekutiel “Tuly” Wultz, were among those injured by the explosion. Daniel later died from his injuries; his mother and siblings sued Iran and Syria under the state-sponsored terrorism exception. The Wultz court stated that punitive damages were made available under the revised FSIA terrorism exception in an effort to punish and deter terrorist actions that are supported by foreign states.

Similarly, in Gates v. Syrian Arab Republic, $300,000,000 ($150,000,000 per victim) in punitive damages was awarded where two contractors were “kidnapped, held hostage, and finally, while their captors videotaped the event, viciously slaughtered.” Their families “brought state law claims against Syria, Syrian Military Intelligence, President Bashar al-Assad, and director of Military Intelligence Asif Shawkat, under the [FSIA].” The families alleged that the foreign

72 Id.
73 Id.
74 Id. at 27.
75 Id. at 41 (explaining that punitive damages meant to punish outrageous behavior and deter such outrageous conduct in the future by foreign states).
77 Id.
state “provided material support” to both Zarqawi and al-Qaeda which led to the deaths of the U.S.-citizen contractors.\footnote{In \textit{Acosta v. Islamic Republic of Iran}, the court awarded $300,000,000 in punitive damages against Iran for assassinating Rabbi Kahane and wounding two American citizens in 1990.\footnote{The court recognized that although a shooting is less horrific than a bombing, both are deadly.\footnote{The court stated that “[r]egardless of the severity of the act, [it had] no doubt that Iran’s intention [ ] in supporting terrorist groups . . . [was] to create maximum harm through terrorist acts.”\footnote{With the aim of deterring further terrorist attacks, large punitive damage awards should be instituted as an effective deterrent measure.\footnote{Therefore, although the Flatow Amendment was only enacted as a note to the state-sponsored terrorism exception, courts applied it as an implied amendment; thus, expanding the realms of the FSIA.}}}}\footnote{With the aim of deterring further terrorist attacks, large punitive damage awards should be instituted as an effective deterrent measure.\footnote{Therefore, although the Flatow Amendment was only enacted as a note to the state-sponsored terrorism exception, courts applied it as an implied amendment; thus, expanding the realms of the FSIA.}}

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After the FSIA’s expansion, the D.C. Circuit court refused to follow \textit{Flatow} and established its own position. In \textit{Cicippio-Puleo}, the D.C. Circuit ruled that Section 1605(a)(7) only allowed waiver of immunity and that some other source of law was required to bring a claim against a foreign state.\footnote{\textit{Cicippio-Puleo} states that the Flatow Amendment only allows “a private right of action to sue “officials, employees, and agents of foreign states for the conduct described in §1605(a)(7),” which is different from pursuing actions against a}
foreign state.\textsuperscript{84} Section 1605(a)(7) waives sovereign immunity where money damages are sought for personal injury or death caused by an act of terrorism, but it does not create a private cause of action. Where “an official, employee, or agent of [a] foreign state while acting within the scope of his or her office, employment, or agency” is engaged in terrorism or materially supporting terrorism, sovereign immunity will be deemed waived.\textsuperscript{85} In essence, the D.C. Circuit found that the FSIA creates a pass-through approach; neither §1605(a)(7) nor the Flatow Amendment creates a private right of action against a foreign government.\textsuperscript{86} Therefore, without a sufficient state law claim, the plaintiff risks dismissal without recovery.\textsuperscript{87}

Mr. Cicippio was a comptroller of the American University of Beirut.\textsuperscript{88} He was kidnapped in Beirut, Lebanon by a terrorist group named Hezbollah, beaten, kept in inhumane cells, and bound by chains.\textsuperscript{89} Mr. Cicippio also suffered an array of medical problems and was forced to undergo abdomen surgery from which he bears a ten-inch scar.\textsuperscript{90} Mr. Cicippio and his wife brought actions against Iran and MOIS and were awarded compensatory and punitive damages. Thereafter, Mr. Cicippio’s adult children brought suit several years later claiming loss of solatium (injury to a person’s feelings) and IIED pursuant to the FSIA’s state-sponsored terrorism exception and the Flatow Amendment.\textsuperscript{91}

The district court dismissed the children’s claims, stating that the court did not have jurisdiction and they failed to state a claim upon which relief could be granted.\textsuperscript{92} On appeal, the D.C. Circuit affirmed the district court’s dismissal, reasoning that “\textsuperscript{84} Id. at 1029.
\textsuperscript{85} Id. at 1032 (citing 28 U.S.C.A. §1605(a)(7)(1996)).
\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{88} Id. at 1027.
\textsuperscript{89} Id.
\textsuperscript{90} Id. at 1027-28.
\textsuperscript{91} Id. at 1028-30.
\textsuperscript{92} Id. at 1030; Fed. R. Civ. P. 12(b)(6).
history of the FSIA clearly established that the Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality. The court stated that the Flatow Amendment creates a cause of action and it imposes liability, but that liability only reaches to “an official, employee, or agent of a foreign state designated as a state sponsor of terrorism.” The Flatow Amendment does not include a foreign state. The D.C. Circuit stressed its point by recognizing that the Flatow Amendment was headed in the right direction. However, the court concluded “it is for Congress, not the courts, to decide whether a cause of action should lie against foreign states.” In that instance, the court refused “to imply a clause of action against foreign states when Congress has not expressly recognized one in the language of § 1605(a)(7) or the Flatow Amendment.”

The Cicippio-Puleo court posits that the “Supreme Court has also made it clear that the federal courts should be loathe to ‘imply’ a cause of action from a jurisdictional provision that ‘creates no cause of action of its own force and effect … [and] imposes no liabilities.’” As mentioned previously, the FSIA does not affect substantive liability, it only provides subject matter jurisdiction, assuming the plaintiff points to an enumerated exception. Therefore, pleading an exception to the FSIA waives sovereign immunity and the plaintiff must “state a cause of action under some other source of law, including state law,” to impose liability.

Other courts soon followed suit and applied Cicippio-Puleo’s determination to cases under the FSIA. For example, Nikbin v. Islamic

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93 Cicippio-Puelo, 353 F.3d at 1033.
94 Id. at 1034.
95 Id.
96 Id.
97 Id.
98 Id. at 1036.
99 Id. at 1033 (citing Touche Ross & Co. v. Redington, 442 U.S. 560 (1979)).
101 Cicippio-Puelo, 353 F.3d at 1036.
Rep. of Iran ruled there is no cause of action against a foreign state without creating a cause of action in substantive state law since the FSIA only waives the foreign state’s sovereign immunity.\textsuperscript{102} Similarly, Pugh v. Socialist People’s Libyan Arab Jamahiriya follows Cicippio-Puleo’s ruling by stating that Section 1605(a)(7) is “‘merely a jurisdiction-conferring provision that does not otherwise provide a cause of action against either a foreign state or its agents.’”\textsuperscript{103} There, several American citizens were injured when their flight was bombed in Brazzaville, Congo.\textsuperscript{104} As a result, six Libyan officers were sued civilly and criminally tried. After the criminal trial, family members of the bombing victims brought civil suits claiming IIED and wrongful death. Defendants moved for a motion to dismiss, stating that plaintiffs need to state claims with particularity. The court agreed and reasoned that according to Cicippio-Puleo, their FSIA complaint has to allege more in order to survive a motion to dismiss.\textsuperscript{105}

Taken together, Cicippio-Puleo sought to halt a plaintiff’s ability to recover damages over foreign states under the FSIA’s state-sponsored terrorism exception and the Flatow Amendment.\textsuperscript{106} Cicippio-Puleo and its progenies required plaintiffs to plead a sufficient claim that justifies liability separate from gaining subject matter jurisdiction by the FSIA.\textsuperscript{107} Therefore, after Cicippio-Puleo’s decision, plaintiffs incurred additional roadblocks in other jurisdictions because Congress had not created a federal cause of action against foreign states.\textsuperscript{108} The Seventh Circuit’s discussion and analysis of Cicippio-Puelo illustrates a curtailing of plaintiffs’ rights; therefore,
Congress responded swiftly by repealing the state-sponsored terrorism statute.

**B. Amendment and Repealing of §1605(a)(7) by Congress.**

In 2008, Congress amended the Act so its intention would have full effect after *Cicippio-Puleo* interpreted and applied the state-sponsored terrorism exception so narrowly.\(^{109}\) Congress enacted section 1605A, providing a private right of action under subsection (c) where:

> a foreign state that is or was a state sponsor of terrorism [] and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—(1) a national of the United States, (2) a member of the armed forces, (3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee’s employment, or (4) the legal representative of a person described in paragraph[s] (1), (2), or (3), for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, *a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.* (emphasis added).

By amending the Act, Congress afforded comfort to victims by granting a private right of action to sue a foreign state.\(^{110}\) *Cicippio-

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\(^{110}\) *Id.*
Puleo had said that a federal cause of action to sue a foreign state would be in the right direction but that Congress had to act; it was not the courts’ duty to find an action where one did not exist.111 Victims of state-sponsored terrorism now enjoy expanded rights under the amended Act because Congress eliminated the inconsistent application of the law by clarifying its original intent to U.S. courts.112

The D.C. Circuit was one of the first courts to apply this new Amendment. For example, in Estate of Doe v. Islamic Rep. of Iran, an action was brought against Iran alleging that it materially supported a terrorist group which was responsible for bombing two U.S. Embassy facilities in Beirut, Lebanon where 58 foreign national employees and one U.S. national employee of the U.S. Government were working and therefore injured or killed as a result of the attack.113 The court held that where the plaintiffs had originally filed suit under the original FSIA exception and commenced a new action in a timely manner under the new FSIA exception, an action was available.114 Similarly, in Wyatt v. Syrian Arab Rep., the court reached the same conclusion and allowed the plaintiffs to proceed under the new FSIA terrorism exception.115 Providing plaintiffs met the FSIA’s state-sponsored terrorism exception under Section 1605A, a private cause of action attached to the foreign state as well as an agent of the state.116

Although still challenging, the new FSIA exception provided relief to American citizens, employees or soldiers of the U.S. government, and sent a signal that their claims mattered. Courts have held that those who brought claims under the original FSIA terrorism exception had a right of action under the new FSIA terrorism

111 Cicippio-Puelo, 353 F.3d at 1036.
113 Estate of Doe v. Islamic Republic of Iran, 808 F. Supp. 2d 1, 6 (D.C. Cir. 2011).
114 Id. at 16-17.
exception. The courts retroactively applied the new right of action provided plaintiffs commenced an action within 60 days after the entry of judgment against the foreign state in a timely filed related action which arose out of the same incident. It is apparent that some jurisdictional and cause-of-action roadblocks were dismantled; families could start their healing processes.

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117 See Taylor v. Islamic Republic of Iran, 811 F.Supp.2d *1 (D.C. Cir. 2011); Haim v. Islamic Republic of Iran, 784 F. Supp.2d *1 (D.C. Cir. 2011); Anderson v. Islamic Republic of Iran, 753 F. Supp.2d 68 (D.C. Cir. 2010) (for a retroactive application analysis to claims that were previously rejected by terrorism victims).

118 See Haim, 784 F. Supp. 2d *1 (plaintiffs allowed to retroactively apply the FSIA new amendment that created a new independent federal cause of action against foreign sovereign for terrorism-related claims, in an effort to seek punitive damages); Anderson v. The Islamic Rep. of Iran, 753 F. Supp. 2d 68 (D.C. Cir. 2010) (where states-sponsored terrorism exception applied retroactively to the suit brought by several family members of servicemen who were severely injured during a bombing of the U.S. marine barracks in Beirut against Islamic Rep. of Iran and the Iranian Ministry of Information and Security); Murphy v. Islamic Rep. of Iran, 740 F. Supp. 2d 51 (D.C. Cir. 2010) (allowing plaintiffs and intervenors the right to retroactively apply the new FSIA provision against Iran for the bombing of the Marine barracks in Lebanon).


Mr. Lautenberg speaks in the Congressional hearing of the 110th Congress, Second Session about the original intent and effects of the FSIA. Mr. Lautenberg states, in part:

In 1996, Congress created the “state sponsored terrorism exception” to the Foreign Sovereign Immunities Act, FSIA. This exception allows victims of terrorism to sue those nations designated as state sponsors of terrorism by the Department of State for terrorist acts they commit or for which they provide material support. Congress subsequently passed the Flatow Amendment to the FSIA, which allows victims of terrorism to seek meaningful damages, such as punitive damages, from state sponsors of terrorism for the horrific acts of terrorist murder and injury committed or supported by them.

Congress’s original intent behind the 1996 legislation has been muddied by numerous court decisions. For example, the courts decided in Cicippio-Puleo v. Islamic Republic of Iran that there is no private right of action against foreign governments-as opposed to individuals-under the Flatow Amendment. Since this
III. CURRENT EFFECT OF THE STATE-SPONSORED TERRORIST EXCEPTION & THE LEIBOVITCH DECISION

A. Limitations of §1605A

Certain limitations still exist before a U.S. court will hear a claim under the FSIA’s terrorism exception: (1) the foreign state has to be designated as a state sponsor of terrorism; (2) the claimant or victim has to be a U.S. national, member of the armed forces, or employee of the government; or (3) is an individual performing a contract awarded by the United States Government and acting within the scope of their employment. If the claimant fulfills these three elements, a U.S. decision, judges have been prevented from applying a uniform damages standard to all victims in a single case because a victim's right to pursue an action against a foreign government depends upon State law. My provision in this bill fixes this problem by reaffirming the private right of action under the Flatow Amendment against the foreign state sponsors of terrorism themselves.

My provision in this bill also addresses a part of the law which until now has granted foreign states an unusual procedural advantage. As a general rule, interim court orders cannot be appealed until the court has reached a final disposition on the case as a whole. However, foreign states have abused a narrow exception to this bar on interim appeals-the collateral order doctrine-to delay justice for, and the resolution of, victim's suits. In Beecham v. Socialist People's Libyan Arab Jamahiriya, Libya has delayed the claims of dead and injured U.S. service personnel who were off duty when attacked by Libyan agents at the Labelle Discothe2que in Berlin in 1986. These delays have lasted for many years, as the Libyans have taken or threatened to take frivolous collateral order doctrine appeals whenever possible. My provision will eliminate the ability of state sponsors of terrorism to utilize the collateral order doctrine. My legislation sends a clear and unequivocal message to Libya. Its refusal to act in good faith will no longer be tolerated by Congress.

120 28 U.S.C. § 1605A(2)(i)-(iii)(2008); see also Michael Rosenhouse, J.D., Annotation, State-Sponsored Terrorism Exception to Immunity of Foreign States and
court will exercise subject matter and personal jurisdiction over their claims. However, courts must be knowledgeable in their application of the federal cause of action or the private right of action enumerated under section 1605A(c).

B. Leibovitch’s Outcome

During the summer of 2003, the Leibovitch family was traveling in their minivan on the Trans Israel highway near, Kalkilya, a town bordering the West Bank. Soon after crossing the West Bank, members of the Palestine Islamic Jihad (“PIJ”) crossed into Israel from the West Bank and opened fire on the Leibovitch family, causing grave harm to two of the Leibovitch children. As a result of the attack, N.L., a seven-year-old Israeli national, died and S.L., a three-year-old American citizen, was seriously wounded by bullets that shattered bones in her right wrist and pierced her torso. The girls had two grandparents and two siblings in the minivan that also survived the attack. They all witnessed N.L.’s tragic death and S.L.’s horrific injuries.

In 2008, the Leibovitch family brought suit against Iran for each family member in the minivan that was attacked by the PIJ and for N.L. and S.L.’s parents (foreign nationals) who were not present during the attack. After the trial court entered a default order against Iran, the court determined that “S.L. was injured in ‘an act of their Property under Foreign Sovereign Immunities Act of 1976, 176 A.L.R. Fed. 1 (2002).

121 Leibovitch v. Islamic Republic of Iran, 697 F.3d 561, 562 (7th Cir. 2012).  
122 Id.; see also Meir Litvak, Palestine Islamic Jihad – Background Information, Jewish Virtual Library, (April 27, 2013, 3:00 PM), www.jewishvirtuallibrary.org/jsource/Terrorism/tau56.html.  
123 Leibovitch, 697 F.3d at 562.  
124 Id.  
125 Id.  
126 Id.  
127 Id.  
128 Id.
… extrajudicial killing’ under the FSIA exception for terrorism.”

In addition, the district court found Iran vicariously liable for injuries that resulted from the PIJ’s attack because Iran had provided material support and resources to the PIJ for its campaign on extrajudicial killing.

The Leibovitch court faced two determinations regarding section 1605A’s jurisdictional scope. The first issue was whether section 1605A specifically tracks the new private right of action which excludes most foreign nationals even if they are family members, or whether Cicippio-Puleo’s pass-through approach (merely granting jurisdiction but no right to sue) survives Congress’ substantial revision of the FSIA’s terrorism provision.”

The second issue was whether S.L. is considered a victim under section 1605A(a)(7).

C. Analysis

First, the Seventh Circuit concluded that § 1605A tracks a new private right of action. The court concluded “that Congress intended to confer jurisdiction over the Leibovitchs’ [IIED] claim.” In doing so, the court analyzed Congress’ revision of Section 1605A and disengaged Cicippio-Puleo and its progenies’ previous arguments.

The Seventh Circuit found that Congress eliminated a huge inconsistency created by Cicippio-Puleo by “slightly amend[ing] the language to waive sovereign immunity if ‘neither the claimant nor the victim was a national of the U.S. … when the act upon which the claim is based occurred.’” Therefore, the court found that Congress “established a private right of action principally for American

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130 Leibovitch, 697 F.3d at 562.
131 Id. at 564.
132 Id. at 572.
133 Id. at 569.
134 Id.
135 Id. at 570.
136 Id. at 570.
claimants while waiving sovereign immunity in a broader set of cases also involving American victims.\textsuperscript{137} The court noted that Congress did not indicate that its Amendment narrowed the original scope of jurisdiction.\textsuperscript{138} Rather, the purpose of § 1605A(c) was to “extend punitive damages to foreign nations sponsoring terrorism and thereby allow the massive liability judgments [to] deter state support for terrorism.”\textsuperscript{139} Essentially, the court found that Congress intended for the Leibovitch’s to “‘have the benefit’ of the FSIA’s jurisdictional provisions even if they could not make use of the federal cause of action” created under the Flatow Amendment.\textsuperscript{140}

Second, the Seventh Circuit determined that S.L. was a victim although her sister, N.L., was a foreign national and S.L. was killed by an extrajudicial killing.\textsuperscript{141} Based on § 1605A’s House Report, “[the] intent of the drafters was that a family should have the benefit of these provisions if either the victim of the act or the survivor who brings the claim is an American citizen.”\textsuperscript{142}

*Valore v. Islamic Republic of Iran* defines victim as “those who suffered injury or died as a result of the attack and claimants as those whose claims arise out of those injuries or deaths but who might not be victims themselves.”\textsuperscript{143} S.L. was an American citizen and a victim of state sponsored terrorism when she was severely injured by bullets that shattered her torso and wrist.\textsuperscript{144} N.L., however, was murdered by an act of extrajudicial killing.\textsuperscript{145}

The Seventh Circuit concluded that although S.L. was not a victim of extrajudicial killing, she was a victim of the same terrorist act that killed her sister because she suffered severe injuries as a result

\begin{itemize}
\item \textsuperscript{137} *Id.* at 571.
\item \textsuperscript{138} *Id.*
\item \textsuperscript{139} *Id.*
\item \textsuperscript{140} *Id.* at 570.
\item \textsuperscript{141} *Id.*
\item \textsuperscript{142} *Id.* at 570 (citing H.R. Rep. No.105-48, pt. 1, 2 (1996)).
\item \textsuperscript{143} Valore v. Islamic Republic of Iran, 700 F. Supp. 2d 52, 68 (D.C. Cir. 2010).
\item \textsuperscript{144} *Leibovitch*, 697 F.3d. at 562, 570.
\item \textsuperscript{145} *Id.* at 572 (citing § 1605A(a)(1) (2008)).
\end{itemize}
of the attack. Therefore, jurisdiction existed over the Leibovitches claims that were derived from S.L.’s injuries. The Seventh Circuit reversed the district court’s ruling and remanded it for further proceedings consistent with its holding. The Seventh Circuit concluded that Section 1605A “not only confers jurisdiction but also includes a private right of action, a remedy not offered under any other exception to sovereign immunity.” The Seventh Circuit made the right decision by following Congressional intent and the language of the new Amendment to hold in favor of the Leibovitches. Like many other families, the Leibovitches could receive a remedy for their horrific ordeal and began their healing process.

CONCLUSION

After the FSIA’s state-sponsored terrorism exception was expanded and narrowed, Congress eliminated legal inconsistencies enacted by U.S. courts. The Seventh Circuit has yet to decide many of these state-sponsored terrorism cases. However, Leibovitch set a groundwork that lower courts in the Seventh Circuit must follow. In Leibovitch, the Seventh Circuit brilliantly explained and applied Congress’s intent to make this exception broader and more available to claimants because victims like S.L. will be deprived of adequate relief for their injuries without it. The FSIA’s state-sponsored terrorism exception was created and has always been advanced as a measure to deter foreign states from harming or killing American citizens. Furthermore, although it appears that the roadblocks to FSIA litigation have been dismantled, only time will tell when the Seventh Circuit decides more cases on this limited issue of the state-sponsored terrorism exception.

146 Id.
147 Id.
148 Id. at 573.
149 Id. at 570.
RIGHTING LECHMERE’S DRIFT: NLRA PREEMPTION OF STATE PROPERTY LAW OF EASEMENTS AND LEASES

RAMSIN G. CANON*


INTRODUCTION

The National Labor Relations Act (NLRA) protects employees’ right to engage in activities necessary to vindicate their right to collectively bargain. This includes the rights of unions to truthfully inform the public about an employer’s activities and to deploy organizers to inform workers of their right to organize. Neither the National Labor Relations Board (NLRB) nor the Supreme Court has read the NLRA as giving an advantage to employees over employers within the potentially adversarial union organizing process. Accordingly, employers’ entrepreneurial and property rights, particularly state property rights, limit the scope of rights granted by the NLRA. At the same time, two doctrines of federal labor law’s preemption of state law, termed Garmon and Machinists preemption, circumscribe the ability of state legislatures and courts to interfere in

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Congress’ comprehensive regulatory scheme over industrial employment relations.

In *Roundy’s Inc. v. NLRB*, the Seventh Circuit correctly enforced a NLRB charge against a supermarket employer who excluded nonemployee union organizers from property near its stores, property over which the company held an easement but did not own. The organizers were engaged in truthful informational leafleting about the employer’s labor practices. In enforcing the order, the court, relying on the Supreme Court’s decision in *Lechmere v. NLRB*, considered whether the employer’s easement, granted by its lessor, gave it a “power to exclude” the organizers, and took up, though ultimately rejected, the employer’s defense based on statutory and common law grants of authority to easement holders.

This inquiry was unnecessary because the NLRA should preempt any such defense. The Seventh Circuit missed an opportunity to clarify the purpose and operation of the NLRA’s grant of rights to nonemployee organizers: if the employer cannot claim a trespass, the organizers may not be excluded so long as they are otherwise acting lawfully; and any state grant of authority to the contrary should be preempted by the NLRA under *Machinists* preemption.

This Comment will support that contention over the next four sections. First, Section I will discuss the facts and outcome of the Seventh Circuit case, *Roundy’s Inc. v. NLRB*, in which the court considered an employer’s appeal of an NLRB charge of violating § 8(a)(1) of the NLRA. Next, Section II will trace the development of the jurisprudence surrounding employees’ and nonemployees’ § 7 rights and exclusion from property. In Section III, the Garmon and *Machinists* preemption doctrines are taken up, looking ultimately at the Supreme Court’s holding in *Chamber of Commerce of the United States v. Brown*, striking down a California statute that impermissibly interfered with Congress’ scheme of keeping employer and employee speech a “free zone” for the interplay of opposing forces. Finally, Section IV draws on the analysis and discussion in the preceding sections and argues that no state statute or common law rule could grant easement-holding employers a right to exclude otherwise lawful
§ 7 hand-billers or organizers because of the preemption doctrines and Lechmere’s limited concern with trespass.

I. THE CASE OVERVIEW: ROUNDY’S v. NLRB

A. Background

Roundy’s, Inc. operates more than two-dozen groceries in southeastern Wisconsin under the name Pick’n Save. In the spring of 2005, the Milwaukee Construction and Trades Council (“the Union”), an association of construction workers union locals, deployed organizers to these Pick’n Save stores to distribute leaflets to consumers, urging them to boycott the stores in protest of Roundy’s failure to retain union contractors or pay prevailing union wages to workers constructing and remodeling their stores. The hand-billers were not attempting to organize Pick’n Save employees into a union—they were already unionized—nor were they attempting to discourage nonunion construction workers from crossing a picket line, two relevant inquiries under the NLRA. Instead, the leafleting was

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3 Id. (“Let me begin by stating what this case does and does not involve. It does not involve organizing activities, either by employees or non-employee union representatives. And it does not involve a bargaining dispute between union-represented employees and their employer. It deals with nonemployee union representatives publicizing a dispute between a union and an employer over using contractors, in the construction or remodeling of its stores, who do not adhere to area wage standards.”).
4 Section 7 of the National Labor Relations Act protects the rights of employees of employers engaged in interstate commerce to engage in “concerted activity” for the purpose of “mutual aid and protection.” Truthfully informing the public about an employer’s labor current relations and outreach to employees by nonemployee union organizers are considered protected by § 7 as derivative rights. For the purposes of this comment, protected § 7 activity, including handbilling and communication with employees (but excluding more technical areas such as “recognitional picketing,”

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intended to pressure Roundy’s to require union contractors be used for its stores, or to require prevailing wages be paid to its nonunion contractors. This type of organizing activity is protected by the NLRA and the legal analysis is the same as if the organizing activity was for the purposes of organizing a new union. Roundy’s leases all but one of its Milwaukee-area locations, many of which are situated in shopping strips, and had therefore initially claimed that they did not have control over contracting decisions. However, in his findings, the administrative law judge (“ALJ”) found that Roundy’s retained authority to insist on lower cost labor through the terms of their lease agreements.

Roundy’s management responded to the handbilling effort by having supervisors and managers order the organizers off the property, or have the police called to eject them. The Council filed an unfair labor practice (“ULP”) charge with the National Labor Relations Board, specifically alleging that the Union’s rights under § 7 of the National Labor Relations Act (“NLRA”) to engage in organizing activity was unlawfully infringed, in part because Roundy’s lacked the requisite property interest to exclude the organizers from the property. The Union alleged that § 8(a)(1) of the Act was violated as a result of the unlawful exclusion.

etc.) is referred to “organizing activity.” See e.g., J.E. Macy, Annotation, Rights of Collective Action by Employees as Declared in § 7 of National Labor Relations Act (29 USCA § 157), 6 A.L.R.2d 416 (1949) (“Employer who promulgated and discriminatorily enforced no-solicitation rule barring nonemployee union organizers from meeting with off-duty credit center employees in cafeteria, and who threatened police action and engaged in unwarranted surveillance of protected union activities, violated employees' rights...”).

5 Roundy’s Inc., 2006 WL 325760.
6 See infra note 13.
7 Roundy’s Inc., 2006 WL 325760.
8 Id. (“At some of the locations, Respondent's store was in a shopping mall and in others the store was free standing.”).
9 Id.
10 Id.
11 Roundy’s Inc. v. National Labor Relations Board, 674 F.3d 638, 643 (7th Cir.2012).
Where employee or nonemployee union organizers are excluded from private property, the NLRB and federal courts consider as a threshold issue whether the employer in fact had a property right sufficient to exclude people from the premises. If the employer lacked a property interest sufficient to exclude parties, that exclusion would infringe protected § 7 organizing-like activities, and thus violate § 8(a)(1) of the Act. Only the property and entrepreneurial rights of the employer limit the protections of the NLRA, the federal law governing labor relations. So for example, a sole tenant in a shopping mall who evicts nonemployee organizers leafleting on a sidewalk abutting the street (which they do not own) would presumably not have a property interest in the sidewalk differentiated from that of the general public, and thus would lack an exclusionary property right. Their eviction of organizers would violate § 8(a)(1).

In the Roundy’s case, the NLRB, after two rounds of fact finding by an ALJ, found that the language of Roundy’s leases did not grant the stores easements sufficient to exclude parties from common areas, such as parking lots and sidewalks. Therefore, the Board found that the exclusions of the handbilling organizers infringed on the Union’s § 7 rights and violated § 8(a)(1). Roundy’s appealed the Board’s decision to the Seventh Circuit Court of Appeals.

The court considered a number of issues raised on appeal, including whether the Board’s remanding to the ALJ for more fact-finding on the property interest was appropriate considering the Board’s General Counsel had failed to properly raise the property interest issue; whether a legal authority on Wisconsin state property law was an appropriate “expert” under the Federal Rules of Evidence and Board precedent; and whether, as a substantive matter, Roundy’s easements, created by the language of the lease and interpreted by

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13 Lechmere Inc. v. N.L.R.B., 502 U.S. 527, 535 (Year) (reiterating that “in practice, nonemployee organizational trespassing had generally been prohibited…”).

14 Id.

15 The jurisprudence underlying this doctrine is discussed more fully in Section III; see discussion infra Section III.

16 Roundy’s Inc., 674 F.3d at 643.

17 Id.
state common law, conferred a sufficient property interest to exclude the organizers.\(^{18}\)

**B. The Seventh Circuit’s Analysis.**

Roundy’s ultimately failed to allege a sufficient property interest to exclude the organizers under a combination of state common and positive law. This was because Roundy’s easement, granted through a lease, did not give Roundy’s an interest sufficient to exclude parties from those easements. Had Wisconsin courts been more charitable to easement holders—or had the Wisconsin legislature positively granted easement holders a cause of action for trespass even absent a fee simple—the case may have gone the other way. The problem lies therein.

The Board, an administrative agency created by the NLRA, is entrusted with interpreting the Act and is entitled to appropriate judicial deference under *Chevron U.S.A. v. Natural Resources Defense Council.*\(^{19}\) However, where the Board must interpret and apply state law to arrive at a decision, that analysis is subject to review de novo.\(^{20}\) In reviewing the Board’s decision in this case, the court acknowledged that in leafleting exclusion and organizing activity cases a union may prevail on either (a) a disparate treatment theory or (b) on the grounds that the employer lacked a sufficient property interest to exclude.\(^{21}\)

In disparate treatment cases, the Board or a reviewing court will consider whether the employer treated union activity differently from other analogous activities—such as political or charitable speech—that are permitted.\(^{22}\) This analysis is unnecessary, however, where the excluding party lacks an initial right to exclude; it is thus a threshold

\(^{18}\) *Id.*


\(^{20}\) *Roundy’s Inc.,* 674 F.3d at 646 (citing United Food & Commercial Workers Int’l Union Local 400 v. NLRB, 222 F.3d 1030, 1035 (D.C.Cir.2000) (reviewing de novo Board’s determination of whether employer had sufficient property interest to exclude union organizers because Board has no special expertise in interpreting Virginia law)).

\(^{21}\) *Id.* at 645.

\(^{22}\) *Id.* at 644-45.
Determining the nature of a party’s property interest is a matter of state property law, and is often common law, an area in which the Board lacks “special expertise.” In such cases, the reviewing court is charged with trying to determine how a state supreme court—in this instance the Wisconsin Supreme Court—would rule on the issue. In *Roundy’s*, state property law defined the rights of easement-holders using this analysis.

To determine whether *Roundy’s* had a property interest sufficient to exclude anyone from the common areas where the hand-billers stood, the court looked first to the language of the leases to determine the type of easements granted to *Roundy’s* by the property owner. The use of the terms “easement” and “lease” may be confusing, so a brief explication may be helpful. *Roundy’s*, like many retail employers, particularly in suburban settings, does not own all of the property in which their store is situated—they lease a building only. However, the lessor (the property owner) grants them an “easement” in the language of their lease. This easement permits their use of the parking lot, berms, loading areas, etc. They need this easement so that their licensees and invitees—their customers primarily—can access the building. But they do not own these portions of the property; they simply have an easement for its use, along with the other tenants and the property owner. Easements should be understood as a right to use

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23 *Id.*
24 *Id.* at 646.
25 *Id.* at 655 (citing to Blood v. VH-1 Music First, 688 F.3d 543, 546-47 (7th Cir.2012)).
26 The Board’s and court’s focus on easements is of particular importance in this case. Easements are flexible and can confer on the recipient a wide variety of property interests, not necessarily inclusionary: “An easement is a property interest that grants a nonexclusive right or privilege to possess or make use of someone else’s lands. It may be obtained by contractual grant, by factual or legal implication from the intention of the parties or other circumstances of the transaction, or by an adverse use during a statutorily prescribed period.” *See, e.g.*, James L. Buchwalter, *Annotation, What Constitutes, and Remedies for, Misuse of Easement*, 111 A.L.R.5th 313 (2003).
27 The court reproduced the language found in the majority of leases in question: “Tenant is hereby granted a *nonexclusive easement*, right and privilege for itself and its customers, employees and invitees and the customers, employees and
property that is not otherwise owned, and the nature of the use is determined by the terms used in the language of the easement and state law.

The court adopted the details of Roundy’s easements in leases as found by the ALJ. While they differed in some details, the easements were essentially nonexclusive easements that “generally permit use of the common areas by [Roundy’s] and its customers, employees and invitees, as well as the landlord and other tenants of the shopping centers, and their customers, employees and invitees.” The right to permit use of common areas is obviously not coextensive with a right to exclude. This limitation/fact can be inferred from the language of

invitees of any subtenant, concessionaire or licensee of Tenant to use the [common areas] without charge with Landlord and other tenants and occupants of the Shopping Center and their customers, employees and invitees; provided, however, no use of the [common areas] shall be made which detracts from the first-class nature of the Shopping Center or obstructs access to or parking provided for customers of the Shopping Center.” Roundy’s Inc., 674 F.3d at 643.

Roundy’s Inc., Respondent & Milwaukee Bldg. & Constr. Council, Afl-Cio, Charging Party, 30-CA-17185R, 2007 WL 966762 (N.L.R.B. Div. of Judges Mar. 28, 2007) (“[Twenty-five of the 26 store] locations were subject to different lease agreements between different landlords and Respondent, which leased the stores themselves, not the common areas in front of the stores, where the handbilling took place. The details of the relevant language of the lease agreements are set forth in a stipulation of the parties during the remand hearing (Jt. Exh. 4). Although the parties differ on whether the Respondent has an exclusionary interest in the common areas where the handbilling took place, there is essential agreement that Respondent had a nonexclusive easement in those common areas. Most of the leases specifically provide that the lessee has a nonexclusive easement in the common areas, including the sidewalks immediately in front of the stores and the parking lots serving the leased premises, and the others implicitly provide as much. The Respondent concedes (Opening brief on remand, at 2 and 37-39) that the leases at all 25 leased locations granted it “non-exclusive easements to the common areas.” The easements generally permit use of the common areas by Respondent and its customers, employees and invitees.”).

Id.

Roundy’s Inc., 674 F.3d at 651 (quoting Borek Cranberry Marsh, Inc. v. Jackson Cnty., 785 N.W.2d 615, 621 (2010)) (“An easement creates a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement.”).
the easements; if Roundy’s had a right to exclude of the type imputed to full property rights, Roundy’s could feasibly exclude the customers of other tenants from sidewalks and the parking lot, and by the language of the easement this plainly could not be the case. This is what is meant by the term “nonexclusive”; where the easement holder does not have an absolute right to exclude third parties from the easement.

While the Seventh Circuit looked at how other courts of appeals had treated nonexclusive easements in similar cases, Supreme Court precedent from Lechmere, Inc. v. NLRB required the court to look at the particular state’s interpretation of property rights. Relying on several cases from the Wisconsin Supreme Court, the Seventh Circuit ultimately determined that the language of the easements did not confer on Roundy’s a right to exclude from common areas, and thus violated § 8(a)(1) of the Act.

In so doing, the court took up Roundy’s defense that a Wisconsin statute, §§ 844.01 et seq., gave them a cause of action where their property interest, including that in an easement, had been injured through some type of interference. While the court rejected this argument, it failed to address whether such a statute—or, indeed, the state supreme court cases construing the exclusionary interests of easement-holders—would be applicable anyway given doctrines of preemption of federal labor law over state regulations and causes of action, known as Garmon and Machinists preemption.

31 Id.
33 Roundy's Inc., 674 F.3d at 652.
34 Id.
35 Id.
36 Fed. Lab. Law: NLRB Prac. § 3:4 (“[M]ost courts divide the preemption doctrine along a bright line, articulating two distinct NLRA preemption principles. The first, the so-called Garmon preemption, prohibits states from regulating activity that the NLRA protects, prohibits, or arguably protects or prohibits….The second preemption principle, the so-called Machinists preemption, precludes state and municipal regulation concerning conduct that Congress intended to be unregulated.”).
Instead, the court focused on the substantive deficiency of the relied-upon statute. The court stated that the statute did not create an independent cause of action granting a right, but only a remedy where a sufficient right existed (presumably by the express terms of the lease and easement).

The court thus rejected the employer’s proffered defense, saying, “Section 844.01(1)... doesn’t create an independent cause of action; it is a remedial and procedural statute that sets forth the remedies available when a cause of action exists.... In other words, Section 844.01 only provides remedies for persons who are injured as a result of an interference with their interests in real property.”

The court then looked to whether, under Wisconsin state law, Roundy’s had suffered an “unreasonable interference” with their easement: “Because Roundy’s has rights to the extent of its nonexclusive use in the easements, it can enjoin third parties when they unreasonably interfere with this use.” After looking at how other circuit courts had treated the question, the court returned to Wisconsin state law and determined that, given the ALJ’s findings that the hand-billers were peacefully engaged in their activity in a way not obstructive to Roundy’s business operations, they were “not unreasonably interfering with Roundy’s use and enjoyment of its easement.”

The exclusion of the hand-billers thus interfered with the Union’s § 7 rights and violated § 8(a)(1). The court enforced the Board’s order prohibiting future exclusions and requiring posting notices of the violation.

The court’s analysis reflects the drift of jurisprudence controlling employer property rights and workers’ organizing rights under the NLRA. By drifting with that post-Lechmere jurisprudence, the court missed an opportunity to rectify the problem by considering how

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37 Roundy’s Inc., 674 F.3d at 652.
38 Id. (citing Menick v. City of Menasha, 200 Wis.2d 737, 547 N.W.2d 778, 782 (Wis.Ct.App.1996); Shanak v. City of Waupaca, 518 N.W.2d 310, 320 (Wis.Ct.App.1994) (stating that Section 844.01 “creates no rights or duties. It does not purport to create a cause of action. It is a remedial and procedural statute.”)).
39 Id. at 653(citing Hunter v. McDonald, 78 Wis.2d 338, 254 N.W.2d 282, 285 (1977)).
40 Id. at 654-55.
41 Id.
federal preemption doctrines could come into play in these scenarios. The following section traces the *Lechmere* genealogy, before a consideration of federal labor law preemption.

**II. ** *Lechmere’s Genesis and Subsequent Drift*

The National Labor Relations Act (NLRA) regulates employee organizing activity. These organizing rights are at the heart of the NLRA and are referred to metonymically as § 7 rights. They were originally conceived to encourage unionization and collective bargaining through organizing activities, and to ensure that employers could not unduly interfere with that process. Since its passage in 1935, interpretation of the NLRA has evolved and it is not currently construed as favoring one party over another. Employee and nonemployee organizers’ rights to physically access employees are based on state, not federal, law because state law defines “property.” Thus, where federal rights interact with property rights, state definitions of property law will be employed.

In *PruneYard Shopping Center v. Robins*, the Supreme Court determined that a state may “exercise its police power or its sovereign right to adopt in its own constitution individual liberties more expansive than those conferred by the Federal Constitution.” The Supreme Court in *PruneYard* held that state law defines a defendant’s property rights in an expressive activity case. The Court affirmed

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43 Chicago labor lawyer Thomas Geoghegan shares an anecdote of a young attorney who applied for a job with the NLRB; when the attorney questioned which side the Board was on in the struggle between employers and employees, the interviewer said, “We’re neutral…but we’re neutral on the side of the workers.” THOMAS GEOHEGAN, WHICH SIDE ARE YOU ON? 265-66 (1991).
44 See e.g., New York New York Hotel, 334 NLRB 761 (2001).
46 Id. (“Nor as a general proposition is the United States, as opposed to the several States, possessed of residual authority that enables it to define ‘property’ in the first instance.”).
and explicated this principle in the labor context in *Thunder Basin Coal Co. v. Reich* in note 21, stating “[t]he right of employers to exclude union organizers from their private property emanate[s] from state common law, and while this right is not superseded by the NLRA, nothing in the NLRA expressly protects it.”

The Court struggled with how the Act’s creation and guarantee of organizing rights for workers and unions interacted with an employer’s property rights. There seemed to be an intractable contradiction: the very nature of workers’ rights to organize one another, discuss unionization, and appeal to the public and other workers to recognize labor disputes requires some interference, if not outright use, of the employer’s property; at the same time, a federal statute that seriously burdened employers’ property rights would implicate any number of constitutional issues. Beginning with *Republic Aviation v. N.L.R.B.*, through *Babcock & Wilcox v. N.L.R.B.*, *Hudgens v. N.L.R.B.*, and culminating in *Lechmere, Inc. v. N.L.R.B.*, the Court moved along a gentle slope from recognizing that the employees’ organizing rights necessarily limited an employer’s property rights, to giving preference to those property rights in large categories of cases.

A. Analogy to First Amendment

One strain of the jurisprudence, rooted in First Amendment free speech rights, started strong but fizzled out. In *Marsh v. Alabama*, the Court held that a company-owned town could not prohibit Jehovah’s Witnesses from proselytizing on a property-rights theory.\(^{48}\) The Court rejected the contention that property rights granted “absolute dominion” to curtail First Amendment rights.\(^{49}\) This was particularly the case where the private property had first been opened to the public and First Amendment expression successively curtailed.\(^{50}\) The Court extended this theory to the labor rights context in

\(^{47}\) *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 217, n. 21 ((1994)).


\(^{49}\) *Id.*

\(^{50}\) *Id.*
Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.\(^{51}\) The Court expressed a policy concern that businesses migrating to strip malls and business parks in suburban contexts “could largely immunize themselves from similar criticism by creating a cordon sanitaire of parking lots around their stores,” if employers could rely on property rights to curtail the First Amendment expression necessarily entailed in § 7 organizational rights.\(^{52}\) The Court applied the reasoning of Marsh, that given the essentially public nature of a shopping center, no meaningful privacy-sourced concern over property rights could justify exclusion.\(^{53}\)

The progress made on a constitutional theory wedding, or at least analogizing, § 7 rights to free speech began to ebb back down the slope with the Court’s decision in Lloyd Corp. v. Tanner. Lloyd was a Vietnam protest case where the Court distinguished Logan Valley and Marsh on the grounds that anti-war speech was unrelated to the nature of the property (a shopping mall), and thus courts should not force property owners to tolerate the speech.\(^{54}\) Subsequently, in Hudgens v. NLRB,\(^{55}\) the Court short-circuited any further expansion of Logan Valley into the labor context: “[T]he rationale of Logan Valley did not survive the Court’s decision in the Lloyd case.”\(^{56}\) Union protesters could not enter a shopping mall for the purpose of advertising their strike against one tenant.\(^{57}\) Logan Valley having conclusively smothered any First Amendment free speech theory for § 7 rights, the expression of those rights is analyzed under its own labor law rubric.

\(^{51}\) *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).

\(^{52}\) *Id.*


\(^{54}\) Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).


\(^{56}\) *Id.* at 518.

\(^{57}\) *Id.* at 520-21.
B. Republic Aviation Through Lechmere

Outside this truncated thread of cases, the Court otherwise treated the question of employee and nonemployee organizer access to or use of employer property within a narrower labor law context, eschewing any free speech analysis. In Republic Aviation Corp. v. N.L.R.B., the Court enforced a Board order invalidating the employer’s blanket prohibition against any solicitation as violative of employees’ § 7 rights, even though the prohibition was not discriminatorily applied. In its essence, the Court’s holding created an employer duty to accommodate employees’ protected § 7 activity even on its own property.

This duty would not encompass too much, however. In 1956, the Court decided N.L.R.B. v. The Babcock & Wilcox Company, holding that an employer had no duty to permit nonemployee organizers to access its (wholly owned) parking lots for purposes of § 7 activities, where the plant was near to small communities where employees lived, and thus many other means of publicity and organizing were available. A non-discriminatory policy against access by nonemployee organizers in particular was therefore enforceable. The Court in dictum stated that, “Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization.” The effect of Babcock was that the NLRA would not create a duty on the employer to accommodate nonemployee organizers’ organizing activities (i.e., “aid[ing] organization”) if the union has any other options for contacting employees.

58 Republic Aviation Corp. v. N.L.R.B., 324 U.S. 793 (1945).
59 Id.
61 Id. at 112.
Of course, later Courts would locate the source of property rights in the states, not the “National Government.” While differentiating between employee and nonemployee organizers and explicating the property rights of employers vis a vis § 7 rights, the Court reiterated that § 7 rights are important enough that they must trump at least one element of an employer’s property rights: “when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize.” This caveat/exception is important because it confounds the idea that employer property rights are absolutely sacrosanct—or that § 7 rights are inherently inferior to those property rights.

*Hudgens,* discussed *supra,* was decided subsequent to *Babcock* and explicated the general rule that employers’ rights to exclude trumped nonemployees’ § 7 organizing rights. Thus situated, some deeper discussion of *Hudgens* is appropriate. Also a shopping center case, employees of a retailer in a shopping mall entered the mall to picket in support of an economic strike. They were threatened with arrest if they did not disperse. The union filed a complaint with the Board alleging abridgment of § 7 rights and a violation of § 8(a)(1). The Fifth Circuit Court of Appeals enforced the Board’s subsequent cease-and-desist order. The Supreme Court reversed that order, on the grounds that the shopping mall owner (the Petitioner, Scott Hudgens) was under no duty to accommodate the striking workers. *Hudgens’* primary effect was to cleave access/accommodation cases under the NLRA from any First Amendment constitutional analysis. The bulk of the opinion is

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62 Id.

63 It may be helpful to think of nonemployee organizers § 7 rights as rights derived from employees’ organizational rights under § 7—i.e., as derivative rights. It is often union organizers who inform employees of their rights under the Act and aid them in organizing their workplace and therefore if nonemployee organizers do not have these “derivative” rights, employees would be unable in many cases to effectively exercise their own organizational rights.

64 *Hudgens v. NLRB,* 424 U.S. 507, 512-521 (1976) (“While acknowledging that the source of the pickets’ rights was § 7 of the Act, the Court of Appeals held that the competing constitutional and property right considerations discussed in
directed at that issue. It also however reinforced the Babcock distinction between employees and nonemployees and reiterated that accommodation was only to be an undesirable recourse where the union did not have a means of access, stating that “[t]he Babcock & Wilcox opinion established the basic objective under the Act.” In what was later determined to be dicta, however, the Court restated at least the premise for a balancing test between § 7 rights and employers’ property rights, putting the “locus of that accommodation…at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context.”

The Board initially took this to be instruction to implement a balancing test in cases of employee or nonemployee organizers accessing employer property for protected § 7 activities. This idea culminated in the Board’s decision in Jean Country. Jean Country, like the Hudgens and Logan Valley cases discussed supra, dealt with a shopping center, demonstrating just how important massive enclosures of space and the concentration of various service-sector employers in single locations has become to federal labor law jurisprudence. In Jean Country, a union attempted to place an “informational picket,” letting consumers know that a retailer, Jean Country, was non-union, at the entrance to the store inside the mall. The store and mall management contacted the police to remove the picketers. The Board adopted the ALJ’s findings and applied a balancing test to determine whether the removal of the picketers infringed on § 7 rights and thus

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Lloyd Corp. v. Tanner, supra, ‘burde(n) the General Counsel with the duty to prove that other locations less intrusive upon Hudgens’ property rights than picketing inside the mall were either unavailable or ineffective,’ 501 F.2d, at 169, and that the Board’s General Counsel had met that burden in this case.”).

66 Id.
68 The importance of shopping centers also vindicates the Court’s concern in Logan Valley.
69 Jean Country, 291 N.L.R.B. at 14-16.
70 Id. at 15.
violated § 8(a)(1). The Board concluded on the basis of that balancing test that the exclusion was unlawful:

Taking account of all the factors above, it is apparent that strict maintenance of the privacy of the mall property during business hours is not an overriding concern and in fact is not generally desirable, because the presence of the public in large numbers is intrinsic to the commercial goals of the lessees and Respondent Brook. Accordingly, we find that the private property right asserted by the Respondents in reaction to the Union's picketing is quite weak in the circumstances. Jean Valley and balancing wouldn't last long.

C. The Lechmere Decision

The Supreme Court finally had an opportunity to take on the balancing test issue squarely in Lechmere Inc. v. NLRB. Lechmere arose as a result of the United Food and Commercial Workers’ (“UFCW’s”) attempts to organize the employees of a retail establishment in Connecticut. Finding it difficult to contact workers by standing on a four-foot grass easement abutting a major arterial road, organizers for the union leafleted employee cars (generally identifiable by where and when they parked); in each instance, management for the store removed the leaflets and ordered the organizers to leave. The UFCW pursued a charge with the NLRB alleging abridgement of § 7 rights. The Board applied the Jean Country/Babcock balancing test and ruled in the union’s favor. Lechmere appealed, and the Court granted certiorari.

71 Id. at 16 (“With the Respondents' interests established, we proceed to an examination of the relative strength of their right to maintain the privacy of the property.”).
72 Id. at 17.
74 Id. at 529.
75 Id. at 529-30.
76 Id. at 531.
77 Id. at 531.
Demonstrating just how much the details of property ownership had crept into determinations of workers’ rights under the Act, the Court described in great detail the physical characteristics of the property on which the retailer was located. The Court rejected the Board’s use of the Jean Country balancing test and created a rather broad and simple categorical rule: an employer may exclude nonemployee organizers from its property where the employer has a property interest sufficient to exclude, and employees may be reached by any other means.

The Court in an opinion by Justice Thomas framed this rule as a simple return to Babcock, relegating the “spectrum” language from Hudgens to the dreaded dicta dustbin. The Court stiffened Babcock’s general preference for employer property rights where any alternative means of contact were available to nonemployee organizers, without concern for the unworkability of employees’ § 7 rights absent nonemployees’ derivative rights to organize them. However, Hudgens did not stand for an eroding of Babcock; instead, in its disposition it left Babcock’s central holding in place, reiterating that “Babcock’s language of ‘accommodation’ was [not] intended to repudiate or modify [the] holding that an employer need not accommodate nonemployee organizers unless the employees are otherwise inaccessible.”

78 Id. at 531 (“The store is located in the Lechmere Shopping Plaza, which occupies a roughly rectangular tract measuring approximately 880 feet from north to south and 740 feet from east to west. Lechmere’s store is situated at the Plaza’s south end, with the main parking lot to its north. A strip of 13 smaller “satellite stores” not owned by Lechmere runs along the west side of the Plaza, facing the parking lot. To the Plaza’s east (where the main entrance is located) runs the Berlin Turnpike, a four-lane divided highway. The parking lot, however, does not abut the Turnpike; they are separated by a 46-foot-wide grassy strip, broken only by the Plaza’s entrance. Lechmere and the developer of the satellite stores own the parking lot jointly. The grassy strip is public property (except for a 4-foot-wide band adjoining the parking lot, which belongs to Lechmere).”).

79 Id. at 538 (Only in scenarios where, for example, employees were wholly isolated or resided on property owned by the employer, as on remote oil rigs or mining operations for example, would the Jean Country balancing test be considered.).

80 Id. at 534.
Lechmere created a stark categorical rule, one crafted in relief against a darkly impermissible alternative: the federal government compelling employers to suffer common law trespass. The Court cast this categorical rule as a commonsensical result: absent such a rule, § 7 would otherwise be interpreted as suborning common law trespass. That is, the Court’s reference to “reasonability” of accommodation in earlier cases “was nothing more than a commonsense recognition that unions need not engage in extraordinary feats to communicate with inaccessible employees—not an endorsement of the view…. that the Act protects ‘reasonable’ trespasses.”

Whereas employee organizers are the employer’s invitees or licensees, nonemployee organizers have no such status. Thus, per Lechmere, a reading of § 7 requiring some accommodation of employees’ activities would not unduly interfere with state property rights. The categorical distinction was for the Court an easy one to make; employees have a status under common law that nonemployees do not, thus accommodation commensurate with that status upsets nothing.

As Justices White and Blackmun pointed out in their dissent, however, this seductive bit of argumentation falls flat upon closer inspection of the facts, but at a slightly greater level of generality. That is, whereas the parking lot involved in Babcock was for use exclusively by employees and abutting a well-settled area, the parking lot in Lechmere existed for the general public, “without substantial limitation.”

The analogy to trespass thus doesn’t survive when employed to justify a categorical distinction between employees and nonemployees; while nonemployees may seem out of place in a parking lot otherwise used only by employees and the occasional licensee, as in Babcock, in a parking lot that is open to the public without any real limitation, nonemployees are perfectly expected, in fact outright encouraged to be present?. They could hardly be analogized to trespassers. What’s more, as the dissenting Justices

81 Id. at 537.
83 Lechmere Inc., 502 U.S. at 543 (White, J., dissenting).
84 E.g., there is no controlled access to the parking lot.
pointed out, the employees’ § 7 rights often rely inextricably on nonemployee organizers, as the *Babcock* decision itself points out.  

The Court’s categorical distinction between employees and nonemployees  and the faulty analogy to trespass has triggered a drift in the jurisprudence that conflates employers’ state law-defined “right to exclude” with employees’ § 7 organizational rights, giving preference to the former even where the facts of a given case don’t raise the specter of compelled trespass.

**D. The Post-Lechmere Approach**

The result of *Lechmere* on handbilling and similar organizing activity cases has been to create a fairly simple formal inquiry: did the employer have a property right, as defined by state law, to exclude? If so, *any* exclusion of nonemployees is appropriate. If not, *any* exclusion violates § 8(a)(1) of the Act (presuming otherwise lawful behavior by the nonemployees). The employer’s right to exclude therefore is not a right conferred by the NLRA itself. Instead, the right as defined by state law *defeats* the § 7 rights of employees and the derivative rights of nonemployee organizers.

As the *Roundy’s* case shows, the inquiry may be simple in form, but it can be complex in practice. The Board must interpret state common law on property rights, not an area of expertise it has, and reviewing courts must approximate how a state supreme court “would

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85 *Lechmere Inc.*, 502 U.S. at 543 (White, J. dissenting) (“Moreover, the Court in Babcock recognized that actual communication with nonemployee organizers, not mere notice that an organizing campaign exists, is necessary to vindicate § 7 rights.”) (citing to *Babcock*, 351 U.S., at 113) (emphasis added).

86 Lechmere is often cited for its proposition that § 7 does not confer rights on nonemployees, only employees (see e.g., *Davis Country, Inc. v. NLRB* 2 F.3d 1162 (D.C.Cir. 1993)). Because “employee” is a term defined by the NLRA, it is left to the Board to interpret its meaning, see *N.L.R.B. v. Town & Country Electric*, 516 U.S. 85 (1995) (holding that an employee simultaneously employed by a union is still an employee for the purposes of the Act).


decide” an issue. The result has been that employees seeking to express their § 7 organizational rights are subject to the sometimes nebulous—sometimes quirky—vagaries of state property law. A few cases can demonstrate this odd drift away from the purpose of the NLRA. That purpose is to comprehensively define and regulate industrial relations and to protect rights of employees to organize. The post-Lechmere jurisprudence has drifted towards allowing expression of that purpose only where the employer must permit § 7 expression.

After Lechmere was handed down, reviewing courts had little trouble disposing with organizer access cases. However, the jurisprudence became more difficult when the property interest was not clear. The Board and reviewing courts could not merely rely on Lechmere because the right to exclude was not a NLRA right, but a state common law right. So in cases involving an unclear property interest, the Lechmere analysis turns on a reading of state property law, which is inherently unstable for two reasons: first, because the Board lacks expertise in state property law; and second, because reviewing courts do not defer to the Board’s interpretation of state property law, but must review the Board’s conclusion de novo.

States’ plenary authority to codify property rights by statute also raises the possibility that state legislatures can alter the governing regimes from time to time. Moreover, the fact that federal courts have a

89 Roundy’s Inc. v. NLRB, 674 F.3d 638 at 651 (7th Cir. 2012).
90 See e.g., Sparks Nugget, Inc. v. N.L.R.B., 968 F.2d 991 (9th Cir. 1992); Frye v. District 1199, Health Care and Social Services Union, Service Employees Intern. Union, AFL-CIO, 996 F.2d 141 (6th Cir. 1993); N.L.R.B. v. Great Scot, Inc., 39 F.3d 678 (6th Cir.1994); Metropolitan Dist. Council of Philadelphia and Vicinity United Broth. Of Carpenters and Joiners of America, AFL-CIO v. N.L.R.B., 68 F.3d 71 (3rd Cir. 1995); Johnson & Hardin Co. v. N.L.R.B., 49 F.3d 237 (6th Cir.1995).
91 See e.g., Thunder Basin Coal v. Reich, 510 U.S. 200 (1994); N.L.R.B. v. Calkins, 187 F.3d 1080 (9th Cir. 1999).
92 Hirsch, supra note 87, at 906-07 (“The Board’s interpretation of a lease, construction of a state’s treatment of public rights-of-way, or factual determination of where the organizers were standing will either trigger Lechmere and make the employer’s attempt to exclude lawful, or evade Lechmere and make the exact same attempt unlawful. This analysis is frustrating for the parties, as they cannot reasonably predict, ex ante, the Board’s determination of the state law issue.”).
93 See discussion infra Section III.
historical doctrinal aversion to adjudicating land use cases in the first place, diminishing their own expertise, aggravates the situation.\textsuperscript{94} Several cases illustrate the challenge for the Board and reviewing courts created by \textit{Lechmere} and its progeny.

In \textit{O’Neil’s Markets v. United Food and Commercial Workers’ Union, Meatcutters Local 88, AFL-CIO, CLC}, the Eighth Circuit declined to overturn a Board order finding that the employer, a grocer, had violated § 8(a)(1) of the Act, subject to further proceedings on the issue of the employer’s property interest.\textsuperscript{95} The employer in that case had evicted “area-standards” hand-billers engaged in § 7 activities like those of the hand-billers in \textit{Roundy’s}.\textsuperscript{96} The \textit{O’Neil’s Markets} court began its analysis by looking to the language found in the lease agreements.\textsuperscript{97} In its analysis, the court stalled its application of \textit{Lechmere} because of uncertainty as to whether that precedent could be applied directly where the employer “does not own the parking lot or sidewalk at issue.”\textsuperscript{98} Citing to a similar though less thoroughly discussed case from the Sixth Circuit, the court inquired into the precise nature of the employer’s property interest as defined by its lease and interpreted by state courts.\textsuperscript{99} The analysis in \textit{O’Neil’s Markets} is keen if a bit unwieldy. The court stated that because per the terms of the lease the employer had a “non-exclusive easement of ingress, egress, and parking,” more

\textsuperscript{94} See e.g., Note, \textit{Land Use Regulation, the Federal Courts, and the Abstention Doctrine}, 89 YALE L.J. 1134, 1135-36 (1980) (“Although the [Supreme] Court reentered the land use field in the 1970s, its disposition of the recent cases has tended to discourage federal land use litigation. The volume of land use litigation in the lower federal courts has increased in recent years, but a variety of procedural and substantive devices, including abstention, have been invoked to discourage land use litigants from entering federal court.”); see also Village of Belle Terre v. Boraas, 416 U.S. 1, 13 (1973) (Marshall, J., dissenting) (federal courts should not sit as “zoning board[s] of appeal.”).

\textsuperscript{95} \textit{O’Neil’s Markets v. United Food and Commercial Workers’ Union, Meatcutters Local 88, AFL-CIO, CLC}, 95 F.3d 733 (8th Cir. 1996).

\textsuperscript{96} \textit{Id.} at 734-35.

\textsuperscript{97} \textit{Id.}

\textsuperscript{98} \textit{Id.} at 737.

\textsuperscript{99} \textit{Id.} at 738-39 (citing to Johnson & Hardin Co., 305 N.L.R.B. 690, \textit{enf’d}, 49 F.3d 237 (6th Cir. 1995)).
Evidence or law would be needed for the employer to carry its persuasive burden proving that it had a property interest sufficient to exclude the hand-billers. Evidence offered by the employer that it was responsible for maintenance of the common areas was insufficient to create a property interest not otherwise explicit in the lease, at least insofar as no case authority was offered to support that conclusion. Instead, the court looked to a contract interpretation case for the proposition that in cases of ambiguity of interests conferred, only the text of the lease could be relied upon. What’s more, Missouri common law explicitly debarred “easement owners” from trespass remedies, which impliedly conflicted with Lechmere’s particular concern with suborned or “reasonable” trespass. The court therefore remanded the case for further proceedings on whether the picketing was truly protected activity with the presumption that if it were, the Petitioner would be liable for a violation of § 8(a)(1).

Obviously, different states ascribe different degrees of interest or rights to easement holders. The Snyder’s of Hanover case demonstrates the quirkiness of this fact. In this unreported and complex case out of the Third Circuit, the court reversed a Board order finding that the employer Snyder’s of Hanover, a Pennsylvania pretzel-maker, had violated § 8(a)(1) when it called police to eject UFCW hand-billers from the public right-of-way at the edge of its factory’s driveway. The route to that conclusion was a circuitous one.

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100 Id. at 739.
101 Id.
103 Id. at 739 (citing Gilbert v. K.T.I., Inc., 765 S.W.2d 289, 293 (Mo.Ct.App.1988).
105 O’Neil’s Markets, 95 F.3d at 740.
107 Snyder’s of Hanover, 334 N.L.R.B. No. 21 (2001).
108 Snyder’s of Hanover, 39 Fed.Appx. at 735.
On October 1st, 1998, five union organizers stood at the “edge” of the facility, on a right-of-way that ran “from the middle of [State Route] 116 to a line running tangent to one utility pole near the driveway and a short distance behind the other utility poles located near the edge of the road.” The five organizers did not “venture inside the utility poles,” thus (apparently) staying in the right-of-way, from where they distributed leaflets to employees in their cars as they drove onto and off of the factory’s premises. Hearing about the union activity outside, company management confronted the organizers and, finding none of them to be employees, asked them to leave the property. When the organizers refused, police were called and the organizers were ejected as trespassers. The UFCW filed a complaint for violation of the NLRA with the Board; the Board agreed, and the employer appealed.

The Third Circuit, reviewing the Board’s interpretation of Pennsylvania property law de novo, reversed the Board. It held that the Board misconstrued the presumption created by the law. In Pennsylvania, property owners own up to the middle of abutting roadways. The court stated that Pennsylvania law, although “checkered,” conditioned a property owner’s rights over a right-of-way on what the given municipality itself permitted. In other words, a property owner could exclude hand-billers, or other parties, if a municipal ordinance barred that activity in rights-of-way, or could not if that activity was expressly permitted by ordinance, but not otherwise. Even further complicating matters, the case law indicated that the interpretation of the type of expressive activity allowed could

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109 The lag between the incident and a final decision in this case demonstrates how uncertainty as to ultimate conclusions can delay remedy under the Act.
110 Snyder’s of Hanover, 39 Fed.Appx. at 731.
111 Id.
112 Id. at 731-32.
113 Id.
114 Id. at 732-33.
116 Snyder’s of Hanover, 39 Fed.Appx. at 733.
117 Id. at 733-34.
vary from an urban to a rural setting. The court ultimately resolved the case on the proposition that the employer did not carry a burden of proving precisely what the municipality permitted—stating that it was a legal question, not a factual question requiring proving up, and the Board had erred in requiring that burden.

Notably, perhaps mercifully, the court declined to undertake a constitutional first amendment analysis of the Pennsylvania law granting municipalities this power to potentially exclude expressive conduct. In any case, it goes without saying that this analysis is a long way from the *Lechmere* Court’s concern with suborning trespass. To the contrary; the court went to pains to err on the side of an exclusionary interest in a right-of-way, a form of property that by its very character is non-exclusive—and arguably of the type captured by the so-called *Hague* dictum, that properties that “have immemorially been held in trust for the use of the public,” should be considered as bearing expressive conduct.

The explicit and implicit power of state and local governments to determine these property interests, federal courts’ doctrinal aversion to adjudicating land use controls, and local governments’ powers to confer rights or require exactions related to the uses of property only further discommode the NLRA’s purpose of crisply and clearly defining industrial relations. To understand how, however, a treatment of NLRA preemption jurisprudence is necessary.

III. *GARMON* AND *MACHINISTS* PREEMPTION UNDER THE NLRA

Two species of preemption govern state and local government actions vis a vis federal labor law. *Garmon* preemption invalidates

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118 *Id.* at 734.
119 *Id.* (“The municipality’s authorization or non-authorization of handbilling by public ordinance is a legal issue, however, and not an issue of fact for which Snyder’s bore the burden of proof ….”) (citing Gary E. Calkins d/b/a/ Indio Grocery Outlet, 323 N.L.R.B. 1138 (1997)).
120 *Id.*
121 *Id.* (quoting *Hague* v. CIO, 307 U.S. 496, 515 (1939)).
122 See discussion infra § IV.
123 See e.g., *Fed. Lab. Law: NLRB Prac.* § 3:5.
any state regulation of activity that the NLRA otherwise regulates through prohibition or protection. The second, Machinists preemption, precludes state regulations of industrial labor relations conduct that Congress otherwise intended to keep unregulated.\(^{124}\) Generally, a state or local law conflicts with federal legislation, including the NLRA, if that law impedes or interferes with the execution of Congress’ objectives in creating the legislation.\(^ {125}\)

In *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, the Court held that a California court had no jurisdiction to award an employer damages for injuries caused by picketing and related concerted activities on state common law tort grounds, *even where* the Board had declined to extend its jurisdiction to the case.\(^ {126}\) The Court held that Congress had, through positive legislation in the form of the language of § 7 and the related enforcement provisions of the NLRA, preempted such a cause of action in state courts, and to hold otherwise would subvert the purpose and efficacy of a national labor relations law rooted in interstate commerce.\(^ {127}\)

In *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Comm'n* (hereafter *Machinists*), the employer filed a charge with the Board, claiming that union members’ concerted refusal to work overtime as a tactic to force renewal of an expired collective bargaining agreement violated the NLRA as an unfair labor practice.\(^ {128}\) The NLRB dismissed the claim, which the employer then brought before the Wisconsin Employment

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\(^{124}\) *Id.* at § 3:4.

\(^{125}\) *See e.g.*, Hines v. Davidowitz, 312 U.S. 52 (1941); St. Thomas-St. John Hotel & Tourism Ass'n, Inc. v. Government of U.S. Virgin Islands ex rel. Virgin Islands Dept. of Labor, 357 F.3d 297 (3d Cir. 2004).

\(^{126}\) *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236 (1959) (the Board presumably declined jurisdiction because of the minimal interaction with “interstate commerce.”).

\(^{127}\) *Id.* at 246 (“Since the National Labor Relations Board has not adjudicated the status of the conduct for which the State of California seeks to give a remedy in damages, and since such activity is arguably within the compass of s 7 or s 8 of the Act, the State's jurisdiction is displaced.”).

Relations Commission, a state agency.\textsuperscript{129} The Commission, navigating Garmon shoals, held that because a “concerted refusal to work overtime” was neither expressly protected by § 7 nor expressly prohibited by § 8, the Commission had jurisdiction to act on the claim, which it did by issuing a cease-and-desist order to the union.\textsuperscript{130}

The Court accepted an appeal from the Wisconsin Supreme Court affirming the decision, and in its analysis laid out the general policy considerations underlying preemption as, first, avoiding multifarious pronouncement from different jurisdictions,\textsuperscript{131} and second, a concern that state actions would circumscribe the expression of rights created by the Act.\textsuperscript{132} The inquiry in Machinists turned on Congressional intent, or more precisely, on Congress’ vision of the nature of labor relations and bargaining. Specifically, where Congress envisioned workers and employers using “economic weapons [the] actual exercise (of which) on occasion by the parties, is part and parcel of the system that the [NLRA has] recognized,” a state regulation will be preempted as regulating activity meant to be left to free interplay between opposing forces.\textsuperscript{133} Concerted activity in the form of refusal to work overtime, while not expressly protected by the Act, was an “economic weapon” deployed as a function of the relative bargaining strength of the union. The Commission’s regulation of that activity was thus a substantive interference in the dispute that “would frustrate effective implementation of the Act’s processes.”\textsuperscript{134} In other words, Congress may have wanted no regulation of certain activities in order to let the two sides duke it out. Where that is the case, Machinists preemption applies.

The two types of federal labor law preemption are thus not as distinct as they may first appear. Activities left unregulated to be

\textsuperscript{129} Id. at 133-35.
\textsuperscript{130} Id. at 135-36.
\textsuperscript{131} Id. at 138; see also Automobile Workers v. Russell, 356 U.S. 634, 644 (1958).
\textsuperscript{132} Lodge 76, 427 U.S. at 138.
\textsuperscript{133} Id. (quoting N.L.R.B. v. Insurance Agents, 361 U.S. 477, 488-89 (1960)).
\textsuperscript{134} Id. at 148 (quoting Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 379 (1969)).
employed freely by the parties to a labor dispute could also be considered activities implicitly protected by the broad language of § 7 of the Act.\textsuperscript{135}

It is important to note an express exemption from preemption strictures: namely, the exemption for trespass.\textsuperscript{136} This exemption is part of a relatively narrow set of exemptions.\textsuperscript{137} The exemption for trespass is a necessary result of Lechmere’s holding that the NLRA could not be read as suborning trespass. In Radcliffe v. Rainbow Const. Co., the Ninth Circuit held that Lechmere’s core holding that the NLRA did not protect “reasonable trespass,” meant that neither Garmon nor Machinists could preempt state trespassing laws.\textsuperscript{138} Circuits have described the narrowness of this exemption by restricting it to trespass cases, for example, in O’Neil’s Market, where the court stated that an easement owner is “debarred from actions traditionally established for the protection of a possession, such as trespass, writ of entry, and ejectment, because the easement owner does not have the prerequisite possession.”\textsuperscript{139}

Garmon and Machinists are vital doctrines that still greatly limit the power of states to positively or incidentally control industrial relations.

\textsuperscript{135} See supra note 129.
\textsuperscript{136} See e.g., 2003 A.L.R. Fed. 1 (originally published in 2003) (an “employer ordinarily may maintain a trespass action against the union without fear of preemption by the National Labor Relations Act…pursuant to the Garmon doctrine, even though the union’s picketing is arguably prohibited or protected by federal law.”).
\textsuperscript{137} See e.g., 2003 A.L.R. Fed. 1 (originally published in 2003).
\textsuperscript{138} Radcliffe v. Rainbow Const. Co., 254 F.3d 772, 784 (9th Cir. 2001), cert. denied, 122 S. Ct. 545 (U.S. 2001) (“[W]hen a union's picketing activities trespass on an employer's property, the employer ordinarily may maintain a trespass action against the union; the trespass claim is not preempted even though the union's picketing was arguably prohibited or protected by federal law…The property right underlying the law of trespass, of course, is a matter of state law.”) (internal citation omitted).
\textsuperscript{139} O’Neil’s Markets v. United Food and Commercial Workers, Meatcutters Local 88, AFL-CIO, CLC 95 F.3d 733, 735 (8th Cir. 1996).

In *Chamber of Commerce of U.S. v. Brown*, the Court struck down a California regulation that prohibited recipients of state grants, or state business above $10,000, from assisting, promoting, or deterring union organizing. The Court held that the rule was preempted by the NLRA and Congress’ intent to leave expressive activity unregulated. The policy posture contouring the Court’s holding was Congress’ intent to maximize the free interplay of opposing forces in labor-management expressive activities. Specifically, employer and employee speech regarding unionization is conceptualized as a “zone” Congress meant to keep free of state interference. The mere fact that the state had a proprietary interest in the use of its funds was not sufficient to outweigh Congress’s objective of keeping this “zone” free and clear.

Although the Court discusses the fact that the state’s purpose was clearly to discourage recipients of state funds from actively opposing unionization, the holding suggests that even if only the incidental (as opposed to intentional) effect of the regulation was to interfere in this competitive zone, it would be preempted. Citing *Wisconsin Dept. of Industry v. Gould*, the Court suggested that wherever a state policy or action created a “potential for conflict,” with the NLRA’s zone-clearing scheme, it could be preempted by the NLRA under *Machinists or Garmon*. *Brown* is an important case because it suggests that a “proprietary interest”—a “total or partial ownership”—is not sufficient grounds to compromise the free interplay zone contemplated by the NLRA and protected by the preemption doctrines.

Understanding the overarching considerations undergirding preemption, and the operation of *Machinists* operation in particular,

141 Id. at 69.
142 Id. at 70.
143 Id. at 70 (citing Wisconsin Dept. of Industry v. Gould, 475 U.S. 282, 289 (1986)) (“Wisconsin's choice ‘to use its spending power rather than its police power d[id] not significantly lessen the inherent potential for conflict’ between the state and federal schemes; hence the statute was pre-empted.”).
sheds light on the inapposite application of *Lechmere* in easement cases.

IV. PREEMPTION OF STATE PROPERTY STATUTES AND CAUSES OF ACTION THAT INCIDENTALY REGULATE EXPRESSIVE ACTIVITY

A. State Definition of Trespass

An employer’s showing of an injury to an easement is too permissive and strays too far from *Lechmere*’s concern with suborning trespass. A trespass occurs when one “enters land *in the possession* of the other, or causes a thing or a third person to do so…” Some variant of this definition holds in each of the states in the Seventh Circuit. It is thus generally the case that a trespass action will lie only where there is a possessory interest that gives its holder an absolute power to exclude. The grantor of an easement (in the relevant context for this Comment, typically a lessor) may convey a possessory interest in an easement coextensive with his own right to exclude, but absent such an express granting, a trespass action by definition would not lie.

By illustration, the owner of a strip mall leases a building to a retailer and grants to lessees in the terms of the lease an easement to use the common areas (such as parking lots and berms). The lessees do not possess these portions of the property as leaseholders—the property owner (the grantor) possesses these portions of the strip mall. A lease may of course explicitly grant lessees an easement which gives them a right to exclude, though to do so would impliedly (and paradoxically) permit one tenant to exclude the licensees and invitees of another tenant, and vice versa.

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144 *Restatement (Second) of Torts* § 158 (1965).
B. State property common or positive law granting exclusionary rights to nonexclusive easement holders should be preempted by the NLRA insofar as they apply to § 7 activities.

If there is no chance that the employer could suffer a trespass, Lechmere simply should not apply. That a state statute or state common law gives easement-holders some cause of action for interference or injury to those easements should not be germane to a court’s review of a § 8(a)(1) charge against an employer for excluding organizers. If the employer is not the owner of the property, and thus lacks a cause of action for trespass, the sole inquiry should be whether the express language of the easement (found typically in the lease) gives them an exclusionary right coextensive with that of the possessor. If they do not, then peaceable, truthful organizing conduct should be protected by § 7.

In deciding the Roundy’s case, the Seventh Circuit missed an opportunity to recognize the application of Chamber of Commerce v. Brown and the NLRA preemption doctrines to reject the increasingly deferential interpretation of Lechmere. Lechmere’s animating concern is the destruction of property owners’ rights against trespass. That concern would be satisfied by requiring employers to show a trespass action would lie as a defense to an § 8(a)(1) charge for illegal exclusion. Express language in a lease or other instrument that grants an interest sufficient to exclude classes of persons from easements would satisfy this requirement. A rightful Lechmere exclusion should not otherwise be premised on state positive or common law defining an easement holder’s right to exclude in a way that interferes with the “zone” of free interplay between employers and employees.

In Roundy’s v. NLRB, the employer offered a state statute as a defense to a § 8(a)(1) charge. The employer argued that the statute created a cause of action for nonexclusive easement holders against those who injure their use and enjoyment of the easement. The court analyzed the statute and concluded that it did not create an independent cause of action for those easement holders, but instead

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147 Roundy’s v. NLRB, 674 F.3d 638, 651-52 (7th Cir. 2012).
created a process for those instances where a cause of action exists (presumably as a function of the interest granted by the easement).\textsuperscript{148} While the court’s approach rationally followed the trend in this line of cases, it missed an opportunity to staunch the expansion of state property law into the free and clear zone of expression contemplated by the NLRA per the preemption doctrines.

It would have been appropriate for the court to reject the employer’s theory outright on the grounds that any state statute that created an independent cause of action for nonexclusive easement holders to exclude peaceful § 7 organizers would be preempted to the extent it applied to those organizers.\textsuperscript{149} The easements created by the lease did not grant the employer a right to exclude any party from the non-leased portions of the property—in other words it did not create an interest coextensive with trespass rights. In such scenarios, the language of the easement should be dispositive.

The concepts here are abstract enough to create some confusion, so a concrete example may be helpful. Absent an express agreement otherwise, an easement grants its holder only as much control as is necessary to enjoy the terms of the easement.\textsuperscript{150} Pursuant to its police powers to define property rights, a state could in theory grant lessees/easement holders a civil action to exclude those, other than the easement grantor (the property owner), who interfere with their preferred use of an easement—for example, as an alternative to having to defer to, or request action from, the property owner.\textsuperscript{151}

In such a scenario, the owner of a shopping mall may grant its lessees an easement to non-leased portions of the property, such as

\begin{itemize}
\item \textsuperscript{148} \textit{Id.} at 652.
\item \textsuperscript{149} While this may seem recursive, it is important to state that such a statute would not be preempted in its totality, as was the case with the statute in Brown, unless it created an independent cause of action specifically against union organizers.
\item \textsuperscript{150} \textsc{Restatement (First) of Property} § 450 (1944) ("Thus, a person who has a way over land has only such control of the land as is necessary to enable him to use his way and has no such control as to enable him to exclude others from making any use of the land which does not interfere with his.").
\item \textsuperscript{151} For a discussion of the basic nature of easements, see \textsc{The Law of Easements & Licenses in Land} § 1:28.
\end{itemize}
parking lots. This grant would give the lessee an interest in those portions of the property. So if the shopping mall lessee is bothered by the RV owners who park in the lot, and the property owner is unwilling or slow to remove them herself, the lessee could rely on the state statute as grounds to eject the vacationers. Such a statute would be perfectly permissible, and analogous to statutes that give tenants particular rights vis a vis their landlords or outside parties.

However, was that statute used to exclude § 7 organizers it should be preempted by the NLRA because its use would clutter up the free zone Machinists preemption is meant to protect. Similarly, a common law rule granting easement holders a right to exclude § 7 organizers, absent an exclusive right to exclude in the language of the easement, should be preempted for the same reason, insofar as it is applied to those organizers.

The Seventh Circuit in Roundy’s considered the employer’s argument that Wisconsin state courts recognized an easement holder’s right to exclude those parties who “injure” their enjoyment of the easement. But § 7 organizers peaceably engaged in non-intrusive, truthful handbilling by definition are not injuring a non-exclusive easement, which affords a right to its holder only to use of the grantor’s property for a limited purpose, typically access for licensees and invitees. Since the ingress and egress of customers and other invitees is not compromised, no injury that doesn’t merely treat union activity qua union activity as injurious takes place.

It is not a normative desire to alter Lechmere but application of Machinists preemption via Chamber of Commerce v. Brown that compels this new posture towards state property law in organizer exclusion cases. In Brown, the Court clarified that Machinists preemption creates “a zone free from all regulations, whether state or federal.” While so doing, the Court also rejected the Ninth Circuit’s holding that employer speech was not a zone free from “all regulation” because the NLRA regulates what employers may say in the run-up to

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a workplace election for or against a union. The Court was unimpressed with this bit of reasoning because Congress had clearly “denied the [National Labor Relations Board] the authority to regulate the broader category of noncoercive speech encompassed by [the California statute]. It is equally obvious that the NLRA deprives California of this authority,” because under preemption doctrines the states have no more authority than the Board.

It is a simple conclusion to reach then that noncoercive employer/employee speech is a “free zone” that must remain free of state regulation. No state law should interfere with this free zone. Lechmere itself creates the outer bound of this preemption limit: trespass. Except for actionable trespass, no state property law can be used as a basis for ejecting otherwise peaceable §7 organizers.

The proper inquiry where an easement is non-exclusive is solely a fact inquiry into the conduct of the organizers. So long as the purposes and details of the easement are not implicated by the handbilling, no state court interpretation of the rights of easement holders should be read to exclude §7 organizers. In the Roundy’s case, the purpose of the easement was access by customers to Roundy’s store and reasonable use of common areas. Absent employee conduct that prevented that, the proffered defense is preempted. Machinists preemption contemplates keeping such organizing activities unimpeded for the free interplay of opposing sides in labor-management disputes. A mere easement-holder should not be able to rely on that easement to avoid engaging in that interplay. Absent the suborned trespass expressly prohibited by Lechmere, an easement-holder employer must either show a trespass-level exclusionary interest or face potential liability for an unlawful exclusion.

\[153\] Id. at 74 (discussing why preemption should apply at all given the Machinists requirement that area being regulated has not been regulated by Congress).

\[154\] Id.

\[155\] Id. (citing Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 751 (1985)).
V. CONCLUSION

While inconsistent in terminology and methodology, the evolution of jurisprudence surrounding the exclusion of § 7 organizers by employers considered trespass to be the line § 7 could not breach. Unfortunately, the discussion in Lechmere of an employer’s property interest sparked a drift towards inquiry into state-defined property laws to gauge the rights of union organizers. As is often the case with long threads of case law, each small quantum of decision has culminated over the years in a qualitative change. By the terms of Lechmere itself however, courts should be concerned solely with the possibility of trespass. The Seventh Circuit’s decision in Roundy’s v. NLRB came up short, despite ultimately arriving at the correct conclusion through sound reasoning. The defenses raised by the employer afforded an opportunity for the court to simplify the inquiry in § 8(a)(1) organizer exclusion cases and remain faithful to Supreme Court decisions and the intent of the NLRA. – but the court refused to take that opportunity?