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PAUL CLEMENT AND THE STATE OF CONSERVATIVE LEGAL THOUGHT

SAM SINGER†

ABSTRACT

If 2011 is remembered as the year the states stood up to the Obama Administration and its bold vision of federal power, Paul Clement will be remembered as the lawyer they chose to make their case to the Supreme Court. In addition to the healthcare challenge, Clement appeared on behalf of Arizona in defense of the State's sweeping new immigration law and helped Texas defend its new electoral map against interference from the federal courts. Along the way, he became the go-to lawyer for the "states' rights" cause—a "shadow Solicitor General" leading the states in their push to reclaim power from the federal government.

This Essay reconciles the perception of Paul Clement as a champion of states' rights with his less-visible work on behalf of the business community—work that, because of the pro-federal slant of the business agenda, often puts him at odds with the states' rights movement. I will demonstrate that, despite the publicity he has gained for his high-profile federalism cases, Clement has done more than most private lawyers in recent memory to undercut the states' rights agenda. More broadly, I will argue that the tension within his caseload—the push and pull between federalism and deregulation—reflects a broader rift within the conservative legal movement. Exploring this rift through the lens of Clement's work, I will consider whether legal conservatism can still embrace the conflicting tenets of federalism and deregulation.

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I. LEGAL CONSERVATIVES FIND A PIN-UP

Last February, in a letter to the Speaker of the House, Attorney General Eric Holder announced the Justice Department would be aban-

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doning its defense of the Defense of Marriage Act (DOMA), the federal law that defines marriage as the legal union between a man and a woman and lets states ignore same-sex unions classified as marriage by other states.[1] Although the Obama Administration had defended DOMA in several prior challenges, it was only in recognition of the Justice Department's longstanding practice of defending duly enacted statutes against legal attack, and then only in jurisdictions where judicial precedent allowed it to mount a plausible defense without taking a position on how closely courts should scrutinize laws that burden the gay community. Now that challenges were pending in jurisdictions where the law is in flux, the Attorney General explained, the Justice Department would be required to take an affirmative position on the appropriate level of scrutiny, and the President was unwilling to take a stance contrary to his firm belief that DOMA is unconstitutional as applied to same-sex couples who are legally married under state law.[2] The Attorney General would go into further detail about the legality of DOMA and the Justice Department's authority to withdraw support from unconstitutional statutes, but the thrust of his message to Congress was clear: We don't like this law, and we've exhausted every professionally responsible argument that can be made in its defense; it's your problem now.[3]

The Holder letter was the first strike in a still-evolving conflict between the White House and House Republicans over the fate of DOMA in the courts. Republicans blasted the move as irresponsible and ill motivated, accusing the President of shirking the Justice Department's obligation to defend congressional enactments.[4] By forcing the Justice Department to abandon this role, critics asserted, the White House was not only attacking DOMA, it was attacking the constitutional prerogatives of Congress.[5] Worse yet, the White House was making an end run around the legislative process by using the Justice Department to effect an unauthorized veto.[6]

With the Justice Department out of the picture, it fell to Congress, and specifically to Republican leaders of the House of Representatives, to make provisions for DOMA's defense. House Speaker John Boehner agreed to intervene in the lawsuit and defend the law in his capacity as Speaker. He retained Paul Clement, a Solicitor General under President

1. Letter from Eric Holder, U.S. Attorney General, to John Boehner, Speaker of the House of Representatives (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.

2. *Id.*

3. *Id.*

4. David Baumann, *House Republicans Blast Holder on DOMA; Say DOJ Should Pay*, MAIN JUSTICE (May 3, 2011, 11:36 AM), http://www.mainjustice.com/2011/05/03/house-judiciary-republicans-blast-holder-on-doma/.

5. David Badash, *NOM's Maggie Gallagher Calls Obama's DOMA Position an "End-Run,"* NEW C.R. MOVEMENT (Feb. 23, 2011), http://thenewcivilrightsmovement.com/noms-maggie-gallagher-calls-obamas-doma-position-an-end-run/legal-issues/2011/02/23/17606.

6. *Id.*

George W. Bush and one of the more sought-after lawyers in the Washington legal community. Boehner had originally threatened to slash the Justice Department's budget to free up money for Clement's contract, which his firm, King & Spalding, had accepted at a considerable discount. When that road proved impassable (and most likely illegal), he scraped together funds, now said to total three quarters of $1 million, from an internal network of House accounts.[7]

That Boehner would turn to Clement for such a momentous case came as a surprise to nobody. There may be two dozen lawyers in the United States who possess credentials commensurate with a case of this magnitude. The number gets smaller if you factor in lawyers with experience defending federal legislation, and approaches zero if you limit it to those with conservative bona fides. Having served at the helm of the Bush Justice Department for eight years, the final four as Solicitor General; having argued before the Supreme Court on more than fifty occasions, many of them for matters of rich historic significance like abortion and campaign finance and the President's conduct of the war on terrorism; and having earned a reputation as a gifted advocate with the ear of the Justices and an aptitude for winning big cases, Clement easily met all three criteria.

But what really sets Clement apart from other elite constitutional lawyers is his knack for avoiding controversy. Among the few lawyers to leave the Bush Administration with a better reputation than he entered with, Clement is in the enviable position of having worked at the helm of one of the more polarizing Justice Department's in the modern era yet having no reputational scars to speak of. This is due in part to the positions he took behind closed doors, where he is said to have clashed with more hawkish Justice Department officials over the scope of the President's counterterrorism powers.[8] But Clement is also emphatically likeable, a Midwesterner known inside Washington as a scrupulous lawyer for whom politics takes a backseat to the rule of law. As Walter Dellinger, who served as Solicitor General under President Bill Clinton, told the *New York Times*, "Paul is such a good advocate and such a cheerful friend that it's easy to forget how conservative he is."[9]

When Clement left the Justice Department, the legal community was alight with speculation over where among the power circle of Wash-

7. Jennifer Bendery, *John Boehner Has Collected $742,000 for DOMA Defense, Top House Official Says*, HUFFINGTON POST (Mar. 28, 2012, 9:02 AM), http://www.huffingtonpost.com/2012/03/27/john-boehner-doma-defense_n_1382990.html.

8. Jason Zengerle, *The Paul Clement Court*, N.Y. MAG., Mar. 26, 2012, at 28, 91.

9. Kevin Sack, *Lawyer Opposing Health Law Is Familiar Face to the Justices*, N.Y. TIMES, Oct. 27, 2011, at A1 (quoting Walter Dellinger, Solicitor General under President Bill Clinton) (internal quotation marks omitted).

ington law firms he would settle.[10] For those who follow the churn of lateral moves between the Justice Department and the private sector, Clement's employment was one of the biggest stories in years. One Washington lawyer described Clement as the "Holy Grail of law firm recruiting," observing that "the buzz in the legal world about Clement is like the buzz in basketball when LeBron James was coming out of high school and turning pro."[11] Clement settled on King & Spalding, the Atlanta-based powerhouse where he had headed the appellate practice before joining the Justice Department in 2001.[12] His decision was viewed as a significant victory for King & Spalding; the hire would unquestionably raise the firm's profile in Washington, and many believed it would vault King & Spalding into the upper echelon of the Washington appellate bar, a space occupied by an elite circle of firms specializing in high-stakes litigation before the Supreme Court.[13]

By all accounts, Clement exceeded the firm's expectations, bringing in prominent cases and influential clients and launching the firm into the spotlight at the Supreme Court. By the time Clement secured the DOMA contract, he had already assisted the National Football League and the National Basketball Association in disputes with their respective players' associations, represented the National Rifle Association before the Supreme Court in a landmark Second Amendment victory, and began work on behalf of a consortium of state attorneys general in an historic challenge to the Affordable Care Act.[14] The DOMA contract, a highly publicized affair and a rare opportunity for a private firm to defend federal legislation, was just the latest evidence that King & Spalding had struck gold when it hired Clement.

But no sooner had the terms of the DOMA contract been negotiated than King & Spalding withdrew its representation. In a statement explaining the decision, firm chairman Robert Hays apologized for the withdrawal, insisting the "process used for vetting this engagement was

10. *See* Brett LoGuirato, *Why Paul Clement Is the 'Lebron James of Law,'* BUS. INSIDER (Apr. 5, 2012), http://articles.businessinsider.com/2012-04-05/politics/31292022_1_oral-arguments-clement-comparison (there would be a massive bidding war).

11. Peter Page, *Legal Life After 'W' for Many Bush Attorneys*, NAT'L L. J., Oct. 27, 2008, at 6; *see also* Natalie Singer, *'Defending Unpopular Positions Is What Lawyers Do': In an Era of Ideological Fencing, Paul Clement '92 Won't Be Fenced In*, HARV. L. BULL. (Winter 2012), http://www.law.harvard.edu/news/bulletin/2012/winter/feature_2.php.

12. Dahlia Lithwick, *The Best Offense Is a Good Defense: Why Even Opponents of DOMA Should Want It to Get a Vigorous Defense*, SLATE (Apr. 26, 2011, 5:06 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/04/the_best_offense_is_a_good_defense.html.

13. Tony Mauro, *King & Spalding Lands a Big Fish: Paul Clement*, BLOG LEGAL TIMES (Nov. 20, 2008, 12:15 PM), http://legaltimes.typepad.com/blt/2008/11/king-spalding-lands-a-big-fish-paul-clement.html.

14. Robert Barnes, *NRA Avoids Getting Shut Out of Gun Case*, WASH. POST, Feb. 8, 2010, at A13; Sack, *supra* note 9; Tony Mauro, *Viet Dinh's Firm Aims for Appellate Big Leagues with Clement Hire*, NAT'L L. J. ONLINE (Apr. 25, 2011), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202491418249.

inadequate."[15] What prompted the change of course is still disputed. DOMA supporters tend to believe the firm caved to pressure—not only from gay equality advocates but also from firm clients and employees.[16] Firm insiders maintain that firm managers did not review the contract until after it was signed, at which point they concluded the terms were untenable and asked Clement to unwind it.[17]

Following the firm's decision, Clement announced he would be leaving King & Spalding and taking the DOMA contract with him.[18] Explaining his decision in a widely circulated resignation letter, Clement said he was resigning "out of the firmly-held belief that a representation should not be abandoned because the client's legal position is extremely unpopular in certain quarters."[19] Having accepted the representation, Clement continued, "I believe there is no honorable course for me but to complete it."[20]

Clement, naturally, would land on his feet. He joined Bancroft, an elite Washington, D.C. boutique founded by Viet Dinh, head of the Office of Legal Counsel under President Bush and a close friend of Clement from Harvard Law School. To the extent a law firm can have an ideological slant, Bancroft tilts decidedly rightward, its staff comprised of a star-studded collection of former Bush Administration lawyers and Supreme Court clerks.[21] Anyone following the Clement saga could sense Bancroft was a good fit, a place free from the institutional constraints of a major firm, where he could take on polarizing public interest cases without fear of upsetting the apple cart (or the business committee that stocks it). But few could have anticipated just how well Clement would take to his new environment, nor how swiftly his stock would rise inside the Washington legal community.[22]

When Clement joined Bancroft in April 2011, he brought the DOMA contract and the healthcare litigation, two of the biggest cases of the year. Those matters alone would have been a handful for a firm of

15. Ashby Jones, *After King & Spalding Drops DOMA Case, Clement Drops Firm*, WALL ST. J. L. BLOG (Apr. 25, 2011, 12:09 PM), http://blogs.wsj.com/law/2011/04/25/after-king-spalding-drops-doma-case-clement-drops-firm/.

16. Greg Sargent, *Gay Rights Group: You're Damn Right We Pressured Law Firm on DOMA*, PLUM LINE (Apr. 26, 2011, 12:13 PM), http://www.washingtonpost.com/blogs/plum-line/post/gay-rights-group-youre-damn-right-we-pressured-law-firm-on-doma/2011/03/03/AFii9bqE_blog.html.

17. Jim Galloway & Bill Rankin, *King & Spalding to Withdraw from Defending DOMA; Clement Resigns*, ATLANTA J.-CONST. (Apr. 25, 2011, 10:30 PM), http://www.ajc.com/news/news/local-govt-politics/king-spalding-to-withdraw-from-defending-doma-clem/nQst6/.

18. Letter from Paul Clement to Robert D. Hays, Chairman, King & Spalding LLP (Apr. 25, 2011), *available at* http://online.wsj.com/public/resources/documents/042511clementresign.pdf.

19. *Id.*

20. *Id.*

21. Galloway & Rankin, *supra* note 17 (supporting the proposition that Bancroft is known for advancing conservative causes). The proposition that they hire conservative Supreme Court clerks and former government attorneys comes from author's personal knowledge.

22. Mauro, *supra* note 14.

Bancroft's size, which still had to manage its normal, pre-Clement caseload. But within months Clement would pile on several additional matters destined for the Supreme Court, including two blockbuster federalism cases.

The first case, *Perry v. Perez*,[23] involved a controversial provision of the Voting Rights Act requiring states with histories of electoral discrimination to preclear new electoral maps with a federal court.[24] Texas had prepared a new map for the 2012 elections but, because of delays in the preclearance process, had been required to use an interim map drawn up by a federal judge.[25] On its face, the case presented a narrow issue—Could the court's interim map serve as a proper substitute for the map proposed by the State, or was the court required to honor the State's policy judgments regarding the size and location of new districts?

Stirring below the surface, however, were weightier questions—Must Southern states with histories of voter discrimination continue to operate under the watchful eye of the federal courts? Are the widespread civil rights violations that made federal legislation necessary in 1965 comfortably behind us? Who, between federal courts and state legislatures, should control redistricting under these circumstances? In a symbolic victory for the "states' rights" movement, the Supreme Court sided with Texas, concluding federal courts must defer to the policy judgments of state lawmakers when drawing up interim maps.[26]

In the second case, Clement represented Arizona in a politically charged dispute with the Justice Department over the State's sweeping new immigration statute.[27] The Justice Department claimed the law interfered with federal immigration policy; Arizona claimed that it was simply trying to help Congress carry that policy out.[28] The question for the Court was how much latitude states should be allowed in using their own penalties and procedures to enforce federal immigration laws.[29] Next to healthcare, it was the most important federalism case to reach the Court in years, and when the Court gutted the law, striking down the majority of the challenged provisions, it dealt the states' rights movement its most decisive loss of the term.

More recently, Clement agreed to represent yet another state government in a voting rights dispute with the Justice Department.[30] In this case, South Carolina challenged the Justice Department's decision to

23. 132 S. Ct. 934 (2012) (per curiam).
24. *Id.* at 939.
25. *Id.* at 940.
26. *Id.* at 944.
27. Arizona v. United States, 132 S. Ct. 2492, 2497 (2012).
28. *Id.*
29. *Id.*
30. South Carolina v. United States, No. 12-203 (BMK) (CKK) (JDB), 2012 U.S. Dist. LEXIS 146187 (D.D.C. Oct. 10, 2012).

block implementation of the State's new voter identification law.[31] The Justice Department claims the law, which requires voters to show government-issued identification before casting a ballot, will have the effect of denying certain residents the right to vote on account of their race.[32] Last October, a three-judge district court handed Clement a partial victory. Although the court refused to preclear the photo identification requirement for the November 2012 election, citing concerns that immediate implementation would have an unlawful retrogressive effect on minority voters, it ruled that the provision would not disproportionally burden minority voters in elections beginning in 2013 and beyond.[33]

Clement had become the bespectacled face of the conservative legal agenda. He was making the case against the White House on health care, immigration reform, and gay marriage, but more broadly he was making the case against unbridled federal power and the Obama Administration's vision of government. "Clement's career is cresting just as the momentous legal crusades of a radicalized Republican Party are reaching the appellate level," wrote *New York Magazine*.[34] In a term about the scope of congressional authority, he had the entire lineup of federalism cases, two of which—healthcare and Arizona immigration—promised to leave lasting changes on the balance of power between the states and the federal government. If it's hard to imagine a private attorney wielding so much power, it's because there's no modern precedent for it.

Perhaps it was Clement's appeal as a symbol of unity in the midst of a divisive primary season, or perhaps it was the obvious parallel to the DOMA saga (just as the White House had walked out on Congress by refusing to defend DOMA, King & Spalding had walked out on Clement), but Clement's resignation elevated him to new heights of celebrity. "There's no doubt that Paul has become the leading advocate for the most deeply conservative causes in the law," said David Frederick, a prominent Supreme Court lawyer.[35] Clement is a profile in courage, a lawyer with the backbone to stand for principle in the face of politics. King & Spalding would become the perfect foil in the Clement narrative, the firm's perceived cowardice in the face of pressure only magnifying Clement's courage and resolve. As one conservative writer put, "Where King and company demonstrated cowardice, Clement showed charac-

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31. *Id.* at *4.

32. James Rosen & Rebecca Cohen McClatchy, *Trial to Look at Voter ID Law, Discrimination History*, MCCLATCHY, Aug. 25, 2012, *available at* http://www.mcclatchydc.com/2012/08/31/164598/sc-voter-id-law-takes-some-hits.html.

33. *See* South Carolina v. United States, No. 12-203 (BMK)(CKK)(JDB), 2012 WL 4814094, at *9–11 (D.C. Cir. Oct. 10, 2012).

34. Zengerle, *supra* note 8, at 30.

35. Martin Gould, *Obamacare Foes Pick Experienced Lawyer for Their Case*, NEWSMAX (Mar. 23, 2012, 4:09 PM), http://www.newsmax.com/Newsfront/ClementBondihealthcaresupreme/2012/03/23/id/433731.

ter."[36] Glenn Beck called Clement a modern-day hero, equating his resignation with John Adams's decision to represent a British soldier accused of murdering American patriots in Boston.[37] As for King & Spalding, Beck hopes the firm goes out of business.[38]

This tidy narrative obscures a more realistic picture of Clement's place in the conservative legal landscape. Contrary to most accounts in the popular press, Clement is not a mouthpiece of the states' rights movement. He's done a spate of high-profile work for the states, but he makes his living as a business lawyer representing the interests of large corporations in cases before state and federal appellate courts. Those interests coalesce around the common cause of deregulation, or failing that, less burdensome regulation. We don't read about his business cases because they concern the private sector and tend to be dryer, low profile, and devoid of the battleground political issues that animate his other work.

They also tend to be at odds with his federalism cases. Although there is nothing inherently inconsistent in fighting for federalism and deregulation at the same time, in practice the two positions are bound to clash. Over time the business community's litigation agenda has taken on a pro-federal bent.[39] National businesses prefer the uniformity of federal law to the conflicts and redundancies of overlapping state regimes.[40] This is especially true during periods of deregulation, when federal law displaces state law without imposing new burdens of its own, creating the optimal regulatory environment. But even during periods of heightened regulation, litigation trends suggest that most businesses would still prefer a standardized set of federal rules to a patchwork of state regulations.[41]

Clement's story, then, is more complicated than most observers appreciate. While Clement's public image is bound up with his states' rights work—Clement has been variously referred to as an "anti-solicitor general" (*New York Magazine*),[42] a right-wing "uber-attorney" (*The*

36. Doug Carlson, *On DOMA: The Courage of Clement, Cowardice of King*, ETHICS & RELIGIOUS LIBERTY COMM'N (May 4, 2011), http://erlc.com/article/on-doma-courage-clement-cowardice-king/.

37. Carlos Maza, *Beck Lashes Out at King & Spalding, Compares Clement to Civil Rights Heroes*, EQUAL. MATTERS BLOG (Apr. 28, 2011, 12:48 PM), http://equalitymatters.org/blog/201104280005.

38. *Beck Hopes Firm Goes out of Business for Failing to Refusing to Defend DOMA*, EQUAL. MATTERS BLOG (Apr. 27, 2011, 8:20 PM), http://equalitymatters.org/emtv/201104270014 (quoting *Glenn Beck Show* (Fox News television broadcast Apr. 27, 2011) ("[B]ut Clement's law firm caved under pressure when things got just a little too uncomfortable, well, I hope they go out of business, quite frankly.")).

39. Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 133 (2004).

40. SOLVEIG STEVENSON, COMPETITIVE ENTER. INST., RETHINKING FEDERALISM: THE CASE FOR PREEMPTION IN THE INFORMATION AGE 1 (2011).

41. *See infra* Part III.

42. Zengerle, *supra* note 8, at 30.

Guardian),[43] a conservative "ideological warrior" (*Daily Beast*),[44] and the "go-to guy for controversial conservative causes" (*Above the Law*)[45]—he continues to make his living as a commercial litigator, helping the business community pursue a pro-federal legal agenda. Both roles are "conservative" in the sense that they further objectives commonly associated with the political right, but one requires him to champion federalism while the other requires him to rein it in. From a legal standpoint, there is nothing wrong with challenging federal power on Wednesday then turning around and promoting it on Thursday; a lawyer's pursuits are governed by the interests of the client, not ideological purity.

But what about from an ideological standpoint? Remove Clement from the picture and examine the two principles in the abstract—Is the push for federalism at odds with the push for deregulation? Can legal conservatism embrace both tenets and still claim to represent a coherent body of principles? If not, which tenet lies closer to the heart of modern-day conservative thought?

These questions need answers before there can be a serious discussion about the future of legal conservatism. As Professor Ernest Young has observed, "[C]onfusion about ideological labels has seriously distorted the debate about constitutional interpretation generally."[46] The confusion begins with our language. We speak of legal conservatism as if it were a uniform and ordered whole when in fact it is messier, less organized, and more fragmented. Legal conservatism is not a monolith but rather a collection of principles and doctrines cobbled together under a shared label.

Our understanding of "conservatism" is pliable enough to bend with context. According to Professor Young, "virtually all participants in the debate have defined conservatism operationally, as whatever jurisprudence is advocated by judges, academics, and politicians generally considered to be on the rightward end of the political spectrum."[47] We saw the term manipulated in the wake of the healthcare decision, when opponents of the Affordable Care Act criticized Chief Justice Roberts for failing to reach the "conservative" outcome[48] at the same time that support-

43. Matt Seaton (MattSeaton) on Twitter, TWITTER (Mar. 12, 2012, 8:49 AM), http://twitter.com/mattseaton/status/185393313719918593.

44. Chris Geidner, *Paul Clement Argues Both Sides of the Federalism Debate*, DAILY BEAST (Apr. 26, 2012, 1:45 PM), http://www.thedailybeast.com/articles/2012/04/26/paul-clement-argues-both-sides-of-the-federalism-debate.html.

45. Staci Zaretsky, *Lawyer of the Month: March Reader Poll*, ABOVE THE LAW (Apr. 5, 2012, 2:37 PM), http://abovethelaw.com/2012/04/lawyer-of-the-month-march-reader-poll/.

46. Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 623 (1994).

47. *Id.* at 621.

48. Luke Johnson, *John Roberts Outrages Conservatives in Health Care Ruling*, HUFFINGTON POST (June 28, 2012, 1:50 PM), http://www.huffingtonpost.com/2012/06/28/john-roberts-conservatives-health-care-ruling_n_1634512.html.

ers applauded his restrained and "conservative" approach to judicial review.[49] One side was using "conservative" to refer to a substantive political outcome, the other to a legal philosophy, but both had laid legitimate claim to the term.

We fall into similar semantic traps when we talk about Paul Clement. Clement can advance a "conservative" cause by helping states push back against expansive interpretations of national power. But he can also advance a "conservative" cause by representing cost-weary businesses seeking to replace patchy state regulations with uniform federal laws. Determining which cause is closer to the heartland of conservative thought ought to be a priority for legal conservatives, if not for their benefit then for the common good, because nobody is well served when pundits and politicians speak of "conservative" laws or "conservative" rulings or "conservative" judges without having the cloudiest idea which principles the term embraces.

II. THE TENSION BETWEEN FEDERALISM AND DEREGULATION

In his memoir about his years as Solicitor General under President Ronald Reagan, Charles Fried says the most frustrating aspect of his job was catering to ideologues inside the Administration who would cry foul anytime the Justice Department took a position in tension with the Administration's stance on federalism.[50] The Reagan Administration was resolved to rein in the federal bureaucracy and redress the yawning disparity in power between the state and federal government. "The driving force behind [its] argument was the belief, widely held in the generation that had framed and ratified the Constitution, that strong local institutions were a bulwark of democracy and a protection against impositions by an arrogant, distant, and overreaching national government."[51] For the "federalism police," as Fried dubbed them, the Administration's vision of state autonomy was an article of faith, a project to be elevated above most other domestic policy goals.[52] Pressing ideas inconsistent with this orthodoxy, even when they stemmed from equally settled conservative tenets like deregulation, "seemed like defiance of the Holy Office."[53]

Fried thought the Administration's dogmatic approach to federalism shortsighted. He left the Harvard Law School faculty to join the Reagan Administration because he believed in one of its central missions: relieving American business of the burden of excessive regulation. He ques-

49. *Harvard Law Prof.: Roberts' Ruling Was Conservative*, CBS NEWS (June 29, 2012, 8:25 AM), http://www.cbsnews.com/8301-505263_162-57463529/harvard-law-prof.-roberts-ruling-was-conservative/.

50. CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 182 (1991).

51. *Id.* at 186.

52. *Id.* at 188.

53. *Id.* at 52.

tioned whether deregulation could be achieved in conjunction with the Administration's promise to restore greater regulatory power to the states. He feared that devolving regulatory authority to states would lead to more regulation and less economic liberty, outcomes inimical to the Administration's pro-business agenda.[54] His distrust of local government stemmed in part from his years in Cambridge (he calls it the "The People's Republic of Cambridge"), a city notorious for its draconian approach to rent control.[55] In Cambridge, as in his birth country of Czechoslovakia, Fried witnessed local government at its most stifling. He came to Washington intent on defending capitalism wherever it might be threatened, convinced economic freedom was no more secure from provincial government bodies than national ones. "[T]he same social forces that had produced overregulation in federal programs were hard at work at the state level and could sometimes only be resisted by uniform federal standards," Fried wrote.[56]

Although Fried's skepticism was weakening his influence inside the Administration, he continued to voice it. When the Justice Department was told to advocate for a legal presumption favoring local regulations to the extent they conflict with federal law, Fried resisted. "This seemed to me a disastrous idea," he wrote.[57] "Better that firms operating on a national basis be subject to one uniform system of regulation than to scores of different ones. In a fractured and uncoordinated situation, businesses would as a practical matter be forced to comply with whatever regulations were most stringent."[58]

Fried was speaking from personal experience, but he might as well have been describing the last several decades of conservative legal thought. Conservatives had been wrestling with the competing tenets of federalism and deregulation well before Fried joined the Reagan Administration. According to Walter Dellinger, a Solicitor General under President Clinton, the tension between deregulation and federalism is a matter of "timeless debate."[59] "There is a genuine fissure," he says, "between the twin poles of states' rights on the one hand and freedom from excessive and multiplicitous and often inconsistent regulations on the other."[60]

When we speak of states' rights, it is often with the curious assumption that devolving regulatory authority to state governments will make for less regulation.[61] There is a perception that the states' right move-

54. *See id.*
55. *Id.* at 186–87.
56. *Id.* at 52.
57. *Id.* at 187.
58. *Id.*
59. *The Roberts Court and Federalism: Minutes from a Convention of the Federalist Society*, 4 N.Y.U. J. L. & LIBERTY 330, 333 (2009) [hereinafter *Roberts Court and Federalism*].
60. *Id.*
61. *Id.*

ment, being a project of the right wing, is synonymous with free markets and deregulation. For Dellinger, states' rights had always called to mind classic conservative imagery like "George Corley Wallace standing in the schoolhouse door."[62] But whereas proponents of states' rights would undoubtedly prefer their project work in harmony with conservative tenets like deregulation and economic liberty, the more sensible among them have come to understand it does not always work out that way. Today, Dellinger says, "states' rights look more appealing to people who want to urge more liabilities on corporations, more recovery, more punitive attitudes, more regulatory protections."[63]

Emboldened by years of deregulation under President Reagan, liberal interest groups redoubled lobbying efforts in state legislatures. Many had success—the environmentalists in California, New York, and Massachusetts; the labor unions in California and Michigan; the anti-tobacco groups in New England; and the bank reformers in New York.[64] But perhaps no group antagonized the business community with as much success as the trial lawyers.[65] In cooperation with consumer protection groups, the trial bar has gradually tilted the scale in civil litigation by pushing laws that make it easier to sue and collect damages from corporations.[66] Year after year, state by state, it has succeeded, securing longer limitations periods, restrictions on arbitration clauses, expanded tort liability for employers and manufacturers, as well as countless reforms designed to make civil litigation a vexing and costly enterprise for corporations.[67] Meanwhile, state courts fashioned creative remedies permitting plaintiffs to recover damages from multiple corporate defendants based on their respective shares of the market, and state attorneys general have ramped up litigation against corporate defendants in areas of national interest like firearms, lead paint, mortgage practices, and greenhouse gasses.[68]

The business climate is especially uninviting in states where the trial bar acts at the behest of the government. In these states, the attorney general plays the role of general contractor, auctioning off potential tort

62. *Id.*

63. *Id.* at 334.

64. *See* Young, *supra* note 39, at 133–34.

65. Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of* Parens Patriae, 74 TUL. L. REV. 1859, 1859 (2000).

66. *See, e.g.*, Tim Murphy, *Rick Perry v. The Trial Lawyers*, MOTHER JONES (Aug. 22, 2011, 6:00 AM), http://www.motherjones.com/mojo/2011/08/rick-perry-vs-trial-lawyers; Lamar Smith, *Trial Bar v. Tort Reform*, POLITICO (Oct. 1, 2009, 8:25 AM), http://www.politico.com/news/stories/0909/27761.html; Marilyn Tennissen, *Business, Trial Bar at Odds over Pending Texas Asbestos Bills*, LEGAL NEWSLINE (Apr. 6, 2009, 2:29 PM), http://legalnewsline.com/asbestos/220228-business-trial-bar-at-odds-over-pending-texas-asbestos-bills.

67. *See* Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 WM. & MARY L. REV. 1501, 1511–12 (2009).

68. *Id.* at 1503.

judgments to plaintiff firms eager to assume regulatory power.[69] The practice, known in the scholarly community as "regulation through litigation," gained national attention in the 1990s when plaintiff lawyers made a mint suing tobacco companies and gun manufacturers on behalf of state governments,[70] and was further popularized by Eliot Spitzer during his tenure as attorney general of New York.

Spitzer is not whom the Reagan revolutionaries envisioned when they set out to restore a balance of power between state and federal authority. Yet he was, in a peculiar way, precisely what they bargained for. Spitzer embodied a modern and muscular vision of state sovereignty. Before figures like Spitzer emerged, state attorneys general were viewed as watchdogs for consumers, their mandate limited to tracking down unscrupulous landlords and corrupt nursing homes.[71] But Spitzer envisioned an entirely different role for his office, combining his investigative authority with an ambitious interpretation of New York's jurisdiction to insert the state into areas traditionally reserved for federal enforcement. His project culminated in the late 2000s with a string of enforcement actions against Wall Street financial institutions. Spitzer went after the banks, the mutual funds, the insurers, and reinsurers.[72] He even went after the record companies, accusing some of the world's largest labels of withholding millions of dollars in royalties.[73] Most of his targets would pay extravagant fines and accede to severe restrictions on their business practices.[74]

But for all of his anti-business crusading, it may have been Spitzer's coziness with the trial bar that permanently estranged him from the business community. To maximize the threat of liability, Spitzer deputized plaintiff lawyers and invited them to carry out his oversight role through contingency-fee suits.[75] These suits, which allowed private lawyers to wield the power and prestige of the State, had a way of bringing companies to the settlement table, and dozens of corporate defendants were forced to change their business practices or pay significant settlements as a result.[76] What sets regulation through litigation apart from the tradi-

69. Joseph Forderer, *State Sponsored Global Warming Litigation: Federalism Properly Utilized or Abused?*, 18 MO. ENVTL. L. & POL'Y REV. 23, 25 n.7 (2010).

70. Edward T. Schroeder, *A Tort by Any Other Name? In Search of the Distinction Between Regulation Through Litigation and Conventional Tort Law*, 83 TEX. L. REV. 897, 900–01 (2005).

71. William B. Eimicke & Daniel Shacknai, *Eliot Spitzer: "The People's Lawyer"—Disgraced*, 10 PUB. INTEGRITY 365, 367 (2008).

72. *See, e.g.*, Carrie Johnson, *SEC, Spitzer Sue Mutual Fund Firm; Columbia Is Accused of Hurting Investors*, WASH. POST, Feb. 25, 2004, at E4 (describing suits against mutual fund firms); Floyd Norris, *When Spitzer Speaks, Insurers Take Note*, N.Y. TIMES, Oct. 16, 2004, at C1 (describing Spitzer's investigation of insurance companies).

73. Lola Ogunnaike, *Record Labels Must Pay Shortchanged Performers*, N.Y. TIMES, May 5, 2004, at E1.

74. Andrew P. Morriss et al., *Choosing How to Regulate*, 29 HARV. ENVTL. L. REV. 179, 182 (2005).

75. *See id.* at 203 n.117.

76. *Id.* at 181–82.

tional tort suit is the plaintiff's motivation: regulatory lawsuits are motivated by a desire to change the behavior of the defendant, rather than by a desire to collect money damages.

Pro-business conservatives take particular offense to the practice because it combines two of their least favorite things—government regulation and the class action lawsuit. It is, critics say, an abuse of government power and a circumvention of the democratic process because unlike private litigants, government "super plaintiffs" can protect themselves from the injurious conduct through regulation or taxes.[77] "These discretionary decisions of state attorneys general regarding which manufacturing industries to target represent a critical aspect of product regulation in today's economy and a major shift in the allocation of powers among the coordinate branches of government."[78] Or, as Senator Mitch McConnell put it, "The more fundamental problem with 'regulation through litigation' is that private parties obtain through lawsuits what legislatures have not chosen, or have even chosen to reject."[79]

It's not only the cost of litigation that dogs the business community, it's the uncertainty and second-guessing that poisons decision making.[80] Tort liability is most burdensome in states where the standards of care are set by state court judges and juries rather than by legislatures. In those states, manufacturers have less guidance in developing safety measures, and because juries don't undertake the cost–benefit analysis that lawmakers do, liability standards tend to be skewed in favor of consumers.[81] Meanwhile, the interests of the countless consumers who actually benefit from the product, be it a prescription drug or a safety belt or a lawnmower, are not represented in court.

Your position on tort reform, then, is a strong indicator of where you fit inside the conservative legal movement. Tort reform is a fixture on the GOP platform, and Republican lawmakers who rely on corporate donors neglect it at their own peril. But if you are serious about states' rights, you must be willing to accept the consequences of state regulation, and one of the most controversial consequences of state regulation is more litigation. That's why tort reform tests the nerves of states' rights conservatives: it requires sharing common ground with natural enemies like trial lawyers.

Early last year, House Republicans proposed capping the damages awardable by state court judges in medical malpractice and personal inju-

77. Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and* Parens Patriae *Product Litigation*, 49 B.C. L. REV. 913, 938 (2008).

78. *Id.* at 938–39.

79. Paul Weyrich, *Willpower: Losing Weight the Responsible Way*, NAT'L CTR. FOR PUB. POL'Y RES. LEGAL BRIEFS (Apr. 16, 2004), http://www.nationalcenter.org/LB41.html.

80. Klass, *supra* note 67.

81. *See id.* at 1511 n.31.

ry cases.[82] The law received a warm reception from the business lobby, which has for years been calling on Congress to reform the civil justice system and reign in the trial lawyers; and a predictably fiery one from House Democrats, who criticized Republicans for weakening accountability in the provision of healthcare and giving negligent doctors a free pass.[83] The real story was opposition from certain corners of the Republican Party.[84] Virginia Attorney General Ken Cuccinelli, a leader in the push to overturn the Affordable Care Act, said the bill was "breathtakingly broad in its assumptions about federal power."[85] He pointed to the proposed law as evidence of a "constitutional disconnect" among Republicans who oppose federal power when it's used for ill (he gives the example of Obamacare) yet still feel comfortable telling state court judges how to conduct civil trials.[86] Congressman Louie Gohmert, a Texas Republican, said he was "reticent to support Congress imposing its will on the states by dictating new state law in their own state courts."[87] Echoing these concerns, Senator Tom Coburn wondered where the line would be drawn once Congress put its "nose under the tent to start telling [states] what their tort law will be."[88]

Randy Barnett, the prolific right-wing legal scholar and one of the most vocal opponents of the Affordable Care Act, was more direct. "What constitutional authority did the supporters of the bill rely upon to justify interfering with state authority in this way?"[89] Barnett asked, before accusing the bill's proponents of practicing "fair-weather federalism," which is to say, supporting federalism only to the extent that it is consistent with other policy objectives.[90] In Barnett's circle, this is a polite way of calling someone spineless.

Barnett didn't coin "fair-weather federalism." The pejorative has been in use for decades, reserved for "hypocritical" conservatives who speak fondly of state rights' one day and then turn around and undermine

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82. *See* Todd Ruger, *House GOP Pushing Tort Reform Bill that Democrats Say Will Fail in Senate*, BLOG LEGAL TIMES (Apr. 19, 2012, 1:02 PM), http://legaltimes.typepad.com/blt/2012/04/house-gop-pushing-tort-reform-bill-that-democrats-say-will-fail-in-senate.html.

83. *See id.*

84. Julian Pecquet, *State Lawmakers Blast House GOP's Medical Malpractice Reform Bill*, THE HILL (Mar. 14, 2012, 4:04 PM), http://thehill.com/blogs/healthwatch/state-issues/216099-state-lawmakers-blast-medical-malpractice-reform-bill-.

85. Ken Cuccinelli, Op-Ed., *Keeping the Feds at Bay*, WASH. POST (Oct. 28, 2011), http://www.washingtonpost.com/opinions/keeping-the-feds-at-bay/2011/10/28/gIQAFJfUQM_story.html.

86. *Id.*

87. David Nather, *Tort Reform Bill Hits Speed Bump*, POLITICO (Feb. 9, 2011, 6:45 PM), http://dyn.politico.com/printstory.cfm?uuid=BBC00AF8-35CA-46D7-8DCD-AA3D0ED1EC05 (internal quotation mark omitted).

88. Eli Y. Adashi, *The Sustainable Growth Rate—What Happens Now?*, MEDSCAPE NEWS (June 30, 2011), http://www.medscape.com/viewarticle/745412.

89. Randy E. Barnett, *Tort Reform and the GOP's Fair-Weather Federalism*, WASH. EXAMINER (May 21, 2011, 12:54 AM), http://washingtonexaminer.com/article/39943.

90. *Id.*

them the next. They called President Bush a fair-weather federalist when he supported a federal cloning ban,[91] and they said the same thing about Governor Rick Perry, who has suggested Texas might be better off a secessionist state, when he said he would back a federal constitutional amendment defining marriage as the union of one man and one woman.[92]

Barnett's criticism would have had more resonance in the 1980s, when legal conservatives were all camping under one tent. Back then everybody shared the same priority—undoing the damage wrought by the Warren Court and two decades of judicial overreaching. The movement was still in a reactive posture, united under the banner of judicial restraint, its common interest in reforming the courts masking long-buried ideological differences.

Although a shared distaste for the Warren Court can kindle a movement, it cannot sustain it—at least not from an organizational standpoint. A legal movement needs a support structure before it can produce consistent results in the courts. But notwithstanding a surge in membership and popular support, legal conservatism remained weak and disorganized, a movement without sway in the legal academy or a viable agenda in the courts.[93] So while the conditions had been ripe for a conservative revolution in the late 1970s and early 1980s (Nixon appointed four Justices to the Supreme Court between 1969 and 1974), the movement still had no legs to stand on, no way to turn anger and frustration into concerted action.

In his book about the rise of the conservative legal movement, Stephen Teles chronicles the movement's transformation from a fringe and widely discredited ideology to a mainstream school of thought.[94] Beginning in the 1970s, when conservatives began populating law school faculties, the outlines of the modern movement started to take shape.[95] Consistent with grooming processes long familiar to the left, right-leaning graduates from top law schools were encouraged to begin their careers in prestigious clerkships with conservative judges and justices.[96] The idea was to "replicate the function that major universities serve on the left of creating a community of people with similar views on similar issues."[97] These clerkships, in turn, opened doors to faculty appointments and government placements previously dominated by left-leaning lawyers. Around the same time, a group of young academics founded the Federal-

91. Glenn Harlan Reynolds, *Fair-Weather Federalism?*, FOX NEWS (Apr. 22, 2002), http://www.foxnews.com/story/0,2933,50840,00.html.

92. Mike Riggs, *Rick Perry's Fair-Weather Federalism*, REASON.COM (July 29, 2011), http://reason.com/archives/2011/07/29/rick-perrys-tenuous-understand.

93. STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 2 (2008).

94. *Id.* at 4–5.

95. *Id.* at 91.

96. *Id.* at 140.

97. *Id.* at 164.

ist Society with the aim of building a conservative "counter-elite" to challenge the dominance of the liberal orthodoxy in the nation's top law schools and legal institutions.[98] These were positive developments, and the Federalist Society would eventually prove instrumental to the movement's development, but it was not until conservatives began channeling resources into long-term litigation campaigns that the movement started reaping dividends in the courts.

Following the lead of established public-interest groups like the National Association for the Advancement of Colored People and the American Civil Liberties Union, conservatives leveraged their newfound foothold in the legal academy by recruiting young lawyers into public-interest law firms (PILFs) where they could further the movement's litigation agenda.[99] Their progress was slow going. According to Teles, the "first-generation PILFs" struggled to build strong reputations because they were too closely linked to local business interests, their main source of funding.[100] Intimate ties to the business lobby frustrated their efforts to develop a public-interest identity, and it took the emergence of a second generation of PILFs, this one funded not by local chambers of commerce but by individual donors and other public-interest groups, to set the states' rights agenda on track.[101] As Mark Tushnet put it, "[T]he first generation of conservative public interest law firms was unable to pull off the public-relations move of identifying the interests of large businesses with the public interest."[102]

The second wave of PILFs went some way toward addressing the organizational problem, lending the movement more authenticity and garnering a strong base of ideological support.[103] Public-interest groups prefer ideological donors because they do not demand instant gratification and won't limit funding to projects promising quick payoffs.[104] Rather, they tend to appreciate the grinding pace at which movements are built and equipped to compete with the well-endowed institutions on the other side of the aisle.

But while the PILFs overcame their organizational problems, they made only modest headway in the courts. The movement appeared to gain traction in the 1990s when the Supreme Court issued a series of decisions scaling back the broad interpretation of federal power that had prevailed in the Court since the New Deal era. It was during this period

98. *Id.* at 138.
99. *Id.* at 67.
100. *Id.* at 221.
101. *Id.* at 68–69 ("The firms' business-heavy caseload lent credence to their adversaries' argument that, far from being defenders of the public interest, they were nothing more than shill for conservative business interests.").
102. Mark Tushnet, *What Consequences Do Ideas Have?*, 87 TEX L. REV. 447, 453–54 (2008) (reviewing TELES, *supra* note 93).
103. TELES, *supra* note 93, at 221.
104. *Id.* at 222.

that the Supreme Court, for the first time in six decades, invalidated a federal law on the ground that it exceeded congressional authority under the Commerce Clause.[105] Although the Supreme Court had not struck down a federal law since 1937, it would strike down thirty-three over the next eight years,[106] a trend that led experts to predict the Court would adopt a pre-New Deal approach to the commerce power.

But the trend would be short-lived. Although judicial conservatism remained ascendant throughout the period, over time it stopped paying dividends for the states' rights movement. In 2005, the Supreme Court ruled that Congress could, consistent with its authority under the Commerce Clause, proscribe the production and use of homegrown marijuana, even though the marijuana was permitted under state law and intended for personal consumption.[107] The Court based the decision, *Gonzales v. Raich*, on an expansive interpretation of the commerce power,[108] dashing hopes that it would restore the pre-New Deal vision of limited federal power.

Scholars disagree about the point at which the Court took a nationalist turn, with some contending it was the late 1990s, others suggesting it was the early years of the Roberts Court, and still others convinced it's been a pro-federal court all along. But everyone agrees the Court's decision in *Raich* was a death knell of sorts for the states' rights movement.[109] In retrospect, the Court's flirtation with states' rights in the 1990s has been attributed not to the movement but rather to the presence on the Supreme Court of ideological allies like Justices Rehnquist and O'Connor. "The two Justices who believed most strongly in federalism have both left the Court," wrote David Strauss, a professor at the University of Chicago, in a piece about the waning influence of judicial conservatism.[110]

The Supreme Court would continue to uphold expansive interpretations of federal power well into the 2000s, but the Court's nationalist, pro-business agenda would find its stride in the Roberts Court.[111] The Roberts Court is rightfully viewed as a business-friendly court, but its pro-business orientation owes much to its bold vision of federal power.[112]

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105. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 617 (2000); United States v. Lopez, 514 U.S. 549, 567–68 (1995).

106. Christopher R. Drahozal, *Preserving the American Common Market: State and Local Governments in the United States Supreme Court*, 7 SUP. CT. ECON. REV. 233, 280–83 app.A (1999).

107. Gonzales v. Raich, 545 U.S. 1, 9 (2005).

108. *See id.* at 22.

109. *See* Mark C. Christie, *Economic Regulation in the United States: The Constitutional Framework*, 40 U. RICH. L. REV. 949, 977 (2006).

110. David A. Strauss, *The Death of Judicial Conservatism*, 4 DUKE J. CONST. L. & PUB. POL'Y 1, 10 (2009).

111. *See* Jeffrey Rosen, *Supreme Court, Inc.*, N.Y. TIMES MAG., Mar. 16, 2008, at 38, 38.

112. *See* Jonathan H. Adler, *Business, the Environment, and the Roberts Court: A Preliminary Assessment*, 49 SANTA CLARA L. REV. 943, 950 (2009).

Since Chief Justice Roberts took the helm in 2005, the Court has been preoccupied with preemption. The issue has been a fixture on the Roberts Court docket since the beginning, and the Court's decisions tend to favor federal law and the particular corporate stakeholder invoking it.[113]

> [A]t the same time the Court was cutting back on Congress's authority under the Commerce Clause in the name of states' rights, it began to limit significantly the ability of states to provide tort rights and remedies for its citizens by preempting common law and statutory claims for damages associated with drugs, medical devices, and consumer products . . . .[114]

Each statutory scheme is different, of course, and the Court's approach toward preemption will vary from case to case. Still, the general trend favors uniformity over multiplicity, federal over state. More specifically, it reflects the Court's suspicion of tort litigation as a means of regulating commercial conduct.[115] The Roberts Court is happy to uphold federal power if it means not subjecting businesses to the whims of juries or state trial judges.

Conservatives devoted to promoting deregulation are finding it increasingly difficult to share common ground with the states' rights movement. Their differences sharpened during the financial crisis, when the business community supported some of the Obama Administration's more dramatic federal interventions into the economy. While the U.S. Chamber of Commerce (the Chamber) went on record in support of the stimulus package and the Troubled Asset Relief Program, states' rights groups accused the federal government of overreaching and challenged the program in court.[116] Since parting ways in the late 1970s, the two camps have found independent sources of funding, occupied separate spheres of power, and advanced diverging positions on some of the biggest cases of the day. Although still loosely linked together under the conservative banner, the camps have little left in common, and often find themselves on opposing sides of the same case. Remarking on this trend, Professor Young said, "It is no longer possible to equate a vote for state autonomy with a vote for a politically conservative result."[117]

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113. *See, e.g.*, Kurns v. R.R. Friction Prods. Corp., 132 S. Ct. 1261, 1265–66 (2012) (holding that state law tort claims of defective design and failure to warn were preempted by the Locomotive Inspection Act); Bruesewitz v. Wyeth LLC, 131 S. Ct. 1068, 1075–76 (2011) (holding that National Childhood Vaccine Injury Act preempts all design-defect claims against vaccine manufacturers brought by plaintiffs who seek compensation for injury or death caused by vaccine side effects).

114. Klass, *supra* note 67, at 1504–05.

115. *See id.*

116. Seth Bailey, *TARP Challenged in Federal Court*, OPENMARKET.ORG (Feb. 9, 2009), http://www.openmarket.org/2009/02/09/tarp-challenged-in-federal-court/.

117. Ernest Young, *The Conservative Case for Federalism*, 74 GEO. WASH. L. REV. 874, 875 (2006).

Organizationally, the business community is the strongest camp in the conservative legal establishment, its advantage so considerable that at least one scholar describes it as being outside the establishment entirely. "[W]e may have seen a return of business-oriented conservative litigation, but it is now outside the conservative legal movement's institutional framework," Professor Mark Tushnet observed.[118] The business community owes part of its institutional strength to the Chamber, the world's largest business federation, whose membership comprises more than 300,000 companies.[119] The Chamber spends a mind-blowing amount of money—more than the national committees of both major parties combined—to advance its agenda in Washington, and its litigation wing, the National Chamber Litigation Center, has had unparalleled success before the Supreme Court, both in its capacity as a party and as amicus writing in support of the business community.[120]

Viewed against this backdrop, the 2011–2012 Supreme Court docket offers a skewed picture of the state of modern conservatism. While the Supreme Court has shown a renewed interest in federalism cases, it's seldom that their outcomes favor the states' rights movement. "[O]ne thing you cannot say," lamented Professor David Strauss, in addressing the Court's pro-federal trend, "is that this is a Court that cares deeply about local prerogatives and protecting local governments from the intrusions of people in Washington, D.C."[121]

III. PREEMPTION AND THE FATE OF THE STATES' RIGHTS MOVEMENT

In November 2008, the Federalist Society hosted a seminar on the Roberts Court and its commitment to federalism.[122] Paul Clement was there, flanked by an impressive panel of law professors and lawyers, including Walter Dellinger, former Solicitor General under President Clinton. Dellinger opened the discussion on a confrontational note, calling attention to a rift in conservative legal thought between deregulation and states' rights.[123] Dellinger was a Democrat addressing a room full of Republicans, and he undoubtedly recognized that he was treading on precarious ground with this topic. But he forged on, insisting conserva-

118. Tushnet, *supra* note 102, at 456.

119. *About the Chamber of Commerce*, USCHAMBER.COM, http://www.uschamber.com/about (last visited Feb. 22, 2013). *But see* Josh Harkinson, *US Chamber Shrinks Membership 90%*, MOTHER JONES (Oct. 14, 2009, 9:33 AM), http://www.motherjones.com/mojo/2009/10/us-chamber-caves-membership-numbers.

120. Adam Liptak, *The Roberts Court: Justices Offer Receptive Ear to Business Interests*, N.Y. TIMES, Dec. 19, 2010, at A1; Eric Lipton et al., *Large Donations Aid U.S. Chamber in Election Drive*, N.Y. TIMES, Oct. 10, 2010, at A1; *see also* David L. Franklin, *What Kind of Business-Friendly Court? Explaining the Chamber of Commerce's Success at the Roberts Court*, 49 SANTA CLARA L. REV. 1019, 1019 (2009).

121. Strauss, *supra* note 110, at 11.

122. *See Roberts Court and Federalism*, *supra* note 59, at 330.

123. *See id.* at 333.

tives were due for a reckoning: they would eventually have to decide which tenet embodies core conservatism.[124]

Clement spoke later. He had prepared remarks about federalism and the Roberts Court, but he was not about to let Dellinger's comments slide. Clement rejected the idea that the two schools of thought are inherently contradictory.[125] The question, he said, was not how much regulation is acceptable but rather who should be doing the regulating.[126] Clement believes you can defend a limited role for the federal government and still accept uniform federal authority in areas where states cannot act collectively.[127] By the same token, he said, you can favor deregulation and still recognize room for state action in areas where state laws won't create tension.[128]

Clement's remarks echo a position he took a decade earlier in a short essay about preemption he co-authored with Viet Dinh, now his colleague at Bancroft.[129] The authors criticized commentators for mistaking the Court's preemption cases for cases about federalism.[130] In their view, federalism cases present big-picture scholarly questions—questions about the boundaries of federal and state authority, about which sovereign can act and when.[131] Preemption cases tend to be narrower, their outcomes turning on the scope of a statute or the intent of Congress, the cases often decided without regard for constitutional principles.[132] "There is no real tension between the Supreme Court's federalism decisions and its preemption cases because the latter, properly understood, are not 'about federalism.'"[133]

Clement's explanation has logical appeal, but is there any evidence that it works that way in practice? In other words, does the states' rights agenda operate in tension with that of the business community? Is the business community considering where its agenda fits with legal conservatism generally and federalism specifically, and if so, will it pull back where its success threatens to undermine the ongoing campaign for states' rights?

Clement knows better than anyone that the two sides are pushing the courts in different directions, their most common point of contention being preemption, or the extent to which federal law displaces state law

124. *See id.* at 336.
125. *Id.* at 352–53.
126. *Id.* at 360–61.
127. *See id.* at 353.
128. *See id.* at 360.
129. Paul D. Clement & Viet D. Dinh, *When Uncle Sam Steps In: There's No Real Disharmony Between High Court Decisions Backing Preemption and the Federalism Push of Recent Years*, LEGAL TIMES, June 19, 2000, at 66, 66.
130. *Id.*
131. *Id.*
132. *See id.* at 66, 67.
133. *Id.* at 66 (quoting Coleman v. Thompson, 501 U.S. 722, 726 (1991)).

in a particular policy area. Having argued both sides of the preemption debate, Clement knows the business community has come to value the doctrine with the same fervor that the states' rights movement has come to detest it. By the same token, he knows the success of one side often comes at the expense of the other. A Supreme Court decision upholding the supremacy of federal law not only threatens to displace state action in the affected policy area but also strengthens the preemption doctrine by making it more likely that federal law will displace state action in other areas.

Clement knows this because he helped the business community secure some of the signature preemption victories of the last decade. He regularly appears on behalf of the business lobby in the Court's preemption cases, often with the aim of obtaining precedents at odds with the states' rights agenda. In *Williamson v. Mazda Motor of America, Inc.*,[134] a case about the preemptive scope of federal seatbelt regulations, he filed an amicus brief on behalf of a group of auto manufacturers.[135] He argued that a state court judgment imposing liability on Mazda for failing to incorporate lap-shoulder seatbelts in certain seating positions was preempted by federal regulations allowing manufacturers to install lap-only belts in the same positions.[136] His argument ultimately failed, and it's a good thing for the states' rights crowd, because implicit in the claim was the legally fraught proposition that states may not mandate what Congress left optional.

Clement would have better luck in *Bruesewitz v. Wyeth LLC*,[137] a highly anticipated preemption case about vaccine safety.[138] The issue there was whether federal law could shield vaccine manufacturers from tort suits arising from vaccine-related injuries. Clement, writing on behalf of the vaccine industry, argued that subjecting vaccine manufacturers to state law liability for design defects would upset the federal regulatory regime.[139] That regime had been carefully calibrated to hold manufacturers accountable to plaintiffs injured by defective vaccines, while still limiting manufacturers' exposure to frivolous lawsuits. Introducing state tort liability, manufacturers argued, would upset this delicate balance.[140] The Supreme Court ruled in favor of the vaccine manufacturers,

134. 131 S. Ct. 1131 (2011).

135. *See* Brief of the Alliance of Automobile Manufacturers, et al. as Amici Curiae Supporting Respondents, Williamson v. Mazda Motor of America, Inc., 131 S. Ct. 1131 (2011) (No. 08-1314), 2010 WL 3820816.

136. *Id.* at 21.

137. 131 S. Ct. 1068 (2011).

138. *Id.* at 1072.

139. *See* Brief of Glaxosmithkline L.L.C. et al. as Amici Curiae in Support of Respondents at 6, *Bruesewitz*, 131 S. Ct. 1068 (No. 09-152).

140. *Id.*

cementing another victory for the business community in its push for control of the Court's preemption doctrine.[141]

In *Kurns v. Railroad Friction Products Corp.*,[142] Clement filed an amicus brief on behalf of General Electric (GE), the world's leading manufacturer of diesel-electric locomotives. He argued that the Locomotive Inspection Act broadly preempts the field of locomotive safety, crowding out state laws aimed at regulating the design and construction of locomotives.[143] He asked the Court to hold that federal locomotive regulations preempted a state law tort claim against a distributor of locomotive parts that contained asbestos.[144] GE's position on preemption was aggressive—even more so than that of the Justice Department, which allowed for the possibility that states could permissibly regulate non-operational locomotives. The Supreme Court sided with GE and the parts distributor, concluding the Locomotive Act leaves no room for state action in the field of locomotive safety.[145]

Clement also had a hand in *AT&T Mobility LLC v. Concepcion*,[146] one of the more undervalued preemption victories of the decade.[147] The suit began as a class action brought by AT&T customers who had been charged sales tax for the retail price of phones they received for free.[148] When AT&T invoked a provision in the sales contract disallowing class action suits, the plaintiffs cried foul, claiming the class action is the only cost-effective way to pursue small-dollar claims against large corporations like AT&T. It would be unconscionable, they argued, to let consumers sign away their rights to their only realistic remedy.[149] The question before the Court was whether the Federal Arbitration Act (FAA) preempts state laws that prohibit contracts with class action waivers.[150] The Court said yes—at least to the extent such rules interfere with the objective of the federal statute that the Court identified as promoting the expeditious and informal resolution of consumer claims.[151] The Court takes a dim view of state laws that restrict the formation of arbitration agreements, especially when they have the effect of requiring the availability of remedies like the class action suit, which "interfere[] with fun-

141. *Bruesewitz*, 131 S. Ct. at 1082.

142. 132 S. Ct. 1261 (2012).

143. Brief for General Electric Corp. as Amicus Curiae Supporting Respondents at 7–8, Kurns v. R.R. Prods. Corp., 132 S. Ct. 1261 (2012) (No. 10-879), 2011 WL 4872044, at *7–8.

144. *Id.* at 8.

145. *Kurns*, 132 S. Ct. at 1270.

146. 131 S. Ct. 1740 (2011).

147. Clement was retained by the wireless industry lobby to write an amicus brief in support of AT&T's position on preemption. *See* Brief of CTIA—The Wireless Association as Amicus Curiae in Support of Petitioner, *Concepcion*, 131 S. Ct. at 1740 (No. 09-893), 2010 WL 3183858.

148. *Concepcion*, 131 S. Ct. at 1744.

149. *See id.* at 1745.

150. *Id.* at 1744.

151. *See id.* at 1748.

damental attributes of arbitration and thus create[] a scheme inconsistent with [federal law]."[152]

After *Concepcion*, corporations can use collective action waivers to shield themselves from high-volume, small-dollar suits then rest comfortably knowing consumers will seldom pursue claims individually. As Justice Breyer observed in his dissent, "The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."[153] Critics fear the effects of the decision will spill into other areas like labor law where class action waivers promise to considerably limit exposure to civil liability.[154] Already, lawyers are advising employers to insert class action waivers in their employment contracts.[155]

> All of the doctrinal developments of recent years circumscribing the reach of class actions pale in import next to the game-changing edict that companies with possible exceptions that warrant close scrutiny may simply opt out of potential liability by incorporating class action waiver language in their standard-form contracts with consumers (or employees or others).[156]

Taken together, Clement's preemption cases tell the story of a lawyer who spends as much time challenging states' rights as he does promoting them. Clement's victories for the business community have not occurred in a vacuum: today's preemption victories lay the groundwork for tomorrow's, strengthening the business lobby's litigation agenda by reinforcing the doctrinal case for uniform federal law. The Court's decision in *Bruesewitz* will stand in the way of state legislatures seeking to regulate vaccine manufacturers and similar industries subject to close federal supervision, while its decision in *Kurns* makes state law a nonfactor in the area of railroad safety. *Kurns* is especially notable because it would later be cited by the Justice Department as support for its preemption position in the Arizona immigration case,[157] forcing Clement, Arizona's lawyer, to argue against a pro-preemption decision he helped secure.

But neither decision rivals *Concepcion* in its potential to alter the balance of power between the federal government and the states. Before

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152. *Id.*

153. *Id.* at 1761 (Breyer, J., dissenting) (quoting Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004)) (internal quotation marks omitted).

154. Nantiya Ruan, *What's Left to Remedy Wage Theft?: How Arbitration Mandates that Bar Class Actions Impact Low-Wage Workers*, 2013 MICH. ST. L. REV. *passim* (forthcoming).

155. *See, e.g.*, Lisa M. Carvalho, *U.S. Supreme Court Reverses Ninth Circuit: Federal Arbitration Act Preempts California Law to Uphold Waiver of Class Action Option in Mandatory Arbitration*, EMP'T L. WATCH (Apr. 29, 2011), http://www.employmentlawwatch.com/tags/att-mobility-v-concepcion/.

156. Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 627 (2012).

157. *See* Brief for the United States at 27, Arizona v. United States, 132 S. Ct. 2492 (2012) (No. 11-182), 2011 WL 5548708, at *27.

Concepcion, state courts could regulate the use of arbitration agreements by enforcing only those deemed fair to consumers and consistent with state policy. The FAA was the business community's response to this judicial hostility, Congress's way of telling the states to stop meddling in the affairs of the business community.

The *Concepcion* decision is already changing the relationship between state regulators and corporations in the area of consumer protection. According to David Arkush, a consumer advocate with Public Citizen, "[c]orporations can now prevent consumers and small business owners from exercising what is often their only real option for challenging companies that defraud them by millions or even billions of dollars: banding together to file class action lawsuits."[158] The decision has cast doubt on dozens of state laws designed to protect consumers from the harsh effects of arbitration. Among the laws now in question are class action-waiver bars in Georgia, California, South Carolina, and New Jersey, as well as a West Virginia law prohibiting nursing homes from using arbitration clauses in their admission agreements that strip residents of their right to bring personal-injury claims to court.[159]

This is just a sample, drawn exclusively from Clement's caseload, of pro-business outcomes that made life more difficult for the states and their allies in the conservative legal movement. If you expand the inquiry to the entire Supreme Court docket, more examples abound. In *CSX Transportation v. Alabama Department of Revenue*,[160] the Supreme Court made it easier for interstate railroad companies to challenge state tax laws under a federal statute prohibiting discriminatory taxes against railroads.[161] More recently, in *National Meat Ass'n v. Harris*,[162] the Court ruled that the Federal Meat Inspection Act preempted California's restrictions on using non-ambulatory farm animals for slaughter.[163] The Chamber submitted a brief in support of the slaughterhouses.[164]

More troubling for states' rights proponents is the fierceness with which the Chamber is pursuing its agenda. Recall that the Reagan Administration wanted the Justice Department to push for a legal presumption favoring state and local regulations to the extent they conflict with

158. David Arkush, *U.S. Supreme Court to Major Corporations: You Write the Rules*, HUFFINGTON POST (Feb. 28, 2011, 6:06 PM), http://www.huffingtonpost.com/david-arkush/us-supreme-court-to-major_b_854714.html.

159. *See* CAL. CIV. CODE § 1668 (West 2012); S.C. CODE ANN. § 56-15-110 (2012); S.C. CODE ANN. § 56-15-130 (2012); W. VA. CODE R. § 16-5C-15(c) (2012); Muhammad v. Cnty. Bank, 912 A.2d 88, 99–101 (N.J. 2006); *see also* Dale v. Comcast Corp., 498 F.3d 1216, 1224 (11th Cir.) (holding that, under Georgia law, such clauses are considered on a case-by-case basis).

160. 131 S. Ct. 1101 (2011).

161. *See id.* at 1114.

162. 132 S. Ct. 965 (2012).

163. *Id.* at 968.

164. *See* Brief of the Chamber of Commerce of the United States as Amicus Curiae in Support of Petitioner, *Nat'l Meat*, 132 S. Ct. at 965 (No. 10-224), 2011 WL 3821399.

federal law. Charles Fried had opposed the idea, worried it would tip the scale too far toward the states. Now the Chamber and its allies in the business community are pushing in the opposite direction, inviting the Court to abandon the "presumption against preemption," which requires courts to assume a state law is valid in the absence of an affirmative showing that it conflicts with federal law.[165] The presumption is an outgrowth of the principle that state power is meant to protect state law from the displacing effect of federal regulation. Doing away with it would tip the scale even further in the business lobby's favor, eliminating one of the states' most powerful defenses in preemption litigation.

These developments belie Clement's assurance that the two schools of thought can work in harmony. If the Chamber were sensitive to the interests of the states—if it were motivated even in part by conservative unity—it would seek narrow holdings in preemption cases. But more often than not, when the Chamber appears before the Supreme Court, it is pushing not only for a business-friendly outcome but also for pro-federal doctrinal change that will endure beyond the particular dispute. The Chamber will not be satisfied to advance its cause in a piecemeal, case-by-case fashion. It wants to create a legal environment conducive to broad federal power and uniform federal regulation.

It appears to be doing just that. The federal courts are gradually changing the division of labor between Congress and the states, enlarging Congress's license to legislate in policy areas once reserved for state legislatures. This shift is consistent with one commentator's belief that the Chamber is not simply trying to secure favorable outcomes for its members; it's trying to set the "intellectual foundation for a newly muscular preemption jurisprudence."[166]

Consider how the two sides positioned themselves on the defining issues of the term—healthcare and immigration. While the states' rights movement rallied behind the opponents of the Affordable Care Act, staking its position in a series of fiery briefs from organizations like the Cato Institute, Project Liberty, and the American Legislative Exchange Council, the Chamber kept a safe distance from the case. Although the Chamber filed two amicus briefs in the Supreme Court, neither took a position on the law's constitutionality.[167] The Chamber wrote only to stress the importance of a prompt resolution, and to suggest that if the individual mandate is struck down, the rest of the Affordable Care should fall with it, because when push comes to shove, the Chamber's members would

165. *See* Tom Goldstein, *Argument Preview: Will 'Presumption Against Preemption' Survive?*, SCOTUSBLOG (Nov. 7, 2011, 6:00 PM), http://www.scotusblog.com/2011/11/argument-preview-will-%E2%80%9Cpresumption-against-preemption%E2%80%9D-survive/.

166. Franklin, *supra* note 120, at 1033.

167. *See* Brief of Chamber of Commerce of the United States as Amicus Curiae in Support of Reversal as to the Severability Issue, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (Nos. 11-393, 11-398, 11-400), 2012 WL 454626 (combining and briefing the cases).

prefer the status quo to the hollowed-out mess of a health care policy that would remain in the absence of the mandate.[168]

The Chamber was altogether absent from the Arizona immigration case, but if the position it took in a similar case last term is any indication, it probably would have aligned itself with the Obama Administration. In *Chamber of Commerce v. Whiting*,[169] the Chamber asserted that the Legal Arizona Workers Act interferes with federal immigration policy by imposing more onerous penalties than federal law on businesses that employ illegal aliens.[170] There is such a thing, the Chamber maintained, as a state that's *too* cooperative in enforcing federal law. The Supreme Court ultimately sided with Arizona, concluding the State had "taken the route least likely to cause tension with federal law."[171] But the Chamber's objection was clear: allowing states to determine for themselves whether someone is employing an unlawful alien frustrates federal law and leaves businesses at the mercy of fifty independent and potentially conflicting enforcement regimes.[172]

This, I think, is what Professor Tushnet meant when he said the business community is operating "outside the conservative legal movement's institutional framework."[173] Healthcare and immigration were indispensable opportunities for states' rights proponents. Winning either case would have lifted the besieged movement from a decade-long slump and dealt a devastating blow to the Obama Administration and its vision of federal power. The conservative "institutional framework," with its elaborate network of think tanks, advocacy groups, and public-interest law firms, mobilized accordingly. The campaign was unyielding: signs were hoisted, editorials submitted, briefs filed. Meanwhile, the Chamber kept quiet. The Chamber had no position on the constitutionality of the Affordable Care Act, at least none it felt comfortable detailing in an amicus brief. And it had already telegraphed its position on Arizona immigration, in the *Whiting* case, when it sued Arizona on the same pro-federal theory the Justice Department was using this time around.

IV. THE BIG TENT

Professor Young, who has written extensively on federalism and conservative political theory, argues that legal conservatism would be adrift were it not for its devotion to federalism.[174] Young believes fidelity to the framers' vision of a balance between state and federal power is

168. *Id.* at 2, 15–16.
169. 131 S. Ct. 1968 (2011).
170. Brief for the Petitioners at 13–15, *Whiting*, 131 S. Ct. at 1968 (No. 09-115), 2008 WL 2131124, at *13–15.
171. *Whiting*, 131 S. Ct. at 1987.
172. *See id.* at 1979.
173. Tushnet, *supra* note 102, at 456.
174. *See* Young, *supra* note 117, at 886–87.

reason enough for conservatives to keep federalism near to their hearts.[175] He maintains that limitations on centralized power can safeguard individual liberty, and that using the states as laboratories for political reform "fits the conservative view that change is both essential and dangerous."[176] In making the conservative case for federalism, Young hopes to "provide principled reasons for a conservative court to favor federalism and to remind conservatives why they ought to be more consistent in that cause."[177]

Young's argument provides a useful starting point, but so far it has not found an audience outside academia, where it is needed most. Writing last year in *Slate*, Dahlia Lithwick and Barry Friedman observed that "federalism cases have always made . . . fickle friends."[178] "They put people in an awkward spot," the authors wrote.[179] "Either choose some rule regarding state (versus federal) power and apply it no matter what issue is at stake, or pick an outcome you like on any given issue, then assign governmental power."[180] Lithwick and Friedman were addressing the tension between federalism and the conservative social agenda, a conflict that has left Republicans in the uncomfortable position of paying lip service to states' rights while defending invasive federal programs like the war on drugs and DOMA. But their criticism is also true of the tension between federalism and deregulation.

The conflict, simply stated, is this: giving states more regulatory authority requires accepting the consequences of more regulation, whereas pushing for regulatory uniformity at the federal level requires accepting a circumscribed role for the states. The two schools of thought cannot exist without tension in a national market economy, but there has always been a flickering hope that their proponents might stay out of each other's way in the greater interest of the movement. This hope has faded over the last decade with the prospect of a united conservative legal movement giving way to the reality that two of its main components, the business community and the states' rights movement, no longer share an agenda.

The Federalist Society took off in the 1980s because it found a way to attract lawyers from a range of political and intellectual backgrounds. It billed itself as a "big tent" institution, a place where conservatives could come together to share fruit plates and listen to people like Paul Clement talk about how much they have in common. This worked well

175. *See id.*
176. *Id.* at 886.
177. *Id.* at 887.
178. Barry Friedman & Dahlia Lithwick, *The Supreme Court Rediscovers Federalism Just in Time for the 2012 Election*, SLATE (Dec. 14, 2011, 4:53 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/12/the_supreme_court_rediscovers_federalism_just_in_time_for_2012_election_.html.
179. *Id.*
180. *Id.*

three decades ago when conservatives were living in the shadow of the Warren Court, with the legal academy still overrun by liberals. But as the movement gained strength, infiltrating the very institutions it once opposed, the impulse that once united its factions grew fainter. Today legal conservatism is said to encompass the same assorted membership as it did thirty years ago, even though the forces that once united it have dissipated and the movement's various components have sought out their own identities and agendas.

We see this trend at work in the media's portrayal of Paul Clement. Both sides of the conflict would claim him as their own, even though history shows him to be beholden to neither. The best one can say for the standard trope about Clement is that it is right for the wrong reason. Clement *is* the go-to lawyer for the conservative legal agenda, but it does not follow that his success will advance the goals of legal conservatism, writ large. Call him a states' rights crusader and you're forced to reconcile his preemption work on behalf of the business lobby. Call him a shill of the business community and you're forced to account for his states' rights work, much of it in tension with the business community's vision of federal power. You can look to the common denominator and call him a "conservative," but then you're right back where you started, left with a label whose meaning has been stretched beyond usefulness.

INSURING THE RISK OF CONSTRUCTION DEFECTS IN COLORADO: THE TENTH CIRCUIT'S *GREYSTONE* DECISION

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ABSTRACT

Whether commercial general liability insurance policies cover claims for construction defects has been the subject of debate for many years in Colorado and across the United States. When a division of the Colorado Court of Appeals ruled in 2009 that negligent work could not give rise to a covered "occurrence" under the pertinent policy language, the state legislature responded with a statute rejecting this view. Disputes continued in the courts until late 2011, however, when the Tenth Circuit reviewed a diversity case and predicted that the Colorado Supreme Court would hold that standard liability policies do in fact cover unforeseen damage to property arising from faulty workmanship. This Article examines the history of construction liability insurance policies, the interpretation of such policies in Colorado, and the Tenth Circuit's holding in *Greystone Construction, Inc. v. National Fire & Marine Insurance Co.*

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INTRODUCTION

With its decision in *Greystone Construction, Inc. v. National Fire & Marine Insurance Co.*,[1] the United States Court of Appeals for the Tenth Circuit has greatly clarified the law of construction insurance in the State of Colorado. The opinion, announced in late 2011, followed years of fighting between policyholders and carriers in Colorado's state courts, federal courts, and legislature. Underlying all of these battles was a fundamental dispute over whether builders' liability insurance policies could cover property damage and construction defect claims arising from negligent work. Although this war is certainly not over, the Tenth Circuit's decision represents a significant victory for policyholders.

I. HISTORY

A. ISO Policies of the 1960s, 1970s, and 1980s

The institution of insurance is at least as old as the earliest records of human civilization in Greece, Rome, and China.[2] Modern concepts of business insurance date back to the Middle Ages, when traders sought a means to offset the risk of hazardous maritime travel and other threats to their property.[3] In the late nineteenth century, however, a new form of risk emerged: the civil judgment. As the Industrial Revolution brought about trains, automobiles, and other new technologies wonderfully suited to people hurting themselves, businesses sought to insure against the risk that a court would order them to compensate third parties for bodily injury or property damage.[4] This desire begat the modern commercial general liability (CGL) insurance policy.[5]

Until the 1930s, each insurance company drafted its own unique policy language to cover potential liabilities, "resulting in little uniformity and a great deal of confusion and litigation."[6] These concerns prompted the various carriers to create an independent service agency to develop standardized language for all general liability policies.[7] This agency, now known as the Insurance Services Office, Inc. (ISO), published its first standardized liability policy in 1940 and has updated its policy forms periodically since then.[8]

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1. 661 F.3d 1272, 1282 (10th Cir. 2011).
2. *See* DAVID P. LEONARD, THE NEW WIGMORE: A TREATISE ON EVIDENCE: SELECTED RULES OF LIMITED ADMISSIBILITY § 6.3.1, at 756 (Aspen Law & Business rev. ed. 2002).
3. *Id.* at 756–57.
4. *Id.* at 758–59; *see also* Kenneth S. Abraham, *The Rise and Fall of Commercial Liability Insurance*, 87 VA. L. REV. 85, 87–88 (2001); James A. Robertson, *How Umbrella Policies Started Part 1: Early Liability Coverage*, INT'L RISK MGMT. INST., INC. (Mar. 2000), http://www.irmi.com/expert/articles/2000/robertson03.aspx.
5. Abraham, *supra* note 4, at 89.
6. SCOTT C. TURNER, INSURANCE COVERAGE OF CONSTRUCTION DISPUTES § 1:5 (2012).
7. *Id.*
8. *Id.*

Today, a few basic ISO forms define the scope of liability coverage available for nearly all businesses throughout the United States, regardless of what type of work the business may do.[9] Although there would be obvious advantages to creating specialized policies tailored to individual industries, this approach would present challenges as well: whenever a carrier seeks to adopt new policy language, it must first obtain approval from the government of each state where the policy would have effect, educate its employees on the meaning and application of the new language, and calculate premiums based on predictions of how courts may interpret the policy in future disputes.[10] Given these administrative hurdles, most insurers opt to use the standard, tested language.[11] As one commentator has noted, however, this results in a situation where "much the same policy is issued to an earthmoving and excavating contractor as to a wholesale bakery."[12]

The very first ISO liability policies were written to cover legal obligations arising out of injury or damage "caused by an accident."[13] Questions emerged, however, over whether an "accident" included harm that took place over an extended period of time. To address such questions, the ISO amended its standard policy language in 1966 to state that the carrier must pay all "sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' . . . caused by an 'occurrence' that takes place in the 'coverage territory.'"[14] The policy in turn defined "occurrence" to be "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."[15] The 1973 revision defined "occurrence" in a similar manner but added an element of fortuity, deeming an "occurrence" to be "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."[16]

Beginning with the 1986 revision, ISO policies have defined an "occurrence" as "an accident including continuous or repeated exposure to substantially the same general harmful conditions," moving the "nei-

9. *Id.*

10. *Id.* As Turner notes, the McCarren Act, 15 U.S.C. §§ 1011–1015 (2012), delegates the regulation of insurance policies to the states and territories, effectively requiring the ISO to obtain the approval of fifty-three separate governments before adopting new language. *See* TURNER, *supra* note 6.

11. For a further discussion of the forces encouraging standardization of insurance policies, see 1 ERIC MILLS HOLMES & MARK S. RHODES, HOLMES'S APPLEMAN ON INSURANCE §§ 2.1–2.2, at 189–202 (2d ed. 1996).

12. TURNER, *supra* note 6.

13. Am. Family Mut. Ins. Co. v. Am. Girl, Inc., 673 N.W.2d 65, 74 (Wis. 2004) (quoting 16 HOLMES & RHODES, *supra* note 11, § 117.3, at 240).

14. *Id.* (alteration in original) (quoting CGL policy) (internal quotation marks omitted).

15. *Id.* at 75–76 (quoting CGL policy) (internal quotation marks omitted).

16. Clifford J. Shapiro & Neil B. Posner, *It Was an Accident: Inadvertent Construction Defects Are an "Occurrence" Under Commercial General Liability Insurance Policies*, 3 J. INS. COVERAGE, Autumn 2000, at 55, 59 (quoting 1973 revision of CGL policy).

ther expected nor intended" language to the exclusions section of the policy.[17] The policies have never defined the word "accident," prompting courts to look to common usage and dictionary definitions, which generally describe an accident as being something that happens by chance or from an unknown or unexpected cause.[18]

As the policy language evolved, insured builders sought coverage for the cost of repairing property that had sustained damage due to inadvertent defects in their workmanship. Although the 1966 and 1973 ISO policies excluded coverage for damage to the "work" or "product" of the named insured, some argued that such exclusions were inapplicable to property damage included within the "Products–Completed Operations Hazard" or similarly titled provisions, which the policies defined to comprise property damage arising out of work that had been completed or abandoned.[19] Few courts of the era were persuaded, however.[20] A 1971 law review article opined that the "business risk" exclusions of the contemporary CGL policies were evidence that the ISO drafters had not intended to cover the possibility that the policyholder might not perform contractual obligations.

> The products hazard and completed operations provisions are not intended to cover damage to the insured's products or work project out of which an accident arises. The risk intended to be insured is the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than to the product or completed work itself, and for which the insured may be found liable. The insured, as a source of goods or services, may be liable as a matter of contract law to make good on products or work which is defective or otherwise unsuitable because it is lacking in some capacity. This may even extend to an obligation to completely replace or rebuild the deficient product or work. This liability, however, is not what the coverages in question are designed to protect against. The coverage is for tort liability for physical damages to others and not for contractual liability of the insured for eco-

17. TURNER, *supra* note 6, § 6:53 (quoting post-1986 policies).

18. *Id.* § 6:54. Turner suggests that, because "accident" is subject to many possible meanings, it is an ambiguous term that courts should interpret in whatever manner maximizes coverage for the insured. *See id.* § 6:53. The Wisconsin Supreme Court, meanwhile, has cited two applicable definitions of this word:

> The dictionary definition of "accident" is: "an event or condition occurring by chance or arising from unknown or remote causes." Black's Law Dictionary defines "accident" as follows: "The word 'accident,' in accident policies, means an event which takes place without one's foresight or expectation. A result, though unexpected, is not an accident; the means or cause must be accidental."

Am. Girl, Inc., 673 N.W.2d at 76 (citations omitted).

19. *See* Roger C. Henderson, *Insurance Protection for Products Liability and Completed Operations: What Every Lawyer Should Know*, 50 NEB. L. REV. 415, 419–24 (1971).

20. *See, e.g.*, Biebel Bros., Inc. v. United States Fidelity & Guar. Co., 522 F.2d 1207, 1211 (8th Cir. 1975); Knutson Constr. Co. v. St. Paul Fire & Marine Ins. Co., 396 N.W.2d 229, 235 (Minn. 1986); Weedo v. Stone-E-Brick, Inc., 405 A.2d 788, 792 (N.J. 1979).

> nomic loss because the product or completed work is not that for which the damaged person bargained.[21]

The Supreme Court of New Jersey quoted this article in a 1979 case, *Weedo v. Stone-E-Brick, Inc.*,[22] in which the court concluded that an insurance carrier had no duty to defend allegations that an insured contractor was liable for replacing defective stucco and roofing materials.[23] The court then offered its own example to guide future litigants.

> An illustration of this fundamental point may serve to mark the boundaries between "business risks" and occurrences giving rise to insurable liability. When a craftsman applies stucco to an exterior wall of a home in a faulty manner and discoloration, peeling and chipping result, the poorly-performed work will perforce have to be replaced or repaired by the tradesman or by a surety. On the other hand, should the stucco peel and fall from the wall, and thereby cause injury to the homeowner or his neighbor standing below or to a passing automobile, an occurrence of harm arises which is the proper subject of risk-sharing as provided by the type of policy before us in this case. The happenstance and extent of the latter liability is entirely unpredictable the [sic] neighbor could suffer a scratched arm or a fatal blow to the skull from the peeling stonework. Whether the liability of the businessman is predicated upon warranty theory or, preferably and more accurately, upon tort concepts, injury to persons and damage to other property constitute the risks intended to be covered under the CGL.[24]

Notably, it does not appear that the plaintiffs in *Weedo* alleged that the defects in the stucco and roofing products led to any water intrusion or property damage within the home, so the court never reached the question of whether the policy would have covered damage to nondefective components of a builder's work.[25]

In any event, though the reasoning of *Weedo* and similar cases may have correctly interpreted the CGL policies of the time, it also suggested that builders had little means of protecting themselves against liability for subcontractor errors or other construction defects. Any modern business wants to insure against potential liability, and this gap in available coverage presented a problem, both for the builders and the affected property owners.[26] The ISO addressed this problem in 1976 by offering a

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21. Henderson, *supra* note 19, at 441 (footnote omitted).
22. 405 A.2d 788, 791 (N.J. 1979).
23. *Id.*
24. *Id.* at 791–92.
25. *Id.* at 789.
26. *See* Abraham, *supra* note 4, at 85 ("The idea that businesses can insure against liability is so axiomatic that it has very nearly become a form of legal reasoning itself."). The moral question of whether society should allow tortfeasors to insure against civil liability is beyond the scope of this Article, but one should not overlook that liability coverage exists both for the benefit of the insured and also "for the protection of the innocent tort victim who suffers personal injury or property dam-

new product, the "Broad Form Property Damage" endorsement.[27] For an additional premium, a builder could add this endorsement to its policy and obtain coverage for liability arising from damage to the builder's completed work that resulted from a subcontractor's errors.[28] Ten years later, the ISO incorporated this language directly into its standard CGL policy by narrowing the exclusion applicable to property damage within the Products–Completed Operations Hazard.[29] Policies written in 1986 and later, including those at issue in *Greystone*, expressly stated that the exclusion for damage to an insured's completed work does not apply "if the damaged work or the work out of which the damage arises was performed on [the named insured's] behalf by a subcontractor."[30]

Following publication of the 1986 revision, industry commentators offered a new example of how the ISO drafters intended the contemporary CGL policy to apply in negligent construction cases.

> The named insured is a general contractor who has built an apartment house with the services of numerous subcontractors. After the building is completed and put to its intended use, a defect in the building's wiring (put in by a subcontractor) causes the building, including work of the general contractor and other subcontractors, to sustain substantial fire damage. The named insured is sued by the building's owner. Although the named insured's policy excludes damage to "your work" arising out of it or any part of it, the second part of [the exclusion] makes it clear that the exclusion does not apply to the claim. That is because the *work out of which the damage arose was performed on the named insured's behalf by a subcontractor*. . . . Thus, barring the application of some other exclusion or adverse policy condition, the loss should be covered, including the part out of which the damage arose.[31]

Nevertheless, disputes continued. Despite selling these new policies to builders, some carriers balked at paying claims relating to subcontractors' defective work. Unable to convince courts that the new, more limited policy exclusions should bar coverage for defective work, these carriers shifted their strategy to the threshold question of whether defective work constituted an "occurrence" in the first place.[32] A number of courts agreed, holding that there was no occurrence when faulty workmanship

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age for which the insured is liable." Friedland v. Travelers Indem. Co., 105 P.3d 639, 646 (Colo. 2005). If an insolvent builder damages a home, for example, the homeowner's only recourse may be to pursue the builder's insurance policy.

27. *See* Lamar Homes, Inc. v. Mid-Continent Cas. Co., 242 S.W.3d 1, 12 (Tex. 2007).

28. *Id.*

29. Am. Family Mut. Ins. Co. v. Am. Girl, Inc., 673 N.W.2d 65, 83 (Wis. 2004).

30. *Id.* at 82.

31. O'Shaughnessy v. Smuckler Corp., 543 N.W.2d 99, 105 (Minn. Ct. App. 1996), *abrogated on other grounds by* Gordon v. Microsoft Corp., 645 N.W.2d 393 (Minn. 2002) (quoting The Nat'l Underwriter Co., *Public Liability: Exclusions*, FIRE, CASUALTY & SURETY BULLETINS, Sept. 1993, at Aa 16–17) (internal quotation marks omitted).

32. *See* Shapiro & Posner, *supra* note 16, at 56.

damaged only itself and did not inflict any harm on the property of a third party.[33] Other courts reached the opposite conclusion and ruled that accidental damage to an insured's own product could indeed constitute a covered occurrence.[34] These conflicting decisions presented a situation that was, in the words of one court, an "intellectual mess."[35]

B. Meanwhile, in Colorado . . .

Interpretation of an insurance policy is, like interpretation of any contract, a matter of state law.[36] Thus, even when considering identical language in standard policies, courts in different states may reach different results. The opinion of *Worsham Construction Co. v. Reliance Insurance Co.*[37] illustrates this. In *Worsham*, a builder sought coverage under its CGL policy for the cost of repairing construction defects in an office building.[38] Reversing a grant of summary judgment for the carrier, the Colorado Court of Appeals expressly rejected the business risk analysis of *Weedo* and instead focused on the language of the policy, which the court found to be ambiguous.[39] One section of the policy excluded coverage for contractual liability but then stated that "this exclusion does not apply to a warranty of fitness or quality of the named insured's products or a warranty that work performed by or on behalf of the named insured will be done in a workmanlike manner."[40] This language, the court noted, seemed to contemplate coverage for property damage resulting from a breach of the builder's duty to perform its work in a non-negligent manner.[41] Although the carrier argued that other sections of the policy excluded "property damages to the named insured's products arising out of such products or any part of such products" as well as "property damage to work performed by the named insured arising out of such work or any portion thereof," the court concluded that these exclusions conflicted with the former language and created an ambiguity that, under Colorado law, had to be resolved in favor of the insured.[42]

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33. *See, e.g.*, J.Z.G. Resources, Inc. v. King, 987 F.2d 98, 102–03 (2d Cir. 1993); Auto-Owners Ins. Co. v. Home Pride Cos., 684 N.W.2d 571, 577 (Neb. 2004).

34. *E.g.*, Fejes v. Alaska Ins. Co., 984 P.2d 519, 523 (Alaska 1999); Sheets v. Brethren Mut. Ins. Co., 679 A.2d 540, 551 (Md. 1996); High Country Assocs. v. New Hampshire Ins. Co., 648 A.2d 474, 478 (N.H. 1994).

35. Edwin L. Doernberger & Theresa A. Guerin, *Construction Defects as an "Occurrence": State Legislatures Weigh In*, COVERAGE, Nov./Dec. 2011, 18, 19 (quoting Crossmann Comtys. of North Carolina, Inc. v. Harleysville Mut. Ins. Co., No. 26909, 2011 WL 93716 at *3 (S.C. Jan. 7, 2011), *modified on reh'g*, 717 S.E.2d 589 (S.C. 2011)). The original opinion that contained this pithy quote has since been withdrawn, but it remains an apt description.

36. *E.g.*, Houston Gen. Ins. Co. v. Am. Fence Co., 115 F.3d 805, 806 (10th Cir. 1997).

37. 687 P.2d 988, 991 (Colo. App. 1984).

38. *Id.* at 990.

39. *Id.* at 990–91.

40. *Id.* at 990.

41. *Id.* at 991.

42. *Id.* at 990–91.

Subsequent rulings in Colorado adhered to the reasoning of *Worsham* when deciding the applicability of these business risk exclusions to construction damages.[43] Some carriers countered with the argument that the exclusions section of a policy could never expand their obligations, under the theory that "an exception to an exclusion can never amount to a grant of coverage but by nature, can only limit coverage."[44] In *Simon v. Shelter General Insurance Co.*, the Colorado Supreme Court justices acknowledged "the technical merits" of this argument, but they were not persuaded.[45] The justices reiterated that insurance policies had to be read as a whole and considered from the perspective of persons of ordinary intelligence, not from the perspective of legal or insurance experts.[46]

With regard to whether damage from construction defects should be treated as an occurrence under Colorado law, two lines of cases developed. Beginning with the Colorado Supreme Court's 1991 decision in *Hecla Mining Co. v. New Hampshire Insurance Co.*,[47] one line of cases focused on "the knowledge and intent of the insured."[48] If the result of the insured's actions was not expected or intended, it would be covered as an accident.[49] Quoting the Second Circuit, the *Hecla* court explained:

> In general, what make injuries or damages expected or intended rather than accidental are the knowledge and intent of the insured. It is not enough that an insured was warned that damages might ensue from its actions, or that, once warned, an insured decided to take a calculated risk and proceed as before. Recovery will be barred only if the insured intended the damages, or if it can be said that the damages were, in a broader sense, "intended" by the insured because the insured knew that the damages would flow directly and immediately from its intentional act.[50]

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43. *See, e.g.*, Simon v. Shelter Gen. Ins. Co., 842 P.2d 236, 242 (Colo. 1992); Colard v. Am. Family Mut. Ins. Co., 709 P.2d 11, 14 (Colo. App. 1985). *But see* Union Ins. Co. v. Kjeldgaard, 820 P.2d 1183, 1187 (Colo. App. 1991) (noting that absent ambiguity, policy excluded coverage for damage to insured's work).

44. *Simon*, 842 P.2d at 240.

45. *Id.*

46. *Id.*

47. 811 P.2d 1083 (Colo. 1991).

48. *Id.* at 1088 (quoting City of Johnstown v. Bankers Standard Ins. Co., 877 F.2d 1146, 1150 (2nd Cir.1989)).

49. *Id.*

50. *Id.* (quoting *City of Johnstown*, 877 F.2d at 1150) (internal quotation marks omitted). Some courts have employed the analogy of a speeding driver to explain this distinction. *See, e.g.*, Merced Mut. Ins. Co. v. Mendez, 261 Cal. Rptr. 273, 279–80 (Ct. App. 1989). A driver who is late for an appointment may intentionally drive too fast and negligently cause a collision. His insurance will still cover the damage because although the act of speeding was intentional, the damage was an unintended accident. This contrasts with the scenario in which a driver deliberately runs over his hated rival in a crosswalk. In the latter case, there is no coverage because the injury was the intended result.

The Colorado Court of Appeals relied on *Hecla* in 2005 when it decided *Hoang v. Monterra Homes (Powderhorn) LLC*.[51] The *Monterra Homes* case arose after several homeowners had sued their builder, Monterra, in state court over construction defects.[52] Shortly before trial, Monterra's insurance carrier commenced a separate action in federal court seeking a declaration that its policies would not cover any of the damages that the homeowners were seeking.[53] The jury in the state court action eventually returned a verdict in the homeowners' favor, at which point the homeowners served the carrier with a writ of garnishment from the state court.[54] The federal court then stayed the carrier's declaratory judgment action because it concluded that it would be improper to grant declaratory relief in relation to an ongoing state court garnishment suit.[55] Recently, the Tenth Circuit affirmed a similar order from a Kansas district court, and it appears unlikely that many federal judges in this circuit will choose to grant declaratory relief concerning insurance lawsuits that are actively pending in the state courts.[56]

After the federal court declined to rule on the coverage issues in *Monterra Homes*, the state trial court considered the evidence and found that the property damage in question had in fact resulted from an occurrence.[57] The Colorado Court of Appeals affirmed:

> Here, the trial court found that Monterra may have known, based on the soil reports and other engineering reports, that there was a substantial *risk* that damages would occur, but the evidence did not show that Monterra actually intended or expected the damages. . . .
>
> Insurers maintain that, by focusing on the result rather than on the knowledge and intent of the insured, the trial court applied an erroneous legal standard in determining that there was an "occurrence" under the policies. A review of the court's order, however, demonstrates that the trial court properly focused its inquiry on Monterra's knowledge, actions, and intentions.[58]

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51. 129 P.3d 1028, 1034 (Colo. App. 2005), *rev'd sub nom.* Hoang v. Assurance Co. of Am., 149 P.3d 798 (Colo. 2007).

52. *Id.* at 1032, 1034.

53. *Id.* at 1032.

54. *Id.*

55. Order, No. 01-CV-2439 (D. Colo. Sept. 12, 2002) (copy of minute order on file with author).

56. *See* Mid-Continent Cas. Co. v. Vill. at Deer Creek Homeowners Ass'n, 685 F.3d 977, 986 (10th Cir. 2012). Whether to grant relief under the Federal Declaratory Judgment Act, 28 U.S.C. § 2201 (2012), is discretionary. *See* Wilton v. Seven Falls Co., 515 U.S. 277, 282 (1995). In addition to the *Monterra Homes* litigation, the United States District Court for the District of Colorado has declined to grant declaratory relief in at least two other unpublished rulings involving garnishments over construction defect judgments. *See* Order Granting Defendants Motion to Stay, No. 04CV-1924REBOES, 2005 WL 2359125, at *1 (D. Colo. Sept. 26, 2005); Order, No. 02-CV-0366-WDM-BNB (D. Colo. Nov. 20, 2002).

57. *Monterra Homes*, 129 P.3d at 1034.

58. *Id.*

The court went on to hold that the policy covered portions of the judgment but that certain exclusions limited coverage.[59]

Both the homeowners and the insurers petitioned for a writ of certiorari, the former challenging whether any exclusions applied and the latter arguing that the builder's faulty workmanship did not constitute an occurrence.[60] The Colorado Supreme Court granted certiorari on the narrow issue of whether an exclusion voided insurance coverage for property damage occurring when a claimant's predecessor in interest owned the property, but it denied the remainder of the petition and cross-petition.[61] Such a denial is not necessarily an endorsement of the court of appeals's decision,[62] though the supreme court's subsequent discussion of the nature and timing of an occurrence necessary to trigger coverage suggests that the justices likely agreed with the lower courts' determination that Monterra's accidental errors did indeed constitute an occurrence.[63]

A second line of cases emerged with the opinions in *Union Insurance Co. v. Hottenstein*[64] and *McGowan v. State Farm Fire & Casualty Co.*[65] In *Hottenstein*, a homeowner obtained an arbitration award against a remodeling contractor for various sums, including the costs necessary to complete the contractor's work, fix various defects, pay for lost use, and repair damage to an existing roof.[66] The contractor's carrier agreed to pay for the roof damage but refused to cover the remaining amounts, contending that these were breach-of-contract damages that its policy did not cover.[67] In a 2003 opinion, the Colorado Court of Appeals affirmed summary judgment for the carrier.[68] The court noted that the ambiguous "exception to the contract exclusion" found in *Simon* (and *Worsham*) was not present in the policy, and it rejected the homeowner's efforts to recharacterize her breach-of-contract judgment as one for negligence.[69] The court further held that, based on decisions from the Eighth Circuit and the Iowa Supreme Court, a contractor's breach of its construction contract was not an accident that could constitute a covered occurrence under the contractor's CGL policy.[70]

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59. *Id.* at 1039.

60. Plaintiffs and Defendant's Joint Reply Brief at 1, 10, Hoang v. Assurance Co. of Am., 149 P.3d 198, 800 (Colo. 2007) (No. 05SC389), 2006 WL 2618808, at *1, *10.

61. Hoang v. Assurance Co. of Am., No. 05SC389, 2006 WL 1586645, at *1 (Colo. Mar. 20, 2006).

62. *See* COLO. APP. R. 35(f) ("Denial of certiorari by the Supreme Court shall not necessarily be taken as approval of any opinion of the Court of Appeals.").

63. *See Hoang*, 149 P.3d at 802.

64. 83 P.3d 1196 (Colo. App. 2003).

65. 100 P.3d 521 (Colo. App. 2004).

66. *Hottenstein*, 83 P.3d at 1198.

67. *Id.* at 1201.

68. *Id.* at 1198.

69. *Id.* at 1201.

70. *Id.* (citing Pace Constr. Co. v. U.S. Fid. & Guar. Ins. Co., 934 F.2d 177, 179–80 (8th Cir. 1991); Yegge v. Integrity Mut. Ins. Co., 534 N.W.2d 100, 102–03 (Iowa 1995)).

McGowan, announced several months later, described similar facts. A husband and wife hired a contractor to build a house but noticed a number of serious defects during construction.[71] They eventually fired the contractor and obtained a default judgment for breach of contract, negligence, and other claims, and they attempted to collect on their judgment from the contractor's insurance carrier.[72] The trial court found that the couple had alleged "property damage" resulting from an "occurrence" as the terms appeared in the relevant CGL policy, but that the policy's exclusions barred coverage.[73] The Colorado Court of Appeals affirmed. Relying indirectly on Tenth Circuit precedent, the court observed that "[c]omprehensive general liability policies normally exclude coverage for faulty workmanship based on the rationale that poor workmanship is considered a business risk to be borne by the policyholder, rather than a 'fortuitous event' entitling the insured to coverage."[74] The court further noted that CGL policies "are not intended to be the equivalent of performance bonds."[75] Turning to the specifics of the case, the court held that the policy unambiguously excluded coverage for damage to the contractor's work unless it fell within the exception for completed operations.[76] Because the contractor had been fired in the midst of the project and much of the damage reflected the cost of finishing the contractor's work, the "completed operations" exception did not apply, and the exclusion controlled.[77] The Colorado Supreme Court denied a petition for certiorari.[78]

Despite the very different outcomes, the lines of cases represented by *Monterra Homes* and *McGowan* can be reconciled. The property damage in *Monterra Homes* was an unexpected result of the insured de-

71. McGowan v. State Farm Fire & Cas. Co., 100 P.3d 521, 522 (Colo. App. 2004).

72. *Id.* at 522–23.

73. *Id.* at 523.

74. *Id.* at 525 (citing 9 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 129:11, at 129–31 (3d ed. 1995) (citing Bangert Bros. Constr. Co. v. Americas Ins. Co., 888 F. Supp. 1069 (D. Colo. 1995), *aff'd*, 1995 WL 539479, at *6 (10th Cir. Sept. 11, 1995)). It is not clear if the court's use of the adjective "comprehensive" in place of "commercial" was deliberate. The first ISO policies bore the name of "Comprehensive General Liability" insurance; beginning with the 1986 revisions, the drafters kept the CGL initials but changed the name to "Commercial General Liability" insurance. *See* Abraham, *supra* note 4, at 89.

75. *McGowan*, 100 P.3d at 525 (citing Union Ins. Co. v. Hottenstein, 83 P.3d 1196, 1202–03 (Colo. App. 2003); Kvaerner Metals Div. v. Commercial Union Ins. Co., 825 A.2d 641, 655 (Pa. Super. Ct. 2003)). A performance bond is an agreement by a third party to guarantee the completion of a construction contract upon the default of the general contractor. BLACK'S LAW DICTIONARY 1253 (9th ed. 2009).

76. *McGowan*, 100 P.3d at 525. Had the contractor abandoned the job instead of being terminated, the result may have been different. *See* Thomas v. Nautilus Ins. Co., No. CV 11-40-M-DWM-JCL, 2011 WL 4369519, at *10 (D. Mont. Aug. 24, 2011), *report and recommendation adopted*, No. CV 11-40-M-DWM-JCL, 2011 WL 4369496, at *2 (D. Mont. Sept. 19, 2011).

77. *McGowan*, 100 P.3d at 525–26. The insurance industry does offer another product—builder's risk insurance—that provides first-party coverage for certain forms of property damage arising prior to the completion or abandonment of a project, and prudent construction professionals may wish to purchase both forms of coverage.

78. McGowan v. State Farm Fire & Cas. Co., No. 04SC354, 2004 WL 2377173, at *1 (Colo. Oct. 25, 2004).

veloper's negligence that appeared well after the completion of the project. By contrast, the unfinished work in *McGowan* was neither a traditional form of property damage nor anything that would typically be considered an accident. Although the appellate panel in *McGowan* suggested that negligent work should never be considered an occurrence, and that courts should interpret CGL policies to avoid overlap with performance bonds, these comments were merely dicta; the holding of the case was based on unambiguous exclusions for damage to the insured's incomplete work. Thus, these cases gave insured builders and their creditors little reason to fear that Colorado courts would refuse to enforce CGL insurance policies in future construction disputes. The situation changed in 2009, however, when the Colorado Court of Appeals announced *General Security Indemnity Co. v. Mountain States Mutual Casualty Co.*[79]

C. The General Security *Case and Colorado House Bill 10-1394*

General Security arose from a large construction defect suit between a homeowners association and a builder.[80] The builder asserted third-party claims seeking indemnity from its subcontractors, and one of these subcontractors in turn filed a complaint against its own subcontractors (the sub-subcontractors).[81] After the original plaintiff and defendant settled, this subcontractor's insurer, General Security Indemnity Company of Arizona (GSINDA), filed a separate action seeking contribution of defense costs and other relief from the sub-subcontractors' insurers.[82] In a series of rulings, the trial court determined that the property damage alleged by the homeowners association had not been caused by an occurrence, and it therefore dismissed GSINDA's claims.[83]

GSINDA appealed to the Colorado Court of Appeals, which affirmed.[84] The judges acknowledged that another division of their court had concluded that defective workmanship was an occurrence when deciding *Monterra Homes*, but they declined to follow this holding.[85] Instead, they criticized the *Monterra Homes* division for failing to consider case law from other states and follow what they characterized as the "majority rule."[86] According to the *General Security* division, a majority of jurisdictions had held "that claims of poor workmanship, standing

79. 205 P.3d 529 (Colo. App. 2009), *superseded by* COLO. REV. STAT. § 13-20-808 (2012), *as recognized in* TCD, Inc. v. Am. Family Mut. Ins. Co., 296 P.3d 255 (Colo. App. 2012).

80. *Id.* at 531.

81. *Id.*

82. *Id.*

83. *Id.* at 532.

84. *Id.* at 538.

85. *Id.* at 536.

86. *Id.* How *General Security* selected its majority is unclear; the opinion identified five jurisdictions as defining the "majority" yet listed six jurisdictions as representing the "minority." The court's primary basis for this statement appeared to be an editorial written by an insurance industry commentator who claimed to have collected cases from other states denying coverage, but the court did not name the author's cases nor provide any further explanation of its dubious arithmetic. *See id.* at 535.

alone, are not occurrences that trigger coverage under CGL policies."[87] Although the division acknowledged that "a corollary to the majority rule is that an 'accident' and 'occurrence' are present when consequential property damage has been inflicted upon a third party as a result of the insured's activity," the judges found this corollary inapplicable to the facts of the case.[88] The judges likewise declined to follow *Hecla*, concluding that it was not binding because the Colorado Supreme Court had considered a slightly different definition of "occurrence" in that case.[89]

On its face, the *General Security* decision seemed to invite certiorari review by the Colorado Supreme Court under the criteria of the applicable state rule: the case decided a significant question of law in a manner probably not in accord with the rationale of *Hecla* and similar supreme court decisions, and it presented a conflict with *Monterra Homes* and other divisions of the court of appeals.[90] Nevertheless, GSINDA chose not to petition for review.

It is easy to speculate why GSINDA may have made this choice. Some commentators have suggested that a dispute between two insurance companies, continuing after the original claimant and the insured defendants have settled, presents a "poor forum for determining significant insurance coverage questions."[91] This theory seems plausible, given that an adversarial, common law system depends on parties aggressively defending their own interests. In a dispute between two insurance carriers at the appellate level, the system may fail insofar as a carrier may face "the prospect of winning the coverage battle but losing the war if an insured turns the insurer's winning coverage arguments against that insurer in a different case."[92] In other words, GSINDA may have decided that a published opinion stating that carriers have no duty to pay con-

87. *Id.*

88. *Id.*

89. *Id.* at 537. Whether this was a valid basis for departing from binding precedent is likewise dubious. As discussed above, the pre-1986 policy considered in *Hecla* included the language "neither expected nor intended from the standpoint of the insured" as part of the definition of an "occurrence," whereas post-1986 policies moved this language to the exclusions. *See* TURNER, *supra* note 6, § 9:1 (quoting the pre-1986 policy) (internal quotation mark omitted). Although this change may have the procedural effect of shifting the burden of proof to the carrier, *see id.*, it does little to suggest that the concept of accident considered in *Hecla* has been superseded. On the contrary, commentators have noted that "the industry still equates an occurrence with the insured neither expecting nor intending the injury or damage." Harmon S. Graves et al., *Shoddy Work, Negligent Construction, and Reconciling the Irreconcilable Under the CGL Policies*, 38 COLO. LAW., Nov. 2009, at 43, 46 & n. 48 (citing The Nat'l Underwriter Co., *Public Liability: CGL Coverage Form—Coverage A; Bodily Injury and Property Damage Liability*, FIRE, CASUALTY & SURETY BULLETINS, July 2008, at A.3-4).

90. Colorado appellate rules provide that the character of reasons for granting certiorari include, *inter alia*, situations where the court of appeals has "decided a question of substance in a way probably not in accord with applicable decisions of the Supreme Court," and situations where a division of the court of appeals has rendered a "decision . . . in conflict with another [division of said court]." COLO. APP. R. 49.

91. Graves et al., *supra* note 89, at 44.

92. *Id.* at 44 n.2.

struction defect claims would be worth more in the long run than whatever damages it might have recovered from the sub-subcontractors' insurers had it convinced the supreme court to reverse the *General Security* holding.

In any event, the *General Security* ruling soon received criticism from both sides of the coverage universe. Representatives of policyholders complained that the decision departed from established Colorado precedent, went against the intent of the ISO drafters, rendered portions of the CGL policy superfluous, and created uncertainty as to what construction damages were covered.[93] Lobbyists for the insurance industry, in turn, testified that *General Security* and related cases "took it too far," came as a "shock" to the industry, and were "not the way courts have ruled in other jurisdictions."[94]

Although GSINDA was content to let the published decision stand without further review, Colorado's legislators were not. In the following session, the Colorado General Assembly passed House Bill 10-1394, which unequivocally rejected the "majority rule" that had enamored the court in *General Security*.[95] The legislators declared that "[t]he interpretation of insurance policies issued to construction professionals is of vital importance to the economic and social welfare of the citizens of Colorado," and stated:

> (I) The policy of Colorado favors the interpretation of insurance coverage broadly for the insured.
>
> (II) The long-standing and continuing policy of Colorado favors a broad interpretation of an insurer's duty to defend the insured under liability insurance policies and that this duty is a first-party benefit to and claim on behalf of the insured.
>
> (III) The decision of the Colorado court of appeals in *General Security Indemnity Company of Arizona v. Mountain States Mutual Casualty Company* does not properly consider a construction professional's reasonable expectation that an insurer would defend the construction professional against an action or notice of claim [for construction defects].[96]

The bill, eventually codified at section 13-20-808 of the Colorado Revised Statutes, took effect in May 2010 and applied to "insurance policies currently in existence or issued on or after the effective date of this

93. *Id.* at 47.

94. Ronald M. Sandgrund & Scott F. Sullan, *H.B. 10-1394: New Law Governing Insurance Coverage for Construction Defect Claims*, 39 COLO. LAW., Aug. 2010, at 89, 90 (quoting *House Testimony on H.B. 10-1394 Before the H. Comm. on Bus. Affairs & Labor*, 67th Gen. Assemb., 2d Reg. Sess. 21:2-11 (2010)).

95. *See* H.B. 10-1394, 67th Gen. Assemb., 2d Reg. Sess. (Colo. 2010) (codified at COLO. REV. STAT. §§ 13-20-808, 10-4-110.4).

96. H.B. 10-1394 § 1 (citation omitted).

act."[97] Since then, several other states have followed suit, enacting similar legislation.[98] Before the bill became law, however, several state and federal courts in Colorado relied on the *General Security* holding to deny coverage to insured builders. One such case was *Greystone Construction, Inc. v. National Fire & Marine Insurance Co.*[99]

II. THE *GREYSTONE* LITIGATION

A. Background and Procedural Posture

Greystone arose out of two state court cases in which homeowners had sued their builders for construction defects, including foundation movement that caused extensive damage to the homes' living areas.[100] In both cases, the homebuilders had used subcontractors to perform most, if not all, of their work.[101] American Family Mutual Insurance Company (American Family) had insured the builders during the time of construction and shortly thereafter, and National Fire & Marine Insurance Company (National Fire) had issued policies covering later dates.[102] In both cases, American Family had tendered a defense to the homebuilders subject to a reservation of rights.[103] National Fire denied owing the homebuilders any defense under its policies, and American Family eventually paid to settle both cases.[104]

American Family and the homebuilders subsequently sued National Fire in the United States District Court for the District of Colorado. They alleged jurisdiction based on diversity of citizenship and asserted claims for declaratory relief, contribution or equitable subrogation, breach of contract, bad faith breach of contract, and violation of the Colorado Consumer Protection Act.[105] The court bifurcated the issue of policy interpretation, and the parties filed cross-motions for summary judgment seeking a determination of whether the underlying cases had alleged an occurrence that fell within the coverage provisions of the policies.[106] Relying heavily on *General Security*, the district court ruled that there was no occurrence to trigger coverage under National Fire's policies because the

97. *Id.* § 3.

98. *See* Doernberger & Guerin, *supra* note 35, at 20–22; *accord* ARK. CODE ANN. § 23-79-155 (2011); HAW. REV. STAT. § 431:1-217 (2011); S.C. CODE ANN. § 38-61-70 (2011).

99. Greystone Constr., Inc. v. Nat'l Fire & Marine Ins. Co., 649 F. Supp. 2d 1213, 1219 (D. Colo. 2009).

100. Greystone Constr., Inc. v. Nat'l Fire & Marine Ins. Co., 661 F.3d 1272, 1276 (10th Cir. 2011), *vacated*, 661 F.3d 1272 (10th Cir. 2011).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Greystone*, 649 F. Supp. 2d at 1215.

105. Complaint and Jury Demand at 2, 6–10, *Greystone*, 649 F. Supp. 2d at 1213 (No. 07-cv-00066-MSK-CBS), 2007 WL 703348, at *2, *6–10.

106. *Greystone*, 649 F. Supp. 2d at 1215–16.

underlying complaints had not alleged property damage to anything other than the insureds' own work.[107]

B. Appeal to the Tenth Circuit

Following the district court's ruling, American Family and the homebuilders appealed to the Tenth Circuit. Because the Colorado state courts had not issued a clear ruling on the subject, the Tenth Circuit certified a question to the Colorado Supreme Court: "Is damage to non-defective portions of a structure caused by conditions resulting from a subcontractor's defective work product a covered 'occurrence' under Colorado law?"[108] The Supreme Court declined to consider the issue.[109]

House Bill 10-1394 passed in the midst of the appeal, and the Tenth Circuit permitted additional briefing on the new statute before announcing its final decision in November 2011.[110]

1. The Policies

To start its discussion, the court noted that the National Fire policies at issue were all versions of the post-1986 CGL policy, which contained the same material language:

> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have [no] duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply . . . .
>
> b. This insurance applies to "bodily injury" and "property damage" only if:
>
> (1) The "bodily injury" or "property damage" is *caused by an "occurrence"* that takes place in the "coverage territory";
>
> (2) The "bodily injury" or "property damage occurs during the policy period . . . .[111]

The court also noted that the policies contained various business risk exclusions, including the "your work" exclusion that barred coverage for

107. *Id.* at 1219–20.

108. Certification of Question of State Law at 1, *Greystone*, 661 F.3d at 1276 (No. 09-1412), 2010 WL 5776109, at *1.

109. *See Greystone*, 661 F.3d at 1277.

110. *See id.*

111. *Id.* at 1277–78 (footnote omitted) (quoting CGL policy) (internal quotation marks omitted). Although it did not affect the holding, the court appears to have misquoted a portion of the policy.

> "[p]roperty damage" to *"your work"* arising out of it or any part of it and included in the "products–completed operations hazard."
>
> This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.[112]

The policies defined an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions" but contained no definition of "accident."[113]

2. Applicability of Section 13-20-808

The *Greystone* court first asked, "Does § 13-20-808, which defines the term 'accident' for purposes of Colorado insurance law, apply retroactively to this case?"[114] The court acknowledged that, if the statute applied, it "would settle this appeal."[115]

Considering the text of the statute, the court observed that the Colorado legislature had expressly rejected *General Security* and established a definition of "accident" that required courts interpreting CGL policies to "presume that the work of a construction professional that results in property damage, including damage to the work itself or other work, *is an accident unless the property damage is intended and expected by the insured.*"[116]

The court also noted that the statute's enabling act provided that it applied to all insurance policies "currently in existence" at the time the statute took effect, but the court questioned how to interpret this language in the context of an occurrence policy.[117] Such policies typically apply for a specified period of time and provide coverage for any damage that occurs during that period, even if a claim is not made until years later. "In this way, an occurrence policy does not expire, but, rather, continues in effect after the policy period ends."[118] After reviewing Colorado law regarding retroactive application of statutes, the Tenth Circuit determined that despite the legislature's directive, there was no clear intent to apply the statute to policies where the policy period had expired.[119] The court therefore declined to apply section 13-20-808 to the *Greystone* dispute.

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112. *Id.* at 1278 (footnotes omitted) (quoting CGL policy) (internal quotation marks omitted).
113. *Id.* (emphasis omitted) (quoting CGL policy) (internal quotation marks omitted).
114. *Id.*
115. *Id.* at 1279.
116. *Id.* (citing COLO. REV. STAT. § 13-20-808(3) (2012)).
117. *Id.* at 1280.
118. Vill. Homes of Colo., Inc. v. Travelers Cas. & Sur. Co., 148 P.3d 293, 296 (Colo. App. 2006).
119. *Greystone*, 661 F.3d at 1280.

3. Whether the Builders' Negligence Created an "Occurrence"

Having decided that the new statute was inapplicable, the Tenth Circuit then considered whether property damage arising from poor workmanship could give rise to an occurrence under existing state law and the policy language.[120]

The court acknowledged that there was no consensus among federal and state courts on this issue, and it began its analysis by looking to the Colorado Court of Appeals's most recent decision on the subject, *General Security*, which had concluded that "a claim for damages arising from poor workmanship, standing alone, does not allege an accident that constitutes a covered occurrence."[121] The Tenth Circuit panel noted that it found this interpretation to be persuasive, but it also recognized that federal courts are not bound by the rulings of intermediate state courts when there is convincing evidence that the state's highest court would decide otherwise.[122] The judges then made their key decision: notwithstanding their own agreement with much of *General Security*'s reasoning, they "predict[ed that] the Colorado Supreme Court would construe the term 'occurrence,' as contained in standard-form CGL policies, to encompass unforeseeable damage to nondefective property arising from faulty workmanship."[123]

In reaching this conclusion, the Tenth Circuit first examined the approaches taken by other jurisdictions as to whether damage caused by faulty workmanship constitutes an occurrence under a standard CGL policy.[124] The court noted that the *General Security* opinion, despite its statements to the contrary, had not actually followed the majority view; in reality, most federal and state courts had found an occurrence under similar circumstances, and the more "recent trend . . . interprets the term 'occurrence' to encompass unanticipated damage to nondefective property resulting from poor workmanship."[125] The court rejected the argument that damage arising from defective construction can never be a covered "occurrence," because this view "creates a fundamental inconsistency with the logic of CGL policies" insofar as it renders other policy provisions, such as the your work exclusion, superfluous.[126]

Next, the Tenth Circuit held that "injuries flowing from improper or faulty workmanship constitute an occurrence so long as the resulting damage is to nondefective property, and is caused without expectation or

120. *Id.* at 1281.

121. *Id.* (quoting General Sec. Indem. Co. v. Mountain States Mut. Cas. Co., 205 P.3d 529, 534 (Colo. App. 2009)).

122. *Id.* at 1281–82 (citing United Fire & Cas. Co. v. Boulder Plaza Residential, LLC, 633 F.3d 951, 957 (10th Cir. 2011) (declining to follow *General Security* on other grounds)).

123. *Id.* at 1282.

124. *Id.* at 1282–83.

125. *Id.*

126. *Id.* at 1283.

foresight."[127] The court rejected *General Security*'s definition of "accident" as requiring "an element of 'fortuity,'" calling this "an overly narrow view of CGL-policy language" that would be "inconsistent with the inherent structure of CGL policies."[128] The court examined prior Colorado appellate law in *McGowan*, *Hottenstein*, and *Monterra Homes* and found that "fortuity is not the sole prerequisite to finding an accident under a CGL policy. To the contrary, an *unanticipated* or *unforeseeable* injury to person or property—even in the absence of true fortuity—may be an accident and, therefore, a covered occurrence."[129] The court also relied on the Colorado Supreme Court's decision in *Hecla*, which had concluded that under similar policy language, "damages were covered because the term 'occurrence' excludes from coverage only 'those damages that the insured *knew would flow directly and immediately from its intentional act.*'"[130]

To bolster its ruling, the Tenth Circuit also considered the history and evolution of CGL policies and noted how the current policy language arose from the desire "to provide general contractors with at least some insurance coverage for damage caused by the faulty workmanship of their subcontractors."[131] The court found that the subcontractor exception that the ISO added to the your work exclusion in 1986 was particularly instructive.[132] This language "specifically contemplated coverage for property damage caused by a subcontractor's defective performance."[133] The court observed that insurance carriers can remove this language from future policies or add a specific endorsement limiting coverage if they decide that they no longer wish to insure such losses.[134]

By contrast, *General Security*'s approach of not allowing coverage where a subcontractor causes the damage to nondefective property "renders the 'your work' exclusion a phantom" in light of the subcontractor exception included in the standard-form CGL policies.[135] The court acknowledged the importance of the exclusions in CGL policies to limit the initial broad grant of coverage and recognized that the exceptions, in turn, narrow the exclusions' scope to restore coverage under the original grant.[136] Under the logic of *General Security*, the Tenth Circuit conclud-

127. *Id.* at 1284.
128. *Id.*
129. *Id.* at 1284–85.
130. *Id.* at 1285 (quoting Hecla Mining Co. v. N.H. Ins. Co., 811 P.2d 1083, 1088 (Colo. 1991)).
131. *Id.*
132. *See id.* at 1288.
133. *Id.* (quoting Lamar Homes, Inc. v. Mid-Continent Cas. Co., 242 S.W.3d 1, 12 (Tex. 2007)) (internal quotation mark omitted).
134. *Id.* (noting that the ISO now publishes an optional endorsement eliminating the subcontractor exception from coverage).
135. *Id.* at 1289.
136. *Id.* (citing David Dekker, et al., *The Expansion of Insurance Coverage for Defective Construction*, 28 CONSTRUCTION LAW. 19, 19–20 (2008)).

ed that "the 'your work' exclusion and the subcontractor exception are illusory if damages to the contractor's nondefective work product—whether caused by poor workmanship or otherwise—are not covered in the first place."[137] By rejecting this interpretation, the Tenth Circuit judges thus gave effect to the your work exclusion, which, in their view, could only apply if the "physical injury caused by poor workmanship—whether to some part of the work itself or third-party property—may be an occurrence under standard CGL policies."[138]

The Tenth Circuit also observed that "interpreting a CGL policy so as to provide coverage for a subcontractor's faulty workmanship does not transform the policy into a performance bond."[139] The court noted that a CGL policy has different traits and protects other parties, and that, ultimately, "even if the CGL policy does share some characteristics of a performance bond, that alone is an insufficient reason to ignore the plain language and intent of the policy."[140]

The court declined to consider whether any exclusions might alternatively bar coverage, remanding the case to the district court to decide this question and any other issues.[141]

4. Defective and Nondefective Property

Although the central holding of *Greystone* correctly interpreted the intent of the ISO drafters, the court's conclusion that only damage to nondefective property presents an occurrence is curious. The express language of a standard CGL policy does not make this distinction, but the Tenth Circuit nevertheless held that "CGL policies *implicitly* distinguish between damage to nondefective work product and damage to defective work product."[142] The court based this conclusion on the premise that the "obligation to repair defective work is neither unexpected nor unforeseen under the terms of the construction contract or the CGL policies,"[143] and "the recognition that the faulty workmanship, standing alone, is not caused by an accident—but that damage to *other* property caused by the faulty workmanship (including both the nondefective work product of the contractor and third-party property) *is* the result of an accident."[144] In *Greystone*, this meant that the damage to the homes was covered, but that damage to the exterior drainage and structural systems was not, because these repairs represented "an economic loss that does

137. *Id.*
138. *Id.*
139. *Id.* at 1288.
140. *Id.* at 1288–89.
141. *Id.* at 1290.
142. *Id.* at 1286 (emphasis added).
143. *Id.* at 1286 (noting that this reasoning is also in line with the Fourth Circuit's holding in *French v. Assurance Co. of Am.*, 448 F.3d 693, 703 (4th Cir. 2006)).
144. *Id.* at 1287.

not trigger a duty to defend under the CGL policies."[145] The court noted that its ruling was thus largely consistent with *General Security*'s "corollary rule," which had recognized that "injury to third-party property may be covered" under a CGL policy.[146]

Some have suggested that this portion of the *Greystone* opinion is an "ancillary holding" that conflicts with the underlying logic of the case.[147] Regardless of its reasoning, this aspect of the case leaves several questions unanswered, not the least of which is whether the court meant to establish a subjective test for coverage that takes into account the knowledge and intent of the insured, or whether the court contemplated an objective analysis limited to the components of property involved. For example, an insured builder seeking coverage for a subcontractor's defective work might argue that *Greystone* adopts the foreseeability test of *Hecla*, and that the cost of repairing such work is not foreseeable under the *Hecla* standard unless the builder actually knew of the subcontractor's errors.[148] In response, the carrier might argue that the builder's knowledge is irrelevant because the implicit exclusion for damage to defective property recognized in *Greystone* is independent of such facts.[149] How the courts will resolve questions like this remains to be seen.

III. THE EFFECT OF *GREYSTONE* ON FUTURE CASES

Although federal court decisions are generally not binding on state tribunals, the Colorado Supreme Court's reluctance to revisit this issue means that *Greystone* will likely define the law of construction insurance in Colorado for the immediate future.[150] The Colorado Court of Appeals has, in fact, already relied on *Greystone* in two published decisions.

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145. *Id.* (citing *French*, 448 F.3d at 703).

146. *Id.* at 1287 (citing Gen. Sec. Indem. Co. of Ariz. v. Mountain States Mut. Cas. Co., 205 P.3d 529, 535 (Colo. App. 2009)).

147. *See* Ronald M. Sandgrund, Greystone *and Insurance Coverage for "Get to" and "Rip and Tear" Expenses*, 41 COLO. LAW. 69, 71 (2012).

148. Greystone Constr., Inc. v. Nat'l Fire & Marine Ins. Co., 661 F.3d 1272, 1286 (10th Cir. 2004); *see also* Hecla Mining Co. v. N.H. Ins. Co., 811 P.2d 1083, 1088 (Colo. 1991) (noting that the fact that an insured was warned of possible damage or decided to take a calculated risk does not mean that there was no accidental occurrence under CGL policy).

149. *See Greystone*, 661 F.3d at 1286–87.

150. As discussed above, the Colorado Supreme Court has denied petitions for certiorari review of what constitutes an occurrence in at least three construction cases over the last decade: *Greystone*, *Hoang*, and *McGowan*. *See Greystone*, 661 F.3d at 1277; Hoang v. Assurance Co. of Am., No. 05SC389, 2006 WL 1586645, at *1 (Colo. Mar. 20, 2006); McGowan v. State Farm Fire & Cas. Co., No. 04SC354, 2004 WL 2377173, at *1 (Colo. Oct. 25, 2004). Recently, the court denied a fourth petition in the *TCD* case discussed below, in which the plaintiff had argued that the Colorado Court of Appeals improperly relied on *General Security* to conclude that allegations of construction defects did not suggest an occurrence that triggered a carrier's duty to defend. TCD, Inc. v. Am. Fam. Mutual Ins. Co., No. 12SC351, 2013 WL 673985, at *1 (Colo. Feb. 25, 2013). At the time of this writing, a fifth petition relating to this issue is pending in the *Colorado Pool* case, also discussed below. Petition for Certiorari, Colorado Pool Sys., Inc. v. Scottsdale Ins. Co., No. 2012SC1000 (on file with author).

In *TCD, Inc. v. American Family Mutual Insurance Co.*,[151] the court of appeals reviewed an order granting summary judgment to a carrier that had argued that it had no duty to defend a contractor accused of installing a defective roof.[152] The court expressly noted that section 13-20-808 had superseded *General Security*, but it declined to apply the statute to the policies in question because their coverage periods had ended prior to the statute's enactment, and the court found no legislative intent to apply the statute retroactively.[153] The court observed that the "corollary rule" from *General Security* was similar to the conclusion from *Greystone* that "an 'accident' and 'occurrence' are present when consequential property damage has been inflicted upon a third party as a result of the insured's activity."[154] The court determined that this rule did not apply, however, because the parties had not alleged any consequential damage to any third party or to any nondefective property, and it therefore affirmed the judgment.[155]

Several months later, another division of the court of appeals announced *Colorado Pool Systems, Inc. v. Scottsdale Insurance Co.*,[156] in which a carrier had refused to defend or indemnify a contractor accused of installing rebar too close to the surface of a concrete swimming pool.[157] The division in *Colorado Pool* took a different view of section 13-20-808 and recognized that the state legislature had indeed intended to apply the statute retroactively, noting that its enabling act expressly provided that the law "applies to all insurance policies *currently in existence* or issued on or after the effective date of this act,"[158] and that the statute itself provided that its purpose was to "to guide *pending* actions, on policies that *have been* issued."[159] Nevertheless, the court concluded that application of the statute to policies created before passage of section 13-20-808 would violate the Colorado constitution's prohibition of retrospective laws that impair vested rights, create new obligations, impose new duties, or attach new disabilities to transactions that have already occurred.[160]

Having concluded that section 13-20-808 did not apply, the court then considered how to interpret the policy under Colorado common law. The contractor argued that *Hoang* should control, whereas the carrier

151. 296 P.3d 255, *cert. denied*, No. 12SC351, 2013 WL 673985 (Colo. Feb. 25, 2013).
152. *Id.* ¶¶ 1–2.
153. *See id.* ¶¶ 23–24, 26.
154. *Id.* ¶¶ 16–17 (emphasis omitted) (quoting Gen. Sec. Indem. Co. of Ariz. v. Mountain States Mut. Cas. Co., 205 P.3d 529, 535 (Colo. App. 2009)) (internal quotation marks omitted).
155. *Id.* ¶ 17.
156. 2012 COA 178.
157. *Id.* ¶¶ 2, 9.
158. *Id.* ¶ 31 (quoting 2010 Colo. Sess. Laws 1128).
159. *Id.* ¶ 31.
160. *Id.* ¶ 34 (citing COLO. CONST. art. II, § 11; *In re* Estate of DeWitt, 54 P.3d 849, 854 (Colo. 2002)).

relied on *General Security*.[161] The court held that neither of these decisions had properly considered all of the policy terms, and that the proper test for coverage was that defined by the Tenth Circuit in *Greystone*.[162] The court discussed the *Greystone* holding in detail and recognized that "injuries flowing from improper or faulty workmanship constitute an 'occurrence' so long as the resulting damage is to nondefective property, and is caused without expectation or foresight," regardless of whether the resulting damage is to the insured's own work or to the work of a third party.[163] Applying the *Greystone* test to the facts of the case, the court held that the contractor's policy did not cover the cost of replacing the defective pool itself, but that the policy did cover the cost of repairing other property that had been damaged during the course of replacing the pool.[164] The trial court had therefore erred by granting summary judgment.

Colorado Pool is significant for two main reasons. First, by explicitly identifying *Greystone* as the correct test for determining CGL policy coverage, the Colorado Court of Appeals has effectively made the federal *Greystone* opinion binding on state trial courts.[165] Second, the opinion interprets *Greystone* to require carriers to indemnify the cost of repairing what some commentators have called "rip and tear" expenses: the cost of ripping and tearing out undamaged property in order to access the insured's defective work.[166] In *Colorado Pool*, the court found that this damage included the cost of removing a pool deck, sidewalk, retaining wall, and electric conduits; none of these components was initially damaged or defective, but each stood in the way of the pool materials that the contractor was legally obligated to replace, and each became damaged in the course of the ensuing repairs.[167] This is a noteworthy analytical shift, insofar as it arguably extends coverage to some intentional property damage necessary to correct an unintentional defect.[168]

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161. *Id.* ¶ 42.

162. *Id.* ¶ 43.

163. *Id.* ¶ 45 (quoting Greystone Constr., Inc. v. Nat'l Fire & Marine Ins. Co., 661 F.3d 1272, 1284 (10th Cir. 2004)) (internal quotation marks omitted).

164. *Id.* ¶¶ 45, 48.

165. *See* COLO. APP. R. 35(f) (mandating that published opinions of the Colorado Court of Appeals "shall be followed as precedent by the trial judges of the state of Colorado").

166. *See, e.g.*, Sandgrund, *supra* note 147, at 73; R. Stephen Rawls, *Do CGL Policies Cover "Rip and Tear" Expenses?*, IRMI ONLINE (Mar. 2011), www.irmi.com/expert/articles/2011/rawls03-liability-insurance-coverage-law.aspx.

167. *Colorado Pool*, 2012 COA 178, ¶ 48.

168. Cases such as this may invite tedious distinctions as courts try to distinguish whether certain elements of property damage result from the alleged occurrence itself or from the repair of said occurrence. *Compare* Dewitt Constr. Inc. v. Charter Oak Fire Ins. Co., 307 F.3d 1127, 1134 (9th Cir. 2002) (holding that CGL policy covered cost of demolishing nondefective work during repair of defective property), *with* Desert Mountain Props. Ltd. P'ship. v. Liberty Mut. Fire Ins. Co., 236 P.3d 421, 441–42 (Ariz. Ct. App. 2010) (holding that there was no coverage for "get to" expenses associated with repair of defect), *aff'd*, 250 P.3d 196 (Ariz. 2011); *see also* Sandgrund, *supra* note 147, at 73 & nn.41–42 (collecting cases). Some courts have sidestepped this question by relying on the policies' alternate definition of "property damage," which includes loss of use of property that has

CONCLUSION

In a diversity action such as *Greystone*, federal courts apply the substantive law of the forum state.[169] It has thus been said that "[t]here is no federal general common law."[170] Nevertheless, in the course of applying state insurance law, the judges of the Tenth Circuit have historically tended to favor a strict view of fortuity and business risk principles.[171] The *Greystone* decision may therefore have surprised observers who expected the panel to rule for the carrier.

Greystone should not have come as a surprise. Although the case gave the Tenth Circuit discretion to predict how the Colorado Supreme Court would decide certain coverage issues, it ultimately required little more than a traditional application of contract principles to effectuate the intent of the parties. Implementing that analysis, the Tenth Circuit recognized that ISO drafters intended for builders' CGL insurance policies to cover liability for property damage caused by defective work. It is oft said but bears repeating: if the insurance industry wants to eliminate coverage for defective construction, it can easily do so.[172] It has not. On the contrary, when given the opportunity, its drafters have elected to expand coverage for construction defects, first by creating the Broad Form Property Damage endorsement in 1976 and later by incorporating the broad form language into all standard CGL policies in 1986. Although some opportunistic lawyers have argued that allowing CGL policies to cover negligent workmanship improperly converts insurance policies into performance bonds, any such similarity is not the work of activist judges. As one court succinctly stated, "[w]e have not made the policy closer to a performance bond for general contractors, the insurance industry has."[173]

The fact that the insurance industry has made this choice likely reflects simple principles of supply and demand: so long as builders are willing to pay premiums for protection from liability for defective work, insurance companies will be willing to sell them an appropriate product. The system only breaks down when a carrier collects a builder's premi-

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not been physically injured. *See* Rawls, *supra* note 166 (discussing Clear, LLC v. Am. & Foreign Ins. Co., No. 3:07-cv-00110JWS, 2008 WL 818978 (D. Alaska Mar. 24, 2008)). The U.S. District Court for the District of Western Oklahoma recently applied this approach in a case with similar facts to *Colorado Pool* when it found coverage under a concrete supplier's policy for repairs to nondefective components of a bridge that had to be ripped out in the course of replacing substandard concrete. *See* Employers Mut. Cas. Co. v. Grayson, No. CIV-07-917-C, 2008 WL 2278593, at *6 (W.D. Okla. May 30, 2008).

169. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

170. *Id.*

171. *See, e.g.*, Adair Group, Inc. v. St. Paul Fire & Marine Ins. Co., 477 F.3d 1186, 1187–88 (10th Cir. 2007); Bangert Bros. Constr. Co. v. Americas Ins. Co., No. 94-1412, 1995 WL 539479, at *5–6 (10th Cir. Sept. 11, 1995).

172. *See* Lamar Homes, Inc. v. Mid-Continent Cas. Co., 242 S.W.3d 1, 12 (Tex. 2007) (noting that the ISO recently published an optional endorsement eliminating the subcontractor exception to the "your-work" exclusion for builders who do not wish to purchase such coverage).

173. Kalchthaler v. Keller Constr. Co., 591 N.W.2d 169, 174 (Wis. Ct. App. 1999).

ums but refuses to honor the policy when the builder files a large claim.[174] The Tenth Circuit's decision in *Greystone* makes clear that Colorado law does not permit this, and that builders and homeowners can expect Colorado state and federal courts to enforce CGL provisions that cover property damage resulting from construction defects.

174. *See* Abraham, *supra* note 4, at 103 (discussing the economics of insurance and noting that policyholders "now speak facetiously about an implied 'big claim' exclusion in CGL policies, referring to the perceived tendency of commercial insurers to deny any substantial claim by asserting what policyholders regard as questionable policy defenses").

THE AUDACITY OF IGNORING *HOPE*: HOW THE EXISTING QUALIFIED IMMUNITY ANALYSIS LEADS TO UNREMEDIED RIGHTS

ABSTRACT

This Comment uses *Kerns v. Bader* as a lens to examine how the qualified immunity analysis can lead to constitutional rights without a remedy. That gap between the right and its remedy affects the articulation of important constitutional rights, and ultimately the right itself. In the absence of guidance about what it means for a right to be clearly established, courts face difficulty in even declaring official conduct as unconstitutional. Over time, as more instances of official conduct go without being declared unconstitutional, the contours of our rights become constricted. That absence of guidance also means the caprice of a judge can decide whether a right was clearly established, requiring an arbitrary degree of factual specificity in making that judgment, and ultimately leaves the protections afforded by important rights unpredictable. In addition, discretionary sequencing in the qualified immunity analysis—deciding cases on the qualified immunity prong while leaving the constitutional merits unaddressed—means the law never becomes clearly established, the law never gets articulated, never develops, and rights articulation stalls. As the articulation of our rights slows, those rights are increasingly left without a remedy for their violation.

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INTRODUCTION

Imagine you are a military veteran.[1] You are honorably discharged and return home from Afghanistan[2] to try to resume a normal life. You live in an ordinary neighborhood, in fact right on the eighteenth hole of a golf course.[3] You are at home one night with your parents and your girlfriend, and while they are all inside sleeping, you have gone outside to work in your garage and driveway.[4] You are listening to music as you work on rearranging and organizing the storage area in the garage and side of the house.[5] A police helicopter is hovering overhead somewhere in the neighborhood, although you have no idea why it is there.[6] Then, suddenly, you hear a loud popping noise.[7] You look up and see the helicopter start to wobble, and hear it make a whining pitch as it nosedives, crashing in a backyard on the golf course less than a mile away from where you are standing.[8]

You are a former military helicopter mechanic,[9] and so you immediately drop what you are doing. You leave the garage door open, the music on, and the items you were organizing still scattered about the garage and driveway and rush to the scene of the crash.[10] When you get there, you help by instructing the on-scene police officers about how to open the helicopter doors to pull the occupants from the wreckage.[11] Once the injured passengers have been removed from the crashed helicopter, you turn your attention to the other officers and begin to relay to them the events you just witnessed.[12] Attempting to aid the police officers in their investigation, you tell them you heard a shot and that you think it came from near your home.[13]

By the time you return home from all this, you learn that during the course of investigating your tip about the shot you heard, three police officers entered your home without a warrant while you were still at the crash site.[14] The officers searched your home only briefly, but they woke up your girlfriend and confronted her in the living room while brandish-

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1. The facts retold throughout this "Introduction" come from the facts of *Kerns v. Bader*, 663 F.3d 1173, 1178 (10th Cir. 2011).
2. Carolyn Carlson, *Copter Suspect Had Sniper Skills*, ALBUQUERQUE J. (Albuquerque, N.M.) (Aug. 17, 2005), http://www.abqjournal.com/news/metro/381480metro08-17-05.htm.
3. Kerns v. Bd. of Comm'rs (*Kerns II*), 888 F. Supp. 2d 1176, 1181 (D.N.M. 2012).
4. Kerns v. Bd. of Comm'rs (*Kerns I*), 707 F. Supp. 2d 1190, 1200, 1203 (D.N.M. 2010), *rev'd in part, vacated in part sub nom.* Kerns v. Bader, 663 F.3d 1173 (10th Cir. 2011).
5. *Id.* at 1200.
6. *See id.*
7. *Id.* at 1201.
8. *See id.*
9. *Kerns*, 663 F.3d at 1178.
10. *See Kerns I*, 707 F. Supp. 2d at 1200.
11. *See id.*
12. *Id.*
13. *Id.*
14. *See Kerns*, 663 F.3d at 1177.

ing their guns.[15] They did not enter your parents' bedroom because your girlfriend told the police they were sleeping.[16]

Later, you are arrested and spend nearly nine months in jail, only to be released when the prosecutor determines that the Government did not actually have enough information to charge you with anything.[17] It then becomes clear to you that you were immediately a suspect in the police's eyes. The police officers, instead of thanking you for rushing to the scene and for trying to help them with the investigation, suspected you were involved. They wanted to arrest you. They wanted to put you in jail.

You want to be vindicated. The police targeted you for a crime you did not commit and entered your home without a warrant that night. You want to be vindicated for having been put in jail for nine months for doing nothing except trying to help. In short, you want to be compensated for the violation of your constitutional rights.

But your quest for a remedy quickly encounters an obstacle. The police officers claim that no Fourth Amendment violation occurred because exigent circumstances justified their entry into your home.[18] You go to court where a federal district judge agrees with you. But on appeal in the Tenth Circuit, a panel of federal judges finds that the officers' explanation of a perceived emergency does, in fact, justify their entry, and you now have no recourse at all.[19]

Moreover, you come to find out that even if the appellate court had found a Fourth Amendment violation, you still would likely have no remedy because it requires you to overcome the affirmative defense of qualified immunity. To do so, you must show that the law was "clearly established,"[20] which requires your attorney to engage in a "scavenger hunt"[21] to find a case that is factually similar to yours.[22] But, both unfortunately and unsurprisingly for you, there has never been any litigation on the factual scenario of a police helicopter being gunned down in a residential neighborhood leading to a warrantless search of a witness's home. And the really twisted part? If this exact same thing happens again, you—or whoever the next party to suffer the same harm turns out to be—still will not have an avenue for recovery.[23]

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15. *Kerns I*, 707 F. Supp. 2d at 1203–04.

16. *Id.* at 1204.

17. *See Kerns*, 663 F.3d at 1180.

18. *See id.* at 1181.

19. *See id.* at 1182 (reversing only on the clearly established prong of the qualified immunity analysis, indicating no disagreement with the lower court's determination that a constitutional violation occurred).

20. *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 232 (2009); Wilson v. Layne, 526 U.S. 603, 609 (1999); *infra* text accompanying notes 40–55.

21. Pierce v. Gilchrist, 359 F.3d 1279, 1298 (10th Cir. 2004).

22. *See Kerns*, 663 F.3d at 1192–93 (Holloway, J., dissenting).

23. Although this depiction might seem to cut in favor of the plaintiff's version of the facts, that perspective is the appropriate standard to use when making the determination about whether to

This series of events actually happened to Jason Kerns. After the helicopter crash, Kerns brought a § 1983 claim against the three police officers who entered his home without a search warrant, claiming that they violated his Fourth Amendment right to be free from unreasonable searches.[24] All three of the defendant officers moved for summary judgment on the basis of qualified immunity, claiming that an exigent circumstance justified their entry.[25] The trial court found a constitutional violation and denied summary judgment on qualified immunity.[26] The officers appealed.[27] On interlocutory appeal, the Tenth Circuit declined to affirm the constitutional ruling and remanded the case for rehearing on the qualified immunity question.

This Comment advances two primary arguments regarding the Tenth Circuit's decision in *Kerns v. Bader*.[28] First, it agrees with the dissenting judge that the Tenth Circuit inappropriately decided an interlocutory appeal of a lower court's denial of qualified immunity. Specifically, the court erred by deciding questions of fact that affected whether exigent circumstances justified the warrantless entry of a private residence.[29] Second, the Comment argues that the court created an insurmountable hurdle for the plaintiff to overcome the qualified immunity defense.[30] That is, it indicated that the plaintiff would have to find a case so factually similar that it would be virtually impossible for the plaintiff to do so.[31]

The Comment then turns to the consequences of the court's decision. The Tenth Circuit vacated the denial of qualified immunity, yet failed to address the merits of Kerns's Fourth Amendment claim. The decision therefore not only left Kerns without a remedy but also failed to clarify the law so that future plaintiffs who suffered similar constitutional harms could recover.

Part I of this Comment briefly describes the evolution of qualified immunity doctrine. Specifically, it examines the notice requirement, the

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award summary judgment on qualified immunity. *See, e.g.*, Bisbee v. Bey, 39 F.3d 1096, 1100 (10th Cir. 1994).

24. *Kerns*, 663 F.3d at 1180. Kerns also brought § 1983 claims under the Fourth and Fourteenth Amendments relating to the police scrutiny and privacy invasion of his medical records. Police, without a warrant, obtained those records. Despite many cases cited by the dissenting judge, the majority held that the privacy right was not clearly established. Kerns also brought § 1983 claims of false arrest, false imprisonment, and malicious prosecution against several other officers and a ballistic forensics expert. Although these claims illustrate the complicated jurisprudence surrounding qualified immunity and the clearly established requirement, they are largely unnecessary to the analysis of this Comment. Therefore, the Comment will focus only on the Fourth Amendment issue raised regarding the warrantless entry of Kerns's home.

25. *Id.* at 1180–81.

26. *See id.* at 1180.

27. *Id.*

28. 663 F.3d 1173 (10th Cir. 2011).

29. *Id.* at 1191 (Holloway, J., dissenting).

30. *Id.* at 1192–93.

31. *See id.*

issue of whether the constitutional merits should be considered before the qualified immunity defense, and the clearly established standard used to establish and overcome a qualified immunity defense. Part II addresses the Fourth Amendment issue: whether exigent circumstances and probable cause justified the search of Kerns's home. Additionally, this Part discusses how ignoring principles from prior cases leaves those individuals whose constitutional rights have been violated with no remedy and explains that this constricts the development of the right itself. Part III discusses the qualified immunity appeal in *Kerns* and the Tenth Circuit's decision to remand the lower court's denial of summary judgment for the officers. It first addresses the threshold concern of the appropriateness of doing so on interlocutory appeal while avoiding decision on the constitutional merits of the case. Second, Part III addresses the broader relationship between rights and remedies; it uses *Kerns* as an example of how the remedy afforded for violations of our constitutional rights shapes the contours of those rights at stake and how the absence of a remedy leads to the erosion of Fourth Amendment rights in general, particularly in situations where courts can rely on the qualified immunity analysis to avoid decision on the constitutional issue. Part IV proposes a solution to the gap that exists between rights and remedies that is perpetuated by courts addressing the clearly established prong of a qualified immunity analysis without also addressing the constitutional merits. The "*Kerns* solution" ensures that the law is articulated and remedies are afforded to future victims for the violations of their rights.

I. BACKGROUND

Section 1983 of Title 42 of the U.S. Code allows individuals to sue for money damages when a government official acting "under color of law" violates their constitutional rights.[32] Although it is not itself a substantive right, § 1983 provides an avenue for individuals to recover for constitutional harms inflicted "under color of law" and is a mechanism for getting into court to enforce the substantive guarantees of the Constitution by suing the offending official for money damages.[33]

Qualified immunity is an affirmative defense available to government actors facing monetary liability in § 1983 claims.[34] Qualified immunity protects government actors who violated an individual's constitu-

32. 42 U.S.C. § 1983 (2012) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to 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 . . . .").

33. *See id.*; *see also* Monroe v. Pape, 365 U.S. 167, 171–76, 181–82, 184, 187 (1961) (discussing the history of § 1983 and the meaning of "under color of law").

34. *E.g.*, Crawford-El v. Britton, 523 U.S. 574, 587 (1998); Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982).

tional rights but who did so in a "reasonable" manner, meaning that the official could not have been expected to know that her conduct was unconstitutional.[35] To overcome a qualified immunity defense, a plaintiff needs to prove two elements: (1) that a constitutional violation actually occurred, and (2) that the right was clearly established at the time of the harm such that a reasonable officer would know that what she was doing violated that right.[36]

Three principal rationales underlie the qualified immunity defense. First, we do not want to over-deter police officers from taking action for fear of lawsuits.[37] Second, courts want to afford leeway to government actors who are required to use discretion and make decisions in tense or rapidly evolving situations.[38] Third, qualified immunity allows courts to articulate constitutional law without subjecting officers to retroactive liability.[39]

A. Evolution of Qualified Immunity: Notice

Courts used to consider an officer's subjective intent in determining the availability of the qualified immunity defense.[40] In *Harlow v. Fitzgerald*,[41] the Supreme Court eliminated the subjective intent prong of the qualified immunity inquiry, primarily to make cases easier to decide on a motion to dismiss or a motion for summary judgment and thus dispense with lengthy, fact-intensive trials for unmeritorious claims.[42]

As part of overcoming a qualified immunity defense, a plaintiff must succeed on the clearly established prong of the analysis by showing that the official was on notice that his conduct violated a constitutional right. The Supreme Court held in *Anderson v. Creighton*[43] that the right the official is alleged to have violated must have been clearly established in a particular and relevant way so that a reasonable official would un-

35. *See, e.g.*, *Harlow*, 457 U.S. at 818; Wood v. Strickland, 420 U.S. 308, 322 (1975). The qualified immunity doctrine does expand to slightly more than just protecting officers who reasonably violate constitutional rights from liability, but for the purposes of this Comment, the important concept is that the doctrine protects officers who "reasonably" violate constitutional rights.

36. *E.g.*, Pearson v. Callahan, 55 U.S. 223, 232 (2009); Wilson v. Layne, 526 U.S. 603, 609 (1999).

37. *E.g.*, *Harlow*, 457 U.S. at 819 ("[T]he public interest may be better served by action taken 'with independence and without fear of consequences.'" (quoting Pierson v. Ray, 386 U.S. 547, 554 (1967))); Scheuer v. Rhodes, 416 U.S. 232, 240 (1974).

38. *Scheuer*, 416 U.S. at 240.

39. *See* Saucier v. Katz, 533 U.S. 194, 201 (2001), *abrogated on other grounds by* Pearson v. Callahan, 555 U.S. 223 (2009). Furthermore, qualified immunity avoids requiring officers to spending time in court and conserves resources that might otherwise be spent on lawsuits were it not for qualified immunity. *See* Mitchell v. Forsythe, 472 U.S. 511, 526 (1985).

40. *Pierson*, 386 U.S. at 556–57 (holding that the good faith and probable cause standard for the defense to false arrest and imprisonment was applicable to § 1983 claims).

41. 457 U.S. 800 (1982).

42. *Id.* at 815–16; *see also Mitchell*, 472 U.S. at 526 (stating that the immunity is from suit, not just from monetary liability).

43. 483 U.S. 635 (1987).

derstand that he is violating a constitutional right.[44] In *Brosseau v. Haugen*,[45] the Supreme Court emphasized that whether a right was clearly established depended on the facts of the case and held that the right must be particularized in order to meet the requirement.[46]

However, in *Hope v. Pelzer*,[47] the Supreme Court, in reversing a lower court's grant of qualified immunity, said that the standard of finding "materially similar"[48] facts was a "rigid gloss on the qualified immunity standard" and was not necessary to ensure that officers are put on notice that their conduct is unconstitutional.[49] The Court further stated that "general statements of the law are not inherently incapable of giving fair and clear warning"[50] and that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful."[51] Aside from that, the Supreme Court has given little clarification on what is suitable to qualify as clearly established for the purposes of a qualified immunity analysis.

B. Evolution of Qualified Immunity: Sequencing

In *Wilson v. Layne*,[52] the Supreme Court recognized a two-part inquiry for qualified immunity analyses and suggested a proper sequence for that inquiry.[53] A court must first determine whether there was a violation of a constitutional right.[54] If so, a court must then determine if the right was clearly established at the time of the alleged violation.[55]

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44. *Id.* at 640 ("[T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.").

45. 543 U.S. 194 (2004).

46. *Id.* at 198–99, 201.

47. 536 U.S. 730 (2002).

48. *Id.* at 739 (quoting Hope v. Pelzer, 240 F.3d 975, 981 (11th Cir. 2001)) (internal quotation marks omitted).

49. *Id.*

50. *Id.* at 741 (quoting United States v. Lanier, 520 U.S. 259, 271 (1997)).

51. *Id.* (quoting *Lanier*, 520 U.S. at 270–71) (internal quotation mark omitted); *see also* Pierce v. Gilchrist, 359 F.3d 1279, 1298 (10th Cir. 2004) ("*Hope* thus shifted the qualified immunity analysis from a scavenger hunt for prior cases with precisely the same facts toward the more relevant inquiry of whether the law put officials on fair notice that the described conduct was unconstitutional. As this Court held even prior to *Hope*, qualified immunity will not be granted if government defendants fail to make 'reasonable applications of the prevailing law to their own circumstances.'" (quoting Currier v. Doran, 242 F.3d 905, 923 (10th Cir. 2001))).

52. 526 U.S. 603 (1999).

53. *Id.* at 609 ("A court evaluating a claim of qualified immunity must first determine whether the plaintiff has alleged a deprivation of an actual constitutional right at all . . . ." (quoting Conn v. Gabbert, 526 U.S. 286, 290 (1999) (internal quotation mark omitted)).

54. *See id.* ("Deciding the constitutional question before addressing the qualified immunity question also promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public.").

55. *Id.*

In *Saucier v. Katz*,[56] the Court made the *Wilson* sequencing approach mandatory, holding that courts had to approach the qualified immunity analysis in the proper order, addressing the constitutional issue before going on to address the clearly established, or qualified immunity, prong.[57] When addressing the first prong, whether an officer's conduct violated a constitutional right, courts were instructed to consider the facts in the light most favorable to the party alleging the injury.[58] In addressing the second prong, whether the right was clearly established, the Court thought it critical to articulating the law that this be analyzed in light of the specifics of the case, not in a broad or general context.[59] This inquiry also was meant to "advance understanding of the law and to allow officers to avoid the burden of trial if qualified immunity is applicable."[60]

The rationales for following this sequence are as follows: "First, it clarifies the law so that police officers may avoid future violations if their conduct is held unconstitutional."[61] Additionally, courts are more willing to articulate new constitutional law principles without subjecting officers to liability for seemingly reasonable actions taken in uncertain legal situations or under tense or uncertain circumstances.[62] Following this sequence also "ensures that, in the future, a similarly-wronged plaintiff would be able to recover if she had, in fact, suffered a violation of her constitutional rights."[63] If courts were to decide the clearly established prong first, without litigating the merits of the constitutional issue, then the same § 1983 claims could be brought repeatedly and never actually become clearly established for the purposes of qualified immunity. Answering the clearly established question first would allow officers to take multiple bites at the "constitutionally forbidden fruit," and leave future plaintiffs with no remedy for similar recurring constitutional violations.[64] The Supreme Court acknowledged the importance of articulating constitutional principles in *Wilson*, stating that "[d]eciding the constitutional question before addressing the qualified immunity question also pro-

56. 533 U.S. 194 (2001).
57. *Id.* at 201.
58. *Id.*
59. *Id.*
60. *Id.*
61. Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 668 (2009).
62. *See* Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974).
63. Leong, *supra* note 61.
64. *See, e.g.*, Garcia *ex rel.* Garcia v. Miera, 817 F.2d 650, 656–57 n.8 (10th Cir. 1987); John M.M. Greabe, *Mirabile Dictum!: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403, 430 (1999) ("When a court bypasses the merits of the pleaded constitutional claim in the circumstances just described, it not only effectively awards the defendant officers one 'liability-free' violation of the Constitution (as it must under the doctrine of qualified immunity), but it also, by declining to 'clearly establish' the undermined right, paves the way for 'multiple bites of a constitutionally forbidden fruit.'" (quoting *Garcia*, 817 F.2d at 656–57 n.8)).

motes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public."[65]

Conversely, the critics of sequencing have pointed out that sequencing fails to "adhere to a basic constitutional obligation by avoiding unnecessary decision of constitutional questions."[66] In some cases, a sequenced-based decision can insulate that decision from appellate review, even if the constitutional ruling is incorrect.[67] If a defendant is found to have violated the Constitution but prevails on qualified immunity, then "[a]s a prevailing party, the defendant cannot appeal the constitutional ruling, even if it believes the ruling is incorrect and the consequences of that ruling are unfavorable for both that defendant and others who are similarly situated."[68]

Commentators have also expressed practical concerns with mandatory sequencing. Specifically, courts will be forced to decide complicated constitutional issues unnecessarily, wasting judicial resources when it is clear that a defendant will prevail on qualified immunity.[69] Similarly, there are concerns that deciding constitutional issues on underdeveloped factual records and under busy conditions will lead courts to the wrong answer, thus articulating bad (constitutional) law.[70] Finally, the immunity afforded to defendants is often characterized as freedom from suit, not just freedom from liability.[71] Mandatory sequencing has the potential to result in officers being forced to endure lengthy litigation on the constitutional issue, only later to be found entitled to qualified immunity.[72]

Ultimately, mandatory sequencing was short-lived. In *Pearson v. Callahan*,[73] the Supreme Court acknowledged the criticisms of mandatory sequencing despite having made it compulsory only eight years earlier.[74] In doing so, the Court overruled the mandatory nature of the *Saucier*

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65. Wilson v. Layne, 526 U.S. 603, 609 (1999).

66. Morse v. Frederick, 551 U.S. 393, 428 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part); *see also* Leong, *supra* note 61, at 676–77 (pointing out that the avoidance principle is rooted in separation of powers and largely related to concerns of altering statutory laws from the bench, a concern inapplicable in the qualified immunity context). Further, I would argue that although constitutional questions should often be avoided in other areas of law, it simply does not make sense to adhere to the avoidance principle when the issue at hand is actually a constitutional issue. This is tantamount, in my opinion, to ignoring the basis of the entire litigation and the underlying interest of articulating the law.

67. *Morse*, 551 U.S. at 431; Brosseau v. Haugen 543 U.S. 194, 202 (2004) (Breyer, J., concurring) ("[Sequencing] can sometimes lead to a constitutional decision that is effectively insulted from review . . . ."); *see also* Bunting v. Mellen, 541 U.S. 1019, 1020–21 (2004).

68. Leong, *supra* note 61, at 678; *see also Bunting*, 541 U.S. at 1020–21.

69. *E.g.*, *Brosseau*, 543 U.S at 201–02 (citing *Bunting*, 541 U.S. at 1025) ("[W]hen courts' dockets are crowded, [sequencing] makes little administrative sense . . . .").

70. *E.g.*, Scott v. Harris, 550 U.S. 372, 387 (2007) (Breyer, J., concurring); Cnty. of Sacramento v. Lewis, 523 U.S. 833, 858–59 (1998) (Breyer, J., concurring); *see also* Leong, *supra* note 61, at 681 n.73.

71. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

72. *Id.*

73. 555 U.S. 223 (2009).

74. *Id.* at 234–35.

sequence and announced that although the two-part inquiry survived and may still often be appropriate, it was thenceforth permissive.[75] In directing lower courts when the sequence was appropriate, the Supreme Court gave remarkably ineffectual guidance by instructing judges to simply "exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."[76]

II. FOURTH AMENDMENT ISSUES AND THE AUDACITY OF IGNORING *HOPE*

In *Kerns*, the Tenth Circuit remanded the trial court's denial of summary judgment on qualified immunity for the three officers who entered Kerns's home with no warrant.[77] The Tenth Circuit's determination on the qualified immunity issue essentially expressed its view that the officers had an objectively reasonable belief that an exigent circumstance existed, although it held that the lower court did not address the issue with sufficient depth.[78] Because the Tenth Circuit remanded the case on the clearly established prong, it did not address the Fourth Amendment question. But the law was clear that a Fourth Amendment violation occurred. As the dissent pointed out, "Some cases . . . require a more particularized inquiry. This is not one of them. . . . The Officers had neither a warrant nor probable cause. If the circumstances they encountered did not support a reasonable belief [in an exigency, the entry] violated clearly established Fourth Amendment law."[79] The *Kerns* court should not have remanded the case. It should have affirmed the lower court's ruling or rejected the interlocutory appeal altogether because both were rooted in factual evaluations.

The absence of Supreme Court guidance about the clearly established standard makes it difficult for judges to declare an action unconstitutional. That difficulty is because of the uncertainty about how specifically precedent applies in determining what amounts to a constitutional violation. This uncertainty about what serves as binding precedent for constitutional violations enables courts to ignore the constitutional question altogether, which affects the articulation of constitutional rights. By remanding *Kerns* to the lower court, the Tenth Circuit not only denied Kerns a remedy for the violation of his right but also left the law unclear, ensuring that the next similarly situated plaintiff would also be left without a remedy.

Kerns raises two principal issues regarding the violation of one's Fourth Amendment right to be free from unreasonable searches, which I

75. *Id.* at 236.
76. *Id.*
77. Kerns v. Bader, 663 F.3d 1173, 1182 (10th Cir. 2011).
78. *See id.* at 1181–83.
79. *Id.* at 1192 (Holloway, J., dissenting).

will discuss in turn in subparts A and B. First, the officers had no objectively reasonable basis to believe that an exigent circumstance existed to justify their warrantless entry of Kerns's home. Furthermore, the determination of any such belief being objectively reasonable was fact dependent and therefore a question for a jury. Second, even if the police officers could prove an objectively reasonable belief in an exigency, their warrantless entry and search of Kerns's home was unreasonable. Even in exigent circumstances, police still need probable cause to search a home without a warrant, and the officers in *Kerns* were unable to establish probable cause. Finally, in subpart C, I will examine the effect that the context of litigation has on articulating rights, specifically how litigation in either a criminal or a civil context can affect the available remedy for violations of rights and how the relationship between the litigation context and the available remedies can affect the underlying right itself. I will examine these issues with an eye toward the underlying rationales of qualified immunity, the specificity required by the court in making the clearly established determination, and the relationship between constitutional rights and the remedies afforded for their violation.

A. Objectively Reasonable Belief in an Exigency

The Fourth Amendment protects individuals from unreasonable searches and seizures.[80] Warrantless searches are presumptively unreasonable and thus presumptively unconstitutional.[81] To justify as constitutional the warrantless entry into a home, officers need to prove that one of the established exceptions, such as consent or exigent circumstances, applies.[82]

In *United States v. Najar*,[83] the Tenth Circuit, following the Supreme Court's announcement in *Brigham City v. Stuart*,[84] put forth the two-part test for determining whether an exigent circumstance exists to justify the warrantless entry of a home.[85] First, "officers [must] have an objectively reasonable basis to believe there is an immediate need to protect the lives or safety of themselves or others."[86] Second, the manner and scope of the search must be reasonable.[87] In the context of the *Kerns* decision, only the first prong is controversial.

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80. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

81. *E.g.*, Kyllo v. United States, 533 U.S. 27, 31 (2001); Payton v. New York, 445 U.S. 573, 586 (1980).

82. *E.g.*, *Payton*, 445 U.S. at 578–81, 583; Katz v. United States, 389 U.S. 347, 356–57 (1967); United States v. Najar, 451 F.3d 710, 712–13, 715, 717, 721 (10th Cir. 2006).

83. 451 F.3d 710 (10th Cir. 2006).

84. 547 U.S. 398, 405–07 (2006).

85. *Najar*, 451 F.3d at 718.

86. *Id.*

87. *Id.*

Applying that test to *Kerns*, the issue was whether the officers who entered Kerns's home without a warrant had an objectively reasonable basis to believe there was an immediate need to protect the lives or safety of themselves or others. If the officers had a reasonable belief, then the warrantless entry was justified and no constitutional violation occurred. If the officers did not have a reasonable belief, then the entry was not justified and Kerns's Fourth Amendment right was violated. The determination of that objectively reasonable belief rests squarely on the assessment of the facts of the case. Any exigency that the police perceived was not objectively reasonable because (1) the officers had the opportunity to ask Kerns about the condition of his home (thus, there was no *immediate* threat), and (2) the circumstances justifying the exigency were factually in dispute (and therefore, by definition, not objective).

Recall that in *Kerns* there was a police helicopter downed by a gunshot.[88] Kerns was the only person to claim that the sound he heard came from near his home.[89] But he said that he heard a "loud pop sound,"[90] not *shots*. He explained that the sound just as likely could have been a car backfiring.[91] None of Kerns's nearby neighbors confirmed hearing a noise.[92] In fact, most of his neighbors were unaware that the helicopter crash had occurred at all.[93]

The officers argued that their warrantless entry was justified under an exigency exception.[94] They claimed that the condition of Kerns's driveway and home provided an "objectively reasonable basis to believe there [was] an immediate need to protect the lives or safety of themselves or others . . . ."[95] Specifically, the police asserted exigent circumstances existed because a door was left open, music was left on inside the home (which may or may not have stopped playing at some point), a window was broken (which was actually merely damaged), boxes were left scattered about the driveway in an untidy manner, and no one answered the door.[96]

But before entering, the police at Kerns's home were in contact with the officer at the crash site who was with Kerns.[97] In fact, the police were in contact with Kerns via the officer at the scene the entire time—even asking follow-up questions about where specifically Kerns thought he

88. Kerns v. Bader, 663 F.3d 1173, 1177 (10th Cir. 2011).
89. *Kerns I*, 707 F. Supp. 2d 1190, 1203 (D.N.M. 2010), *rev'd in part, vacated in part sub nom.* Kerns v. Bader, 663 F.3d 1173 (10th Cir. 2011).
90. *Id.* at 1200.
91. *Id.* at 1201.
92. *Kerns*, 663 F.3d at 1178.
93. *Kerns II*, 888 F. Supp. 2d. 1176, 1204 (D.N.M. 2012).
94. *Kerns*, 663 F.3d at 1181.
95. United States v. Najar, 451 F.3d 710, 718 (10th Cir. 2006).
96. *Kerns*, 663 F.3d at 1177; *Kerns I*, 707 F. Supp. 2d at 1202–03.
97. *Kerns II*, 888 F. Supp. 2d. at 1200.

heard the shot come from, where he was standing, etc.[98] The police at Kerns's home could have easily and quickly radioed to the crash site to ask Kerns if anyone was home, or if the door being open alarmed Kerns, or if Kerns had left music on.[99] Or they could have simply asked Kerns for consent to enter his home. The officers' purported belief in an *immediate* need to protect themselves or others by entering Kerns's home seems unreasonable given these facts.

Fourth Amendment doctrine is very clear: warrantless searches are presumptively unreasonable.[100] To overcome that presumption, police officers must have probable cause and justify the search pursuant to one of the categorical exceptions, such as an exigency.[101] As the dissenting judge in *Kerns* pointed out, "If the circumstances [the officers] encountered did not support a reasonable belief that danger to someone was imminent, then" they violated Kerns's Fourth Amendment right.[102]

Fourth Amendment doctrine regarding exigent circumstances states that in the absence of a warrant, the police need probable cause and an objectively reasonable basis to believe there is an immediate need to protect the safety of themselves or others.[103] With respect to *Kerns*, the determination of whether an exigency existed depends on whether objectively reasonable officers outside of Kerns's home would have believed there was an immediate need to enter the home to protect the safety of themselves or others.[104] Only if that belief were found reasonable, would the warrantless entry be constitutionally justified. At best, that exigency is a question of fact most suitable for a jury given the disputed facts regarding the officers' alleged justification for the warrantless search. At worst, the exigency simply did not exist.

But there are even more specific statements of law regarding when a warrantless entry is constitutionally justified under an exigency exception. In *United States v. Martinez*,[105] the Tenth Circuit held that officers violated Mr. Martinez's Fourth Amendment rights when they entered his home with no warrant and could not establish a reasonable belief in an

98. *Kerns*, 707 F. Supp. 2d at 1203.

99. *Kerns II*, 888 F. Supp. 2d. at 1187 ("Johnston did not speak directly with J. Kerns, but spoke through other law enforcement officers, and, using this technique, Johnston clarified J. Kerns' perceptions concerning the directionality of the noise J. Kerns heard.").

100. *E.g.*, Kyllo v. United States, 533 U.S. 27, 31 (2001); Payton v. New York, 445 U.S. 573, 586 (1980).

101. *E.g.*, *Payton*, 445 U.S. at 578–81, 583; Katz v. United States, 389 U.S. 347, 356–57 (1967); United States v. Najar, 451 F.3d 710, 712–13, 715, 717, 721 (10th Cir. 2006).

102. Kerns v. Bader, 663 F.3d 1173, 1192 (10th Cir. 2011) (Holloway, J., dissenting).

103. *E.g.*, Brigham City v. Stuart, 547 U.S. 398, 402 (2006); *Payton*, 445 U.S. at 588–89; *Najar*, 451 F.3d at 718.

104. *Kerns*, 663 F.3d at 1193 ("[T]he majority's statement of the issue it would have the district court address suffers from other flaws. The majority's reference to the Officers' 'belief' that exigent circumstances existed should not deter the district court on remand from correctly focusing on whether a reasonable officer would have believed that exigent circumstances existed (an issue which, as I have said, must in this case be resolved by the jury).").

105. 643 F.3d 1292 (10th Cir. 2011).

exigent circumstance.[106] In *Martinez*, the officers, responding to a 911 call,

> knocked on the front door[,] . . . received no response[,] . . . inspected the perimeter of the house[,] . . . saw no signs of forced entry[,] . . . nor heard anyone inside. The officers then . . . found a closed but unlocked sliding glass door into the house. Through the glass, they could see some electronics boxes near the door and . . . the house looked disheveled. . . .
>
> The officers entered through the unlocked door . . . .[107]

Martinez is a case from the same circuit, *involved officers from the same county as those in Kerns*, and was decided only five months before *Kerns*. But *Martinez* reached a different conclusion about the constitutional violation. As it relates to articulating rights, the contrast between the two cases shows that what facts amount to a constitutional violation is anything but concrete and fails to make the law predictable or clear for anyone.[108] That opacity also makes courts' determination about the constitutional violation more difficult.[109] Without a national standard to follow, courts vary both in what they deem a constitutional violation and what is adequately clearly established law sufficient to give an officer "fair and clear warning" that his conduct was unconstitutional.[110]

Warrantless searches violate clearly established Fourth Amendment law "unless the police can show that it falls within one . . . carefully defined set of exceptions based on the presence of 'exigent circumstances.'"[111] Given that "[t]he government bears the burden of proving the exigency exception"[112] and that "[t]hat burden is especially heavy when the exception must justify the warrantless entry of a home,"[113] it seems unreasonable that the Government could to prevail at the summary judgment stage, particularly in light of the factual dispute raised by Mr.

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106. *Id.* at 1293–94.

107. *Id.* at 1294–95.

108. And recall *Wilson v. Layne*, 526 U.S. 603 (1999), where the Court stated, "Deciding the constitutional question before addressing the qualified immunity question also promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public." *Id.* at 609; *see also infra* text accompanying notes 172–95 (noting how the context of articulation may help to explain the different results).

109. If the law were clearly established, the *Kerns* court could have relied on prior decisions to find a constitutional violation. Because the law is unclear, the determination of whether a constitutional violation occurred is made more difficult.

110. Hope v. Pelzer, 536 U.S. 730, 741 (2002).

111. Coolidge v. New Hampshire, 403 U.S. 443, 474–75 (1971); *see also* Welsh v. Wisconsin, 466 U.S. 740, 749 (1984) ("[E]xceptions to the warrant requirement are 'few in number and have been carefully delineated.'" (quoting United States v. U.S. District Court, 407 U.S. 297, 318 (1972))); Payton v. New York, 445 U.S. 573, 582–86 (1980).

112. United States v. Najar, 451 F.3d 710, 717 (10th Cir. 2006); *see also Welsh*, 466 U.S. at 750 ("[T]he burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless . . . entries.").

113. *Najar*, 451 F.3d at 717.

Kerns.[114] The presumption of unreasonableness regarding warrantless searches also explains, as the *Kerns* dissent points out, why the lower court did not devote a great deal of its analysis to the question of whether the Fourth Amendment law regarding warrantless entries into a private residence was clearly established; it was obvious.[115]

Although the Government bears the burden of demonstrating exigent circumstances,[116] in the interest of not over-deterring police from making split-second judgments in favor of public safety, courts afford deference to police in reviewing those split-second judgments. But even affording police that deference and conceding the point that this was a tense and rapidly developing situation, the entry into Kerns's home was outside that cushion of discretion. Further, the question of whether the situation supported a reasonable belief of an imminent threat so as to justify the warrantless entry is one that was rooted in evaluations of fact. And, as the district court held, that question was one for a jury.[117]

Affirming the constitutional violation in *Kerns* would not have had the effect of over-deterring police from acting in the interest of public safety. Even had the qualified immunity ruling been affirmed, the Government would likely have indemnified[118] the officers in *Kerns*, so the penalties would have been levied against the County of Bernalillo, not against the officers themselves.[119] Given that this is the same county sheriff's department as in *Martinez*,[120] and that those police officers under remarkably similar circumstances entered private homes without warrants, it is not unreasonable to think that additional deterrent measures against the county would be warranted. The Tenth Circuit's *Martinez* decision and the district court's opinion in *Kerns*, both finding a constitutional violation, also suggest that deterring that behavior is desirable.[121]

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114. *See* Johnson v. Jones, 515 U.S. 304, 313 (1995) ("[T]he appealable issue is a purely legal one: whether the facts alleged (by the plaintiff, or, in some cases, the defendant) support a claim of violation of clearly established law." (quoting Mitchell v. Forsyth, 472 U.S. 511, 528 n.9 (1985) (internal quotation mark omitted)); *id.* ("[A] qualified immunity ruling . . . is . . . a legal issue that can be decided with reference only to undisputed facts and in isolation from the remaining issues of the case.'" (second and third alterations in original) (quoting *Mitchell*, 472 U.S. at 530 n.10) (internal quotation marks omitted)).

115. Kerns v. Bader, 663 F.3d 1173, 1191–92 (10th Cir. 2011) (Holloway, J., dissenting).

116. *Najar*, 451 F.3d at 717; *see also Welsh*, 466 U.S at 750.

117. The assessment of whether officers had a *reasonable belief* is different from cases like, for example, *Brigham City v. Stuart*, 547 U.S. 398 (2006), where the exigency is one that the officers actually observed. *Id.* at 400–01. There, officers could hear yelling from inside the home, observed an individual punch someone, and saw the victim bleeding. *Id.* That situation reflects an objective exigency determination because of a danger to someone inside the home that was actually observed by officers. *Id.* at 401–03.

118. *See* N.M. STAT. ANN. § 41-4-4 (2012).

119. *See* Leong, *supra* note 61, at 668 n.1.

120. United States v. Martinez, 643 F.3d 1292, 1294 (10th Cir. 2011).

121. *Id.* at 1299–1300 ("The sanctity of the home is too important to be violated by the mere possibility that someone inside is in need of aid—such a 'possibility' is ever-present. It is for this reason that exceptions to the Fourth Amendment's warrant requirement are 'subject only to a few

The *Kerns* court should have affirmed the constitutional ruling. Although *Martinez* was decided five months before *Kerns*, the search in *Kerns* actually happened prior to that in *Martinez*, so the officers in *Kerns* could not have been aware at that time.[122] But as it relates to the constitutional merits of *Kerns*, the Tenth Circuit decided the cases within the same year. And in light of *Martinez*, the court missed the opportunity to articulate constitutional law in *Kerns*. Given the remarkably similar facts in *Kerns* and *Martinez*, it should have been easy for the *Kerns* court to at least affirm the constitutional violation, even if it were to remand the qualified immunity holding, as it did.

In *Kerns*, the site of the helicopter crash can be more appropriately characterized as the locus of a tense and rapidly developing situation than can Kerns's home. At the crash site, several witnesses reported hearing a shot that had come from the immediate area.[123] In contrast, there were no substantiated reports of a shot (or noise) from near Kerns's home[124] other than from Kerns himself, who claimed to have heard a noise that "could have been engine backfire or a rifle report."[125] The circumstances outside Kerns's home were relatively benign when compared to the facts of other Tenth Circuit cases where a reasonable belief in an exigency was found to exist.[126] The circumstances in *Kerns* do not seem to add up to a basis for a reasonable belief in an imminent threat inside Kerns's home that would constitutionally justify the warrantless entry.

The officers could have reasoned that because Kerns was the one to report the noise, he could be the shooter and thus there could have been people injured in his home. The problem with this justification is that it starts to look as if the police were *suspicious* of Kerns and entered his home with an *investigatory* purpose and only relied on the exigency exception in hindsight as a pretext for entering without a warrant.[127]

Furthermore, the police in *Kerns* had ample opportunity to establish a more ironclad exception to the warrant requirement: consent. Not even attempting to get Kerns's consent when he was conversing with an officer at the crash site less than half a mile from his home seems unrea-

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specifically established and well-delineated exceptions.'" (quoting Mincey v. Arizona, 437 U.S. 385, 390 (1978))).

122. Kerns v. Bader, 663 F.3d 1173 (10th Cir. 2011); *Martinez*, 643 F.3d at 1294.

123. *Kerns I*, 707 F. Supp. 2d 1190, 1203 (D.N.M. 2010), *rev'd in part, vacated in part sub nom.* Kerns v. Bader, 663 F.3d 1173 (10th Cir. 2011).

124. *Kerns*, 663 F.3d at 1178.

125. *Kerns I*, 707 F. Supp. 2d at 1201.

126. *See infra* note 144 (collecting the Tenth Circuit's exigency cases).

127. Warrantless entry is not justified by an investigatory purpose. If the only justification the police had was a suspicion of Kerns, then the investigatory entry of his home is a plain violation of the Fourth Amendment and one that is clearly established. *See, e.g.*, U.S. CONST. amend. IV; Mincey v. Arizona, 437 U.S. 385, 393 (1978).

sonable.[128] Moreover, that continuous contact with Kerns undermines the argument that the officers believed an imminent threat existed inside the home. If the officers were operating under that belief, why not alert or ask Kerns about it?[129]

For their part, the officers asserted that it is a "well settled"[130] principle that "officers can reasonably search for victims upon reports of gunfire."[131] Citing *Michigan v. Fisher*,[132] the officers pointed out that they do not need "ironclad proof" of a life-threatening injury to invoke the emergency aid exception.[133] However, even affording police wide deference, the situation in *Kerns* and the warrantless entry seem to be outside the margin of error within which reasonable constitutional violations fall, even in light of *Fisher*.

Not only was there no "ironclad proof" of an imminent, life-threatening danger in Kerns's home, which police concededly do not always need, there was hardly any objective reason to suspect people inside the home were in grave danger or were a threat to the police. And, even if there had been a reason to suspect a grave danger, why not radio the officer at the crash site and ask Kerns about the conditions at the home, or for consent to enter? Although police should be given plenty of leeway, the reasoning the police officers relied on in *Kerns* to justify their warrantless entry does not add up to an objectively reasonable fear for safety so much as it does to an investigation of someone the police thought was suspicious, which is a clear constitutional violation.[134]

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128. The failure to get Kerns's consent when he was conversing with an officer at the crash site could itself be considered a Fourth Amendment violation because the Fourth Amendment protects against "unreasonable searches." U.S. CONST. amend. IV.

129. *Kerns II*, 888 F. Supp. 2d. 1176, 1200 (D.N.M. 2012) ("The Court lent weight to the Kerns' argument that, 'if there was concern for the safety of people possibly inside the Kerns' home, Bader, Thompson, and Carter could have learned if there were people in the Kerns' home directly from J. Kerns, with whom Johnston was in radio contact,' and noted that the officers' actions once inside the home undercut their explanation for preceding without a warrant or consent." (quoting Kerns v. Bd. of Comm'rs, 2009 WL 3672877, at *9 (D.N.M. Oct. 5, 2009))).

130. *Id.* at 1197 (quoting City Defendants' Reply to Plaintiffs' Response to Their Motion for Summary Judgment Requesting Dismissal of Counts I, X, and Xiii of Plaintiffs' First Amended Complaint at 10, *Kerns I*, 707 F. Supp. 2d 1190 (D.N.M. 2010) (No. CIV 07-771 JB/ACT), 2009 WL 4993511, at *10).

131. *Id.*

132. 558 U.S. 45 (2009) (per curiam).

133. *Kerns II*, 888 F. Supp. 2d at 1206. In *Fisher*, the facts more strongly indicated a real emergency inside the house. There, police responding to a disturbance call were directed to a specific house "where a man was going crazy," according to witnesses. *Fisher*, 558 U.S. at 45. The scene outside the house was chaotic: several smashed windows—both the house and cars outside—a damaged fence on the property, and blood on the outside of the house. *Id.* at 45–46. Furthermore, the officers, who could see Fisher inside the house "screaming and throwing things," observed that he was cut and bleeding, and when they asked if he needed medical attention, he began cursing at them and eventually pointed a gun at one of the officers. *Id.* at 46–47. The *Kerns* case is a far cry from *Brigham City*, though. In *Brigham City*, as with *Fisher*, the officers were able to make a determination that an emergency existed because of a danger to someone inside the home that was actually observed. *Brigham City*, 547 U.S. at 406.

134. Although somewhat far-fetched, I concede that it is possible the police officers may have believed Kerns could have just gone on a rampage, killed his family, shot down the helicopter, and

In any event, although over-deterring police is a genuine concern, and courts should not haphazardly second-guess police decisions made in dangerous situations,[135] the police here had ample opportunity to assess an ostensibly nonthreatening situation and to ask Kerns about the unlocked door, the damaged window, and the music, before entering his home. Unlike most other Tenth Circuit cases where an exigency was determined to exist,[136] in *Kerns* there was no imminent threat apparent from outside Kerns's home,[137] no reports had singled out his home as a threat or as suspicious,[138] no movement was detected inside the home,[139] nothing was known about the residents,[140] and there were no obvious signs of a crime or injury having taken place there.[141] The objective facts regarding the condition outside Kerns's home and the conduct of the officers before entering make it seem likely that the officers' justification of being worried about the safety of those inside the home was a pretext. It seems just as likely that the officers were suspicious of Kerns and only after entering his home and getting caught with their hands in the cookie jar by Kerns's girlfriend, did they try to justify their warrantless entry made with investigatory motives by claiming exigent circumstances.

Throughout litigation, Kerns's arguments focused mostly on distinguishing his case from those cases where an exigency was found to have existed. Kerns focused less on finding cases with somewhat similar facts where the holding was that no exigency existed. However, it is question-

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then feigned as a good Samaritan to hide his crimes (helping police at the crash site and disclosing that he only heard the gunshot). But although that may have created a reason for the officers to be *suspicious* of Kerns, it still in itself does not demonstrate an *objectively reasonable belief* that there was an imminent threat to themselves or others. Particularly in the absence of any verifying evidence, it amounts to a mere police suspicion.

135. *E.g.*, Ryburn v. Huff, 132 S. Ct. 987, 991–92 (2012) ("[J]udges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation.").

136. *See infra* note 144 (collecting the Tenth Circuit's exigency cases).

137. *See* United States v. Riccio, 726 F.2d 638, 643 (10th Cir. 1984) (holding that warrantless entry was justified under exigency exception where the defendant, suspected of bank robbery, fired gunshots through a window at police).

138. *See* United States v. Gambino-Zavala, 539 F.3d 1221, 1224 (10th Cir. 2008) (holding an exigency justified a warrantless entry where police responded to multiple 911 calls reporting gunshots in an apartment identified by a tenant as the source of shots, witnesses stated that the occupants were known to have guns, and the gun owners' cars were parked outside the apartment).

139. *See* United States v. Najar, 451 F.3d 710, 720 (10th Cir. 2006) (holding that warrantless entry was justified under exigency exception where a 911 call was silent, call-back attempts went unanswered, police responding had the 911 operator call and police could hear the phone ringing inside thus confirming the call came from that residence, and police could see and hear someone inside the home who, when he eventually answered the door, denied having called 911).

140. *See* United States v. King, 222 F.3d 1280, 1281–82 (10th Cir. 2000) (holding that an exigency justified arrest inside a home pursuant to a search warrant where police knew that two target-residents were drug dealers, gang members, and known to carry firearms).

141. *See* Michigan v. Fisher, 548 U.S. 30, 45 (2009) (per curiam) (holding that an exigency justified warrantless entry where police, responding to a disturbance, were told by witnesses that a man "was going crazy," there were broken windows on the home and broken glass on the ground, blood on the exterior of the home, and the officers could see the resident inside throwing things and yelling).

able that it would have mattered.[142] Most of the controlling Tenth Circuit cases dealing with whether an exigency exists[143] require more than was present in *Kerns* to find that one did.[144] In contrast to these cases, in which the exigency usually arose in part because the police were alerted to a threat in an identified residence and were uncertain as to the whereabouts of the suspect or resident of the home, Kerns was nearby with a police officer, was aiding the police in the crash investigation, and could have been contacted.[145] Even if the officers were suspicious of Kerns and

142. *See* United States v. Martinez, 643 F.3d 1292, 1293–95 (10th Cir. 2011) (finding no exigency when officers, responding to a 911 call, could not locate or contact the resident, received no answer upon knocking on the door, the house looked disheveled, boxes were scattered around, and a door was unlocked).

143. *See* Wilson v. Layne, 526 U.S. 603, 614–15, 617–18 (1999) (holding in part that to clearly establish a law requires controlling precedent in that circuit or by the Supreme Court, or a consensus of persuasive authorities). Because it, too, is rather vaguely defined, I will ignore the consensus arm of this test throughout this Comment.

144. *See Gambino-Zavala*, 539 F.3d at 1224 (holding an exigency justified a warrantless entry where police responded to multiple 911 calls reporting gunshots in an apartment identified by a tenant as the source of shots, witnesses stated that the occupants were known to have guns, and the gun owners' cars were parked outside the apartment); *Najar*, 451 F.3d at 717–18, 720 (collecting sources and holding that warrantless entry was justified under exigency exception where a 911 call was silent, call-back attempts went unanswered, police responding had the 911 operator call and police could hear the phone ringing inside thus confirming the call came from that residence, and police could see and hear someone inside the home who, when he eventually answered the door, denied having called 911); United States v. Thomas, 372 F.3d 1173, 1177 (10th Cir. 2004) (holding an exigency justified the warrantless entry into an apartment after ordering everyone out, including defendant who had brandished a weapon, to search for anyone who may have been harmed or injured); United States v. Rhiger, 315 F.3d 1283, 1288–90 (holding that a warrantless entry was justified under exigency exception where officers observed defendant buying materials to manufacture methamphetamines and, after smelling methamphetamine being cooked, had reasonable belief that the officer and public safety were threatened by a potential methamphetamine lab explosion); United States v. Gay, 240 F.3d 1222, 1228–29 (10th Cir. 2001) (holding an exigency justified no-knock entry where police knew location of defendant's residence, defendant was thought to carry a gun, and thus posed a threat to officers' physical safety); United States v. King, 222 F.3d 1280, 1285 (10th Cir. 2000) (holding an exigency justified arrest in home pursuant to search warrant where police knew that two target-residents were drug dealers, gang members, and known to carry firearms); United States v. Wicks, 995 F.2d 964, 970–71 (10th Cir. 1993) (holding that the warrantless entry of motel room was justified under exigency exception where investigation of suspect established probable cause and combination of factors, including safety and destruction of evidence); United States v. Butler, 980 F.2d 619, 622 (10th Cir. 1992) (holding a warrantless entry was justified by "presence of a legitimate and significant threat to the health and safety of the arrestee" who was with officers); United States v. Smith, 797 F.2d 836, 841 (10th Cir. 1986) (holding that the totality of circumstances demonstrated an exigency relating to officer safety that justified a warrantless search where agents investigating a suspected smuggling operation saw marijuana in plain view through the window of a parked airplane); United States v. Riccio, 726 F.2d 638, 643 (10th Cir. 1984) (holding that warrantless entry was justified under exigency exception where the defendant, suspected of bank robbery, fired gunshots through a window at police). *But see Martinez*, 643 F.3d 1292, 1293–95 (finding no exigency when officers, responding to a 911 call, could not locate or contact the resident, received no answer upon knocking on the door, the house looked disheveled, boxes were scattered around, and a door was unlocked); United States v. Davis, 290 F.3d 1239, 1243 (10th Cir. 2002) (holding no exigency existed where officers had no reasonable belief that safety of officers or of defendant's wife was at risk, defendant was communicating with officers, and defendant had no known reputation for violence); United States v. Bute, 43 F.3d 531, 538 (10th Cir. 1994) (holding that no exigent circumstances existed where a door of a commercial building was open and officers claimed entry for protection of property to justify warrantless entry).

145. *Kerns I*, 707 F. Supp. 2d 1190, 1203 (D.N.M. 2010), *rev'd in part, vacated in part sub nom.* Kerns v. Bader, 663 F.3d 1173 (10th Cir. 2011).

reasoned he was the shooter, he was with police already and did not pose an immediate threat that would justify the officers' warrantless entry.

The established principle that warrantless searches require probable cause and a clear, objective basis for belief that an exigency exists should have led the *Kerns* court to affirm the Fourth Amendment violation. Exigency law is clear,[146] so the important question in determining the constitutional violation was whether the officers' belief was objectively reasonable. And that question of whether the belief in an exigency was objectively reasonable was based in facts and therefore more appropriate for a jury.[147] It certainly does not meet the standard for summary judgment, particularly given that the movant could not show that there was no dispute as to material facts.[148] These facts were material to the determination of whether an objectively reasonable belief in an exigency existed, and therefore to whether a constitutional violation occurred. Although many qualified immunity cases are appropriately decided at summary judgment, *Kerns* is not one of them. In *Kerns*, the determination of the constitutional violation itself turned on whether a reasonable belief in an exigency justified the warrantless entry.

In *Anderson*, the Supreme Court held that whether exigent circumstances support warrantless searches requires an examination of the "information possessed by the searching officials."[149] Notwithstanding the factually disputed information known to the police who entered Kerns's home, the police were armed with the knowledge that Kerns could be contacted via radio. This also arguably should have led the *Kerns* court to affirm the constitutional ruling. Especially in light of *Martinez*,[150] where contact with the homeowner was a point of discussion surrounding a reasonable belief in an exigency, failure to contact Kerns, when it was known by the officers that they could have done so without any delay, amounts to a violation of Kerns's Fourth Amendment right. Because the right in this context will not have been established, the result of failing to affirm the constitutional ruling leaves Kerns, and the next similarly situated plaintiff, without a remedy for the violation of his Fourth Amendment right.

B. Probable Cause

In addition to demonstrating an objectively reasonable belief in an exigency, defendants must prove they had probable cause. Thus, even if

146. *See* Brigham City v. Stuart, 547 U.S. 398, 404–06 (2006); United States v. Najar, 451 F.3d 710, 718–20 (10th Cir. 2006).

147. *See generally* Johnson v. Jones, 515 U.S. 304, 313 (1995); Farmer v. Colo. & S. Ry. Co., 723 F.2d 766, 768 (10th Cir. 1983) ("An appellate court should not overturn a trial court's finding of fact unless it is definitely and firmly convinced that a mistake has been made.").

148. *See infra* text accompanying notes 215–29.

149. Anderson v. Creighton, 483 U.S. 635, 641 (1987).

150. *See* United States v. Martinez, 643 F.3d 1292, 1293–94 (10th Cir. 2011); United States v. Davis, 290 F.3d 1239, 1243 (10th Cir. 2002).

the police officers are able to demonstrate an objectively reasonable belief in an exigency, "officers need either a warrant or probable cause plus exigent circumstances in order to make lawful entry into a home."[151] And even as mushy as the standard is, the officers in *Kerns* could not establish probable cause on the facts.

Although it is understandable that the officers would be amped during a tense and chaotic situation following the shooting of a police helicopter and eager to find and arrest the shooter, situations like that should not justify diminishing the constitutional protections afforded by the Fourth Amendment. If anything, that is precisely the situation when it is most important to uphold and reinforce those protections to deter understandably excited and potentially rancorous police officers from overreaching their bounds and violating the constitutional rights of private citizens.

Officers Bader, Thompson, and Carter were at the Kerns residence with Officer Johnston.[152] Officer Johnston was the only one of the four who did not enter the home.[153] These officers, while unable to articulate specific facts to establish probable cause leading to their warrantless entry, alluded to "feel[ing]" the need to get in the house to make sure no one was hurt.[154] Affording officers leeway is an important rationale of qualified immunity. But that latitude must be balanced somehow against the type of intrusion that follows in order to preserve the individual constitutional protections of the Fourth Amendment, particularly when the subject of the search is a place as sacred as a home.[155] The requirement of probable cause provides that balance and equilibrates the interests of the police in protecting public safety with the interests of individuals to be free from unreasonable searches.

Even as opaque as the probable cause standard is, it is hard to find enough to establish probable cause on the facts of *Kerns*.[156] Here, "[t]he officers did not report seeing any movement inside the Kerns' home" and "[o]ther than the broken window, [Officer] Bader did not find any evi-

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151. Kirk v. Louisiana, 536 U.S. 635, 638 (2002); *see also Brigham City*, 547 U.S. at 402; Payton v. New York, 445 U.S. 573, 588–89 (1980); *Najar*, 451 F.3d at 718.

152. *Kerns I*, 707 F. Supp. 2d 1190, 1203 (D.N.M. 2010), *rev'd in part, vacated in part sub nom.* Kerns v. Bader, 663 F.3d 1173 (10th Cir. 2011).

153. *Id.*

154. *See infra* note 163.

155. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 31 (2001) ("'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)); *Payton*, 445 U.S. at 573 ("The physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.").

156. Establishing probable cause as it relates the warrantless entry seems difficult here. However, the probable cause that the police asserted for Kerns's arrest warrant (a separate issue in *Kerns*) seems reasonable based on the unchallenged information included in the warrant affidavit. *See* Kerns v. Bader, 663 F.3d 1173, 1187–90 (10th Cir. 2011).

dence revealing where a shooter may have been standing."[157] These observations should have indicated that no shooter was ever present there because "Bader is a trained human tracker" and thus should have been able to make a determination about recent foot traffic in or out of the home.[158]

The small hole broken through the window was one of the primary justifications for the officer's assertion that an exigency existed.[159] But the window was actually only broken through a single pane of a double-paned window, and "a golf ball striking the Kerns' window would not have been out of the ordinary, because the Kerns' backyard borders the eighteenth hole of the Paradise Hills golf course."[160] It is also plainly unreasonable to conclude that the second pane of glass could have stopped a bullet (was it *magic* glass?). And if it was a bullet that made the hole in the outer pane, but was thwarted by the second pane, where was the bullet?

In addition to there being no evidence of any person responsible for the shooting, "many officers at the Kerns' home were searching for 'shell casings, guns, [and] people,' but no such evidence was ever found there."[161] Johnston, one of the officers present at Kerns's home stated that he "did not think that the shooter would be found at the scene, because of the time lag between the helicopter crash and his arrival at the Kerns' home."[162]

In fact, both Officers Bader and Johnston later conceded that they could not come up with an articulable reason that led them to believe someone in the home was injured or in danger.[163] Thus, these officers

157. *Kerns II*, 888 F. Supp. 2d 1176, 1187 (D.N.M. Aug. 2012).

158. *Id.*

159. *Id.* at 1187–88.

160. *Id.* at 1187.

161. *Id.* (alteration in original) (quoting Sergeant Robert Johnston's deposition).

162. *Id.* at 1189–90. That "time lag" also points to the exigency having ended. *See* Flippo v. West Virginia, 528 U.S. 11, 13–14 (1999) (concluding that when the exigency ends, so does any justification for warrantless entry); Mincey v. Arizona, 437 U.S. 385, 394–95 (1978) (rejecting a "murder scene exception" to the warrant requirement and holding that when the exigency ends, so does the justification for warrantless entry).

163. *Kerns II*, 888 F. Supp. 2d at 1190 n.20 ("Kerns point[ed] to Johnston's statement, in response to a question whether he could articulate what led him to believe that someone may have been hurt inside the house, that, '[a]t this point in time, no, sir.' Later in his deposition, however, Johnston state[d]: 'When we got to the Kerns residents [sic] and the door was open, the lights were on, the music was playing loud, it was late at night, early in the morning, nobody was answering the door, for whatever reason, and the fact that a shooting had taken place of a helicopter, unknown if anybody else had been shot in the interim prior to, after, whatever that yes, *I felt at that time we needed to get in that house to make sure there was nobody injured inside that house.*'" (alteration in original) (emphasis added) (quoting Sergeant Robert Johnston's deposition)); *id.* ("In response to a question whether [Officer Bader] could articulate any objective facts that made him think someone had taken refuge inside of the house, Bader said 'no.' Earlier in his deposition, however, Bader had stated: 'So now we are thinking well, the door is unlocked, we haven't found the offender, now nobody is coming to the door. There may be somebody hurt or maybe somebody being held hostage. We really don't know what's going on yet and that's not good. I mean, this is as far as we know, and we don't have the information to tell us otherwise, *this is basically the scene of a crime. This is*

could not even meet an articulable suspicion standard, a standard below that of probable cause.[164] It appears that no probable cause existed given that the officers at Kerns's home did not have enough evidence to suggest that a crime had occurred there or that an immediate danger existed inside the home. Furthermore, two of the officers admitted to not having enough evidence to meet an even lower standard of suspicion. The officers who entered the home were presumably either acting on a hunch or were motivated by an investigatory purpose, neither of which is constitutional.

It looks more like the police aspired to investigate Kerns, entered his home to do so, and worked backwards to justify their warrantless entry pretextually only after Kerns's girlfriend caught them inside. For his part, Kerns asserted (seemingly correctly) that the officers entered his home because they considered the home a crime scene connected to the helicopter shooting and were beginning to investigate it.[165] This assertion is consistent with the testimony given by Officer Bader that "this is basically the scene of a crime. This is where somebody shot down a helicopter."[166] However, the Fourth Amendment law is clear that "the seriousness of the offense under investigation [does not] itself create[] exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search."[167]

In the absence of probable cause and an objective exigency, the warrantless entry of a private home is unreasonable and therefore unconstitutional.[168] No objective exigency and no probable cause add up to a violation of Kerns's Fourth Amendment right to be free from unreasonable searches.

C. Context's Effect on Articulating Rights

The Tenth Circuit seemed to disregard the statements made by Officers Bader and Johnston—two of the officers at Kerns's home—that they could not articulate a reason as to why they believed someone in the home was injured or in immediate need of help. The court also did not seem to afford deference[169] to the lower court's ruling or to consider many of the facts in the "light most favorable to the" plaintiff, as it was

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where somebody shot down a helicopter. That's a big deal, and to have these people now not able to come to the door to contact us is extremely troubling.'" (emphasis added) (quoting Officer Drew Bader's deposition)).

164. *See generally* Terry v. Ohio, 392 U.S. 1, 20–22 (1968).

165. *Kerns II*, 888 F. Supp. 2d at 1196.

166. *Id.* at 1190 n.20 (quoting Sergeant Robert Johnston's deposition).

167. *Mincey*, 437 U.S. at 394.

168. *E.g.*, Kirk v. Louisiana, 536 U.S. 635, 638 (2002).

169. United States v. Najar, 451 F.3d 710, 717 (10th Cir. 2006).

required to do.[170] Why did the *Kerns* court think these statements were not important?

One explanation is that the court did not believe that these particular statements were important to their determination given the entirety of the statements made by the officers during their depositions. Or perhaps the court's decision here is representative of the general trend in Fourth Amendment unreasonable search and seizure jurisprudence to move away from the strict warrant requirement and towards a balancing of police interests against individual privacy interests.[171] But if this were the reasoning, and if the court had assessed the justification of the warrantless entry under the general reasonableness standard, the court likely would have found the officers' justification unreasonable.

Another possible reason that the court disregarded the officers' own admissions is that the context in which claims are brought and litigated affects how judges think about Fourth Amendment protections.[172] Most Fourth Amendment claims are brought in criminal proceedings and are made in an attempt to exclude evidence obtained as the result of an allegedly unreasonable search.[173] Professor Leong has suggested that the exclusionary remedy is one that judges see as a "massive remedy" and a "get-out-of-jail-free card," and that they are therefore reluctant to grant defendants—who have already been all but proven to have been in possession of contraband by the very nature of their appearance in an exclusionary hearing—the benefit of excluding the evidence.[174] That aversion to granting the exclusionary remedy in most Fourth Amendment claims leads judges to "distort doctrine, claiming the Fourth Amendment was not really violated,"[175] and thereby constrict the protections of the Fourth Amendment. That judicial focus on Fourth Amendment claims in the criminal context, then, leads judges to become accustomed to the practice of deciding cases in a rights-constrictive manner, rather than a rights-expansive approach.[176]

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170. Scott v. Harris, 550 U.S. 372, 377 (2007) (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001), *abrogated on other grounds by* Pearson v. Callahan, 555 U.S. 223 (2009)).

171. The trend in Fourth Amendment jurisprudence of moving from a strict warrant requirement toward a general reasonableness balancing approach is beyond the scope of this Comment, but see Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 894 nn.155–58 (1999) (collecting sources).

172. Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 418–21 (2012) (discussing how the context in which litigation is brought affects the articulation of rights). "Context" is used here to "refer to a given set of remedial, factual, and procedural circumstances," for example, criminal or civil proceedings. *Id.* at 407.

173. *Id.* at 430.

174. *Id.* at 430–31 (quoting Hudson v. Michigan, 547 U.S. 586 (2006) (internal quotation marks omitted) (discussing the effect of single-context litigation through the lens of the available remedies).

175. *Id.* at 431 (quoting Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 799 (1994)) (internal quotation mark omitted).

176. *Id.* at 431–32.

As it relates to *Kerns*, the Tenth Circuit possibly reasoned that because no evidence was obtained as the result of the unreasonable search and the standard remedy for unreasonable searches is to exclude the evidence obtained, Kerns really suffered no tangible injury. It would follow that as a result of the standard exclusionary remedy not being applicable in this case, Kerns's constitutional injury likewise was not cognizable as a Fourth Amendment claim. If a judge routinely rules on Fourth Amendment claims against unsavory criminal defendants who have been caught with contraband and seek to exclude unreasonably obtained evidence, then what could compel a judge used to that routine to grant monetary damages to a plaintiff who ostensibly suffered no harm at all?

Interestingly, in *Martinez*, the Tenth Circuit only five months before *Kerns* decided an exigency case of warrantless entry with similar officer justifications to those made in *Kerns*. The court held that "[b]ecause the officers lacked a reasonable basis for believing an individual inside Mr. Martinez's home was in need of immediate aid or assistance, we agree with the district court's determination that the warrantless search of Mr. Martinez's home was a violation of the Fourth Amendment."[177]

Martinez was an appeal by the Government from a district court's grant of a motion to suppress.[178] There, the officers who entered the home with no warrant claimed a belief in an exigency when after knocking on the door with no response, they "inspected the perimeter of the house"[179] and approached an "unlocked sliding glass door [through which] they could see some electronics boxes near the door and they noticed that the house looked disheveled."[180] They then entered the home and "spent approximately five minutes inside."[181]

The facts in *Kerns* are extraordinarily similar. Recall in *Kerns* that the officers entered the home with no warrant, claiming a belief in an exigent circumstance when, after knocking on the door with no response, they inspected the perimeter of the house.[182] Upon inspection, the officers noticed the generally disheveled condition outside the home: boxes in the driveway and garage, a broken (damaged) window, no lights on, and

177. United States v. Martinez, 643 F.3d 1292, 1300 (10th Cir. 2011).

178. *Id.* at 1293.

179. *Id.* at 1294.

180. *Id.* at 1295.

181. *Id.*; *see also id.* at 1296 ("The government contends the officers' warrantless search was justified by exigent circumstances because the officers had an objectively reasonable belief that someone inside the house needed immediate aid or was in danger. It emphasizes four facts to support its position: (1) the static-only 911 call from the residence; (2) the 'disheveled' appearance of the house; (3) the unlocked door on the backside second floor of the house; and (4) the electronics boxes just inside the unlocked door.").

182. *Kerns I*, 707 F. Supp. 2d 1190, 1202–03 (D.N.M. 2010), *rev'd in part, vacated in part sub nom.* Kerns v. Bader, 663 F.3d 1173 (10th Cir. 2011).

music playing.[183] The officers in *Kerns* also entered the home through an unlocked door and spent only about five minutes inside the home.[184]

The most notable factual difference between *Kerns* and *Martinez* with respect to the belief in an exigency is that in *Martinez*, the "Bernalillo County Emergency Communication Center received a 911 call from Mr. Martinez's residence. The 911 dispatcher who received the call heard only static on the line."[185] In *Kerns*, the plaintiff was actually with the police and in contact with the other officers who were at his home.[186] The other notable difference between *Kerns* and *Martinez* is that *Martinez* was litigated in the criminal context, regarding a suppression motion; *Kerns* was litigated in a civil context, in a § 1983 action.

A 911 call being placed from the home and the police thereafter not being able to reach the owner of the home would sensibly seem to weigh in favor of the court finding an objectively reasonable belief in an exigency. But the Tenth Circuit, in *Martinez*, ultimately agreed with the district court holding that the officers were unable to show a basis for an objectively reasonable belief in an exigent circumstance.[187] Even noting that "'reasonable belief' is a lower standard than probable cause[,] . . . the district court was explaining that the evidence was *neutral* and did not support an objectively reasonable belief there was any emergency in the house."[188] The *Martinez* court also noted the deference to be afforded in reviewing the district court's ruling on factual circumstances surrounding an exigency[189] and that "[t]he burden of proof was on the government to establish that exigent circumstances justified a warrantless search, and this 'burden is especially heavy when the exception must justify the warrantless entry of a home.'"[190] The *Martinez* court concluded:

> The sanctity of the home is too important to be violated by the mere possibility that someone inside is in need of aid—such a "possibility" is ever-present. It is for this reason that exceptions to the Fourth Amendment's warrant requirement are "subject only to a few specifically established and well-delineated exceptions."[191]

What explains the different decisions in *Kerns* and *Martinez*? The simple explanation is that the judges found the evidence more compel-

183. *Id.*; *see also Kerns*, 663 F.3d at 1777 ("[The officers] soon noticed that something seemed amiss when they reached Mr. Kerns's house: a door was ajar, music was playing, no lights were on.")

184. *Kerns I*, 707 F. Supp. 2d at 1203–04.

185. United States v. Martinez, 643 F.3d 1292, 1294 (10th Cir. 2011). Remarkably, this case took place in the same county as did *Kerns*.

186. *Kerns I*, 707 F. Supp. 2d at 1203.

187. *Martinez*, 643 F.3d at 1293–94.

188. *Id.* at 1299.

189. *Id.* at 1296.

190. *Id.* at 1299 (quoting United States v. Najar, 451 F.3d 710, 717 (10th Cir. 2006)).

191. *Id.* at 1299–1300 (quoting Mincey v. Arizona, 437 U.S. 385, 390 (1978)).

ling in one direction than I did. But another explanation is that the two cases reveal that the context in which the constitutional right is litigated affects what remedy is available, and the available remedies, in turn, affect how courts ultimately define the scope of the right.

The striking similarities suggest that perhaps the available remedy affected the respective courts' definition of the contours of the right at issue.[192] In *Martinez*, even considering the 911 call and the officers' inability to locate the homeowner, the court found that no reasonable belief in an exigency existed to justify entry into the home.[193] Therefore, in *Martinez*, the evidence obtained as a result of the warrantless search was suppressed.[194] In *Kerns*, however, the remedy of exclusion was not applicable because no evidence was obtained as a result of the similarly brief, similarly warrantless search.[195] Thus, akin to how an aversion to the exclusionary remedy leads judges to reason that no Fourth Amendment right was actually violated, the concept here is that if the standard remedy cannot be applied, then the right itself must not have been violated in any meaningful way.

III. RIGHTS, QUALIFIED IMMUNITY AND THE REMEDIAL EQUILIBRATION THEORY

> Absence of remedy is absence of right. Defect of remedy is defect of right. A right is as big, precisely, as what the courts will do.
>
> —Llewellyn, *The Bramble Bush*[196]

> [I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.
>
> —*Marbury v. Madison*[197]

Daryl Levinson's "remedial equilibration"[198] model is an appropriate way to think about what it means to have a right, and how the actual,

192. *See, e.g.*, Levinson, *supra* note 171, at 885 ("The defining feature is the threat of undesirable remedial consequences motivating courts to construct the right in such a way as to avoid those consequences. At the extreme, where no viable remedy is at hand, courts may define the right as nonexistent."); *see also* Leong, *supra* note 172, at 409 ("[T]he availability and scope of particular remedies affects the substantive development of constitutional rights.").

193. *Martinez*, 643 F.3d at 1295–96.

194. *Id.* at 1300.

195. *Kerns II*, 888 F. Supp. 2d 1176, 1187 (D.N.M. 2012).

196. K. N. LLEWELLYN, THE BRAMBLE BUSH 88 (Oxford Univ. Press ed., 2008) (1930).

197. 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 23 (1783)) (internal quotation marks omitted).

198. Levinson, *supra* note 171, at 858. Contrast the remedial equilibration theory with the "rights essentialism" model, which assumes a "pure constitutional value" that is distinct from, and is even "corrupted by being forced into[,] a remedial apparatus" as part of an operational function of the real world, *id.*, and is a really abstract *Allegory of the Cave*-type of way to think about rights.

tangible remedy for the violation of that right is what defines the contours of the right itself. Professor Levinson posits that rights and remedies are ultimately inseparable from one another, that they are "inextricably intertwined. Rights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence."[199] As it relates to Jason Kerns, "the absence of any remedy at all, render[s his Fourth Amendment] right essentially worthless"[200] and any protection afforded by it, means nothing.[201]

By allowing for a no-remedy situation, such as in *Kerns*, the court is allowing the Fourth Amendment to be diluted. Although the Supreme Court has elucidated several categorical exceptions to the warrant requirement,[202] Fourth Amendment doctrine is clear that police cannot enter one's home without a warrant.[203] If a warrantless search does not fall within one of those categorical exceptions, it violates the Fourth Amendment.[204] The importance of a right is directly related to the afforded remedy. That relationship means that in cases like *Kerns*, the Fourth Amendment gradually becomes less of a guaranteed protection for individuals and simply one more trivial hassle that police officers sometimes have to deal with after the fact.

In this Part, I will address three issues related to the Tenth Circuit's decision in *Kerns* to reverse the lower court's denial of qualified immunity. First, this Part addresses the threshold procedural concern of an appellate court deciding the fact-based exigency matter of whether an objectively reasonable basis for belief in an imminent threat existed to justify the officers' warrantless entry. Second, it addresses what the clearly established requirement means in the absence of any guidance from the Supreme Court and how that lack of guidance affects the relationship between constitutional rights and the remedies afforded for their violations. Third, this Part addresses the issue of sequencing in a quali-

199. *Id.*

200. *Id.* at 888.

201. Although the actual entry into Kerns's home is a fairly benign harm, the principle applies nonetheless. For a far more egregious illustration of a right without corresponding remedy, see Connick v. Thompson, 131 S. Ct. 1350 (2011). There, a man spent eighteen years in prison after *Brady* violations—withholding exculpatory evidence—by a prosecutor who was held to be entitled to absolute immunity for the intentional withholding of exculpatory evidence at Connick's trial. *Id.* at 1355–56. For his nearly two decades in prison, enduring who knows what sorts of atrocities, and missing out on a significant period of his free adult life, literally being deprived of his liberty—and in many senses of the word, his life—Connick received a remedy of absolutely nothing because of absolute prosecutorial immunity and the difficulty in proving municipal liability. *Id.* at 1356–58.

202. *E.g.*, Arizona v. Hicks, 480 U.S. 321, 323 (1987) (plain view exception); Welsh v. Wisconsin, 466 U.S. 740, 742 (1984) (community caretaking exception); Mincey v. Arizona, 437 U.S. 385, 394 (1978) (exigent circumstances exception); Warden v. Hayden, 387 U.S. 294, 295–96 (1967) (fleeing suspect exception).

203. *E.g.*, Kyllo v. United States, 533 U.S. 27, 37 (2001) (holding it was "clear that any physical invasion of the structure of the home, 'by even a fraction of an inch,' was too much" (quoting Silverman v. United States, 365 U.S. 505, 512 (1961)).

204. *See, e.g.*, *Welsh*, 466 U.S. at 749; Payton v. New York, 445 U.S. 573, 585–88 (1980); Coolidge v. New Hampshire, 403 U.S. 443, 454–55 (1971).

fied immunity analysis and how a court's decision on the clearly established prong without a decision on the constitutional merits affects both the articulation of constitutional principles and the effect thereof on the relationship between rights and remedies.

A. Cross-eyed and Procedureless

Facts are never what they seem to be, but appellate courts' standard when reviewing questions of fact is limited to clear error.[205] Although "[t]he existence of exigent circumstances is a mixed question of law and fact,"[206] facts come with points of view. As a threshold matter then, did the Tenth Circuit, in *Kerns*, even have proper jurisdiction to consider the district court's holding on the issue of a reasonable belief in an exigency? The lower court denied summary judgment because the issue was so factually dependent that it was a jury question.[207] However, the Tenth Circuit "do[es] not have jurisdiction to review the district court's factual findings, including its finding that a genuine dispute of fact existed."[208] Moreover, "government officials cannot appeal pretrial denial of qualified immunity to the extent the district court's order decides nothing more than whether the evidence could support a finding that particular conduct occurred."[209] In *Kerns*, the district court denied summary judgment on the qualified immunity issue, holding that "a jury could find that there was no imminent threat that would justify the Officers' entry into the Plaintiffs' home."[210] As the dissenting judge in *Kerns* noted:

> The question is not a difficult one in my view, and so I disagree with the majority's decision to remand the matter to the district court to rule again on this strictly legal question. The Officers had neither a warrant nor probable cause. If the circumstances they encountered did not support a reasonable belief that danger to someone was imminent, then the armed, nighttime entry into the home violated clearly established Fourth Amendment law.[211]

The question of law to decide in *Kerns* was whether the law was clear regarding exigent circumstances; it was.[212] The critical inquiry was whether those facts supported a reasonable belief in exigent circumstanc-

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205. *See generally* Johnson v. Jones, 515 U.S. 304, 313 (1995); Manning v. United States, 146 F.3d 808, 812 (10th Cir. 1998) ("[An appellate] court must accept the district court's factual findings unless they are clearly erroneous."); Farmer v. Colo. & S. Ry. Co., 723 F.2d 766, 768 (10th Cir. 1983) ("An appellate court should not overturn a trial court's finding of fact unless it is definitely and firmly convinced that a mistake has been made.").

206. United States v. Anderson, 981 F.2d 1560, 1567 (10th Cir. 1992).

207. *Manning*, 146 F.3d at 812.

208. Armijo *ex rel.* Chavez v. Wagon Mound Pub. Sch., 159 F.3d 1253, 1259 (10th Cir. 1998).

209. Foote v. Spiegel, 118 F.3d 1416, 1422 (10th Cir. 1997); *see also* Behrens v. Pelletier, 516 U.S. 299, 312–13 (1996); *Johnson*, 515 U.S. at 313 (1995).

210. Kerns v. Bader, 663 F.3d 1173, 1191 (10th Cir. 2011) (Holloway, J., dissenting).

211. *Id.* at 1192.

212. *See, e.g.*, Brigham City v. Stuart, 547 U.S. 398, 402 (2006); United States v. Najar, 451 F.3d 710, 717–18 (10th Cir. 2006).

es. That determination of whether there was an objectively reasonable belief in exigent circumstances, however, was a question of characterizing facts and that should have been put forth for a jury to decide.

Notably, in an opinion authored by the same judge who wrote *Kerns*, the Tenth Circuit recently held that it is the

> district court's exclusive job to determine which *facts* a jury could reasonably find [and we are not to consider] . . . questions about what facts a jury might reasonably find . . . in appeals from the denial of qualified immunity at summary judgment. . . . So, for example, if a district court concludes that a reasonable jury could find certain specified facts in favor of the plaintiff, the Supreme Court has indicated we usually must take them as true—and do so even if our own *de novo* review of the record might suggest otherwise as a matter of law.[213]

In other words, whether a reasonable officer would have perceived that an imminent threat of danger existed that would justify the warrantless entry and search of Kerns's home was a question of fact better suited for a jury, particularly because that was the district court's determination. In *Martinez*, working by hindsight and deferring to the district court's ruling, the Tenth Circuit noted that its review "entails a determination whether the district court's factual findings are clearly erroneous, viewing the evidence in the light most favorable to the district court's findings."[214]

Similarly, in *Johnson v. Jones*,[215] the Supreme Court distinguished reviewable summary judgment determinations from unreviewable ones, holding that interlocutory appeals are not appropriate where the disputed factual issue may affect the qualified immunity determination.[216] But, under *Shroff v. Spellman*,[217] a recent Tenth Circuit case, interlocutory appeals may still be appropriate if the factual dispute is immaterial and would not affect the qualified immunity determination.

In *Kerns*, the facts the officers asserted regarding the existence of an exigent circumstance were in dispute. That determination of a reasonable belief in an exigency rested in large part upon

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213. Lewis v. Tripp, 604 F.3d 1221, 1225 (10th Cir. 2010).

214. United States v. Martinez, 643 F.3d 1292, 1296 (10th Cir. 2011) (quoting *Najar*, 451 F.3d at 717) (internal quotation marks omitted).

215. 515 U.S. 304 (1995).

216. *Id.* at 313 ("We now consider the appealability of a portion of a district court's summary judgment order that, though entered in a 'qualified immunity' case, determines only a question of 'evidence sufficiency,' i.e., which facts a party may, or may not, be able to prove at trial. This kind of order, we conclude, is not appealable. That is, the District Court's determination that the summary judgment record in this case raised a genuine issue of fact concerning petitioners' involvement in the alleged beating of respondent was not a 'final decision' within the meaning of the relevant statute."); *see also* Mitchell v. Forsythe, 472 U.S. 511, 528 (1985).

217. 604 F.3d 1179, 1186, 1188 (10th Cir. 2010).

> something seem[ing] amiss when they reached Mr. Kerns's house: a door was ajar, music was playing, no lights were on. Things took an even darker turn when the officers noticed a broken window. A silver-dollar-sized hole punctured a window of the house, with shattering concentrically outward. This, the police thought, might be the result of a gunshot—perhaps by the same sniper who had just fired on the police.[218]

However, Kerns disputed several of those facts, including that the door was open[219] and that Kerns described the noise he heard as a gunshot.[220] While still waiting outside Kerns's home, the officers could not agree even among themselves about whether the music was shut off at some point.[221] Furthermore, the "silver-dollar-sized hole" puncturing the window actually only punctured a single pane of glass and may have been more appropriately characterized as a "golf-ball-sized hole" given that the *damaged* window was facing a golf course.[222] As the dissent pointed out, "[T]he majority seems to have strayed at times from viewing the facts in the light most favorable to Plaintiffs as we are constrained to do in the posture of this appeal."[223] Finally, despite the second pane having stopped whatever it was that punctured the first pane of glass, no bullet was found.[224]

Thus, *Shroff* precludes review because these factual issues were disputed and sufficiently material, meaning that the interlocutory appeal was inappropriately undertaken.[225] Even had the facts not been "disputed" in the typical sense, the factual dispute was really, Do these *facts* support "an objectively reasonable basis to believe there is an immediate need to protect the lives or safety of themselves or others"?[226] Put another way, this was not a question of law; it was a question of fact. And, "it is . . . questions [of law]—and not questions about what facts a jury might reasonably find—that we may consider in appeals from the denial of qualified immunity at summary judgment."[227] Specifically, *Kerns* centered not on whether the law was clear but on how the facts could be

218. Kerns v. Bader, 663 F.3d 1173, 1177 (10th Cir. 2011).

219. *Kerns I*, 707 F. Supp. 2d 1190, 1200, 1203 (D.N.M. 2010) ("Johnston's report alleges that the garage door was open when Johnston and his SWAT team got to the Plaintiffs' residence. J. Kerns, however, asserts that the garage door was closed when he left his home to go to the crash [s]ite." (citations omitted)), *rev'd in part, vacated in part sub nom.* Kerns v. Bader, 663 F.3d 1173 (10th Cir. 2011).

220. *Id.* at 1283 n.6 ("While the police consistently assert that J. Kerns told them that he heard a gun shot, J. Kerns is equally insistent that he referred to the sound as a popping noise and stated only that it could have been a rifle report when the officers pressed him for more detail.").

221. *Id.* at 1203 ("According to Johnston, . . . the music coming from the residence played the entire time. . . . Bader observed that the music that had been coming from the Plaintiffs' residence turned off, which raised concerns . . . ." (citations omitted)).

222. *Id.* at 1202.

223. *Kerns*, 663 F.3d at 1191 (Holloway, J., dissenting).

224. *Kerns II*, 888 F. Supp. 2d 1176, 1187 (D.N.M. 2012).

225. Shroff v. Spellman, 604 F.3d 1179, 1186–87 (10th Cir. 2010).

226. United States v. Najar, 451 F.3d 710, 718 (10th Cir. 2006).

227. Lewis v. Tripp, 604 F.3d 1221, 1225 (10th Cir. 2010).

characterized to support an objective belief in an emergency or not. To make that determination, characterizations of facts absolutely had to take place.

Particular facts were the foundation for the officers alleged exigency assessment. These facts served as the basis for the *Kerns* dissent, the lower court's determination that it was a jury question, and the Tenth Circuit's reversal of the lower court's denial of summary judgment in the officers' favor on the qualified immunity appeal.[228] The disputed factual issues clearly affected the qualified immunity determination, if not entirely dispositive themselves Therefore, the *Kerns* case should not have even survived to reach a decision on interlocutory appeal under the *Johnson* standard for unreviewable summary judgment determinations.[229]

B. Unclearly "Clearly Established"

Hope teaches that "general statements of the law are not inherently incapable of giving fair and clear warning" to police officers that their conduct is unconstitutional.[230] It follows that general statements regarding when an exigency exists should have been sufficient to give the officers in *Kerns* fair warning about the constitutionality of their conduct. Because "the Supreme Court has never given a fully cogent definition of what it means for a right to be 'clearly established[,]' [t]he result is an expansion of subjective judicial discretion and a decrease in the overall uniformity of qualified immunity rulings."[231]

The *Kerns* majority accepted the interlocutory appeal but left undecided the clearly established question because it felt it was "without the benefit of a full analysis from the district court" and because "briefing on appeal [was] less than entirely satisfactory."[232] However, "the majority is incorrect to say that the district judge did not address the second prong of the qualified immunity analysis"[233] sufficiently because "both aspects of the qualified immunity test were placed in play by the parties before the district court."[234] The majority even acknowledged that both parties did indeed address the clearly established question in their briefs.[235] Address-

228. *Kerns*, 663 F.3d at 1191 (Holloway, J., dissenting) ("[The officers'] argument rests on rejection of the district court's holding that the jury must decide questions of fact pertaining to whether a reasonable officer would have perceived an immediate need to protect himself or others under the circumstances. And as noted, that holding is not reviewable in this interlocutory appeal.").

229. *Id.* ("[Pursuant to *Johnson*, w]e do not have jurisdiction to review that holding in this interlocutory appeal.").

230. Hope v. Pelzer, 536 U.S. 730, 741 (2002).

231. John C. Williams, Note, *Qualifying Qualified Immunity*, 65 VAND. L. REV. 1295, 1298–99 (2012).

232. *Kerns*, 663 F.3d at 1182 (majority opinion).

233. *Id.* at 1192 (Holloway, J., dissenting).

234. *Id.* at 1181 (majority opinion).

235. *Id.* at 1181 ("And even if they did somehow violate the Fourth Amendment, the officers added, they did not violate *clearly established* Fourth Amendment law. In his opposition to summary judgment, Mr. Kerns understood both prongs of the qualified immunity analysis to be in play and

ing the district court's perceived brevity, the dissent pointed out "that the district court's concise treatment of the issue is completely unsurprising . . . . Some cases do indeed require a more particularized inquiry. This is not one of them. . . . '[G]eneral statements of the law are not inherently incapable of giving fair and clear warning.'"[236]

By avoiding ruling on the constitutional merits while remanding the denial of summary judgment, the *Kerns* decision begins to construct a substantive change in Fourth Amendment protections from "the right . . . to be [free from] unreasonable searches"[237] to "'[t]he right to be free of unreasonable searches and seizures only if such conduct is clearly established at the time of the violation.' This amounts to . . . instead of using objective reasonableness as a guide, officers need only worry about what has been clearly established"[238] in a manner particular enough to satisfy the specific court hearing the case. Thus, the *Kerns* decision not only leaves a right without remedy but also potentially provides an incentive for unconstitutional police conduct. Ironically, it does so by (clearly) establishing that so long as police officers can identify a unique fact, they can achieve any objective without fear of liability by pointing to that unique fact to characterize the situation as one that is not yet clearly established. In effect, all police now need to do to become immune from liability for unconstitutional conduct is say: Despite evidence to the contrary, it was unclear to us at the time, based on this or that excruciatingly unique factual nuance, that the Fourth Amendment prohibits that.

The Supreme Court's failure to give any meaningful guidance about what can serve as particular enough to clearly establish a right in order to make the qualified immunity determination has led to an unpredictable[239] burden of proof for plaintiffs attempting to overcome a qualified immunity defense. It has also led to an unpredictable availability of remedies for violations of Fourth Amendment rights.[240] This unpredictability results, at least in some cases, in the articulation of Fourth Amendment doctrine that is rights-constrictive.[241] The lack of guidance about the clearly established requirement leaves the availability of a remedy up to the caprice of a judge who may or may not require a high degree of factual similarity.[242] And, as discussed in the next subpart, judges tend to be

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proceeded to explain . . . why our precedent clearly established that their conduct violated those rights." (citation omitted)).

236. *Id.* at 1192 (Holloway, J., dissenting) (quoting Hope v. Pelzer, 536 U.S. 730, 741 (2002)).

237. U.S. CONST. amend. IV.

238. David B. Owens, Comment, *Fourth Amendment Remedial Equilibration: A Comment on* Herring v. United States *and* Pearson v. Callahan, 62 STAN. L. REV. 563, 580 (2010).

239. *See The Supreme Court, 2008 Term—Leading Cases*, 123 HARV. L. REV. 272, 278 (2009).

240. *See* Williams, *supra* note 231 ("[T]he Supreme Court has never given a fully cogent definition of what it means for a right to be 'clearly established.' The result is an expansion of subjective judicial discretion and a decrease in the overall uniformity of qualified immunity rulings.").

241. *See* Leong, *supra* note 172, at 432–33.

242. One of the other issues raised by Kerns—which is particularly illustrative of this point but largely unnecessary to the analysis of this Comment—was the privacy protection of his medical

reluctant to recognize a violation of a right where they are reticent to afford a remedy. This reluctance also leads to an articulation of constitutional law that is constrictive of constitutional protections.[243]

The decision in *Kerns* not only is contrary to the spirit of the Fourth Amendment (particularly given that it was Kerns's *home* that was searched) but also leaves room for all police officers who conduct unreasonable searches of a home to rely on any unique fact to provide them with an escape hatch from liability for their unconstitutional conduct. The *Kerns* decision is not an adherence to *Hope*. Warrantless searches are unreasonable[244] and violate the Fourth Amendment unless they meet the objective exigency exception.[245] Without such a justification, police officers violate the Fourth Amendment and should be held liable for doing so. If no remedy is afforded for their violation, what is the point of declaring the existence of rights at all? After all, what good is a right—a constitutional guarantee, no less—if there is no recovery when a government actor violates it?

With no Supreme Court guidance about what it means for a right to be clearly established, courts are left to determine whether the law was clear on the unique facts of the case in front of them. This idiosyncratic determination starts to make the qualified immunity analysis look almost subjective, leaving courts to determine if the right in question was clearly established in the opinion of that particular judge. This seems rather analogous to the fact-intensive good faith inquiry abandoned in *Harlow*. Furthermore, the articulation of constitutional law and principles becomes erratic and idiosyncratic to the specific situation presented to that court. Without a baseline meaning for "clearly established," the determination of such leaves future decisions unpredictable and inconsistent.[246]

The *Kerns* court followed up its decision in *Martinez* by muddying the law and leaving Jason Kerns without a remedy for the violation of his Fourth Amendment right. That lack of remedy is something courts should allow to happen only one time, in the interest of articulating the law.[247] But the goal of law articulation was not accomplished here. The

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records, which the police officers also obtained without a warrant. Addressing both the merits and the qualified immunity issue, the court held that the law entitling medical records to privacy protection was not clearly established enough. The dissent cited nearly a dozen cases dating back to 1977 to illustrate that the privacy interest in medical records is constitutionally protected and has been clearly ruled as such in both the Tenth Circuit and the Supreme Court. Kerns v. Bader, 663 F.3d 1173, 1198–1200 (10th Cir. 2011) (Holloway, J., dissenting).

243. *See infra* text accompanying notes 262–67.

244. U.S. CONST. amend. IV.

245. *See* cases cited *supra* note 103.

246. And, "promot[ing] clarity in the legal standards for official conduct [is a benefit to] both the officers and the general public." Wilson v. Layne, 526 U.S. 603, 609 (1999).

247. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982); *see also supra* text accompanying note 62 (noting one rationale of qualified immunity is that it allows courts to articulate constitutional law without subjecting officers to retroactive liability).

Kerns decision not only trivializes Kerns's Fourth Amendment right but also adds to the watering down of Fourth Amendment rights in general.

To overcome a qualified immunity defense, should courts require plaintiffs to engage in a "scavenger hunt for cases with precisely the same facts"?[248] For example, to show that the right was clearly established, should the *Kerns* plaintiff be responsible for finding cases where a police helicopter was shot down, only one person in the immediate area claimed to have heard a shot or a car backfiring but no neighbors confirmed hearing the noise, the door of a house was left open, there was music on inside the house, and a window of a home on the eighteenth hole of a golf course had a single pane of a double-paned window broken? Or should courts respect the lesson from *Hope* that "general statements of the law"[249] (e.g., that "police, absent a warrant, need probable cause and an objectively reasonable belief in an exigency to enter a home") are enough to put police officers on notice that their conduct is unconstitutional?[250] The *Kerns* court ignored the principle from *Hope* that a general statement should suffice, and inappropriately appropriated from the jury the ability to determine whether an objectively reasonable belief in an exigency existed. It also demonstrated how divergent "clearly established" standards can be—even within the same court and the same year.

By remanding the district court's denial of summary judgment on qualified immunity, the *Kerns* court ignored the principle from *Hope* about general statements of law and required Kerns to engage in the sort of factual "scavenger hunt" that *Pierce* warned about.[251] By ignoring *Hope*, and because Kerns understandably could not find a case with the exact same facts and in the same context—despite *Martinez* being exceedingly close—the court remanded the denial of qualified immunity. That decision left not only Jason Kerns but also any similarly situated plaintiff in the future with no remedy for the violation of his Fourth Amendment right.

By taking the route it did and, in effect, holding on interlocutory appeal that the law was not clearly established, the court ignored the lesson from *Hope* that a right need only to be defined clearly enough to give the officers "fair and clear" warning that their conduct violates the Fourth Amendment. Both the Supreme Court and the Tenth Circuit have articulated as unconstitutional the warrantless entry of a private home absent probable cause and an objectively reasonable exigency. At a min-

248. Pierce v. Gilchrist, 359 F.3d 1279, 1298 (10th Cir. 2004).

249. Hope v. Pelzer, 536 U.S. 730, 741 (2002) (quoting United States v. Lanier, 520 U.S. 259, 271 (1997)).

250. This leans towards being a fact-specific determination and one that is better suited for a jury than for a judge on summary judgment, except that the justifications offered by the police were arguably plainly unreasonable.

251. *Pierce*, 359 F.3d at 1298.

imum, the *Kerns* court missed an opportunity to articulate the law and advance constitutional principles.

The law has already established the categorical exigencies that allow for warrantless searches to be upheld as constitutional. The law is also clear that officers need an objectively reasonable belief in an imminent threat to qualify for the exigency exception to the warrant requirement.[252] By examining the minutia of the facts of this case (a job usually reserved for a jury) instead of simply asking itself whether this falls within one of the clear exigency categories, the court has carved out an exception to the exception and leaves the issue of warrantless searches less clear than it was before *Kerns*. Thus, the next time a warrantless search happens, the offending officers can simply rely on this decision to declare that the law was not clearly established enough.

C. Sequencing Issues

In addition to highlighting how the clearly established determination can lead to rights without remedies, the *Kerns* decision also demonstrates that same ill effect as a result of permissive *Saucier* sequencing.[253] Even though the constitutional issue was acknowledged, it was not decided at the circuit court level. This means the law is actually *less* clear, and one more constitutional violation of this exact kind will have to occur before it can even *potentially* become clearly established. Not holding police liable for reasonable mistakes is an underlying rationale of qualified immunity. In the interest of that policy rationale, courts should allow for only a single violation to take place and then articulate the law accordingly without subjecting officers to liability.[254]

But the situation here is different. By not addressing the constitutional issue and remanding the case to a lower court for final decision, the *Kerns* court has ensured that this exact same constitutional violation can occur without consequence *at a minimum* one more time. And the reality is that the one-more-violation estimate is the best-case scenario. Because even if the very same constitutional violation does occur, it only becomes clearly established for the purposes of qualified immunity if it reaches the Tenth Circuit for decision.[255] And even then, it only becomes clearly established if the decision somehow survives under both *Martinez*

252. *See* United States v. Najar, 451 F.3d 710, 718 (10th Cir. 2006); *see also* cases cited *supra* note 103.

253. Pearson v. Callahan, 555 U.S. 223, 234–35 (2009).

254. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982); *see also* Garcia *ex rel.* Garcia v. Miera, 817 F.2d 650, 658 n.8 (10th Cir. 1987) ("'[O]fficials might believe they 'have one bite of the apple.[]' But if courts cannot prospectively articulate constitutional standards, there looms the even more unpalatable possibility of multiple bites of a constitutionally forbidden fruit." (quoting Comment, Harlow v. Fitzgerald*: The Lower Courts Implement the New Standard for Qualified Immunity Under Section 1983*, 132 U. PA. L. REV. 901, 926 (1984))).

255. Wilson v. Layne, 526 U.S. 603, 614–15, 617–18 (1999) (holding in part that to clearly establish a law requires controlling precedent in that circuit or by the Supreme Court, or a consensus of persuasive authorities).

and *Kerns*, the prospect of which seems impossible. Furthermore, the judge hearing the case would then have to *choose* to address the constitutional merits, instead of only whether the law was clearly established. The result is that officers are likely to get many bites at the "constitutionally forbidden fruit" before the law becomes clear enough to forbid it.

That unremedied right is supposed to be allowed to happen only to the immediate plaintiff, in the interest of not chilling police behavior.[256] But by not addressing the constitutional issue, the court left the right to be free from unreasonable searches in the absence of an exigency unestablished.[257] And by not establishing the officers' conduct as a constitutional violation, the *Kerns* court left the harm to the immediately plaintiff unremedied and left the right without a corresponding remedy for future plaintiffs.

To be fair, the Supreme Court has given little guidance about when to follow the permissive *Saucier* sequence and when it is appropriate for a lower court to bypass the constitutional question and proceed directly to the clearly established prong. Because the *Kerns* court did not declare the officers' conduct a constitutional violation, or definitively not a constitutional violation, the law is yet (or, still) not clearly established, which means that that harm can continue repeating without a remedy.

And "what courts do, as opposed to what they say, is the effective regulator for the scope of a given right."[258] A right is defined by its remedy; or at least one can tell how important the court thinks a particular right is by the remedy afforded when it has been violated. And "even if a court says a lot about the value of a right, the manner in which it vindicates that right is really what determines its value."[259] Put simply: without a tangible remedy for its violation, no right can genuinely be said to exist.[260]

The result in *Kerns* is especially troubling because it has ensured the absence of a corresponding remedy for future plaintiffs. Furthermore, the court even conceded that a right had been violated but found that the right (or exigency, really) was not clearly established enough.[261] Although, admittedly, the court did not make explicit the assertion that the right had been violated, it appears clear that the court believed it had

256. *See Harlow*, 457 U.S. at 815; *Garcia*, 817 F.2d at 656–57 n.8.

257. And if the court, as it seems to do be doing here, requires such a high level of factual specificity, the court should therefore be taking every opportunity to articulate the law under every factual circumstance imaginable. This consistent articulation would balance the specificity requirement seemingly imposed in *Kerns* and help give the law definitive contours, while allowing police and citizens to predict the law and conform their behavior accordingly.

258. *See* Owens, *supra* note 238, at 564.

259. *Id.* at 564–65.

260. *See* Levinson, *supra* note 171, at 894.

261. *See* Kerns v. Bader, 663 F.3d 1173, 1181 (10th Cir. 2011) ("[T]hat no constitutional violation took place . . . isn't so clear in this case.").

been violated. The *Kerns* court admitted it was not manifest that no constitutional violation took place. It did not disturb or remand the lower court's ruling on the constitutional prong; it only remanded on the clearly established prong of the analysis.

Along with the decision in *Martinez*, it seems likely that the *Kerns* court would agree that Kerns's right had been violated. Knowing it would rely on the clearly established prong to remand the case, there are several possible explanations for the court's failure to address the constitutional issue. One possible explanation is the cognitive dissonance theory.[262] "[J]udges are deeply uncomfortable with the notion of acknowledging a violation yet denying relief. Cognitive psychology research supports this notion: judges are reluctant to acknowledge a constitutional violation where they subsequently intend to grant qualified immunity because such a result induces a state of psychological discomfort known as cognitive dissonance."[263] Perhaps the court simply did not feel comfortable explicitly declaring that a right had been violated and then remanding the case back to a lower court for the ultimate determination because, as it knew, the law cannot be articulated at a level high enough to become clearly established for the purposes of qualified immunity.[264]

Similarly, not sequencing affects rights articulation as well. By deciding first that a law is not clearly established, judges addressing the constitutional question are less likely to find a violation of the right.[265] This reticence creates rights-constrictive law articulation because knowing that a plaintiff cannot recover for the harm makes it difficult for a judge to say that a right has been violated in the first place. Therefore, the articulation of the right at issue gets less protective based on the unavailability of the remedy.[266] This illustrates how the articulation of important constitutional rights is shaped by the availability of the remedy, or at least by the willingness of courts to grant that remedy. It also illustrates how sequencing—or not following the *Saucier* sequence—affects the articulation of constitutional rights in general.

Whatever the reason for not addressing the underlying constitutional claim, the decision in *Kerns* amounts to an implicit acquiescence by the court to affording no remedy for the right at issue. The Tenth Circuit had to have been aware that Kerns's Fourth Amendment right would be left unarticulated and without a remedy for its violation. By not discuss-

262. *See* Leong, *supra* note 61, at 670–71, 702–06, 708 (discussing the cognitive dissonance theory as an explanation for judges articulating rights by way of remedies).

263. *Id.* at 670.

264. Wilson v. Layne, 526 U.S. 603, 614–15, 617–18 (1999); *see also* Cortez v. McCauley, 478 F.3d 1108, 1114–15 (10th Cir. 2007) ("[F]or a right to be clearly established, 'there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.'" (quoting Medina v. City of Denver, 960 F.2d 1493, 1498 (10th Cir. 1992)).

265. *See* Owens, *supra* note 238, at 582.

266. *See id.*

ing the right and not explicitly declaring that a violation occurred or did not occur, the *Kerns* court left the right to be free from unreasonable searches—of one's home no less—below the threshold for the clearly established standard. The *Kerns* decision has arguably made the right even *less* clearly established because the decision could be claimed at this point to be in controversy with *Martinez*. At a minimum, the effect of not sequencing in *Kerns* will result in the same remedy-less constitutional violation in at least one more instance.

Although the concept of qualified immunity accepts this result once in order to further articulation of the law, the idea is to make the law more clear so that an unremedied constitutional violation does not happen repeatedly.[267] The *Kerns* court is, in effect, kicking the can down the road, waiting for the next *Kerns* case to make a decision about the right at stake instead of taking the opportunity to articulate constitutional law now. And, unfortunately, while that can is being kicked down the road, those future plaintiffs suffering similar constitutional harms will be left without any avenue for recovery.

That avoidance exemplifies a court willfully allowing for a violation of the exact same constitutional right to go unremedied in the future. By leaving the law unarticulated, the *Kerns* court has, with its eyes wide open, guaranteed that, at the bare minimum, one more violation of the exact same kind can occur and the plaintiff in that case too will be left with no remedy, especially because the law will not be clearly established for the purposes of qualified immunity even if the constitutional issue is decided in Kerns's favor upon remand in the district court (ahem, again). Leaving the law unarticulated means that another case with a similar constitutional violation not only has to occur but also has to reach the Tenth Circuit before the right can be articulated meaningfully.[268] And in a repeat of Kerns's case that actually makes it up to the Tenth Circuit, it would not yet have been decided by a court with sufficient authority. So, the importance that the *Kerns* court places on this right is in question and Fourth Amendment law articulation stalls, leaving unpredictable protections. This prospect is especially disheartening because *Kerns* was a prime opportunity for a federal court to articulate Fourth Amendment law in the civil context, as opposed to the typical criminal context, and to provide some balance to the articulation of Fourth Amendment law at large.

Courts should not leave constitutional rights without a remedy for violations thereof. Constitutional rights are arguably of greater importance than rights deriving from other sources, as demonstrated by their having been enshrined in the country's founding document as guar-

267. *See, e.g.*, *Wilson*, 526 U.S. at 609; Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982).
268. *Wilson*, 526 U.S. at 614–15, 617–18).

antees.[269] When a violation is identified, particularly by a federal court, that court should be obligated to take it seriously and to take action to ensure that the immediate case is the only time it is heard but not remedied. By addressing the qualified immunity analysis in an order opposite the *Saucier* sequence, courts are able to recognize constitutional violations but decide the case on the clearly established prong without addressing the constitutional harm at all. This leaves the law unarticulated and unclear for the purposes of qualified immunity moving forward. Thus the right at issue does not become clearly established for subsequent cases and subsequent victims will similarly be left with no remedy for the violations of their constitutional rights. This stalling in constitutional rights articulation leaves individuals suffering constitutional harms at the hands of government actors without a corresponding remedy. The absence of remedy, in turn, defines the right, which means this cycle is self-perpetuating and leads to less protections stemming from constitutional rights.

IV. AND JUSTICE FOR ALL

When courts are faced with a "*Kerns* situation"—where a right exists and has been violated but it is clear that the harmed individual will be left without a remedy or where the law could be blackened regarding that right—there are several possible solutions. To make that determination, in line with the underlying qualified immunity rationales, the question courts should consider is the following: When the person in this case is left with no remedy, is it possible that the next person could also be left with no remedy?

To address this issue, I propose the admittedly novel *Kerns* solution. In this solution, appellate courts would be required to decide the constitutional issue. Consequently, the law would be articulated to ensure that another similar harm does not take place without an available remedy for the (subsequently) harmed individual. The *Kerns* solution is similar to the mandated *Saucier* sequence, except that it would not be mandatory in all cases, only in those cases in the *Kerns* situation. The *Kerns* solution would be a balancing test outlined by factors to be weighed. One particularly strong showing on a given factor could make up for a relatively weak showing on another. The factors outlining the proposed *Kerns* solution and an obligatory decision on the constitutional question are as follows:

1. *Will the immediate plaintiff be left without a remedy for a constitutional harm?* Under this factor, the rationales underlying qualified immunity would allow for the harm to take place once without a remedy. But if the immediate plaintiff

269. *E.g.*, U.S. CONST. amend. IV.

is left without a remedy, then it is likely that the next one will draw the shortest straw as well.[270]

2. *Is this a harm that has the potential to be repeated?* Stated another way: if the constitutional question is left unaddressed here, would that potentially result in another individual being left with no remedy for a constitutional violation in the future? For example, if the issue were so factually anomalous that it is exceptionally unlikely the harm could repeat, this factor would not be met. But, if in the eye of the beholder there is seemingly any chance at all that the harm could repeat, then the appellate courts should be required under this proposed *Kerns* solution test to address the constitutional question for the purposes of clearly establishing the law.

3. *Is this case sufficiently developed for this court to articulate a meaningful legal principle?* Put another way, would there be a risk of making the law less clear, either as a result of failing to address the constitutional issue, as in *Kerns*, or because the factual record is insufficient to articulate a decent legal principle? This factor is designed to ensure that the facts surrounding the constitutional merits are reasonably developed so that the law that does get articulated is useful and consequential. In those cases where there is need for additional factual development, the "procedural trigger" solution, described below, should be incorporated into this step.

Another possible solution, either as a stand-alone solution or in combination with the third factor of the *Kerns* solution, is the procedural trigger solution. Under this solution, if a case needed to be remanded (a) for development of the factual record in order to articulate the legal principle correctly or (b) as in *Kerns*, on the qualified immunity prong and was ultimately decided in a lower court on the constitutional merits where the level of authority would not sufficiently establish constitutional law, it would automatically trigger a demarcated procedural kick, sending the case back up to a circuit court to affirm the ruling at the level sufficient to clearly establish the law for future cases. This solution will ensure a well-developed factual record on the constitutional issue because the case would necessarily have gone through the trial phase on that issue and the parties would be aware of the need to brief it. It would

270. Note that the law could be articulated here in either direction. The test would be truncated at this point if it were determined that the immediate plaintiff suffered no constitutionally cognizable harm. At least then, however, if the law were articulated such that a constitutional violation were not recognized, there would be no underlying constitutional harm in the next case, and the *Kerns* solution would have served its purpose of articulating the law.

also allow a federal court—one arguably more experienced in constitutional issues—to oversee the issue and the ensuing articulation of rights. This solution would also ensure that in all cases where a constitutional right was at issue—whether a right was found to exist or not—that right would thereafter be clearly established for the purposes of a remedy being available in the future.

In the interest of articulating useful constitutional principles, and for cases in which the record is truly insufficient to do so, the procedural trigger solution should be embraced within the third step of the *Kerns* solution for more in-depth factual development at the trial level. In the procedural trigger solution, those cases bearing on important constitutional issues but not developed enough to make good law would be remanded for rehearing on the constitutional merits. Such cases then would automatically be kicked back up to the circuit level for a recognition of the right, thereby establishing the law clearly at the necessary circuit level.

One anticipated counterargument to the *Kerns* solution is that the record on appeal may not be factually developed enough. In those cases, the concern is that courts would be prone to getting the constitutional question wrong, articulating bad law. But this factual development concern is already extant to a lesser degree in all appellate cases. If the solution proposed here were to be adopted, the procedural trigger solution accounts for it, necessitates rehearing at trial, and accounts for clearly establishing rights at the circuit level. Diluting constitutional rights and their corresponding remedies for the sake of not re-briefing issues or remanding as part of this solution seems like a precarious ransom when constitutional rights are at stake.

Another possible solution is reinstating the mandatory *Saucier* sequencing, but making one of two narrow exceptions to the Federal Rules of Civil Procedure. The first possibility is to allow for an immediate appeal (before addressing the clearly established prong) on the constitutional issue for those parties who lose on that prong. This exception would allow for the non-prevailing party to appeal the constitutional issue while maintaining the incentive for parties to litigate it before even reaching the clearly established prong.[271] Conversely, an exception could be made to allow for an interlocutory appeal after both prongs of the qualified immunity analysis have been decided for those parties who prevail only on the qualified immunity question.

Finally, another solution that has been previously suggested is to "provid[e] more specific guidance to lower courts regarding when se-

271. Thanks to Nick Poppe for suggesting this variation during one of many excellent discussions.

quencing is and is not appropriate."[272] The *Kerns* solution provides just that guidance and ensures that plaintiffs suffering constitutional harms are not left without a remedy.

CONCLUSION

"Absence of a remedy is absence of a right."[273] Maintaining the integrity of constitutional rights relies on the real world vindication of those rights when a violation has occurred. When constitutional rights are at stake, courts should be careful to ensure that those rights are strengthened instead of diluted. Rights are strengthened when remedies are afforded that provide a tangible, corresponding resolution for their violation.

When courts are given ineffectual guidelines about what it means for a right to be clearly established, or about when to decide the constitutional issues in a qualified immunity case, the integrity of our constitutional rights is put in jeopardy because the result is the opportunity for unremedied, albeit recognized, violations. By ignoring the lesson from *Hope* that general statements of law are not inherently incapable of establishing a law, it gets more difficult to articulate constitutional rights because those available remedies begin to dissolve in the absence of rights articulation, specifically in the context of qualified immunity, and often therefore under the Fourth Amendment at large. The result of leaving rights unarticulated is a diminished availability of remedies for the violations of those rights. Fewer and increasingly unreachable remedies result in incomplete and increasingly unarticulated rights. And so the cycle goes. *Kerns* is an example of this difficulty of rights articulation and the disappointing effect on the underlying right.

Aaron Belzer[*]

272. Leong, *supra* note 61, at 671.

273. LLEWELLYN, *supra* note 196.

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UNITED STATES V. SCHAEFER AND *UNITED STATES V. STURM*: WHY THE FEDERAL GOVERNMENT SHOULD REGULATE ALL INTERNET USE AS INTERSTATE COMMERCE

ABSTRACT

Technology is always evolving and at an ever-increasing rate. This evolution leaves the law playing catch-up, with courts left to apply existing laws to new realities. The rapid growth and adoption of the Internet is a prime example, leaving some courts and prosecutors at odds with which laws Internet crimes should be tried under. . Should Internet use, by itself, constitute interstate commerce, thereby invoking federal jurisdiction? This question is explored by reviewing two child pornography cases decided by the Tenth Circuit: *United States v. Schaefer* and *United States v. Sturm*, and the history of Commerce Clause jurisprudence.

In 2007, an admitted possessor of child pornography was acquitted by the Tenth Circuit, which held that proof of child pornography materials moving across state lines was required for a conviction under the federal child pornography laws. This ruling by the Tenth Circuit contradicted several decisions from other federal circuits, which held that proof of Internet use alone in connection with child pornography was enough for a conviction. Seeking to clarify the intent of the child pornography laws, Congress passed the Effective Child Pornography Prosecution Act of 2007 (ECPPA). The ECPPA declared that use of the Internet to receive, possess, and distribute child pornography fell under Congress's Commerce Clause powers.

Following the enactment of the ECPPA, the Tenth Circuit was again asked to interpret the federal child pornography laws in *United States v. Sturm*. Interpreting the same child pornography laws applicable in *Schaefer*, the court overruled its *Schaefer* decision, ultimately leading to a conviction in *Sturm*. These two inconsistent rulings reveal the difficulties that courts have in interpreting existing laws to new technology. This Comment urges Congress to act proactively, rather than reactively as it did with the ECPPA, by declaring that Internet use constitutes interstate commerce for all federal laws, and contends that such a declaration is within Congress's Commerce Clause powers.

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INTRODUCTION

Confess to a crime and punishment follows—not always. Enter the Tenth Circuit decisions of *United States v. Schaefer*[1] and *United States v. Sturm*.[2] In *Schaefer*, the defendant admitted to searching for child pornography on the Internet;[3] however, the confession was not enough to uphold a conviction.[4] The *Schaefer* court held that the Government did not carry its burden of proof because it failed to establish that pornographic images had ever traveled across state lines.[5] Congress responded to the *Schaefer* decision by enacting the Effective Child Pornography Prosecution Act of 2007 (ECPPA) to give federal prosecutors the full reach of the Commerce Clause by amending the statute to read "in or affecting commerce."[6] Following the ECPPA, the Tenth Circuit overturned its decision in *Schaefer*, holding that the term "visual depiction" contained in federal child pornography statutes meant the "substantive content" of the image contained on the tangible media.[7] Although the *Sturm* decision led to a conviction,[8] it was far from clear-cut.

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1. 501 F.3d 1197 (10th Cir. 2007), *overruled by* United States v. Sturm, 672 F.3d 891 (10th Cir. 2012) (en banc).
2. 672 F.3d 891 (10th Cir. 2012) (en banc).
3. *Schaefer*, 501 F.3d at 1198.
4. *Id.* at 1207.
5. *Id.*
6. Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, § 103, 122 Stat. 4001 (2008) (codified in various sections of 18 U.S.C.).
7. *Sturm*, 672 F.3d at 901. "Visual depiction," or the "substantive content" of the image, means the thing that is portrayed within the file or photograph, and is only created once. For example, say you take a picture of your new car using your digital camera. The moment you snap a photograph of your new car, you have created a visual depiction of your new car. Making a copy of this

In passing the ECPPA, Congress clearly intended that anybody who used the Internet in connection with child pornography be punished.[9] Did Congress go too far? Has the Internet become such an interstate activity that the federal government should have free reign to prosecute all cybercrime? This Comment argues that Congress has reacted appropriately by equating Internet use to interstate commerce, and that this broader commerce definition based on Internet usage should be applied to all federal laws.

Although the cases of *Schaefer* and *Sturm* both involve crimes related to child pornography,[10] this Comment will look beyond that context. This Comment will use the decisions in *Schaefer* and *Sturm* as a platform to discuss issues with regulating the Internet like traditional methods of communication, in an effort to show that Congress's move to declare use of the Internet as interstate commerce in the child pornography statutes should be adopted in all federal laws. Part I of this Comment will look at the development of the child pornography laws and why a change was needed. Part II will analyze why treating all Internet use as interstate commerce does not violate the Constitution, and why it falls within the powers granted to Congress under the Commerce Clause. Part III will discuss the benefits of adopting a policy that classifies Internet use as interstate commerce. This Comment will conclude that a clear mandate from Congress to adopt such a policy for all Internet use will provide a straightforward answer to all courts and citizens, and such a policy is the only way to effectively prosecute those criminals who use the Internet as their weapon of choice.

I. EVOLUTION OF THE CHILD PORNOGRAPHY LAWS

A. A Brief History

The early child pornography statutes were enacted prior to the Internet becoming a part of everyday life.[11] In passing these early statutes, Congress realized the dangers to society that child pornography presented.[12] Recognizing this, Congress sought to remedy the problem by pass-

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photograph does not create a new visual depiction; it simply creates a copy of the visual depiction. This visual depiction may be saved in a digital file on your camera or computer. Although the digital file is the media that you can share with friends and family via e-mail, social networks, etc., the substantive content of that digital file is the picture or image of your new car that you see when you view the file on your camera or open the digital file on your computer screen.

8. United States v. Sturm, 673 F.3d 1274, 1288 (10th Cir. 2012).

9. *See id.*; *see also* David M. Frommell, Comment, *Pedophiles, Politics, and the Balance of Power: The Fallout from* United States v. Schaefer *and the Erosion of State Authority*, 86 DENV. U. L. REV. 1155, 1166 (2009).

10. *Sturm*, 672 F.3d at 892; *Schaefer*, 501 F.3d at 1197.

11. Frommell, *supra* note 9, at 1156–58 (discussing the history of the child pornography statutes beginning with the Protection of Children Against Sexual Exploitation Act of 1977 through the first child pornography statute to address computer use in the Child Protection Act of 1988).

12. Michael D. Yanovsky Sukenik, *Distinct Words, Discrete Meanings: The Internet & Illicit Interstate Commerce*, 2011 U. ILL. J.L. TECH. & POL'Y 1, 7.

ing legislation that would stop child pornography from spreading using "instrumentalities of interstate . . . commerce."[13] By 1988, Congress saw the dangerous potential that new technology, such as computers and the Internet, could play in the spread of child pornography.[14] As a result, Congress amended the Child Protection Act of 1984 by prohibiting any "knowing transportation, shipment, receipt or distribution of child pornography . . . by any means, including by computer."[15] It is under this version of the statute that we begin our review of the case law.

Prior to the Tenth Circuit's ruling in *Schaefer*, many other circuits were asked to interpret the language of the child pornography statutes.[16] In each of these earlier cases, the interpretation by the federal courts of appeals reached the same conclusion—Internet use constituted interstate commerce.[17] The *Schaefer* court, however, decided to rule differently,[18] arguably going against congressional intent.[19]

In *Schaefer*, the district court convicted the defendant for possession of child pornography based in part on evidence that he had subscribed to websites that contained images of child pornography.[20] The Tenth Circuit, however, reversed the district court's conviction, holding that the Government failed to prove actual "movement across state lines."[21] Rejecting the view of the other circuits,[22] the Tenth Circuit required clear evidence that the images of child pornography possessed by Schaefer had in fact "moved across state lines."[23] The court reasoned that the plain language of the statute supported its ruling.[24] The Tenth Circuit's ruling, however, allowed Schaefer to escape conviction, even though he had

13. *Id.* (quoting S. Rep. No. 95-438, at 5 (1977)) (internal quotation mark omitted); *see also* Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, § 2252, 92 Stat. 7 (1978) (codified at 18 U.S.C. §§ 2251–2259 (2012)) (regulating any "visual or print medium" that depicts child pornography).

14. *See* Frommell, *supra* note 9, at 1158.

15. *Id.* (citing Act of Nov. 18, 1988, Pub. L. No. 100-690, § 7511, 102 Stat. 4181 (codified at 18 U.S.C. §§ 2251–53, 2423 (2012)).

16. *See* United States v. MacEwan, 445 F.3d 237, 242 (3d Cir. 2006) (holding that use of the Internet is sufficient evidence to show interstate activity); United States v. Runyan, 290 F.3d 223, 242 (5th Cir. 2002) ("[C]ircumstantial evidence linking a[n] . . . image to the Internet . . . can be sufficient evidence of interstate transportation . . . ."); United States v. Carroll, 105 F.3d 740, 742 (1st Cir. 1997) ("Transmission . . . by means of the Internet is tantamount to moving . . . across state lines and thus constitutes transportation in interstate commerce.").

17. *See* cases cited *supra* note 16; *see also* Frommell, *supra* note 9, at 1164–65.

18. United States v. Schaefer, 501 F.3d 1197, 1198 (10th Cir. 2007), *overruled by* United States v. Sturm, 672 F.3d 891 (10th Cir. 2012) (en banc).

19. Sukenik, *supra* note 12, at 14.

20. *Schaefer*, 501 F.3d at 1198.

21. *Id.*

22. *See* cases cited *supra* note 16; *see also* Frommell, *supra* note 9, at 1165.

23. *Schaefer*, 501 F.3d at 1198.

24. *Id.* at 1207 (holding that 18 U.S.C. § 2252(a)(2) and § 2252(a)(4)(B) require "movement across state lines").

confessed to searching for child pornography on the Internet.[25] This outcome outraged Congress, prompting an immediate reaction.[26]

The ECPPA made it clear that Congress intends all use of the Internet to constitute interstate commerce.[27] Congress responded to the Tenth Circuit's *Schaefer* decision in an effort to prevent a similar "misreading" by a court in the future.[28] Later, the Tenth Circuit was asked again to interpret the child pornography statutes in *United States v. Sturm*.

In *Sturm*, the Tenth Circuit was required to interpret the child pornography statutes it had previously interpreted in *Schaefer*.[29] As was the defendant in *Schaefer*, the defendant in *Sturm* was charged with possession of child pornography based on pornographic images found on his hard drive that had been saved while using the Internet.[30] Unlike the *Schaefer* court, however, this court was acting in the wake of the new ECPPA, which made it clear that the *Schaefer* decision was at odds with the intent of Congress.[31] Arguably succumbing to the wishes of Congress, the *Sturm* court overruled its prior decision in *Schaefer*.[32] In overruling *Schaefer*, however, the *Sturm* court did not change its reading of the statute requiring proof of actual movement across state lines.[33] Instead, it found a different reading of "visual depiction,"[34] allowing the Tenth Circuit to reach the result Congress intended in a roundabout way.[35] This ruling meant that it is the image portrayed in the digital file that must move across state lines, rather than the digital file itself.[36] The court even went on to suggest how the Government may prove this necessary interstate element, on remand, by showing that the "substance of

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25. *Id.* at 1198.

26. Sukenik, *supra* note 12, at 14 ("[R]eversal of a conviction of a man who 'was found to be in possession of child pornography' on trivial textual grounds... [was] 'a truly unfortunate and . . . wrongly decided decision.'" (quoting Rep. John Conyers Jr., Democrat from Michigan)).

27. Act of Oct. 8, 2008, Pub. L. No. 110-358, § 102(7), 122 Stat. 4001 (codified as amended at 18 U.S.C. § 2251 (2012)); *see also* Frommell, *supra* note 9.

28. *See* Sukenik, *supra* note 12, at 14.

29. *See* United States v. Sturm, 672 F.3d 891, 897 (10th Cir. 2012) (en banc).

30. *Id.* at 896.

31. *Compare* Pub. L. No. 110-358, § 102(7), 122 Stat. 4001 (2008) ("The transmission of child pornography using the Internet constitutes transportation in interstate commerce.") (codified as amended at 18 U.S.C. § 2251 (2012)), *with* United States v. Schaefer, 501 F.3d 1197, 1207 (2007) (holding that evidence of Internet use was insufficient to satisfy jurisdictional requirement of interstate commerce).

32. *See Sturm*, 672 F.3d at 901.

33. *Id.* at 897.

34. *Id.* at 900.

35. *See* Sukenik, *supra* note 12, at 14 (discussing Congress's dissatisfaction with the Tenth Circuit's strict textual interpretation, contradicting the intent of Congress).

36. *Sturm*, 672 F.3d at 900 (construing "the term visual depiction to mean the substantive content of an image"). To further explain the ruling by the court, imagine taking a photograph of your car in front of your Denver, Colorado house. The photographed car was built at a factory in Detroit, Michigan. At some point, the car traveled from the factory in Detroit to your house in Denver. Under the *Sturm* ruling, the physical photograph that you can hold in your hand depicting the car does not need to travel across state lines. The interstate jurisdictional requirement is met because the car you photographed was built in a different state and at some point traversed state lines to arrive in your driveway.

an image of child pornography was made in a state and/or country other than the one in which the defendant resides."[37] The Tenth Circuit's ruling accomplished two things. First, the court satisfied Congress.[38] Second, the court remained committed to *Schaefer*'s strict textual interpretation of the statute by requiring actual interstate movement,[39] thereby enabling the court to continue rejecting the reasoning of the other federal circuits—that Internet use constitutes interstate commerce.[40]

B. Why the Previous Framework Was Not Working

The inconsistency the Tenth Circuit exhibited in its interpretation of an identical statute in *Schaefer* and *Sturm* demonstrates a need for change in how Congress addresses the relationship between law and technology. Until the *Schaefer* decision, Congress was pleased with the interpretations provided by the courts.[41] Although some scholars have criticized Congress for not acting sooner,[42] there was no need for Congress to act when the decisions were following the intent of Congress.[43] The decisions by the Tenth Circuit should not come as a surprise, however, because courts have long struggled to apply the laws in our new technological age.[44]

In 1996, the Sixth Circuit was the first to apply obscenity standards to the Internet.[45] The standards applied by the Sixth Circuit in *United States v. Thomas* were established by the Supreme Court in 1973,[46] long before the mainstream adoption of the Internet.[47] In *Thomas*, the Sixth Circuit attempted to determine what "community standards" it should apply when Internet users access pornography from different jurisdictions.[48] The court ultimately held that "varying community standards"

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37. *Id.* at 901–02.

38. *See Sturm*, 673 F.3d at 1277 (affirming conviction after remand); *see also* Sukenik, *supra* note 12, at 14 (discussing the negative reaction to the *Schaefer* decision by members of Congress).

39. *Sturm*, 672 F.3d at 901 ("[T]he Government is . . . required to prove that the visual depiction 'has been' . . . transported in interstate . . . commerce at any point in time." (quoting 18 U.S.C. § 2252(a)(2)(B) (2012)); United States v. Schaefer, 501 F.3d 1197, 1206 (10th Cir. 2007) ("The government needed to prove that the images . . . moved between states."), *overruled by* United States v. Sturm, 672 F.3d 891 (10th Cir. 2012) (en banc).

40. *See* Frommell, *supra* note 9, at 1164 ("[T]he First, Fifth, and Third Circuits . . . embrace the inference that mere Internet use involves interstate commerce . . . .").

41. *See* Sukenik, *supra* note 12, at 13 ("Having grown accustomed to the judicial interpretation furnished by the majority circuits, Congress did not previously have occasion or incentive to consider whether its statutory drafting failed to account for advances in modern technology.").

42. *See id.* at 31 (noting that Congress decided not to broaden statutory language to clearly explain congressional intent over the course of several statutory amendments).

43. *Id.* at 13.

44. Mitchell P. Goldstein, *Congress and the Courts Battle over the First Amendment: Can the Law Really Protect Children from Pornography on the Internet?*, 21 J. MARSHALL J. COMPUTER & INFO. L. 141, 155 (2003).

45. United States v. Thomas, 74 F.3d 701, 709 (6th Cir. 1996).

46. *See* Goldstein, *supra* note 44, at 151 (citing Miller v. California, 413 U.S. 15, 24 (1973)).

47. *NSF and the Birth of the Internet—1990s*, NAT'L SCI. FOUND., http://www.nsf.gov/news/special_reports/nsf-net/textonly/90s.jsp (last visited Feb. 15, 2013).

48. *Thomas*, 74 F.3d at 710–12.

may apply, which can result in a more conservative standard.[49] It remains unclear, however, whether this idea of community standards is suited for the Internet due to its pervasiveness.[50]

The confusion among the courts extends beyond pre-Internet statutes.[51] In 1996, Congress passed the Child Pornography Prevention Act (CPPA).[52] Unlike earlier versions of child pornography statutes, the CPPA targeted the exploitation of minors that is facilitated by new technology.[53] The CPPA attempted to prohibit the use of technology to create "virtual child pornography."[54] Even in the current age of everyday technology use, the courts again were unable to come to a common understanding.[55] In the end, the Supreme Court stepped in to resolve the circuit split, finding that the law overstepped the protections of the First Amendment.[56]

The cases of *Schaefer* and *Sturm* further demonstrate the difficulties the courts have in applying the law in today's world of ever-increasing technological innovation. Despite their best efforts, the courts have been unable to consistently apply the law to new technology.[57] A member of Congress echoed this concern, stating that "[w]e live in a world of very quickly transforming technology[, and t]he courts sometimes have difficulty keeping up with that."[58] This leaves the law unsettled, requiring one of two things: allowing the courts to continue to stretch existing laws to new realities or demanding that Congress take action. The Tenth Circuit's decisions in *Schaefer* and *Sturm* demonstrate that leaving courts to apply outdated laws to new technology is not the best solution in the long term.[59] These inconsistent decisions leave congressional action as the

49. *See id.* at 711.

50. *See* Goldstein, *supra* note 44, at 155–57.

51. *Id.* at 171.

52. Onmibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 121, 110 Stat. 3009 (1996) (codified as amended at 18 U.S.C. §§ 2251, 2252, 2252A, 2256 (2012)).

53. *Id.*

54. *Id.*

55. *See* United States v. Fox, 248 F.3d 394, 397 (5th Cir. 2001); United States v. Mento, 231 F.3d 912, 915 (4th Cir. 2000); Free Speech Coalition v. Reno, 198 F.3d 1083, 1097 (9th Cir. 1999); United States v. Acheson, 195 F.3d 645, 650 (11th Cir. 1999); United States v. Hilton, 167 F.3d 61, 65 (1st Cir. 1999).

56. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 244 (2002).

57. *Compare* cases cited *supra* note 16 (holding in each case that use of the Internet alone was sufficient to show interstate movement), *with* United States v. Sturm, 672 F.3d 891, 892 (10th Cir. 2012) (en banc) (holding that the Government met its burden of proof by showing "the substantive content of the images" traveled in interstate commerce), *and* United States v. Schaefer, 501 F.3d 1197, 1198 (10th Cir. 2007) (holding that proof of Internet use does not prove interstate commerce); *see also* Goldstein, *supra* note 44, at 173 (noting the circuit split interpreting the CPPA); Frommell, *supra* note 9, at 1164–65 (discussing the circuit split interpreting child pornography jurisdictional requirements).

58. Sukenik, *supra* note 12, at 14 (first alteration in original) (quoting Rep. Christopher Cannon, Republican from Utah).

59. *See Sturm*, 672 F.3d at 901 (overturning *Schaefer* in the wake of congressional action amending child pornography statutes).

only method available to establish clear law to be applied in today's technology-driven world.

II. WHY CLASSIFYING INTERNET USE AS INTERSTATE COMMERCE DOES NOT VIOLATE THE CONSTITUTION

Congress's decision to expand federal jurisdiction through the ECPPA is firmly rooted in the Commerce Clause powers. Commerce Clause jurisprudence can be traced as far back as 1824. In *Gibbons v. Ogden*,[60] Chief Justice Marshall laid the foundation for Congress's commerce power, stating that "[c]ommerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."[61] Congress's power under the Commerce Clause has a history of expanding with the way business is conducted.[62] In *NLRB v. Jones & Laughlin Steel Corp.*,[63] the Supreme Court held that the right of employees to organize was a labor practice affecting commerce.[64] In doing so, the Court broke free from the more limited reach that Congress's commerce power previously had.[65] The *Jones & Laughlin* decision established the idea that intrastate activities may affect interstate commerce, thereby recognizing the power of Congress to regulate local business activities based on the effect it may have on the national economy.[66] More recently, the Supreme Court has clarified the commerce power and its application with its decisions in *United States v. Lopez*,[67] *United States v. Morrison*,[68] and *Gonzales v. Raich*.[69] A review of this modern Commerce Clause jurisprudence will show that the congressional mandate—Internet use constitutes interstate commerce—is supported by the Constitution.[70]

A. The Federal Government's Powers Under the Commerce Clause

1. *Lopez* Lays the Groundwork

In *Lopez*, the Rehnquist-led Court reviewed a century of Commerce Clause jurisprudence to establish "three broad categories of activity that Congress may regulate."[71] The first category is the "channels of interstate

60. 22 U.S. (9 Wheaton) 1 (1824).
61. *Id.* at 189–90.
62. *See* United States v. Lopez, 514 U.S. 549, 556 (1995).
63. 301 U.S. 1 (1937).
64. *Id.* at 43.
65. *Lopez*, 514 U.S. at 556.
66. *See Jones & Laughlin*, 301 U.S. at 37.
67. 514 U.S. 549 (1995).
68. 529 U.S. 598 (2000).
69. 545 U.S. 1 (2005).
70. *See* Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, 122 Stat. 4001 (2008) (codified throughout 18 U.S.C.); *see also* Frommell, *supra* note 9 (noting the new child pornography statute "equates Internet use with interstate commerce").
71. *Lopez*, 514 U.S. at 558.

commerce."[72] "Channel" is defined as a waterway, or more precisely, a "groove through which a stream flows."[73] Applying this definition to interstate commerce, one can logically conclude that a channel of interstate commerce is a path, route, or course that commerce may flow or move through. This application aligns with Supreme Court precedent.[74]

The second category is the "instrumentalities of interstate commerce."[75] An "instrumentality" is defined as "a thing used to achieve an end or purpose."[76] The *Lopez* Court clarified that application of an instrumentality to interstate commerce included things used in interstate commerce, "or persons or things in interstate commerce."[77] The authority to regulate instrumentalities under the Commerce Clause extends to intrastate activities.[78]

The third category includes those activities that "substantially affect interstate commerce."[79] The "substantially affects" category applies primarily to those activities that are economic in nature.[80] The *Lopez* Court identified four factors to determine if an activity substantially affects interstate commerce: (1) is the statute regulating economic activity? (2) does the statute have a jurisdictional element limiting its reach to interstate commerce? (3) is there legislative history linking the statute to interstate commerce? and (4) is the relationship between the regulated activity and interstate commerce "attenuated"?[81] Like instrumentalities, the substantially affects test permits regulation of intrastate activities.[82] The Court went on to explain that although the power to regulate the first two categories is clear, the power to regulate those activities that fall under the third category may be murky.[83]

Having established these three categories, the *Lopez* Court then turned to the case at hand involving the Gun-Free School Zones Act of

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72. *Id.*

73. BLACK'S LAW DICTIONARY 264 (9th ed. 2009).

74. *See Lopez*, 514 U.S. at 558 ("[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question." (alteration in original) (quoting Caminetti v. United States, 242 U.S. 470, 491 (1917)) (internal quotation mark omitted).

75. *Id.*

76. BLACK'S LAW DICTIONARY, *supra* note 73, at 870.

77. *See Lopez*, 514 U.S. at 558.

78. *Id.* (providing examples such as "destruction of an aircraft, or . . . thefts from interstate shipments" (alteration in original)).

79. *Id.* at 558–59.

80. United States v. Morrison, 529 U.S. 598, 613 (2000) ("While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.").

81. *Id.* at 610–12; *see also Lopez*, 514 U.S. at 559, 561–62.

82. *Lopez*, 514 U.S. at 559 ("[The Court has] upheld a wide variety of congressional Acts regulating intrastate activity where [the Court has] concluded that the activity substantially affected interstate commerce.").

83. *Id.*

1990.[84] Indicating that the Act could only be supported by the third category,[85] the Court proceeded to review the Act against the four previously noted factors to determine if the Act regulated activity that substantially affected interstate commerce.[86] The Court concluded that the Act failed under the third category because it "ha[d] nothing to do with 'commerce' or any sort of economic" activity.[87]

2. *Lopez* Applied in *Morrison*

The *Morrison* Court addressed whether the Violence Against Women Act (VAWA) fell within the third *Lopez* category.[88] VAWA was a federal law that provided civil remedies to women who were victims of gender-motivated violence.[89] VAWA, like the statute at issue in *Lopez*, was a criminal statute containing no element related to commerce or economics.[90] Though not ruling out the possibility, the Court concluded that such a "noneconomic" statute does not allow for federal regulation of a purely intrastate activity.[91] Thus, as did the *Lopez* Court, the *Morrison* Court found that the statute lacked the required connection to interstate commerce.[92]

3. *Lopez* Applied in *Raich*

In *Raich*, the Supreme Court was again asked to determine whether Congress had the power to regulate seemingly non-commercial activity under the Commerce Clause.[93] *Raich* considered the effects of homegrown medical marijuana for personal possession and use under the Controlled Substances Act (CSA), and whether the CSA was a valid application of the Commerce Clause.[94] Finding significant support from *Wickard v. Filburn*,[95] the Court ruled that there was sufficient connection be-

84. *Id.* at 551 (making it illegal to possess a gun in a school zone).
85. *Id.* at 559.
86. *Id.* at 559, 561–62.
87. *Id.* at 561.
88. United States v. Morrison, 529 U.S. 598, 609 (2000) (reviewing whether VAWA regulated an activity substantially affecting interstate commerce).
89. *Id.* at 601–02.
90. *Id.* at 613.
91. *Id.* ("While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.").
92. *Id.* at 617–18.
93. *See* United States v. Raich, 545 U.S. 1, 8 (2005) ("The Court of Appeals distinguished prior Circuit cases . . . by focusing on what it deemed to be the '*separate and distinct class of activities*' at issue in this case: the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes . . . ." (quoting Raich v. Ashcroft, 352 F.3d 1222, 1228 (9th Cir. 2003)) (internal quotation mark omitted)).
94. *Id.* at 15.
95. 317 U.S. 111 (1942).

tween the interstate regulation of marijuana and the homegrown marijuana that the defendant was using.[96]

As was the statute in *Wickard*, the CSA was enacted to control the interstate market of controlled substances, such as marijuana.[97] Reasoning that purely intrastate wheat production and consumption would affect the interstate market for wheat, the *Wickard* Court concluded that Congress had a "rational basis" for regulating intrastate wheat activity.[98] Here, the *Raich* Court came to the same conclusion, stating that "failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA."[99]

These cases establish the current scope and reach of what may be regulated under the Commerce Clause. Additionally, the cases demonstrate that the federal government may regulate purely intrastate activity so long as the thing being regulated has an economic effect on interstate commerce. As will be explained below, the Internet has come to play a vital role in personal and commercial economic activity, thereby lending itself to be fully regulated under the Commerce Clause.

B. The Commerce Power Applied to the Internet Under Lopez

To understand how the commerce power applies to the Internet, we first must determine which category it falls under. As summarized above, the *Lopez* Court established three areas of interstate commerce that Congress may regulate under the Commerce Clause: channels, instrumentalities, and activities that substantially affect interstate commerce. The Internet arguably falls within all three *Lopez* categories: channels, instrumentalities, and substantial effect. Although only one category is needed to enable Congress to regulate, an activity must fall outside all three categories to escape Congress's commerce power.[100] These categories, and their application to the Internet, will be examined below.

1. The Internet as a Channel

A channel of interstate commerce is a path, route, or course that commerce may flow or move through.[101] Traditional examples of interstate commerce channels are rivers, highways, and railways.[102] If you go

96. *Raich*, 545 U.S. at 32–33.

97. *Id.* at 18–19 ("Just as the Agricultural Adjustment Act [in *Wickard*] was designed 'to control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses. . .' and consequently control the market price, a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets." (second alteration in original) (citations omitted) (quoting *Wickard*, 317 U.S. at 115)).

98. *Id.* at 19.

99. *Id.* at 22.

100. United States v. Lopez, 514 U.S. 549, 558 (1995).

101. *See supra* Part II.A.1.

102. Nathaniel H. Clark, Comment, *Tangled in a Web: The Difficulty of Regulating Intrastate Internet Transmissions Under the Interstate Commerce Clause*, 40 MCGEORGE L. REV. 947, 954 (2009).

to your local electronics retail store and purchase a television, you have participated in interstate commerce because prior to you purchasing the television, it was manufactured and delivered to your local electronics retail store, most likely by highway. Although your purchase of the television was entirely intrastate, it traveled through a channel of interstate commerce, the highway, to reach you.

Much like the path of the television in the example above, the Internet is a channel of interstate commerce, one that continues to grow in popularity.[103] The Internet allows you to connect with people and businesses worldwide. Each transmission you send or receive over the Internet is transported through various computer networks to reach its intended destination.[104] Although there are many non-commercial, personal uses of the Internet, more people than ever are turning to the Internet to conduct business.[105] One example of this is Internet shopping, or e-commerce. E-commerce is the business of buying and selling goods or services via the Internet.[106] The goods being purchased may include a television or a software product that is sent to you electronically. In either case, you have used the Internet as a channel of interstate commerce.

2. The Internet as an Instrumentality

As established in *Lopez*, an instrumentality is something used in interstate commerce "or persons or things in interstate commerce."[107] The Supreme Court has previously stated that "railroads, highways, and bridges constitute instrumentalities of interstate commerce."[108] These examples seem to describe some of the channels just discussed. But it is important to note that a channel can be an instrumentality, and vice versa.[109]

The Internet meets the definition of instrumentality as does a highway, railroad, or bridge, being both a channel and instrumentality of interstate commerce. We can use each of these as a tool to traverse state and national boundaries, but each one is also a path that commerce trav-

103. *Internet World Stats—Usage and Population Statistics*, INTERNETWORLDSTATS.COM, http://www.internetworldstats.com/stats.htm (last updated Jan. 17, 2013) (citing world growth of Internet use at 566.4% between 2000 and 2012).

104. *See generally* United States v. MacEwan, 445 F.3d 237, 241 (3d Cir. 2006) (explaining the process of routing Internet traffic); Clark, *supra* note 102, at 952–53 (explaining the process for intrastate Internet transmissions).

105. Pascal-Emmanuel Gobry, *The Internet is 20% of Economic Growth*, BUS. INSIDER INTELLIGENCE (May 24, 2011, 8:37 AM), http://www.businessinsider.com/mckinsey-report-internet-economy-2011-5?op=1 (noting the Internet represents over 20% of economic growth during the last five years).

106. Rifat Azam, *E-Commerce Taxation and Cyberspace Law: The Integrative Adaptation Model*, 12 VA. J.L. & TECH. 5, 14 (2007).

107. United States v. Lopez, 514 U.S. 549, 558 (1995).

108. United States v. Bishop, 66 F.3d 569, 588 (3d Cir. 1995).

109. *See MacEwan*, 445 F.3d at 245 (concluding that the "Internet is an instrumentality and channel of interstate commerce"); *see also* 15 C.J.S. COMMERCE § 110 (2012) ("The Internet is generally an instrumentality and a channel of interstate commerce.").

els through. The Internet meets this dual classification because of the Internet's nature as being both the thing we use to buy a DVD, and the network of channels that the payment information we use to purchase the DVD travels through.

Identifying the Internet as an instrumentality of interstate commerce in this manner is not a novel concept.[110] Contrary to the views of some,[111] numerous courts have established that the Internet is an instrumentality of interstate commerce,[112] with some going so far as to say that finding something more "intertwined" with interstate commerce would be "difficult."[113] Although the Supreme Court has not expressly declared that the Internet is an instrumentality of interstate commerce, several cases decided by the Court concerning other interstate facilities support the proposition that the Internet is an instrumentality of interstate commerce.[114] In addition to the courts, many scholars have supported the idea that the Internet is an instrumentality of interstate commerce.[115] Thus, it seems evident that the Internet meets the definition of an instrumentality of interstate commerce.

3. Use of the Internet Substantially Affects Interstate Commerce

The substantially affects test focuses on economic activity.[116] As the *Morrison* Court put it, "While we need not adopt a categorical rule against aggregating . . . noneconomic activity . . . , thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."[117] If the activity is shown to substantially affect interstate commerce, Congress may regulate such activity even if it is purely local in nature.[118] We now turn to the factors discussed in *Lopez* to determine if the Internet substantially affects interstate commerce.

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110. *See* sources cited *supra* note 109.

111. *See* Clark, *supra* note 102, at 958–59 (identifying a computer or mobile device as the instrumentality used to access the Internet).

112. United States v. Faris, 583 F.3d 756, 759 (11th Cir. 2009); Utah Lighthouse Ministry v. Found. for Apologetic Info. & Res., 527 F.3d 1045, 1054 (10th Cir. 2008); *MacEwan*, 445 F.3d at 245.

113. *MacEwan*, 445 F.3d at 245.

114. Kenneth D. Bassinger, Note, *Dormant Commerce Clause Limits on State Regulation of the Internet: The Transportation Analogy*, 32 GA. L. REV. 889, 904 n.102 (1998) (citing Fed. Power Comm'n v. Union Elec. Co., 381 U.S. 90, 94 (1965) (holding the transmission of electricity is subject to commerce power); Head v. N.M. Bd. of Exam'rs in Optometry, 374 U.S. 424, 427 (1963) (holding that radio station broadcasts over state lines constitute interstate commerce)).

115. *See* Frances E. Zollers et al., *Fighting Internet Fraud: Old Scams, Old Laws, New Context*, 20 TEMP. ENVTL. L. & TECH. J. 169, 181 (2002); Bassinger, *supra* note 114, at 926; Greg Y. Sato, Note, *Should Congress Regulate Cyberspace?*, 20 HASTINGS COMM. & ENT. L.J. 699, 716 (1998).

116. *See supra* note 80 and accompanying text.

117. United States v. Morrison, 529 U.S. 598, 613 (2000).

118. *See supra* note 82.

To reiterate, the *Lopez* Court identified four factors to help determine if an activity substantially affects interstate commerce: (1) is the statute regulating economic activity? (2) does the statute have a jurisdictional element limiting its reach to interstate commerce? (3) is there legislative history linking the statute to interstate commerce? and (4) is the relationship between the regulated activity and interstate commerce "attenuated"?[119] I will apply these factors to the ECPPA to better illustrate how the Internet substantially affects interstate commerce.

First, is the ECPPA regulating economic activity? The ECPPA was enacted to combat the receipt, possession, and distribution of child pornography.[120] As early as 2005, the child pornography industry was estimated to be a $3 billion per year industry.[121] In 2006, worldwide pornography revenues reached $97.06 billion.[122] That same year, revenues for Internet pornography in the United States reached $2.84 billion, or 21.3% of the entire United States pornography market.[123] Additionally, about 20% of all Internet pornography involves children.[124] These figures make it very clear that child pornography is a thriving economic industry. But can these figures serve as the basis for holding that the ECPPA is actually regulating economic activity? To answer this question, compare the ECPPA with the statute in *Lopez* that dealt with the "possession of a gun in a local school zone."[125] The *Lopez* statute did not deal with the receipt or distribution of a gun, whereas the ECPPA expressly mentions receipt and distribution of child pornography.[126] By mentioning receipt and distribution, the ECPPA is connected to an activity that "through repetition" may substantially affect interstate commerce.[127] Possession of anything alone, without considering its movement, provides no "tie to interstate commerce."[128] This difference, although small, provides the "economic activity that might . . . substantially affect . . . interstate commerce" and does not require courts "to pile inference upon inference" as did the statute in *Lopez*.[129] For these reasons, the ECPPA regulates an economic activity.

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119. *Morrison*, 529 U.S. at 610–12.

120. 18 U.S.C. § 2252A (2012), *amended by* Child Protection Act of 2012, Pub. L. No. 112-206, 126 Stat. 1490 (2012) (codified throughout 42 U.S.C.).

121. *Statistics on Pornography, Sexual Addiction and Online Perpetrators*, SAFEFAMILIES.ORG, http://www.safefamilies.org/sfStats.php (last visited Feb. 15, 2013) [hereinafter *Statistics on Pornography*].

122. Jerry Ropelato, *Internet Pornography Statistics*, TOPTENREVIEWS.COM, http://internet-filter-review.toptenreviews.com/internet-pornography-statistics.html (last visited Feb. 15, 2013).

123. *Id.*

124. *Statistics on Pornography*, *supra* note 121.

125. United States v. Lopez, 514 U.S. 549, 567 (1995).

126. *Compare* 18 U.S.C. § 922(q)(1)(A) (2012) (making it illegal "for any individual to . . . possess a firearm i[n] a school zone"), *with* 18 U.S.C. § 2252A(a) (2012) ("Any person who . . . receives or distributes . . . any child pornography . . . . shall be punished . . . .").

127. *Lopez*, 514 U.S. at 567.

128. *Id.*

129. *Id.*

Second, does the ECPPA have a jurisdictional element limiting it to interstate commerce? The ECPPA prohibits the use of "any means or facility of interstate commerce" or "in or affecting interstate" commerce in connection with child pornography.[130] These elements effectively limit the reach of the ECPPA by excluding the intrastate possession and delivery of child pornography because the Act requires child pornography to have a relationship with interstate commerce.[131] This is unlike the statute in *Lopez* that sought to regulate any possession of a gun in a school zone, regardless of any connection to interstate commerce.[132] Therefore, the ECPPA is limited to the receipt, possession, and distribution of child pornography that has an "explicit connection with" interstate commerce.[133]

Third, is there legislative history linking the ECPPA to interstate commerce? Prior to passing the ECPPA, Congress established that child pornography was "estimated to be a multibillion dollar industry."[134] Furthermore, Congress realized the danger that the Internet presented in making child pornography easily accessible, and even commented that "[t]he Internet is . . . a method of distributing goods and services across State lines."[135] Congress concluded that "transmission of child pornography using the Internet constitutes transportation in interstate commerce."[136] Having shown that the child pornography industry is worth billions of dollars, and that use of the Internet is a known method of delivering child pornography, one can conclude that there is a connection between the ECPPA and interstate commerce.

Fourth, to what degree is the relationship between regulated activity and interstate commerce attenuated? This question almost requires a limit to be articulated on the reach of the federal power under the statute.[137] The ECPPA has provided for limited reach by expressly stating that use of the Internet constitutes interstate commerce.[138] Using the Internet to obtain and search for child pornography would fall under the ECPPA, whereas would-be criminals that receive, possess, or distribute images of child pornography through purely local sources would not be liable under

130. 18 U.S.C. § 2252A(a)(2)(B) (2012); *see also* Frommell, *supra* note 9, at 1166–67.

131. *See Lopez*, 514 U.S. at 562 (discussing the failure of the statute in *Lopez* to have a jurisdictional element because possession of a firearm alone does not have a "nexus to interstate commerce," and without it there is no "limit [to] its reach").

132. *Id.* at 561–62.

133. *See id.* at 562 (discussing why the statute in *Lopez* failed under the Commerce Clause). "Unlike the statute in *Bass*, [the statute in *Lopez*] has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an *explicit connection with* or effect on interstate commerce." *Id.* (emphasis added).

134. Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, § 102(1), 122 Stat. 4001 (2008) (codified throughout 18 U.S.C.).

135. *Id.* § 102(6).

136. *Id.* § 102(7).

137. *See* United States v. Morrison, 529 U.S. 598, 615 (2000) (discussing the ramifications if the Court were to follow the "but-for causal chain" presented by the Government).

138. *See supra* note 136 and accompanying text.

the ECPPA.[139] Therefore, a clear separation between federal and state prosecution exists under the ECPPA.

The Internet has an almost infinite number of uses, and this analysis of the ECPPA was just one example of how the Internet may be used in a manner that substantially affects interstate commerce. The Internet can be found in many areas of commercial activity.[140] Whether that commercial activity is local in nature or not, it does not change the fact that your use affects commerce internationally.[141] And as *Wickard* plainly established decades ago, "The power of Congress over interstate commerce is plenary" and if "activities intrastate . . . so affect interstate commerce" then "the reach of that power extends to those intrastate activities."[142]

C. Internet Use Is Interstate Commerce

Understanding how the Internet fits into the *Lopez* categories, we can now turn to the amount of power Congress has to regulate its use. It is well-settled law that Congress has plenary power under the Commerce Clause, enabling Congress to regulate both interstate and intrastate activities.[143] This plenary power includes the ability to regulate both channels and activities that substantially affect interstate commerce.[144] Having established that the Internet is a channel,[145] an instrumentality,[146] and that use of the Internet substantially affects interstate commerce,[147] it is unequivocal that the Internet is inherently interstate in nature and thus may be regulated by Congress to the fullest extent of its Commerce Clause powers.[148]

Although the Internet has previously been recognized as being sufficient for exercising federal regulation,[149] skepticism still exists as to whether mere use of the Internet constitutes interstate commerce.[150] As

139. By limiting the reach of the ECPPA to the Internet, a person who snapped pictures of his or her neighbor's minor daughter engaged in sexual conduct would not be liable under the ECPPA if those pictures were kept or distributed locally without the assistance of the Internet but may be liable under state laws.

140. *See generally* Steve Schifferes, *How the Internet Transformed Business*, BBC NEWS (Aug. 3, 2006, 11:53 PM), http://news.bbc.co.uk/2/hi/business/5235332.stm (noting the history of the Internet and its broad penetration into business).

141. *See id.*

142. Wickard v. Filburn, 317 U.S. 111, 124 (1942).

143. Michele Martinez Campbell, *The Kids Are Online: The Internet, the Commerce Clause, and the Amended Federal Kidnapping Act*, 14 U. PA. J. CONST. L. 215, 244 (2011) ("Congress's Commerce Clause authority . . . includes the power to reach purely intrastate conduct.").

144. *Compare id.* at 245 ("[C]ongressional power to regulate the channels . . . of commerce includes . . . purely local [activities]." (quoting United States v. Ballinger, 395 F.3d 1218, 1226 (11th Cir. 2005)) (internal quotation marks omitted)), *with Wickard*, 317 U.S. at 124 (explaining the commerce power "extends to those activities intrastate which so affect interstate commerce").

145. *See supra* Part II.B.1.

146. *See supra* Part II.B.2.

147. *See supra* Part II.B.3.

148. *See* United States v. Lopez, 514 U.S. 549, 558–59 (1995).

149. 2 RAYMOND T. NIMMER, INFORMATION LAW § 9:12 (2012) ("[V]irtually all uses of Internet and Internet-related services have an interstate component . . . .").

150. *See* Clark, *supra* note 102, at 959–60.

this Part explains, it is hard to think of the Internet as being anything but interstate. After all, the Internet is known as the "information superhighway,"[151] a "spiderweb-like" network of computers that facilitates communication and business worldwide.[152]

III. THE BENEFITS OF CLASSIFYING INTERNET USE AS INTERSTATE COMMERCE

In passing the ECPPA, Congress sent a clear message: "[U]sing the Internet constitutes . . . interstate commerce."[153] The mandate, though not without its critics,[154] ensures that mistakes in applying the law to the Internet will no longer lead to questionable decisions in child pornography cases.[155] This mandate, however, should not be limited to child pornography laws. Instead, it should be adopted in all federal statutes because many federal statutes suffer from the same problem child pornography laws faced before Congress enacted the ECPPA—When is interstate commerce triggered? For example, take the recent Second Circuit case of *United States v. Aleynikov*.[156] Aleynikov was a programmer employed by Goldman Sachs.[157] While at Goldman Sachs, he developed a software product to facilitate high-speed trading of securities and commodities.[158] Aleynikov later left Goldman Sachs for a position at a different firm, but before leaving, he took the trading platform's source code with him to his new employer.[159] Aleynikov was later charged with stealing the trading platform under the Economic Espionage Act of 1996 (EEA), among other things.[160] The EEA prohibits the conversion of another's trade secret "that is related to or included in a product that is produced for or placed in interstate . . . commerce."[161] The Second Circuit, focusing on this interstate commerce element, decided that the source code did not constitute a product "produced for or placed in interstate . . . commerce."[162] The court based its reasoning on the fact that Congress had used limiting language and did not "purport to exercise the full scope of

151. Jeffrey Kahn, *Building and Rescuing the Information Superhighway*, LBL RES. REV., Summer 1993, at 10, 10.

152. *Id.* at 11.

153. Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, 122 Stat. 4001 (2008) (codified throughout 18 U.S.C.); *see also* Frommell, *supra* note 9.

154. *See* Clark, *supra* note 102, *passim*; *see also* Frommell, *supra* note 9, at 1172–73.

155. *See* Sukenik, *supra* note 12, at 14 (noting Congress's reaction to the *Schaefer* decision).

156. 676 F.3d 71 (2d Cir. 2012).

157. *Id.* at 73.

158. *Id.*

159. *Id.* at 74.

160. *Id.* at 73–75 (noting other charges under the National Stolen Property Act and under the Computer Fraud and Abuse Act).

161. Economic Espionage Act of 1996, Pub. L. No. 104-294, § 1832(a), 110 Stat. 3488 (codified at 18 U.S.C. §§ 1831–1839 (2012)).

162. *Aleynikov*, 676 F.3d at 73 (quoting Economic Espionage Act of 1996, Pub. L. No. 104-294, § 1832(a), 110 Stat. 3488 (codified at 18 U.S.C. §§ 1831–1839 (2012))) (internal quotation mark omitted).

[its] congressional authority" under the Commerce Clause.[163] Agreeing with the majority's explanation, Judge Calabresi questioned if the court had given effect to Congress's intent and requested Congress to revisit the statute to make its intention clear.[164] On December 20, 2012, Judge Calabresi's request was answered when an amendment to the EEA was enacted to include any "product or service used in or intended for use in" interstate commerce,[165] providing perhaps the answer to Judge Calabresi's question of Congress's actual intent under the EEA.[166] Although the *Aleynikov* decision did not deal directly with whether the trading platform itself had entered interstate commerce, the court was still grappling with whether the interstate commerce element of the EEA was satisfied.[167] As *Aleynikov* illustrates, regardless of what cybercrime statute is at issue, the idea remains the same: Congress needs to make it clear that Internet use constitutes interstate commerce and do so before another "alleged misreading" of a cybercrime statute takes place.[168]

I have identified two benefits provided by Congress's mandate in the ECPPA that Internet use constitutes interstate commerce. First, it will provide clear instruction to the courts, yielding more predictable results. Second, it will bring certainty to the laws, resulting in prosecutions that are more effective. Although the discussion of these benefits below is in the context of child pornography, the benefits could be experienced in all federal cases if the mandate—Internet use constitutes interstate commerce—were adopted in all federal laws.

A. Clear Instruction for the Courts

The language in the prior child pornography statutes left the courts to interpret the scope of its reach.[169] To interpret the statute, courts focused on the jurisdictional language contained in 18 U.S.C. § 2252(a)(2) and § 2252(a)(4)(B), specifically whether child pornography "has been mailed, or has been shipped or transported in interstate or foreign commerce . . . by any means including by computer."[170] Despite the seemingly clear intent of this statute,[171] the language prompted confusion among the courts—When does Internet child pornography constitute interstate

163. *Id.* at 81.
164. *Id.* at 83 (Calabresi, J., concurring).
165. Theft of Trade Secrets Clarification Act of 2012, S. Res. 3642, 112th Cong. (enacted).
166. *See Aleynikov*, 676 F.3d at 83 (Calabresi, J., concurring).
167. *Id.* at 79–83 (majority opinion).
168. *See id.* at 83 (Calabresi, J., concurring) (questioning whether the court reached the decision Congress intended); *see also* Sukenik, *supra* note 12, at 14 ("Congress . . . criticiz[ed] . . . the [*Schaefer*] court's alleged misreading of legislative intent.").
169. Frommell, *supra* note 9, at 1163–66 (discussing the split among the federal courts of appeals).
170. 18 U.S.C. § 2252(a)(2), (a)(4)(B) (2012); *see also* Frommell, *supra* note 9, at 1159.
171. *See* Frommell, *supra* note 9, at 1163–64 (showing a consensus among the federal courts of appeals in equating Internet use with interstate commerce).

commerce?[172] To address this question, Congress enacted a new version of the statute, removing any hint of guesswork.[173]

The new statute, in relevant part, reads "any person who . . . receives or distributes any child pornography that has been mailed, or using any means or facility of interstate or foreign commerce shipped or transported in or affecting interstate or foreign commerce by any means, including by computer."[174] By amending the language as it did, Congress made it clear to the courts that it intended the statute to reach the full extent of Congress's Commerce Clause power.[175] Using traditional Commerce Clause buzzwords such as "any means or facility" and "in or affecting,"[176] Congress answered the call from the Tenth Circuit in *Schaefer* demanding more precise language.[177]

In demanding specific language, the Tenth Circuit seemingly relied exclusively upon the strictest of textual interpretations,[178] giving no weight to any of the other established canons of statutory interpretation.[179] The court's reliance on this textual interpretation resulted in the Tenth Circuit handing down a decision that even a concurring member of the court admitted was incorrect.[180] Although some of the blame should be placed on the prosecution,[181] the majority of the blame rests with the court, which ultimately made the decision, going against the other circuits to overturn a conviction that should have been upheld.[182]

Five years later in *Sturm*, the Tenth Circuit was again asked to interpret the child pornography laws it had interpreted in *Schaefer*.[183] Unlike *Schaefer*, however, the *Sturm* court ruled in favor of the Government by redefining the term "visual depiction" in the statute to mean the "substantive content of an image."[184] Prior to *Sturm*, courts focused on the

172. *See id.* at 1166 (discussing the split in the federal courts of appeals following the *Schaefer* decision).

173. Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, 122 Stat. 4001 (2008) (codified throughout 18 U.S.C.); *see also* Frommell, *supra* note 9 ("The updated legislation unambiguously equates Internet use with interstate commerce . . . .").

174. 18 U.S.C. § 2252A(a)(2)(A) (2012).

175. *See id.*; *see also* Frommell, *supra* note 9.

176. *See supra* note 174 and accompanying text.

177. *See* United States v. Schaefer, 501 F.3d 1197, 1201–02 (10th Cir. 2007) ("Congress's use of the 'in commerce' language, as opposed to phrasing such as 'affecting commerce' or a 'facility of interstate commerce,' signals its decision to limit federal jurisdiction . . . ."), *overruled by* United States v. Sturm, 672 F.3d 891 (10th Cir. 2012) (en banc).

178. *See id.*; *see also* Sukenik, *supra* note 12, at 14 ("Congress moved quickly . . . , criticizing . . . the textual-interpretation methodology . . . .").

179. *See* Frank B. Cross, *The Significance of Statutory Interpretative Methodologies*, 82 NOTRE DAME L. REV. 1971, 1972–78 (2007) (discussing some of the common methods of statutory interpretation).

180. *See Schaefer*, 501 F.3d at 1207 (Tymkovich, J., concurring) ("I have no doubt the images traveled across state and national borders.").

181. Frommell, *supra* note 9, at 1161–62 (discussing the failures of the prosecution).

182. *Schaefer*, 501 F.3d at 1204–05 (majority opinion).

183. United States v. Sturm, 672 F.3d 891, 898 (10th Cir. 2012) (en banc).

184. *Id.* at 901.

digital file or tangible media itself that contained the image, not the substance of the image it contained.[185] By redefining "visual depiction," the Tenth Circuit was able to stick to its interpretation in *Schaefer* requiring proof of actual interstate movement by holding that the "substantive content of an image" must move in interstate commerce.[186] This interpretation by the court resulted in the outcome Congress intended,[187] albeit in a way that is arguably not how Congress intended.[188]

The Tenth Circuit's inconsistency in interpreting the same statute is prima facie evidence that a congressional mandate was needed. Congress delivered the needed clarity in the ECPPA, leaving no doubt how the courts should read the new law.[189] This mandate benefits the courts and the public by adding predictability in the outcome of cases dealing with child pornography and the Internet.

B. Prosecutions that Are More Effective

Prosecutorial success should be measured by its effectiveness in carrying out the legislative intent that Congress had when passing a specific law.[190] This is, after all, how our government is supposed to work—giving effect to a law based on the intent of our democratically elected members of Congress.[191] The intent of child pornography laws has remained the same over the years: punish those individuals who receive, possess, or distribute child pornography.[192] Prior to *Schaefer*, to obtain a conviction under the child pornography laws, the Government needed only to show that the defendant used the Internet to obtain child pornography.[193] Relying on this common theme from other courts,[194] the Government presented evidence in *Schaefer* to prove that the defendant used the Internet to obtain child pornography.[195] Unbeknownst to the Gov-

185. *See, e.g.*, *Schaefer*, 501 F.3d at 1205 ("[T]he government needed to prove the visual images . . . moved across state lines."); *see also supra* note 7.

186. *Sturm*, 672 F.3d at 901.

187. *See* Sukenik, *supra* note 12, at 14 (discussing the disgust of Congress over the decision in *Schaefer*).

188. *See id.* (commenting that Congress intended Internet use to constitute interstate commerce).

189. *Id.* at 15.

190. *See id.* at 14 (quoting several members of Congress who criticized the decision in *Schaefer* because the court's interpretation went against alleged legislative intent).

191. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984) ("If a court . . . ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

192. *See* Effective Child Pornography Prosecution Act of 2007, 18 U.S.C. § 2252(a) (2012), *amended by* Child Protection Act of 2012, Pub. L. No. 112-206, 126 Stat. 1490 (codified throughout 42 U.S.C.); *see also* Frommell, *supra* note 9, at 1156–58 (discussing the history and expansion of federal child pornography laws and the common goal of punishing those who deal in child pornography).

193. Frommell, *supra* note 9, at 1164–65.

194. *See* cases cited *supra* note 16.

195. United States v. Schaefer, 501 F.3d 1197, 1206 (10th Cir. 2007) ("The government maintains that this evidence was sufficient to establish the interstate commerce element because it permit-

ernment, however, the *Schaefer* court would require proof that the images actually moved between states to uphold a conviction.[196] Following the *Schaefer* decision, the Government had to consider the relevant jurisdiction to determine the amount of evidence required to prove the interstate component of the child pornography laws.[197] Congress's mandate in the ECPPA—equating Internet use with interstate commerce—established a clear standard for proving interstate commerce, removing a key hurdle to effective prosecution.[198]

In *United States v. Carroll*,[199] the First Circuit interpreted the jurisdictional requirement in 18 U.S.C. § 2251(a).[200] To secure a conviction under this child pornography statute, the Government needed to show that the defendant "knew or had reason to know" that the child pornography "would be transported in interstate commerce."[201] The Government relied on the testimony of the victim indicating that the defendant intended to upload images to a computer and "distribute them on the Internet."[202] The court said that such transmission "by means of the Internet" would satisfy the statutory interstate commerce requirement.[203]

The Fifth Circuit followed the First Circuit's lead and came to a similar conclusion in *United States v. Runyan*.[204] Runyan was indicted on four separate charges.[205] The first charge was based on the same provision at issue in *Carroll*, whereas the remaining three were under a different section of the child pornography laws, 18 U.S.C. § 2252A.[206] The *Runyan* court agreed with the interpretation of 18 U.S.C. § 2251 advanced by the First Circuit.[207] Turning to the charges under § 2252A, the Government offered Runyan's confession as proof that the images of child pornography were in interstate commerce.[208] Runyan admitted that the images of child pornography he possessed came from the Internet.[209]

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ted a reasonable fact-finder to determine that the images of child pornography . . . were obtained from the Internet."), *overruled by* United States v. Sturm, 672 F.3d 891 (10th Cir. 2012) (en banc).

196. *Id.* ("[I]t was not enough for the government to prove that the child-pornography images . . . were obtained from the Internet. The government needed to prove that the images . . . moved between states.").

197. Frommell, *supra* note 9.

198. Sukenik, *supra* note 12, at 15.

199. 105 F.3d 740 (1st Cir. 1997).

200. *Id.* at 741–42.

201. *Id.*

202. *Id.* at 742.

203. *Id.*

204. 290 F.3d 223, 239 (5th Cir. 2002).

205. *Id.* at 238.

206. *See id.*

207. *Id.* at 239 ("We join the First Circuit in holding that '[t]ransmission of photographs by means of the Internet is tantamount to moving photographs across state lines and thus constitutes transportation in interstate commerce' for the purposes of 18 U.S.C. § 2251.") (alteration in original) (quoting United States v. Carroll, 105 F.3d 740, 742 (1st Cir.1997)).

208. *Id.* at 241.

209. *Id.*

Finding that this confession was sufficient to link the images to the Internet, the court upheld Runyan's conviction.[210]

Finally, in *United States v. MacEwan*,[211] the Third Circuit came to a similar verdict.[212] MacEwan was charged with receiving child pornography under 18 U.S.C. § 2252A(a)(2)(B).[213] After seizing MacEwan's computers, the Government found over 250 images of child pornography along with links to child pornography websites in his Internet history.[214] The Government attempted to prove that these images were in interstate commerce from expert testimony that "summarized the flow of data over the Internet."[215] This testimony noted the mere possibility that transmission of data over the Internet could cross state lines.[216] The Third Circuit concluded that because of the "very interstate nature of the Internet," proof of Internet use to download images of child pornography was enough to show the images had "traveled in interstate commerce."[217]

Following these decisions, the burden on the Government was clear: show the child pornography images were linked to the Internet and the interstate commerce requirement will be satisfied.[218] However, the Tenth Circuit rejected this notion in *Schaefer*, abandoning nonbinding, persuasive precedent.[219] Despite a showing by the Government in *Schaefer* that the defendant had "subscribe[d] to websites containing images of child pornography" and that child pornography images were found on his computer,[220] the Tenth Circuit held that this evidence was insufficient proof of interstate commerce, instead requiring evidence that the images of child pornography actually moved "across state lines."[221] This inconsistent burden of proof requirement not only resulted in an acquittal in

210. *Id.* at 242–43.
211. 445 F.3d 237 (3d Cir. 2006).
212. *Id.* at 239.
213. *Id.*
214. *Id.* at 240.
215. *Id.* at 241.
216. *See id.* at 241–42.
217. *Id.* at 244.
218. Sukenik, *supra* note 12, at 9 ("The majority of circuits . . . held that evidence of Internet use alone satisfied the jurisdictional requirement in the statute.").
219. *Compare* United States v. Schaefer, 501 F.3d 1197, 1198 (10th Cir. 2007) (holding that actual movement across state lines is required), *overruled by* United States v. Sturm, 672 F.3d 891 (10th Cir. 2012) (en banc), *with MacEwan*, 445 F.3d at 244 (holding that use of the Internet is sufficient evidence to show interstate activity), *and* United States v. Runyan, 290 F.3d 223, 242 (5th Cir. 2002) ("[C]ircumstantial evidence linking a[n] . . . image to the Internet . . . can be sufficient evidence of interstate transportation . . . ."), *and* United States v. Carroll, 105 F.3d 740, 742 (1st Cir. 1997) ("Transmission . . . by means of the Internet is tantamount to moving . . . across state lines and thus constitutes transportation in interstate commerce.").
220. *Schaefer*, 501 F.3d at 1198.
221. *Id.* at 1201.

Schaefer[222] but also highlighted potential difficulties in prosecuting criminals in the Internet age.[223]

Congress's mandate that Internet use constitutes interstate commerce eases the difficulty in prosecuting child pornography crimes involving the Internet.[224] This will ultimately result in prosecutions that are more effective because the burden of proof is clear.[225] Additionally, prosecutorial efficiency will improve because proving Internet use is far easier than explaining the intricacies of how data moves over the Internet.[226] After all, it is the guilt or innocence of a party that should be of primary concern, not deciphering expert testimony about the particular path a specific image or data file followed through the elaborate worldwide network of the Internet.

CONCLUSION

In *Schaefer*, a man who admitted to searching for child pornography was set free because a court made a decision with blinders on. Taking quick action, Congress amended the statute to ensure similar, shortsighted decisions would not occur in the future. The Tenth Circuit, realizing its mistake, overturned *Schaefer*, and with it found a new way to interpret the law. But its *Sturm* decision ended up being just another example of the dangers involved in allowing courts the opportunity to use their statutory interpretation canon of choice.

The congressional mandate in the Effective Child Pornography Prosecution Act of 2007 stating that "using the Internet constitutes transportation in interstate commerce" should be extended to all federal laws. It allows for predictability in the courts and more consistent prosecutions of alleged criminals. This mandate is not outside the powers granted to the federal government by the Constitution. The Internet is an inherently interstate mode of communication and method to transport data. Let's

222. *Id.* at 1207.

223. *Id.* ("The development and growth of the Internet . . . complicates the statutory analysis in this case.")

224. Sukenik, *supra* note 12, at 15 ("Congress's legislation . . . clarif[ied] the appropriate jurisdictional standard to be applied . . . .").

225. *See id.*

226. *See generally* United States v. MacEwan, 445 F.3d 237, 241 (explaining the process of routing Internet traffic); Clark, *supra* note 102, at 952–53 (explaining the process for intrastate Internet transmissions).

enter the twenty-first century by declaring all Internet use as interstate commerce.

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* J.D. Candidate, 2014. First and foremost, I would like to thank my family and friends, specifically my parents, for always believing in me and supporting me in all aspects of my life. I would also like to thank my colleagues on the *Denver University Law Review* and Professor John T. Soma for their helpful insights.

THE DANGER OF THE "ESSENTIAL FUNCTIONS" REQUIREMENT OF THE ADA: WHY THE INTERACTIVE PROCESS SHOULD BE MANDATED

ABSTRACT

The 1990 passage of the Americans with Disabilities Act (ADA) was met with resistance from both courts and employers. This resistance took the form of a screening mechanism that restrictively interpreted the definition of "disability." To rectify the narrowed interpretation of disability, Congress passed the Americans with Disabilities Amendments Act of 2008 (ADAAA), which expanded the definition. Although the ADAAA has increased the number of individuals covered by the ADA, the other elements of a plaintiff's prima facie claim for employment discrimination under Title I of the ADA remain the same. Because most pre-ADAAA disability discrimination litigation concerned whether an individual had a disability, jurisprudence about the other elements of a prima facie claim is relatively undeveloped. This lack of jurisprudence as well as continued judicial resistance to the ADA raises concerns about the emergence of a new screening mechanism available to courts: the "essential functions" requirement of the ADA, which mandates that an employee be able to perform the essential functions of her job. If the essential functions requirement were used as a gatekeeper, it would undermine the goals of the ADA. To prevent such abuse, a certain kind of interactive employer–employee mediation process should be mandated. Additionally, an employer should be independently liable for failure to participate in the interactive process.

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INTRODUCTION

Following the passage of the Americans with Disabilities Act of 1990 (ADA), plaintiffs bringing disability-based employment discrimination claims under the ADA faced a disproportionate number of summary judgments.[1] The disability rights movement, which helped to enact the ADA, saw the need to amend the ADA because it was not fulfilling the goals it was meant to achieve—to end the paternalism of, and to foster integration into everyday life for, people with disabilities.[2] The purpose of the ADA Amendment Act of 2008 (ADAAA) was to broaden the definition of disability because the definition in the original ADA was somewhat ambiguous, and consequently courts were able to narrow it significantly in their interpretation of the ADA.[3] Because the ADAAA did expand the definition of "disability," other elements of a plaintiff's prima facie claim for disability discrimination under the ADA remained the same, including the requirement that an individual be "qualified" (i.e., able to perform) with or without reasonable accommodations, the "essential functions" of a job.[4] The requirement that the employee be able to perform the essential functions of a job could become an attractive gatekeeper for courts to continue to block potential plaintiffs from bringing or prevailing in employment discrimination suits under the

1. *See* Adrien Katherine Wing, *Examining the Correlation Between Disability and Poverty: A Comment from a Critical Race Feminist Perspective—Helping the Joneses to Keep Up!*, 8 J. GENDER RACE & JUST. 655, 656–57 (2005) ("[O]nly 2.7% of plaintiffs prevailed in Title I ADA filed cases, as opposed to 17.2% of plaintiffs in nonemployment ADA cases." (footnote omitted)).

2. Throughout this Comment, I use the phrase "people with disabilities" or "individuals with disabilities" because politically active Americans with disabilities think that these phrases are more reverent and less degrading than "the disabled." SAMUEL R. BAGENSTOS, DISABILITY RIGHTS LAW CASES AND MATERIALS 1 (2010).

3. *See* Hillary K. Valderrama, Comment, *Is the ADAAA a "Quick Fix" or Are We out of the Frying Pan and into the Fire?: How Requiring Parties to Participate in the Interactive Process Can Effect Congressional Intent Under the ADAAA*, 47 HOUS. L. REV. 175, 199–200 (2010).

4. *See id.* at 204.

ADA. The recent Tenth Circuit case of *EEOC v. Picture People, Inc.*[5] shows how this requirement could be used as a screening mechanism.

This Comment argues that the use of the essential functions requirement as a screening mechanism would be especially dangerous for the goals of the disability rights movement. Continually dismissing cases because the plaintiff could not perform the essential functions of her job would reinforce the stereotypes the ADA was enacted to combat: that people with disabilities are less worthy than are able-bodied individuals and thus should not be integrated into the world or seen as fully capable persons.[6] To combat the use of the essential functions requirement as a possible screening mechanism, this Comment suggests that a particular kind of interactive employer–employee mediation process be mandated by the ADA.

To contextualize the language of the ADA and the ADAAA, Part I of this Comment provides a brief background of the ADA's enactment and its subsequent amendments. Part II shows how the essential functions requirement could be used to block potential plaintiffs from bringing or prevailing in employment discrimination suits under the ADA as was done in *EEOC v. Picture People, Inc.* Part III argues that the use of the essential functions requirement as a screening mechanism would be especially damaging to the goals of disability rights advocates. Moreover, this Comment argues that an interactive employer–employee mediation process focusing on the essential functions of a job should be mandated to keep the essential functions requirement from becoming such a screening mechanism.

I. BACKGROUND

To help contextualize the ADA and its subsequent amendments, subpart A explains the goals of the disability rights movement. Subpart B explains the uniqueness of the original ADA as it encompassed aspects of both a civil rights statute and welfare legislation.[7] Subpart C explains why and what kind of backlash the original ADA received, and subpart D introduces the ADAAA—the legislative response to the ADA backlash.[8] Finally, subpart E explains why it is important to look to post-ADAAA disability discrimination litigation to determine whether and what kind of screening mechanisms could be used by the courts.

A. Goals of the Disability Rights Movement

The ADA, signed into law on July 26, 1990, by President George H.W. Bush, was heralded as a remarkable step toward rectifying the dis-

5. 684 F.3d 981 (10th Cir. 2012).
6. *See* BAGENSTOS, *supra* note 2, at 4.
7. *See id.*
8. *Id.* at 52.

crimination faced by millions of Americans with disabilities.[9] The purpose of the ADA was "to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for [individuals with disabilities]."[10] The ADA's articulation of this goal was largely the result of the efforts of advocates in the disability rights movement, which began in the 1970s.[11] Truly understanding the goals and hopes of the ADA requires first examining the forces behind its enactment.[12]

Throughout the disability rights movement, the advocates championed two major theoretical concepts: anti-paternalism and the social model of disability.[13] The first concept, anti-paternalism, was lifted from two articles written by Jacobus tenBroek in 1966.[14] Professor tenBroek argued that society's common perceptions and stereotypes about people with disabilities, much more than any physical impairment itself, creates substantial limitations on people with disabilities to interact with the world.[15] These limitations manifest as a "custodial attitude [that] is typically expressed in policies of segregation and shelter, of special treatment and separate institutions."[16] To combat this, tenBroek argued that disability law should focus on integration.[17] His recommendation largely influenced the goals of the disability rights movement, as seen by the movement's challenge to society's common response of pitying people with disabilities.[18] Advocates wanted people with disabilities to be seen as autonomous individuals capable of conducting their own lives.[19]

The second concept behind the disability rights movement, the social model of disability, challenged the typical medical definition of the word "disability."[20] The social model theorizes that the norms of society determine who is and who is not disabled.[21] Viewing people with disabilities as different from the majority has created a world that caters to the

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9. Grant T. Collins & Penelope J. Phillips, *Overview of Reasonable Accommodation and the Shifting Emphasis from Who Is Disabled to Who Can Work*, 34 HAMLINE L. REV. 469, 473 (2011); Maureen R. Walsh, Note, *What Constitutes a "Disability" Under the Americans with Disabilities Act: Should Courts Consider Mitigating Measures?*, 55 WASH. & LEE L. REV. 917, 918 (1998).

10. 42 U.S.C. § 12101(a)(7) (2012).

11. *See* Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405, 1409 (1999); *see also* BAGENSTOS, *supra* note 2, at 2.

12. Eichhorn, *supra* note 11.

13. BAGENSTOS, *supra* note 2, at 4.

14. *See id.* at 2, 4.

15. Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CALIF. L. REV. 841, 842 (1966).

16. Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CALIF. L. REV. 809, 816 (1966).

17. tenBroek, *supra* note 15, at 843.

18. *See* BAGENSTOS, *supra* note 2, at 4.

19. *See id.*

20. *See* Eichhorn, *supra* note 11, at 1414–15.

21. *See id.*

majority and ignores the needs of people with disabilities.[22] Disability results from the various barriers that society constructs—physical, social, and attitudinal—which obstruct an individual's ability to truly partake in society.[23] For example, a person in a wheelchair experiences disability because society has chosen to design buildings with steps and narrow doorways instead of ramps and wider doorways, even though it would not have been more expensive to construct the building in an accessible way.[24] Thus, a disability is not an innate condition; rather, it is a social construction resulting from society's preference for the majority.[25] By challenging the common perception of disability as a problem that needs to be cured or as a condition that requires pity or charity and instead positing that society itself perpetuates disabilities, the disability rights movement hoped that "the proper response [to disability would be] one that requires *society* to change its aspects that make some mental or physical conditions disabling."[26]

The goals of the disability rights movement, and subsequently of the ADA, reflect these two major concepts.[27] These goals stress integration into society by effectuating change in societal attitudes.[28] It is important to disability rights advocates to accomplish these goals in a manner that stresses the recognition of rights over charity.[29] Thus, disability rights advocates desired civil rights legislation as opposed to welfare legislation to prohibit discrimination against people with disabilities.[30]

B. The ADA as a Hybrid of a Civil Rights Statute and Welfare Legislation

The ADA recognized the disability rights advocates' desire for a civil rights statute while acknowledging the unique circumstances of individuals with disabilities.[31] In some instances, individuals with disabilities need different treatment in order to be treated equally.[32] Therefore, unlike other civil rights statutes, the ADA is unique because it

22. *See id.*

23. Stacy A. Hickox, *The Underwhelming Impact of the Americans with Disabilities Act Amendments Act*, 40 U. BALT. L. REV. 419, 428 (2011).

24. *See* Chai R. Feldblum, *Rectifying the Tilt: Equality Lessons from Religion, Disability, Sexual Orientation, and Transgender*, 54 ME. L. REV. 159, 181–84 (2002).

25. Eichhorn, *supra* note 11, at 1415 ("Disabled people are not inherently disabled, but are instead actively disabled by a discriminatory society.").

26. BAGENSTOS, *supra* note 2, at 4.

27. *See id.*

28. Eichhorn, *supra* note 11, at 1418 ("Among the chief goals of the movement, which continues today, are recognition of disabled people as full human beings and elimination of physical and attitudinal barriers to their full participation in society." (footnote omitted)).

29. *Id.*; *see also* BAGENSTOS, *supra* note 2, at 4.

30. BAGENSTOS, *supra* note 2, at 4.

31. *See id.* at 7–8; Eichhorn, *supra* note 11, at 1419.

32. *See* BAGENSTOS, *supra* note 2, at 7–8.

"does not simply require equal treatment of similarly situated individuals."[33] Instead, the ADA

> [r]equir[es] both less and more. The ADA requires more because not only does it require that individuals with disabilities be treated no worse than nondisabled individuals with whom they are similarly situated, but, in certain contexts, it requires that they be treated differently, some might say better, to achieve equal footing. The ADA arguably requires less because, if the disabled individual cannot do the job, even with reasonable assistance, the employer is not obligated to employ that individual.[34]

The ADA was initially celebrated for its unique approach to combating disability discrimination; however, the Act was met with substantial backlash not only from employers[35] but also from the judiciary.[36] This resistance stemmed from a fear that the ADA provided claimants with preferential treatment, and it was often characterized as an affirmative action statute.[37] The judicial backlash manifested in a disproportionate number of summary judgments for defendants due to claimants' failure to qualify as disabled under the ADA definition of "disability."[38] A more detailed account of the nature and extent of the backlash is discussed below.

C. Judicial Backlash

To establish a prima facie case for disability discrimination under the original ADA, a plaintiff must show that (1) she is disabled within the meaning of the ADA; (2) she is qualified (with or without a reasonable accommodation) to perform the essential functions of the position she has or desires; and (3) the employer took an adverse employment action against an employee with a disability because of her disability.[39] The definition of "disability" under the original ADA was as follows: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[40] In the

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33. Collins & Phillips, *supra* note 9, at 471.

34. *Id.*

35. Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 315 (2009).

36. *Id.*; *see also* Collins & Phillips, *supra* note 9; Scott Johnson, *The ADAAA: Congress Breathes New Life into the Americans with Disabilities Act*, 81 J. KAN. B. ASS'N 22, 23 (2012).

37. Johnson, *supra* note 36 ("Many courts characterized it as an affirmative action program for the disabled, rather than as an antidiscrimination statute. Even the U.S. Supreme Court explicitly referred to certain accommodations as 'preferences for individuals with disabilities.'" (footnote omitted) (quoting Travis, *supra* note 35, at 318)).

38. Valderrama, *supra* note 3, at 204.

39. 42 U.S.C. §§ 12111–12112 (2012).

40. 42 U.S.C. § 12102(2) (2012).

following two cases, the Supreme Court significantly narrowed the ADA definition of "disability."

In *Sutton v. United States Air Lines, Inc.*,[41] the Supreme Court substantially narrowed the definition of "disability," making it more difficult for claimants to overcome defendant employers' motions for summary judgment.[42] In an opinion delivered by Justice O'Connor, the *Sutton* Court affirmed the judgment of the Tenth Circuit,[43] holding that courts should consider mitigating measures, such as an individual's medications or treatments, when determining whether one has a disability for purposes of the ADA.[44] Additionally, the *Sutton* Court's opinion highlighted the demanding nature of fulfilling a "regarded as [disabled]" claim under the ADA.[45] Under a regarded as disabled claim, a plaintiff must show not only that the employer held a misconception about the plaintiff's impairment but also that the employer believed that the plaintiff's impairment substantially limited a major life activity.[46]

In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,[47] the Supreme Court defined "major life activities" as "those activities that are of central importance to daily life."[48] To support this definition, the *Toyota* Court declared that the ADA's definition of disability "need[s] to be interpreted strictly to create a demanding standard for qualifying as disabled,"[49] further narrowing the definition of disability under the ADA.

D. Result of Sutton *and* Toyota*: The Americans with Disabilities Amendments Act*

Sutton and *Toyota* made it extremely difficult to prevail with an employment discrimination claim under the ADA.[50] Research showed that only 2.7% of plaintiffs prevailed in employment discrimination cases filed under the ADA, as opposed to 17.2% of plaintiffs in non-employment ADA cases[51] and 58.0% of plaintiffs in all federal civil cases—an enormous disparity.[52] The rulings in *Sutton* and *Toyota* left plaintiffs in a catch-22 situation in which they either were not "disabled enough" to warrant protection under the Act or were "too disabled" to qualify for the jobs they desired.[53] One scholar noted that the "judicial

41. 527 U.S. 471 (1999).
42. *See* Johnson, *supra* note 36, at 24.
43. *Id.*
44. *Sutton*, 527 U.S. at 475.
45. *Id.* at 489.
46. *Id.*
47. 534 U.S. 184 (2002).
48. *Id.* at 185.
49. *Id.* at 197.
50. *See* Johnson, *supra* note 36, at 25.
51. Wing, *supra* note 1, at 656.
52. *Id.* at 656–57.
53. Johnson, *supra* note 36, at 25–26; Valderrama, *supra* note 3, at 198.

hostility to the ADA ran so deep that Congressional response seemed inevitable."[54] Disability rights advocates persuaded "members of the business community to negotiate a compromise bill to restore the ADA's protected class to the scope originally intended by Congress, in exchange for several provisions that precluded the potential expansion of rights and coverage under other disputed sections of the original ADA."[55] On September 25, 2008, President George W. Bush signed the ADAAA.[56] The ADAAA sought to correct the narrow interpretation of "disability" that resulted from *Sutton* and *Toyota*.[57]

The ADAAA made several changes to the ADA. First, with regard to mitigating measures, the ADAAA affirmatively states that they should not be considered when determining if an individual has a disability.[58] This provision directly addressed the Supreme Court's ruling in *Sutton* that mitigating measures should be considered in assessing whether a plaintiff has a disability.[59] Second the ADAAA made proving a regarded as disabled claim easier for employees, as the employee only has "to show an adverse employment action was taken because the employer 'perceived' an impairment—which can be any condition with an expected duration of more than six months."[60] The plaintiff no longer must show that her employer believed that the impairment substantially limited a major life activity.[61] Third, in response to the Supreme Court's definition of "major life activities" in *Toyota*, the ADAAA expanded what constitutes a major life activity, including such things as "standing, lifting, bending, reading and concentrating, along with performing manual tasks, thinking, eating, sleeping and communicating."[62] Additionally, the ADAAA states that major life activities include "the operation of a major bodily function."[63] "Further broadening the coverage of the [A]ct, the ADAAA makes clear that impairments that are episodic or in remission are still protected disabilities if they would substantially limit a major life activity when active."[64] Fourth, the ADAAA also states that the term "substantially limits" should not mean "significantly restricted" as some courts had held because that was "too high a standard."[65]

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54. Travis, *supra* note 35, at 319.
55. *Id.*
56. BAGENSTOS, *supra* note 2, at 52.
57. *Id.*
58. 42 U.S.C. § 12102(4)(E)(ii) (2012).
59. Stephanie Wilson & E. David Krulewicz, *Disabling the ADAAA*, N.J. LAW., Feb. 2009, at 37, 39.
60. *Id.* at 38.
61. *See id.*
62. Wilson & Krulewicz, *supra* note 59, at 38 (citing 42 U.S.C. § 12102(2)(A)).
63. 42 U.S.C. § 12102(2)(B).
64. Wilson & Krulewicz, *supra* note 59, at 38 (citing 42 U.S.C. 12102(4)(D)); *see also* BAGENSTOS, *supra* note 2, at 53.
65. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3553–3554.

One major component of the Act remained unchanged.[66] To establish a prima facie claim for discrimination, a plaintiff must still prove that she was qualified, either with or without reasonable accommodations.[67] A "qualified individual" is defined as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[68] Thus, an individual must still show that she can perform the essential functions of the position and that her accommodations were reasonable.[69]

E. Litigation After the ADAAA Enactment

The ADAAA took effect on January 1, 2009,[70] and it did not apply retroactively.[71] Therefore, the volume of litigation applying the new aspects of the ADAAA is relatively limited. Because cases prior to the ADA dealt exclusively with the definition of "disability" and did not develop the other elements of a prima facie case,[72] it is important to look at whether the ADAAA is receiving the same kind of backlash as did the original ADA and whether a new screening mechanism has been erected by the courts, resulting in a disproportionate number of summary judgments for defendants. This prospect seems likely, considering the ADAAA has been criticized for opening the floodgates of litigation by expanding the definition of "disability."[73]

II. *EEOC V. PICTURE PEOPLE, INC.*

In *EEOC v. Picture People, Inc.*, the Tenth Circuit recently demonstrated that an employee's ability to meet the essential functions of a job could potentially be used as a gatekeeping mechanism for employment discrimination claims brought under the ADAAA. An analysis of the case and its potential impact on the future of disability discrimination litigation under the ADAAA follows.

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66. *See* Valderrama, *supra* note 3, at 204.
67. *See id.*
68. 42 U.S.C. § 12111(8) (2012).
69. *See id.*
70. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3553–3554.
71. Kerri Stone, *Substantial Limitations: Reflections on the ADAAA*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 509, 514 (2011).
72. *See* Valderrama, *supra* note 3, at 204.
73. Amelia Michelle Joiner, *The ADAAA: Opening the Floodgates*, 47 SAN DIEGO L. REV. 331, 366 (2010) ("[T]he enactment of the ADAAA . . . '[could] open a 'Pandora's Box' of claims by people who do not have a disability under any rational interpretation of that term.'" (second alteration in original) (quoting *Restoring Congressional Intent and Protections Under the Americans with Disabilities Act: Hearing on S. 1881 Before the S. Comm. on Health, Educ., Labor, and Pensions*, 110th Cong. 34 (2007) (statement of Camille A. Olson, Partner, Seyfarth Shaw, LLP))).

A. Facts

The plaintiff, Jessica Chrysler, was an employee at Picture People, Inc., a photography studio in Littleton, Colorado.[74] She was "profoundly deaf," but she could communicate through "writing notes, gesturing, pointing, and miming. She [could] also type, text message, and use body language."[75] Jessica could also use American Sign Language (ASL), but according to Picture People, she could not read lips or speak many words.[76]

Jessica was hired as a "performer" for the photography studio, which entailed "customer intake, sales, portrait photography, and laboratory duties."[77] Another performer usually aided Jessica when she shot photographs in the studio, but she was occasionally able to shoot by herself.[78] On such occasions, Jessica would communicate with her photography subjects, who were usually children, "by writing notes, gesturing, and miming."[79]

In November 2007, Master Photographer Libby Johnston was sent to Picture People "to improve photography quality and sales in anticipation of the holidays."[80] Jessica claimed that she requested an ASL interpreter for a training session held by Johnston, but Picture People was unable to provide one.[81] Johnston's evaluation of Jessica focused on Jessica's communication skills, which Johnston maintained were "awkward, cumbersome, and *impractical*."[82] After conferring with Johnston, Picture People's district manager recommended and Picture People agreed that Jessica be "almost exclusively" relocated to the photography lab.[83]

Jessica was relocated and her hours were cut, after which she requested more hours.[84] Jessica was denied more hours, and management reported that she was "angry" and less productive at work.[85] After the 2007 holiday season, Jessica remained an employee but was not allotted work hours at the photography studio.[86] She was officially terminated in October 2008.[87]

74. EEOC v. Picture People, Inc., 684 F.3d 981, 983–84 (10th Cir. 2012).
75. *Id.* at 983.
76. *Id.* at 983–84.
77. *Id.* at 984.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 984–85.
86. *Id.* at 985.
87. *Id.*

B. Procedural History

The Equal Employment Opportunity Commission (EEOC) sued under Title I of the ADA on Jessica's behalf, claiming employment discrimination on the basis of a disability.[88] The district court granted summary judgment in favor of the employer.[89] The district court determined that Jessica could not meet a prima facie case for discrimination under the ADAAA because she could not perform the essential functions of the job with or without reasonable accommodations.[90]

C. Majority Opinion

The Tenth Circuit reviewed the district court's ruling de novo and affirmed.[91] The court stated the elements needed to show a prima facie case for discrimination under the ADAAA—that the employee "(1) be a disabled person as defined by the ADA; (2) is qualified, with or without reasonable accommodation, to perform the essential functions of the job held or desired; and (3) suffered discrimination by an employer or prospective employer because of that disability."[92] The parties agreed that Jessica was disabled, so the opinion hinged on the second element of disability discrimination.[93]

The issue concerned whether verbal communication skills constituted an essential function of the job of performer.[94] The majority emphasized the need to first inquire as to whether the employer required all performers to have strong verbal communication skills.[95] If so, the court must next inquire as to "whether verbal communication skills are fundamental to the performer position."[96] This inquiry considers the following factors:

> (i) [t]he employer's judgment as to which functions are essential;
>
> (ii) [w]ritten job descriptions prepared before advertising or interviewing applicants for the job;
>
> (iii) [t]he amount of time spent on the job performing the function;
>
> (iv) [t]he consequences of not requiring the incumbent to perform the function;
>
> (v) [t]he terms of a collective bargaining agreement;

88. *See id.*
89. *Id.*
90. *Id.* at 983.
91. *Id.* at 983, 985.
92. *Id.* at 985.
93. *Id.*
94. *Id.*
95. *Id.* at 985–86.
96. *Id.*

> (vi) [t]he work experience of past incumbents in the job; and/or
>
> (vii) [t]he current work experience of incumbents in similar jobs.[97]

The court concluded that Jessica was "unable to fully perform three of the four duties of a performer."[98] Although she could perform in the lab, she did not possess the ability to proficiently register and recruit customers, instruct children while taking their pictures, or sell photo packages by addressing customer issues.[99] Her limited abilities, the court reasoned, were problematic, especially because Picture People allowed only twenty minutes for each photo shoot.[100]

Because the court determined that Jessica was unable to perform the essential functions of the job, the court considered whether there were reasonable accommodations that the employer could provide that would enable her to perform those essential functions.[101] The court defined reasonable accommodations as

> "[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position" or "[m]odifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities."[102]

The majority opinion first stated that a reasonable accommodation could not consist of allowing Jessica to communicate non-verbally because it could not require an employer to eliminate an essential function of the job.[103] The majority opinion then stated that providing Jessica with an ASL interpreter at staff meetings would not allow her to perform the essential functions of her job because verbal communication needed to occur during photo sessions.[104] In light of these circumstances, the court concluded that no reasonable accommodation could have allowed Jessica to perform the essential functions of her job.[105]

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97. *Id.* at 986.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 987.
102. *Id.* (alterations in original) (quoting 29 C.F.R. § 1630.2(o)(1)(ii)–(iii) (2012)).
103. *Id.*
104. *Id.* at 987–88.
105. *Id.* at 988.

D. Dissenting Opinion

Judge Holloway offered a dissent that began by presenting a more detailed account of the facts of the case.[106] The dissent pointed out that Picture People had hired Jessica knowing she was deaf and knowing the duties of a performer.[107]

The dissent also noted that Jessica's start time had been delayed three weeks because Picture People failed to provide an interpreter for her training session.[108] The manager of the studio contacted Picture People's human resources department but was told that Picture People did not provide those services in an e-mail stating that "hiring an interpreter 'to be around the studio while this employee is working . . . seems like an expense we would like to do without.'"[109] Eventually, Jessica found her own interpreter to aid her during her job training session.[110]

The dissent emphasized that Jessica had received highly favorable reviews for her photography sessions with children and there was no evidence that her sessions were unsuccessful.[111] In fact, just days after her training session, Jessica had a photo shoot with a family who was so pleased with her performance, it purchased more photos than it had originally planned.[112] Consequently, the family returned to the studio the next month for another photo shoot with Jessica, but Picture People falsely informed the family that Jessica was unavailable when, in fact, Jessica was working in the lab at the time.[113]

The dissent noted that despite Jessica's positive performance, Picture People reassigned Jessica to the lab following a staff training session for which she requested but was not provided an interpreter.[114] Following this reassignment, Picture People cut her hours significantly.[115] She requested more hours and was promised an increase; eventually Picture People cut her hours altogether.[116] Finally, Picture People terminated Jessica after months of waiting to see if she would get more hours.[117] On top of everything, the dissent concluded, Picture People reprimanded Jessica when she complained about her hour reduction.[118]

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106. *Id.* at 992 (Holloway, J., dissenting).
107. *Id.*
108. *Id.* at 994.
109. *Id.* (alteration in original).
110. *Id.*
111. *Id.* at 992.
112. *Id.* at 994–95.
113. *Id.*
114. *Id.* at 995.
115. *See id.* at 996.
116. *Id.* at 996–97
117. *Id.* at 997.
118. *Id.* at 992–93.

The dissent reasoned that summary judgment for the defendant employer was inappropriate. There was substantial evidence from which a jury could decide that verbal communications skills were not an essential function of the job but instead were a method used to perform an essential function of the job, which was communication in general.[119] The dissent stated that none of the descriptions of the job, either written by Picture People before Jessica's employment or given from witnesses during trial, stated that verbal communication was an essential function of the job.[120]Thus, there was enough evidence to preclude summary judgment.[121]

Additionally, the dissent disagreed with the court's holding that Jessica's written communication and gestures were less effective than was oral communication.[122] Jessica received no negative feedback from customers about her performance while photographing children.[123] On the contrary, Jessica showed that she could communicate effectively by receiving positive feedback about her performance.[124] The dissent stated that "[o]nly by ignoring this clear example of [Jessica's] ability to perform the essential functions of photo shooting and sales can the majority find that 'nothing suggests' that she could do that which she had in fact already done."[125]

Finally, the dissent remarked that the determination of whether something is an essential function of a job is a question for the jury.[126] The dissent emphasized that "[a] jury could determine that the Employer's decisions were based on exactly the kind of stereotypes that the ADA was enacted to combat."[127]

III. ANALYSIS

The majority opinion in *EEOC v. Picture People, Inc.* is illustrative of the dangerous potential of judicial backlash towards the ADAAA in the form of granting summary judgment for employer defendants on the basis of employees lacking the ability to perform an essential job function. The essential functions requirement could be a new screening mechanism courts employ to combat the "flood of litigation" the ADAAA arguably unleashes.[128] As the dissent in *Picture People* conveyed, the grant of summary judgment for the defendant was unwarrant-

119. *Id.* at 999.
120. *Id.* at 998.
121. *See id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 1000.
127. *Id.*
128. Joiner, *supra* note 73, at 336.

ed.[129] Even if summary judgment were warranted, the problems Jessica experienced at her job highlight the failure or lack of an interactive process through which the employer and employee discuss what the essential functions of the job will be and what, if any, reasonable accommodations the employee will need to perform the job's duties.

This Comment argues that a mandated interactive process should be implemented as part of establishing a prima facie case for disability discrimination. First, subpart A explains why judicial backlash to the original ADA occurred, and predicts why a similar backlash in the form of using the essential job functions requirement as a gatekeeper is a real possibility. Second, subpart B discusses the dangers of using the essential job functions requirement as gatekeeper because it would seriously undermine the goals of the ADAAA. Subpart C explains the interactive employer–employee mediation process and suggests that it should be mandated for employers to participate in such a process with an employee if the employer knows or should know that the employee has a disability. If an employer does not participate in an interactive process, the employee's claim should prevail. Finally, subpart D outlines what an effective interactive process should look like.

A. Explaining the Judicial Backlash

Although the ADAAA was signed into law in September 2008, it only applies to adverse employment actions taken after the effective date of January 1, 2009.[130] Therefore, the first cases interpreting the ADAAA have taken some time to surface.[131] Consequently, any meaningful trends regarding the judicial reaction to the ADAAA are limited.[132] Whether a new screening mechanism will emerge remains to be seen; however, there is reason to believe that a similar form of judicial backlash will occur.[133] Because ADA jurisprudence is wrought with ambiguities and the ADAAA will likely result in more disability-based employment discrimination litigation, it is also likely that judicial backlash will again take the form of a screening mechanism to control the increased volume of cases.[134]

A new gatekeeping mechanism could potentially develop via the other prima facie elements of a plaintiff's employment discrimination claim: the essential functions requirement and the reasonable accommodation requirement.[135] Because so many cases under the original ADA

129. *Picture People*, 684 F.3d at 1000.

130. Jana K. Terry, *The ADA Amendment Acts Three Years After Passage: The EEOC's Final Regulations and the First Court Decisions Emerge at Last*, FED. LAW., Nov.–Dec. 2011, at 49, 49.

131. *Id.*

132. *Id.*

133. *See* Valderrama, *supra* note 3, at 202–03.

134. *Id.*

135. *See id.* at 204.

focused on whether a plaintiff had a disability, case law concerning whether a plaintiff can perform the essential functions of a job, or whether a requested accommodation is reasonable, is less developed.[136] Because these areas of law are less developed, courts still have latitude in "end[ing] the inquiry at the coverage stage based on the plaintiff's qualifications (including whether she can perform essential job functions or whether the accommodation was reasonable), achieving the same result as the restrictive definition of disability."[137]

In any case, it is important to understand why courts would implement such a mechanism. Understanding the judicial backlash helps predict the form said mechanism could take and helps in the development of a solution. There are several explanations for the judicial resistance to the original ADA (and the consequent reaction of the restrictive definition of disability).[138] First, courts may have been reacting to the special nature of the ADA as a blended civil rights and welfare statute.[139] Other civil rights statutes prohibit employers from discriminating against an employee based on that employee's protected status.[140] The protected status, such as race, gender, age, or religion, is generally irrelevant to an employee's ability to perform a job.[141] The ADA concerns and protects individuals whose disabilities may legitimately impact job performance and requires that employers accommodate those individuals at the employer's own expense.[142] Thus, courts may have viewed claimants as underserving, or even worse, as "really just lazy, malingerers, or whiners."[143] Second, courts may have been reluctant to impose costs on employers.[144] After all, employers are not responsible for plaintiffs' disabilities, and "it might thus seem unreasonable to require them to absorb costs associated with these conditions."[145]

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136. *See id.*

137. *Id.* (footnote omitted).

138. *See* Hickox, *supra* note 23, at 426–28.

139. *See id.* at 426–27 ("Some experts attribute ADA plaintiffs' lack of success in workplace discrimination claims to a lack of acceptance of the ADA's protections among the courts, employers, and other members of society, and an unwillingness to accept the disabled or 'the notion that the ADA is about rights and equality.'" (quoting Sharona Hoffman et al., *The Definition of Disability in the Americans with Disabilities Act: Its Successes and Shortcomings: Proceedings of the 2005 Annual Meeting, Association of American Law Schools Sections on Employment Discrimination Law; Labor Relations and Employment Law; and Law, Medicine and Health Care*, 9 EMP. RTS. & EMP. POL'Y J. 473, 494 (2005) (comments of Chai R. Feldblum))); *see also* Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 40 (2000); Sharona Hoffman, *Settling the Matter: Does Title I of the ADA Work?*, 59 ALA. L. REV. 305, 326–27, (2008) [hereinafter Hoffman, *Settling the Matter*].

140. *See* Hoffman, *Settling the Matter*, *supra* note 139, at 327.

141. *Id.*

142. *Id.*

143. Hickox, *supra* note 23, at 427.

144. Hoffman, *Settling the Matter*, *supra* note 139, at 327.

145. *Id.*

On a theoretical level, courts' resistance to the ADA may have stemmed from the prevailing medical definition of the word "disability."[146] As discussed in Part I.A, the medical model of disability treats disability not as a social problem but as an individual medical problem with only a medical solution.[147] Thus, courts may have viewed discrimination against individuals with disabilities as rational "'[because it results from] their own bodies' deficiencies,' unlike discrimination against other groups," which results from animus.[148]

The reason for the judicial backlash appears to be more than just an unwillingness to impose costs on employers. Rather, the courts' main concern about enforcing the ADA seems to be that individuals with disabilities do not deserve protection because (1) their disabilities actually can affect job performance and (2) they are not being discriminated against in the typical sense, as there is not always animus behind adverse employment actions.

Given these concerns, courts are likely to see the essential functions requirement as an attractive candidate for a new screening mechanism. If courts do use the essential functions requirement as a screening mechanism, it would put the focus of litigation on the individual with a disability's perceived shortcomings rather than on how employers can change their practices to better integrate employees with disabilities into the workplace. This focus on the individual with a disability would reflect the courts' view that disabilities negatively affect job performance, and that employers generally act rationally when they take adverse employment action against individuals with disabilities. Therefore, the reasoning of the courts goes, it is unfair to place financial burdens on employers because they act rationally and without animus.

B. Using the "Essential Functions" Requirement as a Gatekeeper Would Undermine the Goals of the ADAAA

If the essential functions requirement were systematically used as a screening device, the goals of disability rights advocates would be seriously undermined. The chilling effect on the ability of disability discrimination litigants to bring successful claims would be similar to that which the judicial interpretation of the definition of "disability" had on litigants pre-ADAAA. As one scholar noted:

> [T]he specific wording of the ADA's definition of "disability," borrowed from the earlier Rehabilitation Act, has undercut the statute's goal of fostering greater participation in society on the part of people

146. Hickox, *supra* note 23, at 427–28.

147. *Id.*

148. *Id.* (alteration in original) (quoting Bradley A. Areheart, *When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma*, 83 IND. L.J. 181, 181–82 (2008)).

> with disabilities. The problematic language in the definition fails to reflect the congressional intent to cover people with a broad range of physical and mental impairments, and it actually cuts against several of the theoretical underpinnings of the disability rights movement.[149]

If the essential functions requirement of the ADAAA is used as a gatekeeper for disability discrimination claims, it, like the gatekeeping that occurred pursuant to the ADA's definition of "disability,"[150] could undermine the disability rights movement.

The disability rights movement sought to integrate individuals with disabilities into society and end paternalism toward them.[151] The essential functions requirement to block potential plaintiffs would seriously undermine those goals because it requires making a judgment about those individuals' abilities. As highlighted by the dissent in *Picture People*,[152] an employer's assessment of the capacities of an individual with a disability can reflect common stereotypes about people with disabilities.[153]

Furthermore, focusing on the employee's limitations themselves—as opposed to focusing on whether an accommodation is reasonable or on whether an employer participated in an interactive process—reinforces the common stereotype that individuals with disabilities are lesser human beings.[154] The focus on limitations ignores that society needs to change, which is a major goal of the disability rights movement. Rather, it emphasizes the shortcomings of the individual herself (whether those shortcomings are real or assumed based on stereotypes). Thus, the real or perceived limitations of plaintiffs with disabilities would be systematically scrutinized. Again, the focus of disability discrimination cases should be on how society should change,[155] not on how an individual's disability makes her unqualified for a position.

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149. Eichhorn, *supra* note 11, at 1408.

150. *See id.*

151. BAGENSTOS, *supra* note 2, at 4–6.

152. EEOC v. Picture People, Inc., 684 F.3d 981, 1000 (10th Cir. 2012) (Holloway, J., dissenting).

153. *See* Eichhorn, *supra* note 11, at 1416 ("[N]on-disabled people find it difficult to understand how people can live full, satisfying lives despite mental and physical impairments . . . ."); *see also* Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 423 (2000) ("[P]eople with disabilities may be deprived of opportunities because of stereotypes—overbroad generalizations about the limiting effects of their impairments.").

154. *See* Eichhorn, *supra* note 11, at 1411–12 ("Those who wish to draw lines—to reify disability—are simply trying to ensure their own place on the correct, 'normal' side. They can then assume that those on the other side are somehow lesser humans, whose primary need in life is a cure that will allow them to join the ranks of the normal." (footnotes omitted)); *see also* Jonathan C. Drimmer, Comment, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1343 (1993) ("Frequently, people with disabilities are stigmatized as less than human . . . .").

155. This is not to say that there should be or is no limit to what employers are obliged to accommodate. The ADA provides an "undue hardship" defense to an accommodation request, even

C. The Interactive Process

Mandating that employers participate in an interactive employer–employee mediation process and be subject to liability for failure to do so could refocus employment discrimination cases back onto how society needs to change. Courts disagree as to whether the interactive process is required.[156] Many courts only require that an employer participate in an interactive process if an employee has requested such an accommodation.[157] Courts also disagree about the consequences an employer faces for failure to participate in the interactive process.[158] The EEOC regulations provide that in the interactive process, the employer and employee should

> (1) [a]nalyze the particular job involved and determine its purpose and essential functions; (2) [c]onsult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation; (3) [i]n consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and (4) [c]onsider the

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if that request is reasonable. 42 U.S.C. § 12111(10) (2012) ("The term 'undue hardship' means an action requiring significant difficulty or expense, when considered in light of [several] factors[, including] (i) the nature and cost of the accommodation needed . . . ; (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.").

156. *See, e.g.*, John R. Autry, *Reasonable Accommodation Under the ADA: Are Employers Required to Participate in the Interactive Process? The Courts Say "Yes" but the Law Says "No,"* 79 CHI.-KENT L. REV. 665, 677–685 (2004); Alysa M. Barancik, Comment, *Determining Reasonable Accommodations Under the ADA: Why Courts Should Require Employers to Participate in an "Interactive Process,"* 30 LOY. U. CHI. L.J. 513, 527 (1999); Valderrama, *supra* note 3, at 206. *Compare* Picard v. St. Tammany Parish Hosp., 423 F. App'x 467, 470 (5th Cir. 2011) (holding that the district court did not abuse its discretion in refusing requested jury instruction in ADA case that failure to engage in the interactive process once accommodation was requested constituted per se violation of the ADA), *with* Livingston v. Fred Meyer Stores, Inc., 388 F. App'x 738, 741 (9th Cir. 2010) (holding that employers are required to engage in an interactive process with employees to identify and implement appropriate reasonable accommodations).

157. Sam Silverman, *The ADA Interactive Process: The Employer and Employee's Duty to Work Together to Identify a Reasonable Accommodation Is More than a Game of Five Card Stud*, 77 NEB. L. REV. 281, 287 (1998).

158. Stephen F. Befort, *Accommodation at Work: Lessons from the Americans with Disabilities Act and Possibilities for Alleviating the American Worker Time Crunch*, 13 CORNELL J.L. & PUB. POL'Y 615, 627–28 (2004) ("While at least one circuit court decision has suggested that independent liability may exist under the ADA for a party who fails to participate in the interactive process, most courts hold that liability will arise only where an employer has failed to implement a reasonable accommodation that would enable a disabled employee to perform adequately in the workplace. Taking a somewhat different tack, a growing number of circuit courts have ruled that an employer's failure to engage in the interactive process ordinarily should warrant a trial court's refusal to grant an employer's motion for summary judgment." (footnote omitted)).

> preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.[159]

1. The Benefits of an Interactive Process

A requirement that an employer participate in an interactive process in good faith with the risk that failure to participate will result in independent liability could potentially decrease litigation,[160] benefit employers financially,[161] and reinforce the notion that society needs to change, not the individual with a disability.

A mandated interactive process would allow employees to determine what kind of accommodations an employer could provide.[162] In turn, the employee would have the opportunity to suggest alternatives, which might be less costly for the employer.[163] Along the same lines, an employer could "overestimate the costs of an accommodation without input from the employee."[164] Furthermore, "the interactive process has many of the same benefits as mediated settlements; it is 'cheaper than litigation, [and] can help preserve confidentiality, allow the employee to stay on the job, and avoid monetary damages for an employer's initially hostile responses to requests for accommodations.'"[165]

Finally, mandating an interactive process would reinforce the idea that society needs to change because it requires slightly more from an employer. For people with disabilities to be truly given an equal opportunity to succeed in the workplace and beyond, the goal should continue to be integrating individuals with disabilities into society as much as possible.

2. The Kind of Interactive Process to Mandate

The Third Circuit requires participation in the interactive process.[166] To prove that an employer violated the requirement to participate, the Third Circuit provides that a plaintiff needs to show:

> "(1) the employer knew about the employee's disability; (2) the employee requested accommodations or assistance for his or her disability; (3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and (4) the employee could

159. Valderrama, *supra* note 3, at 208.
160. *See id.* at 206.
161. *See id.*
162. *See id.*
163. *See id.*
164. *Id.* (footnote omitted) (quoting Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79, 154 (2003)) (internal quotation mark omitted).
165. *Id.* (alteration in original) (quoting Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 316 n.6 (3d Cir. 1999)).
166. *Taylor*, 184 F.3d at 317.

have been reasonably accommodated" had the employer made a good faith effort to do so.[167]

The interactive process should focus less on whether a reasonable accommodation existed and more on whether the employer made a good faith effort to discuss with the employee the essential job functions.[168] Additionally, the employee should not be required to request an accommodation in order to trigger a required interactive process.

a. An Employer Should Communicate with the Employee About the Essential Job Functions

The determination of whether an employee could be reasonably accommodated depends on the essential functions of the job. If the employer does not communicate these functions to the employee, then it is unfair to protect an employer from liability when no reasonable accommodation could have been provided because, in some cases, the essential functions of the job are decided only after a claim is brought.

The facts from *Picture People* exemplify this unfairness. The employer clearly knew about Jessica's disability, and Jessica asked for a reasonable accommodation by requesting an ASL interpreter. At this point, an interactive process should have occurred, in which the employer could have articulated to Jessica that verbal communication was an essential function of the job of performer and that there was no reasonable accommodation available. However, no interactive process occurred, and the verbal communication essential job function was only declared after the plaintiff filed her claim. As a result, before the claim was filed, the plaintiff did not know what the essential functions of her job were and thus could not know whether a reasonable accommodation existed. Additionally, it seems that Picture People decided that verbal communication was an essential job function *after* Jessica brought her claim. Had Jessica claimed that Picture People should have been liable because it did not in good faith participate in an interactive process, Jessica would have been awarded no remedy because no reasonable accommodation was available. This result is unfair given that Jessica did not know while employed what the essential functions of her job were, or consequently, whether a reasonable accommodation would have allowed her to perform those essential functions.

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167. Valderrama, *supra* note 3, at 209 (quoting Taylor v. Phoenixville Sch. Dist., 174 F.3d 142, 165 (3d Cir. 1999), *vacated on reh'g on other grounds*, 184 F.3d 296 (1999).

168. These two inquiries (whether a reasonable accommodation exists and whether an employee can perform the essential functions of a job) are separate inquires. 42 U.S.C. § 12111(8) (2012) ("The term 'qualified individual' means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.").

Therefore, an employee should not be required to show that she could have been reasonably accommodated unless the employer participated in an interactive process in which the essential functions of the job were discussed.

b. An Employee Should Not Have to Request a Reasonable Accommodation to Trigger the Interactive Process

If an employer knows or should know that an employee has a disability, the interactive process should take place regardless of whether the employee has requested a reasonable accommodation. It would be in both parties' best interest to discuss the essential functions of the job and what reasonable accommodations might be available.[169] Additionally, employees might not know that they can request accommodations. Employers are likely to know of their obligations due to licenses they obtain to do business in the state. Thus, there should be no obligation that an employee ask for reasonable accommodations to trigger the requirement for an interactive process.

c. What the Interactive Process Mandate Should Look Like

Although *Picture People* was not decided on the issue of a required interactive process, I believe that it should have. A plaintiff should prove the following elements to show that an employer violated the ADA requirement to participate in the interactive process: (1) the employer knew or should have known about the employee's disability; (2) the employer did not make a good faith effort to discuss with the employee the essential functions of the job and to assist the employee in seeking accommodations; and (3) the employee could have been reasonably accommodated had the employer made a good faith effort to do so. Thus, if an employer failed to communicate to the employee the essential functions of her job, the employer would be in violation of the ADA and would be independently liable.

By mandating an interactive process like the one described, employment discrimination claims brought under Title I of the ADA would focus more on how society can help stop discrimination against individuals with disabilities, rather than on the limitations of these individuals. This process would be more consistent with the goals of the ADA and would offer other benefits to both employees and employers; it could potentially avert subsequent lawsuits, saving employers the time and expense of litigation, and reinforce the notion that society needs to change, not the individual with a disability.

169. *See supra* notes 160–65 and accompanying text.

CONCLUSION

Picture People shows that the essential function requirement of the ADA could be used as a screening mechanism in employment discrimination cases based on disability. Permitting courts to systematically use this requirement to screen out cases would undermine the goals of the ADA. To prevent this outcome, the ADA should mandate that employers participate in an interactive process that focuses not only on reasonable accommodations but also on the essential job functions. This mandate would remove the focus from the real or perceived shortcomings of an individual with a disability, place the focus back onto society, and serve to better integrate individuals with disabilities into the workplace.

Amy Knapp[*]

* J.D. Candidate, 2014. I would like to thank the *Denver University Law Review* Board members and editors, as well as Professor Nicole B. Porter for her inspiring and insightful class, which led me to write this Comment. I also want to thank my friends and family, especially my parents, my sister, Kelley, and my brother, Brady, for their love and support.

ATKINS V. VIRGINIA: THE NEED FOR CONSISTENT SUBSTANTIVE AND PROCEDURAL APPLICATION OF THE BAN ON EXECUTING THE INTELLECTUALLY DISABLED*

ABSTRACT

In 2002, the Supreme Court changed the landscape of Eighth Amendment jurisprudence in deciding *Atkins v. Virginia*. In *Atkins*, the Court prohibited the execution of intellectually disabled individuals. In doing so, however, the Court provided the states with very little guidance and left the implementation of the ban to the discretion of the states. Providing the states such discretion has resulted in *Atkins* standards with inconsistencies in the following areas: (1) the definitional framework, (2) the definitional components, (3) the identity of the fact finder and the timing of the determination, and (4) the allocation of and standard for the burden of proof.

To highlight the inconsistencies in the *Atkins* standards among various states, this Comment will survey the *Atkins* standards in three of the Tenth Circuit states: Oklahoma, Colorado, and Kansas. This Comment will then examine how such inconsistency violates the Eighth Amendment and the doctrine of incorporation. To remedy these violations, it is vital that the states implement a consistent *Atkins* standard to implement the Supreme Court's ban on executing the intellectually disabled. Consequently, this Comment will sum up by recommending the standard that the states should implement. This recommendation provides a consistent standard and incorporates the mandates provided by the Supreme Court in *Atkins* along with mandates of the mental health sciences. Implementing this standard will allow the states to remedy the aforementioned constitutional violations and uphold the law laid down in *Atkins v. Virginia*.

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* There has been a recent trend in replacing the term "mental retardation" with "intellectual disability." *See, e.g.*, Robert L. Schalock et al., *The Renaming of Mental Retardation: Understanding the Change to the Term Intellectual Disability*, 45 INTELL. & DEVELOPMENTAL DISABILITIES 116, 116–17 (2007). Accordingly, this author has chosen to use the term "intellectually disabled" throughout this Comment despite the fact that the Supreme Court itself and much of the current legal literature uses the phrase "mental retardation."

INTRODUCTION

In *Atkins v. Virginia*,[1] a landmark Eighth Amendment case, the Supreme Court of the United States held that executing intellectually disabled defendants falls within the constitutional ban on cruel and unusual punishment.[2] In its opinion, however, the Court provided very little guid-

1. 536 U.S. 304 (2002).
2. *Id.* at 321. The Court explains that the Eighth Amendment prohibits categories of "excessive" sanctions and that the concept of excessiveness is to be determined by reference to society's

ance on how to define and enforce this new ban and instead left the task up to the states.[3] As a result, the *Atkins* standard has been applied inconsistently among the states allowing the death penalty.[4] These inconsistencies, discussed in Part II and III of this Comment, can be found in several areas, including the definitional framework for intellectual disability, the assessment of the components of the definition, the appropriate fact finder and timing for the intellectual disability determination made during an *Atkins* hearing, and the standard and allocation of the burden of proof.[5]

These inconsistencies, in turn, have lent themselves to two principal constitutional issues discussed in Part IV of this Comment. First, the inconsistent and arbitrary application of the *Atkins* standard among the states violates the Eighth Amendment due to the resultant unequal treatment of intellectually disabled defendants based solely on their state of residence. Second, for similar reasons, the inconsistent application of the standard also violates the doctrine of incorporation of the Bill of Rights.

These constitutional violations call for a remedy, and that remedy can be found in consistent use of the *Atkins* standard and procedures that this Comment recommends in Part V. The recommended standard for intellectual disability includes utilization of the definitional framework advocated by the American Association on Intellectual Disabilities (AAIDD) (formerly the American Association on Intellectual Disability) and its concomitant definitions of each component thereof. To ensure consistent application across the states, it is important to have a consistent procedure for implementing the *Atkins* ban. Accordingly, this Comment recommends that prior to trial, a judge make the intellectual disability determination. It is further recommended that defendants have the burden of proving that they are intellectually disabled by a preponderance of the evidence based on the findings of a qualified expert. Consistent utilization of this standard will remedy the constitutional violations posed by the various *Atkins* standards and will help to fairly and consistently implement the ban mandated by the *Atkins* Court.

I. *ATKINS V. VIRGINIA*: THE CREATION OF THE *ATKINS* STANDARD

In *Atkins*, defendant Daryl Atkins was tried and convicted of capital murder.[6] During the sentencing phase of trial, a forensic psychologist for the defense testified that based on interviews with Atkins's associates,

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"evolving standards of decency." *Id.* at 311–12 (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (internal quotation marks omitted).

3. *Id.* at 317.

4. Penny J. White, *Treated Differently in Life but Not in Death: The Execution of the Intellectually Disabled After* Atkins v. Virginia, 76 TENN. L REV. 685, 686 (2009).

5. *See* Peggy M. Tobolowsky, Atkins *Aftermath: Identifying Mentally Retarded Offenders and Excluding Them from Execution*, 30 J. LEGIS. 77 *passim* (2003).

6. *Atkins*, 536 U.S. at 307.

his school, medical, and court records, and an intellectual quotient (IQ) test, Atkins was "mildly"[7] intellectually disabled. The State then presented evidence from the trial record and from victim impact statements to prove Atkins's future dangerousness and the "vileness of the offense."[8] After deliberations, the jury chose to impose the death penalty on Atkins.[9] Due to errors in the verdict form, however, the Supreme Court of Virginia ordered a second sentencing hearing.[10] At that hearing, the State put on its own rebuttal expert (apart from the original defense expert), who testified that Atkins was of "average intelligence, at least."[11] Again, the jury chose to impose the death penalty.[12] Relying on the Supreme Court precedent of *Penry v. Lynaugh*,[13] the Supreme Court of Virginia upheld the sentence.[14] Atkins appealed to the Supreme Court of the United States and due to "the dramatic shift in the state legislative landscape" since the *Penry* decision, the Court granted certiorari.[15]

In its decision on the merits, the Court held that executing intellectually disabled offenders violates the Eighth Amendment.[16] At the outset, it noted that Eighth Amendment jurisprudence depends on society's "evolving standards of decency."[17] With that in mind, the Court began by surveying the various state legislative declarations concerning execution of intellectually disabled offenders.[18] Because over thirty-four states had enacted legislation either exempting intellectually disabled criminals from the death penalty or eliminating the death penalty entirely since the *Penry* decision, the Court surmised that modern society now viewed intellectually disabled offenders as "categorically less culpable" than other criminals.[19] Consequently, the Court concluded that a national consensus had developed against the execution of intellectually disabled offenders.[20]

In considering the issue, the Court utilized the AAIDD's definition of "intellectual disability": subaverage intellectual functioning, significant limitations in adaptive skills, and onset prior to the age of eighteen.[21] It listed a number of characteristics often associated with this defi-

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7. *Id.* at 308.
8. *Id.*
9. *Id.* at 309.
10. *Id.*
11. *Id.*
12. *Id.*
13. 492 U.S. 302, 335 (1989) (holding that the Eighth Amendment does not categorically ban the execution of intellectually disabled offenders).
14. *Atkins*, 536 U.S. at 310.
15. *Id.*
16. *Id.* at 316.
17. *Id.* at 311–12 (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (internal quotation marks omitted).
18. *Id.* at 318.
19. *Id.* at 316.
20. *See id.*
21. *Id.* at 318. Note that the *Atkins* Court used the term "mental retardation."

nition, including diminished capacity for processing information, communicating, abstracting and learning from mistakes, engaging in logical reasoning, controlling impulses, and understanding the reactions of others.[22] The Court stated that such characteristics negated the major purposes underlying imposition of the death penalty—retribution and deterrence. [23] The Court reasoned that the national consensus that had developed likely reflected the judgment that the characteristics accompanying intellectual disability made intellectually disabled offenders less culpable and consequently less deserving of retribution.[24] Similarly, these same characteristics made it less likely that intellectually disabled offenders consider the potential for execution when carrying out crimes, thereby negating the death penalty's deterrent effect.[25] The Court further opined that these characteristics might also undermine the procedural safeguards inherent in capital proceedings because intellectually disabled offenders may be less able to assist their lawyers, act as good witnesses, or appear to juries to have remorse for their crimes.[26] Consequently, the Court held that the execution of intellectually disabled offenders violates the Eighth Amendment.[27] However, it left open to the states the task of properly defining the scope of and enforcing this new prohibition.[28]

II. INCONSISTENCIES AMONG THE STATES

Because of the Supreme Court's deference to the states in defining and implementing the ban on intellectually disabled offenders, different standards have arisen. These inconsistencies can be divided into four general categories: the definitional framework, the assessment of the definitional components, the fact finder and timing for the intellectual disability determination, and the standard and allocation of the burden of proof. Variations in each area will be reviewed in turn.

A. Inconsistencies in the Definitional Framework

In general, states have utilized three definitional frameworks in defining "intellectual disability": the AAIDD's definition, the American Psychological Association's definition, and state-created definitions. The most common of these definitions, and the one referred to in the *Atkins* case,[29] is the definition provided by the AAIDD.[30] The AAIDD defines "intellectual disability" as a "disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as ex-

22. *Id.*
23. *Id.* at 319.
24. *Id.*
25. *Id.*
26. *Id.* at 316–317.
27. *Id.* at 316.
28. *Id.* at 317.
29. *Id.* at 318.
30. Tobolowsky, *supra* note 5, at 87–89.

pressed in conceptual, social, and practical adaptive skills. This disability originates before age 18."[31] This definition can be broken into three distinct components: (1) the "intellectual functioning" component, (2) the "adaptive behavior" or "adaptive functioning" component, and (3) the manifestation during the developmental period (commonly referred to as "early onset") component.[32] According to the AAIDD, the intellectual functioning component includes characteristics such as learning, reasoning, and problem solving.[33] The AAIDD states that an IQ score of two standard deviations below the mean for the IQ test used is the upper threshold for meeting the intellectual functioning component.[34] The adaptive behavior component requires limitations in the following three skill sets: conceptual, social, and practical skills.[35] A score of two standard deviations below the mean for the adaptive behavioral assessment used qualifies an individual as having limitations in adaptive functioning.[36] The early onset component requires that the disability originate before the age of eighteen.[37]

Other states choose to follow the similar three-pronged definition from the American Psychiatric Association (APA).[38] The APA's current definition, included in the Diagnostic and Statistical Manual IV (DSM-IV), is as follows:

> A. Significantly subaverage intellectual functioning: an IQ of approximately 70 or below[39] on an individually administered IQ test.
>
> B. Concurrent deficits or impairments in present adaptive functioning (i.e., the person's effectiveness in meeting the standards expected for his or her age by his or her cultural group) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.
>
> C. The onset is before age 18 years.[40]

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31. *Frequently Asked Questions on Intellectual Disability and the AAIDD Definition*, AM. ASS'N ON INTELL. & DEVELOPMENTAL DISABILITIES 1 (Jan. 2008), http://www.aaidd.org/media/PDFs/AAIDDFAQonID.pdf [hereinafter *AAIDD Definition*].

32. *See* Tobolowsky, *supra* note 5, at 87, 89.

33. *AAIDD Definition*, *supra* note 31, at 2.

34. *Id.* (noting that generally a score two standard deviations below the mean will fall in the range of a score of 70 to 75 depending on the IQ test used).

35. *Id.*

36. *Intellectual Disability: Definition, Classification, and Systems of Support*, AM. ASS'N ON INTELL. & DEVELOPMENTAL DISABILITIES 20 (2010), http://www.aaidd.org/media/PDFs/CoreSlide.pdf [hereinafter *Intellectual Disability*].

37. *AAIDD Definition*, *supra* note 31.

38. *See* Tobolowsky, *supra* note 5, at 88.

39. The word "approximately" in the definition indicates that a score of 70 is an approximation of a score that is two standard deviations below the mean for the IQ test being used. Richard J. Bonnie, *The American Psychiatric Association's Resource Document on Mental Retardation and Capital Sentencing: Implementing* Atkins v. Virginia, 32 J. AM. ACAD. PSYCHIATRY & LAW 304, 306 (2004).

The APA definition also categorizes an individual's level of intellectual disability based on IQ score into one of the following categories: mild, moderate, severe, and profound.[41]

Generally, states use either the AAIDD's or the APA's definition of "intellectual disability" due to the clinical nature of each.[42] However, despite the general similarities between the two definitions, obvious differences exist. For example, the APA sets an approximate cutoff score, whereas the AAIDD allows for a wider variation of scores depending on the IQ test used. Furthermore, the two definitions differ as to the adaptive functioning areas in which an individual must have behavioral limitations to be deemed intellectually disabled. Consequently, utilization of the different definitions results in states measuring the intellectual functioning component and defining the adaptive functioning component in divergent manners.[43]

In a wholly separate category are states that adopt their own independent definitions of "intellectual disability." Some of these states adopt terms from the AAIDD or APA definitions and then rely on judicial interpretation to fill in the meanings of those terms.[44] For example, California defines "intellectual disability" as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18."[45] The lack of further definition requires judicial interpretation of the meaning of each definitional component. Other states define "intellectual disability" as at or below a certain IQ score and then shift the burden to the prosecution to prove the defendant is not intellectually disabled.[46] For example, Illinois's criminal procedure statute provides for a presumption of intellectual disability when an individual scores 75 or below on an IQ test.[47] Although the statute also requires concurrent deficits in adaptive behavior, the presumption accompanying the IQ score causes the adaptive behavior component to carry far less weight because the presumption automatically shifts the burden of proof to the other side.

B. Inconsistencies in the Assessment of the Definitional Component

In addition to variations in the definitional framework of the intellectual disability standard, states vary in how they define and assess each

40. ROBERT L. SPITZER ET AL., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS CASEBOOK 366 (4th ed. 1994).

41. *Id.* at 549.

42. Tobolowsky, *supra* note 5, at 92.

43. *Id.* at 92–93.

44. Brooke Amos, Note, Atkins v. Virginia*: Analyzing the Correct Standard and Examination Practices to Use When Determining Mental Retardation*, 14 J. GENDER RACE & JUST. 469, 482 (2011).

45. CAL. PENAL CODE § 1376(a) (West 2012).

46. *See* Amos, *supra* note 44.

47. 725 ILL. COMP. STAT. § 5/114-15 (West 2012).

component of the "intellectual disability" definition. Because the three-pronged clinical definition is the most popular,[48] only variations in assessment of that definition's components will be analyzed. First, states vary widely in the instrument they use to measure intellectual functioning. Second, states vary in how adaptive behavior limitations are assessed, especially due to the varying definitions of this component. Third, states differ in how they determine whether an individual's intellectual disability originated prior to eighteen years of age.

Although states widely agree that the intellectual functioning component should be measured by a standardized IQ test,[49] the options for such a test are many. Some of these variations include the Wechsler Adult Intelligence Scale (assessing verbal comprehension, perceptual reasoning, working memory, and processing speed),[50] the Stanford–Binet Intelligence Scale (assessing verbal reasoning, quantitative reasoning, and short-term memory),[51] the Kaufman Adolescent and Adult Intelligence Test (assessing sequential reasoning, induction, long-term memory, word knowledge and language development, language comprehension, listening ability, visual processing, cultural knowledge, and delayed memory),[52] and the Cognitive Assessment System (assessing planning, attention, integration of separate stimuli, and the ability to serially order things).[53] Although each test purports to measure intelligence, each does so on a different basis. The consequences of this divergence become apparent when considering that the scientific community generally agrees that intellectually disabled individuals have limitations that exist concurrently with their strengths.[54] Consequently, one test might highlight an individual's strengths, whereas another test might highlight that same individual's weaknesses and therefore provide a vastly different score.[55] These discrepancies could mean the difference between being classified as intellectually disabled or not and consequently being spared or sentenced to death.[56]

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48. Tobolowsky, *supra* note 5, at 87, 89.

49. Amos, *supra* note 44, at 490.

50. John Fabian et al., *Life, Death and IQ: It's Much More than Just a Score: Understanding and Utilizing Forensic Psychological and Neuropsychological Evaluations in* Atkins *Intellectual Disability/Mental Retardation Cases*, 59 CLEV. ST. L. REV. 399, 406 (2011).

51. Richard Bonnie & Katherine Gustafson, *The Challenge of Implementing* Atkins v. Virginia*: How Legislatures and Courts Can Promote Accurate Assessments and Adjudication of Mental Retardation in Death Penalty Cases*, 41 U. RICH. L. REV. 811, 827 (2007).

52. *Kaufman Adolescent and Adult Intelligence Test*, ENCYCLOPEDIA MENTAL DISORDERS, http://www.minddisorders.com/Kau-Nu/Kaufman-Adolescent-and-Adult-Intelligence-Test.html#ixzz29xNOC4bW (last visited Feb. 24, 2013).

53. ESTHER STRAUSS ET AL., A COMPENDIUM OF NEUROPSYCHOLOGICAL TESTS: ADMINISTRATION, NORMS, AND COMMENTARY 133 (3d ed. 2006).

54. *AAIDD Definition*, *supra* note 31.

55. *See* Fabian et al., *supra* note 50, at 414 (explaining that test scores are not expected to be the same across different tests).

56. *See infra* Part II.D.

Variations in assessing the adaptive behavior component are even greater than those in assessing intellectual functioning due to the adaptive behavior component's relatively new addition to the scientific definition of "intellectual disability."[57] Consequently, over 200 different assessments of adaptive behavior currently exist.[58] Typical adaptive behavior assessments involve mental health professionals interviewing or providing questionnaires to third parties, such as teachers and parents, who are involved in an intellectually disabled individual's life.[59] Some of these tests depend solely on accounts provided by third parties such as caregivers, some depend on a wider variety of third-party accounts, and some incorporate observation of the individual being assessed.[60] The existence of these divergent approaches to assessment of the adaptive behavior component highlights the lack of one uniform and reliable method and the consequent need to choose an assessment with proven scientific reliability and validity.[61]

Despite its seemingly clear definition, the early onset component of intellectual disability is also measured in varied ways. Measurement can include diagnoses made before the age of eighteen, IQ tests administered before the age of eighteen, or any variety of evidence indicating the onset of intellectual disability prior to the age of eighteen.[62] Allowing for various forms of evidence to indicate the onset of intellectual disability prior to eighteen is appropriate because problems can arise when states require formal diagnoses or test results from before an individual turned eighteen.[63] Such requirements can result in discrimination against persons whose mental health needs were not appropriately addressed during their adolescence.[64] For example, some intellectually disabled offenders may not have had adequate access to mental health services as a child, resulting in their mental health needs being overlooked.[65]

C. Inconsistencies in the Identity of the Fact Finder and the Timing of the Determination

In addition to these definitional variances, states differ as to who determines the existence of intellectual disability and when during the trial that determination is made. States may select the judge, the jury, or an expert to make the intellectual disability determination.[66] The *Atkins* determination is very similar to criminal competency and criminal insanity

57. Bonnie & Gustafson, *supra* note 51, at 846.
58. *Id.*
59. *Id.* at 847.
60. WILLIAM COOK, DETERMINING ELIGIBILITY FOR SERVICES TO PERSONS WITH DEVELOPMENTAL DISABILITIES IN MONTANA: A STAFF REFERENCE MANUAL 14–16 (5th ed. 2011).
61. Tobolowsky, *supra* note 5, at 97.
62. *See* Bonnie & Gustafson, *supra* note 51, at 855.
63. *Id.*
64. *Id.*
65. *See id.*
66. Tobolowsky, *supra* note 5, at 85; *see also* Amos, *supra* note 44, at 495.

determinations. Consequently, for purposes of determining the appropriate fact finder, this Comment will treat the role of the fact finder in *Atkins* determinations as identical to that in competency and insanity proceedings.[67] When a judge is used as the fact finder, the judge generally makes a pretrial determination during an *Atkins* proceeding about whether the facts presented by the party with the burden satisfy the relevant legal standard.[68] This, in turn, dictates how the ensuing prosecution will proceed.[69] For example, if the judge decides that the defendant is not intellectually disabled, then the prosecution will pursue a capital trial. On the other hand, when the jury acts as fact finder, the *Atkins* determination generally occurs after the guilt phase of trial.[70] Typically, the determination will involve some consideration of the individual's culpability in the charged crime.[71] Finally, when the court selects and utilizes an expert as fact finder, the expert can acts as a neutral party wholly separate from the adversarial process.[72] The experts make their determinations based on their interpretations of facts relevant to diagnosing intellectual disability.[73] The experts then present their opinions via testimony as part of the defense's mitigation theories.[74]

D. Inconsistencies in the Allocation of and Standard for the Burden of Proof

The final area of inconsistency among the states is the allocation of and standard for the burden of proof at an *Atkins* hearing. States can allocate the burden of proof on either the defendant or the Government.[75] No states, however, have chosen to place the burden on the Government.[76] This procedural aspect therefore requires little discussion. On the other hand, states do vary in the standard they impose for the burden of proof.[77] Three categories for this burden exist: (1) preponderance of the evidence, (2) clear and convincing proof, and (3) beyond a reasonable doubt.[78] Because states consistently allocate the burden to the defendant, oftentimes the standard alone will ultimately determine whether a de-

67. *See* Tobolowsky, *supra* note 5, at 105.

68. *Id.* at 106. Alternatively, a judge may make the intellectual disability determination during the sentencing phase of trial. However, if a defendant is determined pre-trial not to be intellectually disabled, a less involved sentencing phase may be required. Therefore, generally the judge will make the determination during the pre-trial phase to increase judicial efficiency. *See id.* at 105–06, 110.

69. *Id.* at 105.

70. *See id.*

71. *Id.*

72. Amos, *supra* note 44, at 495.

73. *Id.*

74. *See* Bonnie & Gustafson, *supra* note 51, at 857.

75. Tobolowsky, *supra* note 5, at 114.

76. *See id.* at 118.

77. Justin Marceau, *Un-Incorporating the Bill of Rights: The Tension Between the Fourteenth Amendment and the Federalism Concerns that Underlie Modern Criminal Procedure Reforms*, 98 J. CRIM. L. & CRIMINOLOGY 1231, 1289–90 (2008).

78. *Id.*

fendant is found intellectually disabled.[79] A defendant who could be found intellectually disabled in a state whose burden is preponderance of the evidence may not be found intellectually disabled in a state whose burden is beyond a reasonable doubt. This disparity exemplifies the inconsistency resulting from differing burdens of proof among the states.[80]

III. INCONSISTENCIES IN THE *ATKINS* STANDARD IN THE TENTH CIRCUIT

Because of these discrepancies among the states, modern death penalty jurisprudence regarding the prohibition on executing the intellectually disabled has proven incapable of producing a consistent standard.[81] This lack of consistency is exemplified by surveying the *Atkins* standards applied in some of the state trial courts comprising the Tenth Circuit. A comparison of the standards in Oklahoma, Colorado, and Kansas is telling. In Oklahoma, the relevant standard utilizes the three-pronged clinical definition but adds a requirement that the defendant have an IQ of no more than 70.[82] Colorado also adheres to the three-pronged definition, and although it does not implement additional requirements as Oklahoma does, it does not provide any definitional guidance as to each of the three prongs.[83] Conversely, Kansas's utilization of the three-pronged standard includes precise definitional components and implements a precondition[84] that defendants must meet before they can even attempt to prove their intellectual disability.[85] A detailed comparison of the *Atkins* standard in these three states follows. This comparison shows that even among states adhering to the three-pronged definition, wide variation abounds regarding the definitions and processes by which these states implement the *Atkins* ban.

A. Oklahoma

Application of the *Atkins* standard in Oklahoma is exemplified in the recent Tenth Circuit case of *Hooks v. Workman*,[86] in which an *Atkins* hearing resulted in a determination that the defendant was not intellectually disabled.[87] In *Hooks*, the defendant was convicted of first-degree murder and first-degree manslaughter for the beating death of his preg-

79. *Id.* at 1289.

80. *Id.* at 1289–90.

81. Lyn Entzeroth, *The Challenge and Dilemma of Charting a Course to Constitutionally Protect the Severely Mentally Ill Capital Defendant from the Death Penalty*, 44 AKRON L. REV. 529, 578 (2011).

82. Murphy v. State, 54 P.3d 556, 567–68 (Okla. Crim. App. 2003), *overruled on other grounds by* Blonner v. State, 127 P.3d 1135 (Okla. Crim. App. 2006).

83. *See* COLO. REV. STAT. § 18-1.3-1101 (2012).

84. *See* KAN. STAT. ANN. § 21-6622 (2012) (requiring the court to determine that there is "sufficient reason to believe" that the defendant has an intellectual disability prior to allowing an *Atkins* proceeding).

85. *Id.*; KAN. STAT. ANN. § 76-12b01 (2012).

86. 689 F.3d 1148 (10th Cir. 2012).

87. *Id.* at 1173.

nant common law wife.[88] At the defendant's *Atkins* hearing, both parties agreed that the defendant's disabilities had manifested themselves before the age of eighteen but disagreed as to whether the defendant had limitations in his intellectual and adaptive functioning.[89] At the *Atkins* hearing, nine IQ tests taken over a thirty-four-year period were presented to the jury with scores ranging from 53 to 80.[90] The jury also heard evidence about the defendant's limited functioning in the adaptive skill areas of communication and academics.[91] Considering the range of IQ scores and the strengths the defendant had in other areas of adaptive functioning, the jury concluded that the defendant had not proven his intellectual disability by a preponderance of the evidence and his conviction was upheld.[92]

Thereafter, the defendant filed two habeas petitions, addressing, among other matters, the shortcomings of the procedure and result of his *Atkins* hearing.[93] The defendant claimed that despite the jury's finding, he had proven with sufficient evidence that he was intellectually disabled based on his IQ scores and his limitations in two areas of adaptive functioning.[94]

To resolve the defendant's sufficiency challenge and determine whether the lower court had reasonably applied *Atkins*, the Tenth Circuit began by reciting Oklahoma's *Atkins* standard as laid out in *Murphy v. State*.[95] The *Murphy* court held that a defendant is intellectually disabled if he or she has significantly subaverage intellectual functioning, the intellectual disability manifested prior to the age of eighteen, and the defendant concurrently suffers from significant limitations in adaptive functioning.[96] The *Murphy* court provided a list of areas in which the limitations of the defendant's intellectual functioning must be apparent and a list of nine skill areas in which limitations in adaptive functioning could be manifest.[97] These limitations can be proven through IQ tests, along with other evidence.[98] The court held that defendants must establish their intellectual disability by a preponderance of the evidence during trial.[99] The court also imposed a precondition that a defendant must have an IQ of no greater than 70 to even be allowed an *Atkins* hearing.[100]

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88. *Id.* at 1161.
89. *Id.* at 1167.
90. *Id.* at 1168.
91. *See id.* at 1171.
92. *See id.* at 1171.
93. *Id.* at 1161–62.
94. *See id.* at 1164.
95. 54 P.3d 556, 567–68 (Okla. Crim. App. 2002), *overruled on other grounds by* Blonner v. State, 127 P.3d 1135 (Okla. Crim. App. 2006).
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 658.
100. *Id.*

In considering whether the defendant had presented sufficient evidence to meet the intellectual functioning prong of this test, the Tenth Circuit agreed with the lower court's reasoning that the lower IQ scores reflected Hooks's refusal to cooperate during a period of trauma in his life rather than limitations in intellectual functioning.[101] The two test scores that the lower court found reliable included a 72 and a 76.[102] The court held that because these scores fell above the threshold score of 70 required by *Murphy*, a rational trier of fact could have found that the defendant was not eligible to be considered intellectually disabled and that the court had not unreasonably applied *Atkins*.[103]

The court then moved on to consider whether the defendant presented sufficient evidence to meet the significant limitations in the adaptive functioning prong.[104] Contrary to the defendant's argument, and noting that the Supreme Court had left "the precise contours of the definition" to the states, the court reasoned that it was not necessary to focus on the defendant's limitations at the exclusion of his strengths.[105] After listing various evidence regarding Hooks' strengths in many of the adaptive functioning skill sets, the court concluded that a rational fact finder could have found that Hooks did not satisfy this prong of the test.[106] The court also reasoned that all of the evidence presented by the defendant regarding his adaptive functioning had come from witness testimony and therefore should be appraised based on witness credibility.[107] It cited the rational fact finder standard as further reason to deny the defendant's sufficiency of the evidence challenge and to find that the lower court had reasonably applied the *Atkins* standard.[108]

B. Colorado

The application of the *Atkins* standard in Oklahoma can be contrasted with that in Oklahoma's Tenth Circuit sister state of Colorado. The Colorado Supreme Court upheld the constitutionality of Colorado's statute banning the execution of intellectually disabled defendants in *People v. Vasquez*.[109] In *Vasquez*, the defendant, Jimmy Vasquez, was charged with first-degree murder.[110] He filed a motion indicating his intent to establish that he was intellectually disabled, and subsequently asked the court to find Colorado's *Atkins* statute unconstitutional because it re-

101. Hooks v. Workman, 689 F.3d 1148, 1168 (10th Cir. 2012).
102. *Id.*
103. *Id.*
104. *Id.* at 1171.
105. *Id.* at 1171–72.
106. *Id.* at 1172–73.
107. *Id.* at 1173.
108. *Id.*
109. 84 P.3d 1019, 1020–21 (Colo. 2004).
110. *Id.* at 1020.

quired defendants to prove their intellectual disability by clear and convincing evidence.[111]

The Colorado Supreme Court began its analysis by referencing Colorado's statute banning the execution of intellectually disabled individuals.[112] The statute defines "intellectually disabled defendant" as "any defendant with significantly subaverage general intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested and documented during the developmental period."[113] The statute also requires that the intellectual disability determination be made prior to trial and that the defendant have the burden of proving his intellectual disability by clear and convincing evidence.[114] Because of the timing of the determination, the statute designates the court as the fact finder.[115] Regarding the intellectual functioning and adaptive behavior evaluations themselves, the statute also requires that if more than one evaluation is ordered, at least one must be performed by a psychologist recommended by the executive director of the Department of Human Services.[116] The statute allows for evidence of statements made by the defendant, of the circumstances surrounding the commission of the crime, and of the defendant's medical and social history to be included in the evaluation.[117]

After its review of the relevant intellectual disability standard, the court reviewed the *Atkins* decision and noted that it implemented a substantive, rather than procedural, rule.[118] The Colorado Supreme Court then held that both the allocation of the burden and the burden itself were constitutional because *Atkins* had left it up to the states to determine how to implement the ban and nothing in *Atkins* bars a state from enacting a process by which to exclude intellectually disabled defendants from capital punishment.[119]

C. Kansas

The *Atkins* standard implemented in Oklahoma and Colorado contrasts sharply with the *Atkins* standard implemented in Kansas. According to Kansas's relevant statutory scheme, when defendants wish to establish that they are intellectually disabled, the court must initially determine whether there is sufficient evidence to believe that the defendant

111. *Id.*
112. *Id.* at 1021.
113. COLO. REV. STAT. § 18-1.3-1101(2) (2012). Note that the statute uses the term "mentally retarded defendant."
114. *Id.* § 18-1.3-1102.
115. *Id.*
116. *Id.* § 18-1.3-1104.
117. *Id.*
118. People v. Vasquez, 84 P.3d 1019, 1022 (Colo. 2004).
119. *Id.* at 1021.

is intellectually disabled.[120] If the court finds evidence for this belief, in order to make its final determination, the court must appoint two professionals to perform an evaluation on the defendant: either two psychologists, two physicians, or one of each.[121] The professionals must be "qualified by training and practice" in order to be appointed by the court.[122]

The Kansas statutory scheme defines "intellectual disability" as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from birth to age 18."[123] The statute requires that the defendant have significant subaverage general intellectual functioning "to an extent which substantially impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law."[124] For defendants to fulfill the subaverage intellectual functioning prong of the test, they must score at least two standard deviations below the mean score on a standardized test that is specified by the secretary of social and rehabilitation services.[125] The statute also provides a definition of "adaptive behavior": "the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of that person's age, cultural group and community."[126] At the *Atkins* hearing, defendants may present any evidence they wish to convince the judge that they are intellectually disabled.[127]

D. Comparison of the Tenth Circuit States

To further highlight the inconsistent ways in which the *Atkins* standard is applied among the states, Table 1 below presents a side-by-side comparison of the three Tenth Circuit states just discussed. For each state, the table compares the definitional framework, the assessment of the definitional components, the fact finder and timing for the determination, the allocation of and standard for the burden of proof, and types of evidence allowed in an *Atkins* hearing. The comparison presented by the table highlights the obvious lack of a consistent *Atkins* standard.

120. KAN. STAT. ANN. § 21-6622 (2012).
121. *Id.*
122. *Id.*
123. KAN. STAT. ANN. § 76-12b01 (2012).
124. *Id.* § 21-6622.
125. *Id.* § 76-12b01.
126. *Id.*
127. *Id.* § 21-6622.

Table 1. Comparison of *Atkins* Standards Among Selected Tenth Circuit States

	Oklahoma	Colorado	Kansas
Definitional Framework	• *Pre-condition:* Defendant must have an IQ of no greater than 70 • Significantly subaverage intellectual functioning • Manifestation prior to the age of eighteen • Concurrent suffering from significant limitations in adaptive functioning (consisting of nine skill areas)	• Significantly subaverage general intellectual functioning • Concurrent existence with substantial deficits in adaptive behavior • Manifested and documented during the developmental period	• *Pre-condition:* Sufficient reason to believe that the defendant is intellectually disabled • Significantly subaverage general intellectual functioning that significantly impairs the defendant's capacity to appreciate the criminality of his or her conduct • Deficits in adaptive behavior • Manifestation during the period from birth to 18
Assessment of the Definitional Components	• IQ tests may be used, but there is no guidance as to which are acceptable	• No guidance provided	• The defendant must score two standard deviations below the mean on a standardized test specified by the secretary of social and rehabilitation services
Fact Finder and Timing for the Determination	• *Timing: Atkins* trial prior to guilt trial • *Fact finder:* Not specified	• *Timing:* Prior to trial • *Fact finder:* Judge	• No guidance provided
Allocation of and Standard for Burden of Proof	• Preponderance of the evidence on the defendant	• Clear and convincing evidence on the defendant	• No guidance provided

	Oklahoma	Colorado	Kansas
Allowable Types of Evidence	• IQ tests and other evidence	• Statements made by the defendant • Circumstances surrounding the crime • Defendant's medical and social history • One evaluation must be performed by a psychologist recommended by the executive director of the department of human services	• Court must appoint two mental health officials, qualified by training and experience, to conduct an evaluation of the defendant

Source: COLO. REV. STAT. § 18-1.3-1101, -1102, -1104 (2012); KAN. STAT. ANN. §§ 21-6622, 76-12b01 (2012); Murphy v. State, 54 P.3d 556, 567–68 (Okla. Crim. App. 2002).

IV. CONSTITUTIONAL ISSUES ARISING FROM INCONSISTENT *ATKINS* STANDARDS

The inconsistencies among states in the application of the *Atkins* standard lend themselves to a number of constitutional issues. These issues stem from the fact that the Supreme Court left it to state discretion to decide how to define and implement the *Atkins* ban. This decision, and the consequent varying standards that states have promulgated since, lead to violations in two areas of the Constitution: the Eighth Amendment and the incorporation doctrine.

A. Eighth Amendment Issues

Ironically, although *Atkins* was intended to remedy violations of the Eighth Amendment in light of "evolving standards of decency,"[128] the fact that the Court deferred to the states the decision about how to implement the new ban has resulted in a different violation of the Eighth Amendment: arbitrariness. In *Furman v. Georgia*,[129] the Supreme Court held in a plurality opinion that an arbitrarily applied punishment falls into the category of "cruel and unusual punishment."[130] Justice Douglas, in concurrence, reasoned that the Eighth Amendment's predecessor in the English Bill of Rights was aimed at preventing "selective or irregular

128. Atkins v. Virginia, 536 U.S. 304, 321 (2002).
129. 408 U.S. 238 (1972).
130. *Id.* at 239–40.

application of harsh penalties."[131] He noted that this now contemporary recognition of "the basic theme of equal protection" implicit in the Eighth Amendment is violated when a punishment is applied arbitrarily or discriminatorily.[132] As aptly stated by Justice Stewart, "where the ultimate punishment of death is at issue[,] a system of standardless jury discretion violates the Eighth . . . Amendment[]."[133]

The Supreme Court left the *Atkins* decision vulnerable to arbitrary application in violation of the Eighth Amendment by deferring the definition and implementation processes to the states. By not providing a precise definition, process, or designated fact finder, the Court provided for an increased likelihood of arbitrary results.[134] When juries without backgrounds in psychology or health care are allowed to determine whether a defendant is intellectually disabled, it is far more likely that extrinsic, individualized factors will weigh in their decisions, causing the decisions to be highly subjective and potentially baseless.[135] To be sure, these dangers are present in all capital murder cases; however, the dangers are especially apparent in *Atkins* hearings due to the clinical underpinnings of the *Atkins* standard.[136]

B. Doctrine of Incorporation Issues

The other constitutional issue brought about by the inconsistencies in the implementation of the *Atkins* standard involves violations of the doctrine of incorporation. The doctrine of incorporation refers to the process by which the fundamental rights provided in the Bill of Rights are applied to the individual states.[137] The doctrine places particular importance on the uniform application of the Bill of Rights across the several states, specifically prohibiting the states from applying "watered-down" versions of the rights.[138] This leaves almost no room for deference to the states when it comes to defining the incorporated rights.[139]

In *Robinson v. California*,[140] the Supreme Court noted that the Eighth Amendment's ban on cruel and unusual punishment was applicable to the states through the Due Process Clause of the Fourteenth Amendment.[141] According to the doctrine of incorporation, therefore, the Eighth Amendment must be applied "consistently and with equal force"

131. *Id.* at 242 (Douglas, J., concurring).
132. *Id.* at 249.
133. Gregg v. Georgia, 428 U.S. 153, 195 n. 47 (1976).
134. Amos, *supra* note 44, at 484.
135. *Id.* at 485.
136. *See id.* at 493.
137. Marceau, *supra* note 77, at 1242.
138. *Id.* at 1242–43 (quoting Mallory v. Hogan, 378 U.S. 1, 24 (1964) (internal quotation marks omitted).
139. *Id.*
140. 370 U.S. 660 (1962).
141. *Id.* at 675 (Douglas, J., concurring).

across the several states.[142] However, even a quick glance at the Tenth Circuit summary table shows that the *Atkins* ban has certainly not been applied in any consistent manner.[143] States vary in how they define, assess, and procedurally implement the ban. Such disparity directly violates the doctrine of incorporation.[144]

V. RECOMMENDATION FOR A CONSISTENT STANDARD

Constitutional concerns such as these justify the need for a consistent *Atkins* standard among the states. To comport with the mandates of the doctrine of incorporation, and to avoid further violation of the Eighth Amendment, there must be at least a minimum baseline level of consistency in the *Atkins* standard.[145] The most appropriate standard is one that takes account of three important considerations: the general guidelines provided by the Supreme Court in *Atkins*, current scientific research regarding the definition and diagnosis of intellectual disability,[146] and the mandates of the Constitution.[147] Implementation of the consistent standard recommended by this Comment will remedy the noted constitutional violations because those violations derive from the inconsistent application of the standard itself. Focusing on the remaining two considerations, the guidance of the *Atkins* court and the principles of science, will supply the needed consistent standard.

This Comment recommends the following: when implementing the *Atkins* ban, courts should adhere to the AAIDD definition of "intellectual disability" for both their definitional frameworks and for the definitions of the components of that framework. In regard to assessing the components of this definition, the intellectual functioning component should be assessed by either the Wechsler Adult Intelligence Scale (WAIS) or the Stanford–Binet Intelligence Scale (Stanford–Binet), the adaptive functioning component should be assessed by Scales of Independent Behavior (SIB-R), AAIDD Adaptive Behavior Scale (ABAS-II), or Inventory for Client and Agency Planning (ICAP), and the early onset component should be a holistic assessment. It is further recommended that procedurally the judge should make the intellectual disability determination prior to trial and defendants should bear the burden of proving intellectual disability by a preponderance of the evidence. Adherence to this standard

142. Marceau, *supra* note 77, at 1242.

143. *See supra* Part III.D.

144. Marceau, *supra* note 77, at 1292 ("These divergent standards as to a federal constitutional right are in tension with the general dictates of federal supremacy and the specific mandates of constitutional incorporation. There is simply no federal oversight, much less uniformity.").

145. *See id.* at 1302.

146. *See* Parham v. J.R., 442 U.S. 584, 609 (1979).

147. Use of a consistent standard in and of itself will ensure that the third consideration is met. Therefore, in justifying this Comment's various recommendations, only the other two considerations will be explicitly addressed.

will remedy the problems created by the current lack of a consistent standard.[148]

A. Recommended Definitional Framework: The AAIDD Definition

The AAIDD's definition of "intellectual disability" should be used consistently at all *Atkins* hearings. The *Atkins* decision supports the use of this definition. Although the Supreme Court in *Atkins* did not mandate a definition for use by the states, it did provide some general guidelines.[149] According to the Court, "clinical definitions of [intellectual disability] require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18."[150] In providing this definitional framework, the Court referenced two separate definitions—those of the AAIDD and the APA.[151] Although these two definitions are nearly the same in substance, the goals underlying each are different. The goal of the APA is to promote education, research, and patient care in the field of psychiatry.[152] The AAIDD's stated mission, on the other hand, is to "promote[] progressive policies, sound research, effective practices, and universal human rights for people with intellectual and developmental disabilities."[153] As a matter of policy and for the sake of consistency, the AAIDD's definition should be used because it incorporates evolving policy, research, practice, and human rights of the intellectually disabled, rather than the more general concern with the field of psychiatry found in the APA's definition. The underlying policies of the AAIDD also contribute to the alignment of the AAIDD definition with the guidance provided by the Supreme Court in *Atkins* and with the ever-evolving scientific standards behind intellectual disability. Consequently, this Comment recommends that the appropriate definitional framework for use in an *Atkins* hearing is as follows: (1) significantly subaverage intellectual functioning, (2) significant limitations in adaptive behavior, and (3) onset or origination before the age of eighteen.[154]

In keeping with the need for consistency, each component of the definitional framework should align with the well-developed corresponding AAIDD definition of the component. Accordingly, "subaverage intellectual functioning" should be defined as limitations in one's "general mental capability that include[] the ability to reason, solve problems, think abstractly, plan, and learn from experience, [and] comprehend[]

148. *See* Entzeroth, *supra* note 81, at 578.
149. Atkins v. Virginia, 536 U.S. 304, 318 (2002).
150. *Id.*
151. *Id.* at 308 n.3.
152. *About APA & Psychiatry*, AM. PSYCHIATRIC ASS'N, http://www.psychiatry.org/about-apa—psychiatry (last visited Jan. 25, 2013).
153. *Mission*, AM. ASS'N ON INTELL. & DEVELOPMENTAL DISABILITIES, http://www.aamr.org/content_443.cfm?navID=129 (last visited Jan. 25, 2013).
154. *AAIDD Definition*, *supra* note 31, at 5–6.

one's surroundings."[155] Subaverage intellectual functioning is reflected by a score at least two standard deviations below the mean score on the IQ test being used, taking into account the standard error of measurement for the test as well.[156] "Adaptive behavior" should be defined as performance in three categories of skill sets: conceptual skills,[157] social skills,[158] and practical skills.[159] Like subaverage intellectual functioning, limitations in adaptive behavior are also reflected by a score at least two standard deviations below the mean score on the behavioral assessment being used, taking into account the standard error of measurement for the assessment.[160] The AAIDD's definitions for these individual components align with the guidance provided by the *Atkins* Court and are based on the most up-to-date clinical science.

B. Recommended Assessment of the Definitional Components

Because the AAIDD provides a clinical definition of "intellectual disability," it is most appropriate to assess each component according to modern clinical research and standards.[161] This ensures utilization of the most modern science. It is important, however, to also align these clinical principles with the policy considerations behind the prohibition on executing the intellectually disabled, as noted by the *Atkins* Court.

1. Recommended Assessment of the Subaverage "Intellectual Functioning" Component

Choosing an assessment standard is complicated due to the various available options for IQ tests.[162] In deciding the appropriate test, one must seek to maintain consistency without mandating one single test because no test is one-size-fits-all.[163] In its manual, the AAIDD does provide some guidance as to what type of test is most appropriate by stating that "[u]ntil more robust instruments based upon one or more of the multifactorial theories of intellectual functioning are developed and demonstrated to be psychometrically sound, we will continue to rely on a

155. Amos, *supra* note 44, at 474 (quoting AM. ASS'N OF MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 55 (10th ed. 2002)) (internal quotation mark omitted).

156. *Intellectual Disability*, *supra* note 36, at 8.

157. Conceptual skills include language and literacy; money, time, and number concepts; and self-direction. *AAIDD Definition*, *supra* note 31, at 2.

158. Social skills include interpersonal skills, social responsibility, self-esteem, gullibility, naïveté (i.e., wariness), social problem solving, and the ability to follow rules or obey laws and to avoid being victimized. *Id.*

159. Practical skills include activities of daily living (personal care), occupational skills, healthcare, travel or transportation, schedules or routines, safety, use of money, and use of the telephone. *Id.*

160. *Intellectual Disability*, *supra* note 36.

161. *See* Bonnie & Gustafson, *supra* note 51, at 815–16.

162. *See supra* Part II.B.

163. Bonnie & Gustafson, *supra* note 51, at 827–28.

global (general factor) IQ as a measure of intellectual functioning."[164] Additionally, these tests should be generally accepted by the scientific community and utilize the most up-to-date diagnostic procedures.[165] Choosing tests that fit these standards will therefore satisfy the consideration of utilizing up-to-date scientific research and methods.

At the outset, it should be noted that due to the inclusion of defendants with mild intellectual disability in the *Atkins* prohibition,[166] the IQ test used must adequately include these individuals within the intellectual disability definition to comport with the guidance provided by the *Atkins* Court. Although there are many tests available, this Comment recommends that subaverage intellectual functioning be assessed using either the WAIS or the Stanford–Binet intelligence quotient test.

The WAIS is considered exceptionally reliable, valid, organized, and easy to use.[167] It measures vocabulary, arithmetic, and visual–spatial skills on both a verbal and performance basis.[168] Likewise, the Stanford–Binet is highly representative of the general population and is considered highly reliable overall.[169] It measures five different categories: fluid reasoning (the ability for complex problem solving), knowledge, quantitative reasoning (the ability to complete mathematical word problems), visual–spatial processing (interpretation of figures and diagrams), and working memory (short-term memory).[170] The test assesses these factors both verbally and non-verbally.[171] Both IQ tests, when used in their full form as they should be, utilize various subtests to create a composite IQ score based on a range of intellectual functioning components.[172] This comports with the guidance provided by the AAIDD. Furthermore, both of these tests are normed on the general population, thereby including individuals with intellectual capacities ranging from severely intellectually disabled to genius level.[173] Consequently, they sufficiently account for the *Atkins* Court's mandate that the definition of "intellectual disability" include those individuals with only mild intellectual disability who may not be accounted for in tests focusing only on more obviously intellectually disabled individuals.

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164. AAIDD AD HOC COMM. ON TERMINOLOGY & CLASSIFICATION, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION AND SYSTEMS OF SUPPORTS 41 (11th ed. 2010).

165. Bonnie & Gustafson, *supra* note 51, at 829–30.

166. *Id.* at 822.

167. Alexis K. Dowling, Comment, *Post-*Atkins *Problems with Enforcing the Supreme Court's Ban on Executing the Mentally Retarded*, 33 SETON HALL L. REV. 773, 799 (2003).

168. *Id.* at 798 n.230.

169. *Id.* at 800.

170. *Tips to Encounter a Stanford Binet IQ Test*, PERSONALITY-AND-APTITUDE-CAREER-TESTS.COM, http://www.personality-and-aptitude-career-tests.com/stanford-binet-iq-test.html (last visited Jan. 25, 2013).

171. *Id.*

172. *See id.*

173. Dowling, *supra* note 167, at 799–800.

To promote consistency and ensure that tests are not chosen arbitrarily, Virginia's model for available choices of IQ test should be utilized by all states. Virginia's statutory scheme "requires the Commissioner of Mental Health, Mental Retardation and Substance Abuse Services [to] maintain an 'exclusive list'" of appropriate tests for use in courts during *Atkins* hearings.[174] An analogous official in each state should be appointed or required to carry out this same responsibility. Initially, only the WAIS and Stanford–Binet should be included in such a list of tests. However, formalized procedures should be provided for any litigant wishing to add additional tests to this list.[175] Although the exact contours of such a procedure are beyond the scope of this Comment, the procedure should serve the dual purpose of providing a screening mechanism that would help ensure that only the highest quality tests are allowed into the courtroom and allowing the list to be updated as newer and more scientifically sound tests are produced.[176]

2. Recommended Assessment of the Limitations in "Adaptive Functioning" Component

Limitations in adaptive functioning should be assessed with one of the three following tests: the SIB-R, the ABAS-II, or the ICAP. As with IQ tests, an exclusive list of appropriate tests should be maintained by a designated authority, along with a formalized procedure for the addition of new tests to ensure that up-to-date science is being utilized.

The SIB-R, ABAS-II, and ICAP are the three most commonly used adaptive behavior assessments for adults.[177] The SIB-R is a comprehensive assessment that provides a score based on a combination of an individual's adaptive and maladaptive behaviors.[178] It measures these behaviors in the categories of motor skills, social interaction and communication skills, personal living skills, and community living skills.[179] The SIB-R can be administered either as a questionnaire or as a structured interview.[180] Developed by the AAIDD, the ABAS-II is used to assess how individuals cope with the demands of their natural and social environments.[181] The test can be administered in a school or in a community setting.[182] The ICAP is an assessment tool that, like the SIB-R, measures

174. Bonnie & Gustafson, *supra* note 51, at 832 (quoting VA. CODE ANN. § 19.2-264.3:1.1 (2012)).

175. *See id* at 832–33.

176. *See id.* at 833.

177. Brad Hill, *Adaptive and Maladaptive Behavior Scales*, ASSESSMENT PSYCH. ONLINE, http://www.assessmentpsychology.com/adaptivebehavior.htm (last updated Aug. 15, 2012).

178. *Id.*

179. *Scales of Independent Behavior—Revised*, NELSON EDUC., http://www.assess.nelson.com/test-ind/sib-r.html (last visited Feb. 1, 2013).

180. Hill, *supra* note 177.

181. *Id.*

182. *Id.*

an individual's adaptive and maladaptive behaviors.[183] It also takes into account an individual's demographics, diagnoses, support services, and leisure activities.[184] Each of these tests comport with the AAIDD's recommendation that adaptive behavior be assessed "through the use of standardized test measures normed on the general population, including people with disabilities and people without disabilities."[185] However, each of these tests also has drawbacks: the SIB-R does not incorporate observation of the individual being assessed, the ABAS-II is somewhat confusing and "unidimensional" because it only measures one dimension of behavior, and the ICAP is limited in scope due to its short length.[186]

However, the adaptive behavior component is a relatively new addition to the intellectual disability definition.[187] Consequently, new and improved adaptive behavior assessments are on the horizon. For example, in 2013 the AAIDD will release the Diagnostic Adaptive Behavior Scale, which will directly assess the skill sets included in the AAIDD's definition of "adaptive behavior."[188] This makes the recommendation for a formalized procedure for adding new tests especially important for adaptive behavior assessments. Some of the standards that should be included in this procedure include tests that consider each adaptive behavior skill set in the context of the individual's peer group, social environment, and cultural environment.[189] In addition, assessments must include third-party input from individuals who have regular, substantial contact with the defendant.[190] This procedure will ensure that the most modern and scientifically sound assessments are utilized to measure adaptive behavior for an *Atkins* hearing.

3. Recommended Assessment of the "Early Onset" Component

The onset of intellectual disability prior to the age of eighteen should be a holistic assessment. This means that as much information as possible should be gathered about the defendant's past adaptive behaviors and intellectual functioning.[191] This information can be gathered from an individual's past test scores, medical records, school records, juvenile court records, etc.[192] There is a general consensus among mental health organizations that intellectual disability need not be formally diagnosed before the age of eighteen, but rather that there be evidence

183. *Id.*
184. *Id.*
185. Bridget M. Doane & Karen L. Salekin, *Susceptibility of Current Adaptive Behavior Measures to Feigned Deficits*, 33 LAW & HUM. BEHAV. 329, 331 (2009).
186. *See* Hill, *supra* note 177.
187. Bonnie & Gustafson, *supra* note 51, at 846.
188. *Diagnostic Adaptive Behavior Scale*, AM. ASS'N ON INTELL. & DEVELOPMENTAL DISABILITIES, http://www.aaidd.org/content_106.cfm?navID=23 (last visited Feb. 26, 2013).
189. *Id.*
190. *See* Bonnie & Gustafson, *supra* note 51, at 847.
191. Fabian et al., *supra* note 50, at 410.
192. *Id.* at 408.

from sources such as these that it originated prior to that age.[193] Allowing for a variety of evidence is important because many defendants will not have a formal diagnosis of intellectual disability that occurred prior to the age of eighteen[194] and the mental health needs of many of these individuals are not properly met during their adolescence.[195] By allowing various forms of evidence to show early onset of intellectual disability, this recommendation will ensure that the *Atkins* ban is properly applied to individuals suffering from intellectual disability since adolescence, as the *Atkins* Court intended, regardless of the presence of a prior formal diagnosis.

4. Policy Considerations in the Assessment of Intellectual Disability

In addition to aligning with the guidance provided by the *Atkins* Court and keeping pace with current scientific standards, the above recommended definitions and assessments comport with the policy considerations noted by the *Atkins* Court when mandating the prohibition. In *Atkins*, the Supreme Court based part of its reasoning for the ban on the idea that the characteristics underlying the clinical definition of "intellectual disability" negate the purposes behind the death penalty: deterrence and retribution.[196] The Court explained that the goal of deterrence is only served in situations in which the crime at issue is the product of premeditation and deliberation.[197] However, the cognitive and behavioral impairments associated with IQ test scores two standards deviations below the mean, as the AAIDD and this Comment recommend, negate the goal of deterrence.[198] For example, significant limitations in planning and the ability to think abstractly severely limit one's ability to premeditate complex crimes like homicide and to therefore be deterred by a potential death penalty sentence.[199]

Regarding retribution, the *Atkins* Court stated that the purposes of the death penalty are only served when the offender is highly culpable.[200] Philosophers such as Aristotle have long indicated a number of characteristics that a moral agent (i.e., a person who can be morally culpable) possesses.[201] Some such characteristics include the ability to care for others, be self-reflective, formulate plans of action, and exercise self-

193. *Id.* at 407.
194. *Id.*
195. Bonnie & Gustafson, *supra* note 51, at 855.
196. Atkins v. Virginia, 536 U.S. 304, 319 (2002). Note that the *Atkins* Court used the term "mental retardation."
197. *Id.*
198. *See* Tobolowsky, *supra* note 5, at 83–84.
199. *Atkins*, 536 U.S. at 318.
200. *Id.* at 319–20.
201. Peggy Sasso, *Implementing the Death Penalty: The Moral Implications of Recent Advances in Neuropsychology*, 29 CARDOZO L. REV. 765, 774–76 (2007).

control.[202] The skill sets listed in the adaptive functioning component of the AAIDD definition address these characteristics.[203] Significant limitations in self-reflection and the ability to care for others restrict individuals' capacity for moral culpability and cognizance of their "deserving of execution."[204]

C. *Recommended Procedural Components for Implementing the* Atkins *Standard*

In addition to having one standardized framework for definition and assessment, the procedures for implementing the *Atkins* ban must be consistent. As reflected by the comparison of three Tenth Circuit states, differing procedural processes may be the sole determination of whether a defendant is found to be intellectually disabled.[205] The first two suggested procedural aspects are interconnected; they are the timing of the determination and the fact finder. In this regard, a judge, prior to the guilt phase of trial, should make the *Atkins* determination. Furthermore, defendants should carry the burden of proving their intellectual disability by a preponderance of the evidence. Finally, this Comment recommends that proper utilization of expert testimony by the defendant will further assist in accurate and consistent determinations of whether a defendant is found to be intellectually disabled.

1. Recommended Fact Finder and Timing for the Determination: The Judge, and Prior to the Guilt Phase of Trial

The *Atkins* determination should be made by a judge, prior to the guilt phase of trial. Because the *Atkins* Court provided no guidance on these procedural aspects of the ban, general policy considerations in implementing the ban will be examined for the justification of each recommendation. Preliminarily, and contrary to the views of some legal scholars, using the jury as the fact finder is not required in *Atkins* hearings.[206] The *Atkins* Court mentioned no such requirement, and prior Supreme Court precedent only requires that juries make determinations of fact in situations in which there is a potential for a defendant's punishment to be increased beyond the statutory maximum.[207] The purpose of an *Atkins* determination is to determine whether the defendant can be removed from the purview of the death penalty, thereby potentially decreasing the punishment rather than increasing it.[208] Therefore, using the judge as the fact finder is not only allowable, it is preferable for the following reasons.

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202. *Id.* at 775–76.
203. *AAIDD Definition*, *supra* note 31, at 2–3.
204. *Atkins*, 536 U.S. at 319.
205. *See supra* Part III.D.
206. Tobolowsky, *supra* note 5, at 107.
207. *Id.* at 106–07.
208. *Id.* at 107.

As previously mentioned, when the judge is used as the fact finder, the relevant determination is made prior to trial based on a legal standard of intellectual disability.[209] A requirement that the determination occur in this manner is a vital aspect of protecting the *Atkins* ban.[210] It is far more difficult for defendants to make an adequate showing of intellectual disability after the prosecution has presented all of its evidence, especially if the crime committed was a heinous one.[211] This difficulty is heightened when the jury is the fact finder because jurors might confuse the trial phase and sentencing phase as being interrelated or improperly consider the details of the defendant's crime in their determinations.[212] By using judges, who are more familiar with making objective determinations based on complicated legal standards (such as the clinical definition of "intellectual disability"), such risks of inaccuracy and bias are significantly reduced.[213] Of course, judges are humans too and still may be susceptible to some of these same biases. Therefore, having the determination occur before the guilt phase of trial will help to further insulate the judge's decision from improper influences (e.g., knowing the gruesome details of the crime), thereby decreasing the arbitrariness of *Atkins* determinations. Furthermore, holding the *Atkins* determination first will, at least in some cases, prevent the need for costly and unnecessary capital proceedings.[214]

2. Recommended Allocation of and Standard for the Burden of Proof: On the Defendant, and by a Preponderance of the Evidence

For comprehensive procedural consistency in *Atkins* determinations, defendants should bear the burden of proving their intellectual disability by a preponderance of the evidence. The allocation of and standard for the burden of proof, like the fact finder and timing issues, are best justified with reference to general policy considerations due to the lack of guidance from the *Atkins* Court.

The proper allocation of and standard for the burden of proof are best determined with reference to two landmark Supreme Court decisions regarding mental competency hearings: *Medina v. California*[215] and *Cooper v. Oklahoma*,[216] respectively. In *Medina*, the Court held that placing the burden of proof on a defendant in a criminal competency

209. *See supra* Part II.C.
210. *See* Tobolowsky, *supra* note 5, at 109–10.
211. *Id.* at 109.
212. *Id.*
213. *See id.* at 110.
214. *Id.*
215. 505 U.S. 437 (1992).
216. 517 U.S. 348 (1996).

proceeding did not violate any principles of fundamental fairness.[217] The Court reasoned that access to the proceeding in the first place allowed the defendant "a reasonable opportunity" to prove incompetence.[218] In that case, the Court upheld the placement of the burden on the defendant to prove his incompetence by a preponderance of the evidence.[219] In *Cooper*, on the other hand, the Court held that requiring a defendant to prove his incompetence by clear and convincing evidence did violate principles of fundamental fairness.[220] This was so, the Court reasoned, because it meant that even if defendants could prove that they were more likely than not incompetent, they still might not satisfy the clear and convincing evidentiary burden.[221] The significant risk of this occurring could pose dire consequences for defendants.[222]

Considering that the Supreme Court and a majority of states have accepted the preponderance of the evidence standard, this is the most appropriate standard for use in proving a defendant's intellectual disability.[223] Contrary to the clear and convincing standard, which the Supreme Court critiques, the preponderance of the evidence standard allows defendants a reasonable opportunity to prove their intellectual disability and lessens the risk of an excessively high burden, which would allow the execution of defendants who would otherwise fall within the *Atkins* ban. Therefore, the standard of proof for an *Atkins* determination should be a preponderance of the evidence. Because it is permissible to place the burden on the defendant and defendants are in the best position to prove their own mental health, the burden of proof should be allocated to the defendant.[224]

3. Other Recommendations to Ensure Constitutionality

One last related issue that has received scant attention is how evidence of intellectual disability should be presented. All evidence presented at an *Atkins* hearing should be presented through a uniquely qualified expert to ensure that an *Atkins* hearing comports with the most up-to-date scientific research and standards. This recommendation also aligns with the *Atkins* Court's utilization of a clinical definition.[225] There has been some argument that not only should the evidence be presented via an expert, but that the same expert should also act as the fact finder and make the final decision as to whether a defendant is intellectually disa-

217. *Medina*, 505 U.S. at 448–49 (quoting Dowling v. United States, 493 U.S. 342, 352 (1990)) (internal quotation marks omitted).
218. *Id.* at 451.
219. *Id.* at 453.
220. *Cooper*, 517 U.S. at 363–64.
221. *Id.* at 364.
222. *Id.* at 363–64.
223. Tobolowsky, *supra* note 5, at 118.
224. *See id.* at 117–18.
225. Atkins v. Virginia, 536 U.S. 304, 318 (2002).

bled.[226] However, it is common knowledge that "[t]he law is the ultimate arbiter of criminal responsibility."[227] The criminal trial process decides the moral guilt or innocence of an individual and imposes sanctions based on that individual's culpability.[228] An individual may not receive these sanctions unless he or she is morally culpable, and this determination hinges on whether a person is deemed intellectually disabled under the law.[229] Consequently, an appropriate legal fact finder—a judge, as advocated in this Comment—needs to make the intellectual disability determination based on sound scientific evidence provided by an appropriate expert.

To ensure the accuracy of information brought forth during the *Atkins* hearing and to protect against arbitrariness, a consistent set of guidelines must be in place for choosing an expert to present testimony on a defendant's intellectual disability. Virginia's statute provides a model for what should be required of an expert: (1) the expert should be either a psychologist or a psychiatrist; (2) the expert should have training and experiencing in assessing, scoring, and interpreting intelligence and adaptive behavior measures; and (3) the expert should be trained and experienced in the performance of forensic evaluations.[230] The Supreme Court has previously noted that "the determination of 'whether a person is mentally ill turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists.'"[231] However, as noted previously, the ultimate decision must lay with the fact finder—the judge. These suggested standards simply help judges determine whether an expert is qualified to provide information relevant to an intellectual disability determination. Qualified experts, in turn, support the provision of reliable and consistent information during *Atkins* proceedings.

CONCLUSION

Atkins brought forth an important change in Eighth Amendment jurisprudence. The prohibition on the execution of the intellectually disabled was a pivotal step in protecting less culpable offenders from excessive punishment. This important protection, however, has been diluted through its inconsistent application among the several states. A comparison of only three states within the Tenth Circuit demonstrates such inconsistencies. States vary in how they define, assess, and procedurally implement the ban on executing the intellectually disabled. These inconsistencies pose serious threats to the constitutional rights of intellectually disabled capital defendants.

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226. *See* Amos, *supra* note 44, *passim*.
227. Sasso, *supra* note 201, at 806.
228. *Id.* at 807.
229. *Id.* at 808.
230. Bonnie & Gustafson, *supra* note 51, at 856.
231. Parham v. J.R., 442 U.S. 584, 609 (1979) (quoting Addington v. Texas, 441 U.S. 418, 449 (1979)).

To resolve such threats, it is important that there be a level of consistency in the application of the ban. This Comment recommends that such consistency be realized through the utilization of the AAIDD's definitional framework because the AAIDD is referenced by the *Atkins* Court and is the leading authority on intellectual disability. It is further recommended that the AAIDD definitions of each component of that framework be adopted. Next, utilizing tools consistent with the most up-to-date scientific research and methods to assess each component of the AAIDD definition will help to ensure consistent application of the definitional framework. For IQ tests, either the WAIS or Stanford–Binet should be used as the method of assessment. For adaptive behavior assessments, the SIB-R, ABAS, or ICAP should be utilized until more advanced tests become available.

To avoid further arbitrariness, this definitional framework and assessment must be consistent in its procedural application. The most appropriate fact finder for an intellectual disability determination is a judge, who is less likely to be improperly swayed than is a layperson jury. To further insulate the judge from improper outside influences, the *Atkins* determination should be made prior to trial, before any gruesome details of the crime have been brought forth. Relatedly, judges must base their decisions on information provided by an appropriate and qualified expert, thereby ensuring the reliability of judicial determinations as well as procedural consistency. Lastly, the burden and standard of proof demand procedural consistency. Placing a preponderance of evidence burden on the defendant comports with precedent and historical practice while still allowing defendants a reasonable opportunity to prove their intellectual disability. Requiring the states to implement these policies will ensure that the ban on execution of the intellectually disabled is not implemented arbitrarily, thereby protecting the rights of intellectually disabled capital defendants just as the Supreme Court intended in *Atkins v. Virginia*.

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* J.D. Candidate, 2014. The author would like to thank Professor Justin Marceau for his guidance in writing this Comment and her husband, Nick Raffensperger, for his support throughout the publication process.

U.S. VS. THEM: A PERSPECTIVE ON U.S. IMMIGRATION LAW ARISING FROM *UNITED STATES V. ROSALES-GARCIA* AND THE COMBINATION OF IMPRISONMENT AND DEPORTATION

ABSTRACT

This Comment centers on immigration law, specifically, U.S. immigration law. *United States v. Rosales-Garcia*, a recently published case from the Tenth Circuit, was the original diving board for the thoughts that follow. In *Rosales-Garcia*, Raul Rosales-Garcia (Rosales), an undocumented immigrant, had been deported following a state drug conviction and was caught having illegally returned to the United States. He appealed the length of his sentence for a federal conviction of illegal reentry. The district court had enhanced (increased) his sentence based on the U.S. Sentencing Guidelines. Rosales appealed the level of enhancement. While the Tenth Circuit's decision ultimately helped to clarify how sentence enhancements for Rosales and similarly situated defendants are calculated, it did not answer a more fundamental question. Prior to his illegal reentry, Mr. Rosales had been convicted of a state drug-trafficking felony. He was sentenced to ninety days in jail and three years of probation. After serving the ninety days in jail, Mr. Rosales was deported. My question is, why, if we are going to deport an immigrant, are we first bothering to imprison him?

This Comment considers the importance of citizenship by looking at the roots of modern democratic civilization: ancient Greece and Rome. The Comment then looks at the birth of the United States, specifically the fact that from the beginning, this country was a nation of immigrants. Now, the original popular perception of America as a haven welcoming immigrants appears to have changed. America no longer seems so welcoming in light of the current popular perception that immigrants are dangerous. The idea of immigrants as criminals is reflected in the hostility present in current immigration law, which is set up to both punish and deport the criminally convicted immigrant. I suggest that deportation itself is more properly a punishment than a collateral consequence, and therefore the combination of deportation and imprisonment is excessive. The time has come for reform; immigration law needs to reevaluate the purposes it serves and ensure that the laws and regulations are set up to further those purposes rather than to pay tribute to hostile feelings towards the immigrants who continue to dare enter our land.

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INTRODUCTION

Well I'm so glad I'm livin' in the U.S.A.

Yes I'm so glad I'm livin' in the U.S.A.

Anything you want we got right here in the U.S.A.

—Chuck Berry, *Back in the U.S.A.*[1]

This Comment deals with double jeopardy[2]—a special kind of double jeopardy not recognized by the U.S. legal system.[3] In our current

1. CHUCK BERRY, *Back in the U.S.A.*, *on* REELIN' & ROCKIN' (Chess Records 1959).

2. BLACK'S LAW DICTIONARY 564 (9th ed. 2009) (defining "double jeopardy" as "[t]he fact of being prosecuted or sentenced twice for substantially the same offense"); *see also* U.S. CONST. amend. V (providing that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb").

3. *See, e.g.*, Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 481 (2007) ("[B]ecause deportation has been held not to be punishment, the constitutional bar on double jeopardy does not preclude the government from bringing deportation proceedings once the person has completed his or her criminal sentence.").

system of immigration law, deportation is not considered punishment.[4] An undocumented immigrant convicted of a crime can therefore be both imprisoned and deported.[5] This was the experience of one such immigrant, Raul Rosales-Garcia (Rosales), who was convicted of a state felony, imprisoned, released on parole, and deported.[6] But Rosales' saga of crime and punishment did not end there. He was caught having returned to the United States.[7] His return was a double violation because it violated not only the terms of his probation but also the federal code.[8] Rosales was sent back to state prison to serve another sentence as punishment for violating probation.[9] After completing that sentence, he was released into federal custody to be tried for the crime of illegal reentry.[10] The Government sought not only to imprison Rosales for this charge but also to enhance[11] his base sentence.[12] It was the length of the enhancement that Rosales appealed before the Tenth Circuit.[13]

The Tenth Circuit's decision in *United States v. Rosales-Garcia*[14] provided an important clarification for the particular sort of sentence enhancement Rosales faced, that which is provided for undocumented immigrants who have been previously convicted of a serious crime.[15] A drug-trafficking felony, like the one for which Rosales was convicted, is enumerated as a serious crime for purposes of the U.S. Sentencing Guidelines.[16] The amount of enhancement depends upon the maximum length of the sentence imposed for the prior crime.[17] The question on appeal was how much longer Rosales's federal sentence could be: either a 12-level enhancement, based on the length of his original state sentence of ninety days followed by three years of probation, or a 16-level based on the maximum length of his probation-revocation sentence (fifteen years), imposed after deportation.[18] When *Rosales-Garcia* was decided,

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4. *See, e.g., id.* at 472 ("For more than a century, . . . the courts have uniformly insisted that deportation is not punishment.").

5. *See* United States v. Rosales-Garcia, 667 F.3d 1348, 1349 (10th Cir. 2012); Legomsky, *supra* note 3.

6. *See Rosales-Garcia*, 667 F.3d at 1349.

7. *See id.*

8. *See id.* (citing 8 U.S.C. § 1326 (2012)).

9. *Id.*

10. *Id.*

11. An enhanced sentence is one which is made longer for some reason. *See* BLACK'S LAW DICTIONARY, *supra* note 2, at 609 (defining "enhanced" as "[m]ade greater; increased").

12. *Rosales-Garcia*, 667 F.3d at 1349 (referring to the Presentence Report prepared by the United States Probation Office).

13. *Id.* at 1349–50.

14. 667 F.3d 1348 (10th Cir. 2012).

15. *See id.* at 1349 ("The sentencing scheme embodied in § 2L1.2 imposes, via enhancements to the defendant's base offense level, more severe punishment for defendants who have committed serious prior crimes.").

16. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A) (2012); *see also Rosales-Garcia*, 667 F.3d at 1349.

17. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A)–(B).

18. The levels refer to the length of time by which a sentence can be increased (enhanced). If the 12-level enhancement were applied to Rosales, the range of sentencing would be twenty-four to

it was unclear whether the predicate sentence (the length of which determines the level of enhancement) must have been imposed before deportation and subsequent reentry.[19] The court in *Rosales-Garcia* held that the predicate sentence must precede deportation and reentry.[20] Only a sentence imposed prior to the defendant's deportation and illegal reentry may be used for enhancement of the federal sentence punishing illegal reentry.[21]

In his dissenting opinion, Judge Gorsuch lamented the ambiguity in the language of the U.S. Sentencing Guidelines, adding that whether his interpretation or the majority's was correct "may be ultimately less important than the fact we're unable to agree."[22] Not long after the decision in *Rosales-Garcia*, the commentary accompanying the Sentencing Guidelines was amended.[23] It would seem that the U.S. Sentencing Commission heard and complied with Judge Gorsuch's request for clarity.[24] With the official clarification provided by the amendment, the courts will no longer be split on this issue and, at least regarding this particular aspect, "similarly situated defendants [will] receive . . . consistent treatment" by the federal courts.[25]

Though the *Rosales-Garcia* decision was restricted to the narrow question of sentence enhancements of the criminal immigrant,[26] it served as the diving board for the broader consideration of U.S. immigration law that follows. It may be somewhat intuitive that the penalty inflicted upon the undocumented when caught within our borders is to eject them and send them back whence they came.[27] What is not intuitive, however, is why we feel the need to first imprison them within the very borders from which we plan to evict them. The paradoxical penalty is that to punish the undocumented for being here when we don't want him, we shall

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thirty months. When the U.S. Probation Office applied the 16-level enhancement, the result was a range of thirty-seven to forty-six months. The district court applied the 16-level enhancement and sentenced Rosales to a prison term of thirty-seven months. *Rosales-Garcia*, 667 F.3d at 1350.

19. *See id.* at 1354; United States v. Lopez, 634 F.3d 948, 952–53 (7th Cir. 2011); United States v. Bustillos-Pena, 612 F.3d 863, 868–69 (5th Cir. 2010); United States v. Compres-Paulino, 393 F.3d 116, 118–19 (2d Cir. 2004) (per curiam).

20. *Rosales-Garcia*, 667 F.3d at 1351 ("Because it is undisputed that the defendant's prior *conviction* must have occurred before deportation, we agree with Mr. Rosales that the most logical reading of § 2L1.2 is to refer to the date of deportation in evaluating whether the 'sentence imposed' for the prior felony exceeded 13 months.").

21. *Id.* ("In other words, we conclude that the temporal requirement contained in the text of § 2L1.2 with regard to the defendant's *conviction* also applies to the imposition of his *sentence* for that conviction.").

22. *Id.* at 1359 (Gorsuch, J., dissenting).

23. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.1(B)(vii) (2012).

24. *Rosales-Garcia*, 667 F.3d at 1359; *see also* United States v. Catalan, 701 F.3d 331, 333 (9th Cir. 2012) (per curiam) ("Recognizing this ambiguity, the Sentencing Commission recently clarified the interpretation in Amendment 764 to the Guidelines . . . and discussed *Bustillos-Pena*, *Lopez*, *Rosales-Garcia*, *Guzman-Bera*, and *Compres-Paulino*.").

25. *Rosales*-Garcia, 667 F.3d at 1359 (Gorsuch, J., dissenting).

26. *Id.* at 1349 (majority opinion).

27. *See, e.g.*, Legomsky, *supra* note 3, at 476 ("Violations of the immigration laws, naturally enough, have consequences. One of those consequences is removal from the United States . . . .").

first force him to stay. Though we cannot properly define this as double jeopardy,[28] we may classify it as a double sanction for the undocumented immigrant.

I suggest that a driving force behind this double sanction of incarceration and removal provided by our legal system is a brand of xenophobia which has directed the trend of U.S. immigration law over the course of the twentieth century.[29] A good number of the American public assumes that immigrants are here illegally.[30] In the case of Rosales, he was in the U.S. illegally and was convicted of a felony.[31] However, "the vast bulk of immigration to the United States occurs through legal channels."[32] Why should the popular perception be that immigrants are illegal?[33] The preoccupation in this country is with illegal immigration rather than with the many legal channels of immigration.[34] This reflects a shift occurring in the twentieth century from a land calling on the rest of the world to send us their "tired, . . . poor, . . . huddled masses yearning to breathe free"[35] to a nation edged with fences and border patrols.[36] Based on the continuing surge of immigration into the United States,[37] it would seem that the huddled masses are still eager to come to our shores and partake of the American way of life to which Chuck Berry jubilantly refers in *Back in the U.S.A.*[38] This Comment considers why there has been this shift in the American immigration paradigm. Why is it that the Statute of Liberty no longer has the loudest voice on the border? This Comment will suggest that the answer lies within a certain xenophobic paranoia that immigrants are dangerous.[39]

Part I of this Comment takes a brief look at the importance of citizenship in the ancient world and considers both the disdain of foreigners and the duty of hospitality to strangers. Part II turns specifically to the

28. *See id.* at 515 (citing Oliver v. INS, 517 F.2d 426, 428 (2d Cir. 1975) (refusing to apply double jeopardy to a deportation proceeding)).

29. The fear being, in part, that immigrants are responsible for heightened crime in the United States. *See, e.g.*, Stephen H. Legomsky, *Portraits of the Undocumented Immigrant: A Dialogue*, 44 GA. L. REV. 65, 145 (2009) ("Surveys consistently show that the public associates immigrants—whether or not undocumented—with high rates of crime.").

30. *See* Legomsky, *supra* note 3, at 503–04.

31. *Rosales-Garcia*, 667 F.3d at 1349.

32. Legomsky, *supra* note 3, at 503–04.

33. *Id.*

34. *See id.* at 504–05.

35. Emma Lazarus, *The New Colossus*, *in* THE NORTON ANTHOLOGY OF AMERICAN LITERATURE 2601 (Nina Baym et al. eds., 6th ed. 2003).

36. *See, e.g.*, Legomsky, *supra* note 3, at 509 (highlighting specifically increased border patrol in an effort to respond to perceived "security vulnerabilities in the immigration laws").

37. *See, e.g.*, Ayelet Shachar, *Earned Citizenship: Property Lessons for Immigration Reform*, 23 YALE J.L. & HUMAN. 110, 111 (2011) ("[The United States] annually accepts the largest intake of immigrants in the world."); STEVEN A. CAMAROTA, CTR. IMMIGR. STUD., PROJECTING IMMIGRATION'S IMPACT ON THE SIZE AND AGE STRUCTURE OF THE 21ST CENTURY AMERICAN POPULATION 16 (2012) ("The high standard of living in the United States means that it remains an attractive option for migration, particularly for people in less-developed countries.").

38. *See* BERRY, *supra* note 1.

39. *See, e.g.*, Legomsky, *supra* note 29.

United States and looks at the popular conception of America as the land of opportunity with a warm welcome mat at Lady Liberty's feet. Part III tracks the progression of immigration law in the twentieth and twenty-first centuries, looking specifically at the blending of civil immigration law with criminal law and the related popular perception that if one is an immigrant, then he is likely to be an undocumented one. Part IV turns to *United States v. Rosales-Garcia*, summarizing the case's facts, procedural history, and opinions. Part V analyzes the conclusions reached by the majority and the dissent and concludes by discussing the odd state of affairs presented by *Rosales-Garcia*: current immigration law is set up to punish the criminal immigrant within our own penal system and then remove the immigrant altogether. Part V also considers whether deportation truly is not punishment. The closing suggestion is that immigration law should consider the purpose of this practice of combining imprisonment and deportation and whether it is necessary or desired.

I. "XENOLOGY"

Allez, venez, Milord

Vous asseoir à ma table

Il fait si froid dehors

Ici c'est confortable.

Laissez-vous faire, Milord

Et prenez bien vos aises

Vos peines sur mon coeur

Et vos pieds sur une chaise.

—Édith Piaf, *Milord*[40]

A. Prized Possessions: The Value of Citizenship in the Classical World

The ancient Greeks greatly prized and protected citizenship.[41] The Greek *polis*[42] was a closely knit community, with a dynamic akin to that

40. ÉDITH PIAF, *Milord*, *on* MILORD (Columbia Records UK 1959) ("Come along, Milord, / Sit yourself at my table / It is so cold outside / Here it's comfortable. / Relax, Milord / And take your at ease / Put your troubles on my heart / And your feet on a chair.").

41. *See, e.g.*, SARAH B. POMEROY ET AL., ANCIENT GREECE: A POLITICAL, SOCIAL, AND CULTURAL HISTORY 451 (3d ed. 2012) ("Alexandria . . . was founded [by Alexander] as a Greek polis with citizenship limited to Greeks and Macedonians.").

42. H.D.F. KITTO, THE GREEKS 64 (2d ed. 1957) ("'Polis' is the Greek word which we translate 'city-state.'"); *see also* POMEROY ET AL., *supra* note 41, at 530 (defining polis as a "[c]ity [or] town"). "Beginning in the eighth century, *polis* came to designate a political community, composed of a principal city or town and its surrounding countryside, which together formed a self-governing entity, the city-state." *Id.*

of a family.[43] Inclusion within the citizenry of the *polis* was therefore strictly limited, and outsiders were rarely naturalized.[44] The *polis* that was perhaps the strictest in this regard was Sparta, who not only resisted naturalization of outsiders but was also known for removing them entirely from the community.[45] While Athens was far more hospitable to outsiders, citizenship and naturalization were severely limited.[46] Inclusion within the citizenry was an honor and much was expected of the citizens.[47] Pericles famously said, "We . . . regard a man who takes no interest in public affairs, not as a harmless, but as a useless character . . . ."[48] Citizenship thus was not merely nominal membership within the citizenry but literally a government ruled by the people.[49]

In Rome, a civilization that greatly admired and, to a certain extent, emulated the Greeks,[50] citizenship was also prized and protected.[51] Take, for example, the Social War, fought because the Romans denied citizenship to their Italian city-state allies.[52] In this instance, the Italian allies

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43. *See, e.g.*, C.M. BOWRA, THE GREEK EXPERIENCE 65 (1969) ("[The Greeks] felt that the city-state was a natural development first of the family and then of the village . . . . [They did not] look beyond [the city-state, or *polis*,] to some more embracing unity. . . . Even when Athens and Sparta built empires in the fifth century, these were largely coalitions, in which the members maintained a considerable degree of local autonomy, and there was little sense of corporate identity."); KITTO, *supra* note 42, at 78 ("The polis was a living community, based on kinship, real or assumed—a kind of extended family, turning as much as possible of life into family life . . . .").

44. *See* KITTO, *supra* note 42, at 74.

45. *See e.g.*, *id.* (using Pericles's Funeral Speech as recorded by Thucydides).

46. *See, e.g.*, Simon Hornblow, *Greece: The History of the Classical Period*, *in* THE OXFORD HISTORY OF THE CLASSICAL WORLD 135 (John Boardman et al. eds., 1986) ("A law of the year 451 [B.C.] restricted citizenship and thus its benefits . . . to persons of citizen descent on both sides. . . . Athenian (and Spartan) stinginess with the citizenship was singled out by panegyrists of Rome as the chief cause of the brevity of their empires."); *see also* Oswyn Murray, *Life and Society in Classical Greece*, *supra*, at 210 ("[I]n the classical period the state intervened to establish increasingly stringent rules for citizenship and so for legitimacy: ultimately a citizen must be the offspring of a legally recognized marriage between two Athenian citizens, whose parents must also be citizens. . . . It became impossible for an Athenian to marry a foreigner or to obtain recognition for the children of any other type of liaison: the development is essentially democratic, the imposition of the social norms of the peasant majority on an aristocracy which had previously behaved very differently . . . .").

47. *See, e.g.*, THE OXFORD CLASSICAL DICTIONARY 333–34 (Simon Hornblower & Antony Spawforth eds., 3d ed. 1996) (defining "citizenship, Greek"); *id.* at 334–35 (defining "citizenship, Roman").

48. Thucydides, *The Funeral Oration of Pericles and the Plague*, *in* GREEK AND ROMAN CLASSICS IN TRANSLATION 410 (David McKay Co. ed., 1947).

49. *See* 4 THE OXFORD ENGLISH DICTIONARY 442–43 (2d ed. 1989) (defining "democracy" as "[g]overnment by the people" and explaining that the word is derived from the combination of the Greek words *demos* (the people) and *kratia* (rule)).

50. Perhaps the best example of Rome's admiration and emulation of the Greeks they conquered is Virgil's *Aenied*, hoped to be the Roman equivalent of Homer's *Iliad*. *See, e.g.*, VIRGIL, THE AENEID, Bk. VI, ll.847–53 (H. Rushton Fairclough trans., 1974) (19 B.C.) ("Others, I doubt not, shall beat out the breathing bronze with softer lines; shall from marble draw forth the features of life; shall plead their causes better; with the rod shall trace the paths of heaven and tell the rising of the stars: remember thou, O Roman, to rule the nations with thy sway—these shall be thine arts—to crown Peace with Law, to spare the humbled, and to tame in war the proud!" (footnotes omitted)).

51. THE OXFORD CLASSICAL DICTIONARY, *supra* note 47, at 334–35 (defining Roman citizenship).

52. Circa 91–88 B.C., Rome's Italian allies waged the Social War (also called the Marsic War or the Italic War) against Rome. WILLIAM E. DUNSTAN, ANCIENT ROME 149–50 (2011). Rome was

felt that having both served and paid tribute to Rome, they had a right to become full citizens of Rome.[53] The city-states had long desired the benefits of Roman citizenship, and this came to a head in the Social War.[54] At the conclusion of the war, the city-states won their citizenship and the associated privileges of Roman citizenship.[55] Subsequently, the Roman Empire continued this trend of granting the privilege of citizenship to her allies.[56] The benefits of Roman citizenship were conferred upon selected members of the outlying territories that Rome had conquered and incorporated into the Empire.[57]

B. Us vs. Them: The Notion of Barbarians

Fear of, dislike for, and distrust of foreigners has been a longstanding tradition of civilized society.[58] The ancient Greek term "οι βαρβαροι" (*hoi barbaroi*) was used to refer to anyone who was not Greek and thus foreign.[59] This term has been transported into modern English as "barbarians,"[60] which tends to carry with it the additional association of uncouth, uncivilized, and even savage.[61] At first, this more negative connotation of barbarian was not associated with the term as the Greeks used it.[62] As time passed, however, the connotations of foreigners as uncouth and inferior to the Greeks became incorporated into the usage of the term.[63]

C. Welcoming Them to the Table: The Role of Hospitality

In spite of the limits on naturalization and the view of non-Greeks as uncultivated and even savage, it was a moral requirement of the

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victorious mainly because of her concession to the Italian allies to grant them citizenship, which united all of Italy south of the Po River by the common bond of Roman citizenship. *Id.*

53. *See, e.g.*, Michael Crawford, *Early Rome and Italy*, *in* THE OXFORD HISTORY OF THE CLASSICAL WORLD, *supra* note 46, at 413–16.

54. *See id.*

55. *See id.*

56. THE OXFORD CLASSICAL DICTIONARY, *supra* note 47, at 1330 (entry for "Rome (history)").

57. *Id.*

58. *See, e.g.*, HAROLD MACMILLAN, RIDING THE STORM: 1956–1959, at 49 (1971) ("This kind of isolationism or economic nationalism, amounting to xenophobia, seized all nations, great and small, from time to time.").

59. A LEXICON: ABRIDGED FROM LIDDELL AND SCOTT'S GREEK–ENGLISH LEXICON 126–27 (Oxford Univ. Press ed., 1997) (1891) [hereinafter A LEXICON] ("Plato divides mankind into Barbarians and Hellenes, as the Hebrews gave the name of Gentiles to all but themselves. [F]rom the Augustan age, the term was applied by the Romans to all nations except themselves and the Greeks: but the Greeks still affected to look upon the Romans as Barbarians.").

60. *See* 1 THE OXFORD ENGLISH DICTIONARY, *supra* note 49, at 945.

61. *Id.*

62. *See, e.g.*, BOWRA, *supra* note 43, at 14 ("[I]n its early days the Greek word [for barbarian] was not necessarily contemptuous or hostile, and meant little more than 'foreign.'").

63. *See, e.g.*, *id.* ("After the Persian Wars had revealed what hideous destruction could be wrought by barbarian invaders, the Greek attitude hardened, and the word *barbaros* began to assume some of its modern associations.").

Greeks to offer hospitality to the strangers who crossed the threshold.[64] Interestingly, the word "ξενος" (*xenos*) in ancient Greek originally connoted guest, host, and stranger.[65] It is from the Greek roots "*xenos*" and "*phobos*" (fear, terror, dismay)[66] that modern English derives the term "xenophobia."[67] And so, Athens was thrown open to the world and foreigners were given hospitality but not citizenship.[68]

II. TIRED, POOR, AND HUDDLED MASSES[69]

> Tell the folks back home this is the promised land callin'
>
> And the poor boy is on the line.
>
> —Chuck Berry, *Promised Land*[70]

The United States of America proclaims to be a nation rooted in the principle of "liberty and justice for all."[71] America was seen as the country where those suffering under the yoke of persecution could find asylum and, ultimately, a new life.[72] And certainly this promise of safe haven from persecution was at least partially true for the early colonization of American shores.[73] The Pilgrims, dissatisfied with their lives in Eng-

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64. A LEXICON, *supra* note 59, at 471. Hospitality is also a recurring motif in classical mythology. *See e.g.*, Ovid, *Philemon and Baucis*, *in* METAMORPHOSES 192 (A.D. Melville trans., Oxford Univ. Press ed., 1986) (8 A.D.) ("This wicked neighbourhood shall pay / Just punishment [for refusing to admit the gods across the threshold]; but to you there shall be given / Exemption from this evil."); *see also* POMEROY ET AL., *supra* note 41, at 525. *Xenia* [guest friendship] is "[a] form of ritual friendship whereby a 'stranger' (*xenos*) entered into a relationship of mutual friendship with a man from another *demos*, each being obliged to offer hospitality and aid when visiting the other's community. . . . A prominent feature of Homeric society, *xenia* continued throughout antiquity . . . ." *Id.*

65. A LEXICON, *supra* note 59, at 471.

66. *Id.* at 764.

67. 20 THE OXFORD ENGLISH DICTIONARY, *supra* note 49, at 674 ("A deep antipathy to foreigners.").

68. *See, e.g.*, Thucydides, *supra* note 48 ("Our city is thrown open to the world, and we never expel a foreigner . . . .").

69. Lazarus, *supra* note 35.

70. CHUCK BERRY, *Promised Land*, *on* ST. LOUIS TO LIVERPOOL (Chess Records 1964).

71. 4 U.S.C. § 4 (2012).

72. *See, e.g.*, Barbara Stark, *Postmodern Rhetoric, Economic Rights and an International Text: "A Miracle for Breakfast,"* 33 VA. J. INT'L L. 433, 438 (1993) ("Wave upon wave of immigrants have come to [America] to escape ancient systems of caste, class and ownership, to be rid of bureaucracies and kings, to be left alone, free to make their fortunes by their own wit and hard work. It is the American dream, and it has bred a wild energy, a spirit of openness and innovation marveled at throughout the world." (citing ARTHUR M. SCHLESINGER, JR., THE DISUNITING OF AMERICA 13 (1992) ("Those intrepid Europeans who had torn up their roots to brave the wild Atlantic *wanted* to forget a horrid past and to embrace a hopeful future. They *expected* to become Americans. Their goals were escape, deliverance, assimilation. They saw America as a transforming nation, banishing dismal memories and developing a unique national character based on common political ideals and shared experiences.")).

73. *See, e.g.*, *William Bradford*, *in* THE NORTON ANTHOLOGY OF AMERICAN LITERATURE 121 (Nina Baym et. al. eds., 8th ed. 2012) [hereinafter NORTON ANTHOLOGY] ("For Bradford, as well as for the other members of this community [the first wave of Pilgrims], the decision to settle at Plymouth was the last step in a long march of exile from England, and the hardships they suffered . . .

land and in Holland, chose to immigrate to America.[74] As the colonization continued, many more people from England, France, Holland, Spain, Portugal, and elsewhere settled in America.[75] At the completion of the American Revolution, the newborn United States reaffirmed their[76] values of liberty, justice, and freedom for (almost) all.[77] As further confirmation of America's warm welcome to all those who shared the treasured value of liberty, the Statue of Liberty took her post at Ellis Island.[78] In 1903, the following words of welcome were etched in a plaque at her base: "Give me your tired, your poor, / Your huddled masses yearning to breathe free."[79] Certainly, America was popularly associated with free and welcome immigration.[80]

As time passed, America, peopled by a varied and multifaceted mixture of backgrounds, continued to be perceived as welcoming immi-

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were tempered with the knowledge that they were in a place they had chosen for themselves, safe at last from persecution.").

74. *See, e.g.*, *Introduction: Pilgrim and Puritan*, *in* NORTON ANTHOLOGY, *supra* note 73, at 13 ("In 1608, . . . the Scrooby congregation [Pilgrims] left England and settled in the Netherlands. . . . Eventually, fearing that they might lose their religious identity as their children were swallowed up in Dutch culture, they petitioned for the right to settle in the vast American territories of England's Virginia Company.").

75. *See generally* 1 SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 84–86 (Meridian 3d ed. 1994) (1965).

76. Prior to the American Civil War, the United States were referred to in the plural form; ever since the war, the United States has been referred to in the singular form. This syntactical shift exhibits the reunited states' desire to be, once and for all, a single union rather than a league of individual states. *See* Shelby Foote, *The Civil War* (PBS television series Sept. 23–27, 1990).

77. *See, e.g.*, U.S. CONST. pmbl. ("We the People of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness."). I have noted this as "freedom and liberty for (almost) all" because, of course, not everyone in the newborn United States was free, at least not until slavery was repealed. *See, e.g.*, *American Literature 1700–1820: Pursuing Happiness*, *in* NORTON ANTHOLOGY, *supra* note 73, at 374 ("Of course, in 1820, many Americans were still not free. Some of the Founding Fathers, including George Washington and Thomas Jefferson, were themselves slave owners . . . . Men could not vote unless they owned property; women could not vote at all.").

78. *Statue of Liberty*, NAT'L PARK SERVICE, http:www.nps.gov/stli/index.htm (last updated Mar. 21, 2013) ("The Statue of Liberty Enlightening the World was a gift of friendship from the people of France to the people of the United States and is a universal symbol of freedom and democracy. The Statue of Liberty was dedicated on October 28, 1886, designated as a National Monument in 1924 and restored for her centennial on July 4, 1986.").

79. Lazarus, *supra* note 35 ("Not like the brazen giant of Greek fame, / With conquering limbs astride from land to land; / Here at our sea-washed, sunset gates shall stand / A mighty woman with a torch, whose flame / Is the imprisoned lightning, and her name / Mother of Exiles. From her beacon-hand / Glows world-wide welcome; her mild eyes command / The air-bridged harbor that twin cities frame. / 'Keep, ancient lands, your storied pomp!' cries she / With silent lips. 'Give me your tired, your poor, / Your huddled masses yearning to breathe free, / The wretched refuse of your teeming shore. / Send these, the homeless, tempest-tossed to me, / I lift my lamp beside the golden door!'" (footnotes omitted)).

80. The reference to "(almost) all" in note 77 is applicable here too, as there were concerns regarding certain specific immigrants right from the birth of the nation. *See, e.g.*, Chinese Exclusion Act of May 6, 1892, ch. 60, 22 Stat. 58 (repealed 1943).

grants with open arms.[81] As Fievel Mousekewitz was told in the animated film *An American Tail*, "[Y]ou are in luck, my little immigrant. This is America."[82] In the picture of America painted by Lady Liberty's iconic lines, the United States was truly a land of the free where "the more the merrier" held true.[83] Was this utopian vision true? Perhaps. Did it hold? Judging by the morass of complex immigration laws and criminal penalties for undocumented immigrants, and coupled with tightened border patrols and fences, it would seem that the American lens of immigration is no longer quite so rosy-hued.[84] What happened to "[g]ive me your tired, your poor"?[85] One possible answer is that "[n]ow it reads 'NO VACANCIES.'"[86]

III. CRIMINALIZING IMMIGRATION

I just spent 60 days in the jailhouse

For the crime of having no dough, no no

Now here I am back out on the streets

For the crime of having nowhere to go!

—The Band, *The Shape I'm In*[87]

A. The View of Immigrants as Criminals

There is no reason to assume that the term "immigrant" refers specifically to illegal immigrants[88]; however, that is the trend in our society

81. *See, e.g.*, Stark, *supra* note 72, at 438–40 (describing the American "rhetoric of opportunity," which held "that there was plenty for everyone willing to work hard and take a chance in America" and continued through various waves of immigration from the colonial period to the Great Depression).

82. AN AMERICAN TAIL (Amblin Entertainment 1986).

83. Lazarus, *supra* note 35.

84. *See, e.g.*, Keith Aoki & John Shuford, *Welcome to Amerizona—Immigrants Out!: Assessing "Dystopian Dreams" and "Usable Futures" of Immigration Reform, and Considering Whether "Immigration Regionalism" Is an Idea Whose Time Has Come*, 38 FORDHAM URB. L.J. 1, 3 (2010); Samuel Bettwy, *Assisting Soldiers in Immigration Matters*, 1992 ARMY LAW. 3, 3 ("Many attorneys consider immigration law to be the most complicated area of American jurisprudence, rivaled in its complexity only by tax law."); Kristina M. Campbell, *Imagining a More Humane Immigration Policy in the Age of Obama: The Use of Plenary Power to Halt the State Balkanization of Immigration Regulation*, 29 ST. LOUIS. U. PUB. L. REV. 415, 417 (2010); Kevin R. Johnson, *Ten Guiding Principles for Truly Comprehensive Immigration Reform: A Blueprint*, 55 WAYNE L. REV. 1599, 1637 (2009) ("The U.S. immigration laws have long been incredibly complex. By many accounts, only the much-maligned Internal Revenue Code rivals the intricate, lengthy, and frequently obtuse Immigration and Nationality Act of 1952, which is the centerpiece of modern American immigration law."); Legomsky, *supra* note 3, at 509 (highlighting specifically increased border patrol in an effort to respond to perceived "security vulnerabilities in the immigration laws"); Diana R. Podgorny, Comment, *Rethinking the Increased Focus on Penal Measures in Immigration Law as Reflected in the Expansion of the "Aggravated Felony" Concept*, 99 J. CRIM. L. & CRIMINOLOGY 287, 298 (2009).

85. Lazarus, *supra* note 35.

86. LETHAL WEAPON 4 (Warner Bros. 1998). The response to this line in the film was "I guess your parents were Native Americans . . . ." *Id.*

87. THE BAND, *The Shape I'm In*, *on* STAGE FRIGHT (Capital Records 1970).

today.[89] My own mother is an English emigrant legally working and residing here in the United States, so I know of legal channels of immigration from personal experience. And yet, I hear the term "immigrant" and my mind, like that of so many others, conjures an image of someone crawling under a barbed-wire fence on the Texas–Mexico border.[90] It is clear that a certain hostility towards immigrants is present in America today.[91] Again, that "NO VACANCIES" slapped across the Statue of Liberty's slogan crops up. Famous, or in some circles infamous, examples of this hostility appear in state and local immigration initiatives, such as Arizona Senate Bill 1070 and California Proposition 187.[92] One has only to look at the statements by Barbara Coe, Proposition 187's drafter, to see evidence of this hostility:

> 'You get illegal alien children, Third World children, out of our schools, and you will reduce the violence. That is a fact. . . . You're not dealing with a lot of shiny face, little kiddies. . . . You're dealing with Third World cultures who come in, they shoot, they beat, they stab and they spread drugs around in our school system.[93]

While Proposition 187 was never passed, Arizona's new immigration law is in full legal effect.[94] There is certainly a lot that can be, and has been, said about Arizona's controversial immigration law.[95] The fact that the title of the law is "Support Our Law Enforcement and Safe

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88. *See* Legomsky, *supra* note 3, at 503–04 ("Although the vast bulk of immigration to the United States occurs through legal channels, the public thinks the opposite is true.").

89. *See id.* at 471–72 ("Public perception of criminals and foreigners have become ever more intertwined."); *see also* Campbell, *supra* note 84.

90. *See, e.g.*, Legomsky, *supra* note 3, at 502–04.

91. *See, e.g.*, Campbell, *supra* note 84, at 416, 418–19.

92. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. Apr. 23, 2010) (amended by H.B. 2162, 49th Leg., 2d Reg. Sess. (Ariz. Apr. 30, 2010)); Proposition 187, 1994 Cal. Stat. A-317 (approved by electors Nov. 8, 1994); *see also* Johnson, *supra* note 84, at 1606 ("[T]he state and local immigration ordinances have been motivated in no small part by racism and nativism.").

93. *See* Podgorny, *supra* note 84, at 299 n.90 (quoting Jennifer M. Chacón, Commentary, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1841 (2007)) (internal quotation marks omitted).

94. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. Apr. 23, 2010) (amended by H.B. 2162, 49th Leg., 2d Reg. Sess. (Ariz. Apr. 30, 2010)).

95. *See, e.g.*, Arizona v. United States, 132 S. Ct. 2492 *passim* (2012); Karla Mari McKanders, *Unforgiving of Those Who Trespass Against U.S.: State Laws Criminalizing Immigration Status*, 12 LOY. J. PUB. INT. L. 331, 352 (2011) ("Numerous lawsuits have been filed challenging the constitutionality of S.B. 1070."); Scott Nakama, *Senate Bill 1070: The Implication of Arizona's Immigration Law upon MLB*, 8 DEPAUL J. SPORTS L. CONTEMP. PROBS. 23, 23 (2011) (describing Arizona's Senate Bill 1070 as "one of the most controversial pieces of immigration legislation in recent history"); Lisa Sandoval, *Race and Immigration Law: A Troubling Marriage*, 7 MODERN AM. 42, 43 (2011); David A. Selden et al., *Placing S.B. 1070 and Racial Profiling into Context, and What S.B. 1070 Reveals About the Legislative Process in Arizona*, 43 ARIZ. ST. L.J. 523, 523–24 (2011) ("S.B. 1070 is fascinating on many levels for many reasons. It has focused a national and international spotlight on Arizona. It has broadened and intensified the national debate regarding immigration policies and enforcement. It has tested the constitutionality of state and local enforcement of immigration laws. . . . S.B. 1070 is so controversial in part because of strong feelings and deep divisions about racial profiling.").

Neighborhoods Act"[96] strongly suggests that perception of immigrants as criminals was a driving force behind the law. Initiatives like Proposition 187 and Senate Bill 1070 are specifically designed to target immigrants.[97]

Let's take another example, this time from the turn of the twentieth century: the passing of laws prohibiting marijuana.[98] When these federal marijuana laws were enacted, right around the time that Prohibition ended, the Mexican-American population was the main consumer of marijuana.[99] So, the addition of marijuana to the list of banned substances effectively created a new crime for the Mexican-American immigrant population.[100]

This new crime was at least partly a response to the growing population of Mexican immigrants. While twenty-two states had prohibited marijuana between 1910 and 1931, marijuana was not targeted on the federal level until 1932.[101] That year, marijuana was added to the catalog of banned drugs listed in the Uniform Narcotic Drug Act.[102] The following year, Prohibition was repealed.[103] Four years later, Henry J. Anslinger, Director of the new Federal Bureau of Narcotics, successfully passed the Marijuana Tax Act of 1937 after just three days of truncated hearings unsupported by empirical findings or research.[104] The early twentieth century saw a significant increase in the number of Mexicans immigrating into the western United States.[105] From the turn of the twentieth century through the 1930s, there was very little in the way of general public concern regarding the use of marijuana.[106] It was generally thought that Mexican immigrants were the main users of marijuana and thus the ones bringing the "narcotic" into the country.[107] Not coincidentally, the first states to restrict marijuana were the southwestern states.[108] When Texas passed the McMillan Senate Bill, which included marijuana restrictions, the *Austin Texas Statesman* noted, "[Marijuana is] a Mexican herb . . .

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96. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. Apr. 23, 2010) (amended by H.B. 2162, 49th Leg., 2d Reg. Sess. (Ariz. Apr. 30, 2010)).

97. *Id.*; Proposition 187, 1994 Cal. Stat. A-317 (approved by electors Nov. 8, 1994).

98. *See* Marihuana Tax Act of 1937, Pub. L. No. 75-238, ch. 553, 50 Stat. 551 (repealed 1970).

99. Richard J. Bonnie & Charles H. Whitebread, II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1011 (1970).

100. *See id.* at 1012.

101. *Id.* at 1010.

102. *Id.*

103. U.S. CONST. amend. XXI.

104. Bonnie & Whitebread, *supra* note 99, at 1054.

105. *Id.* at 1012.

106. *Id.* at 1011.

107. *Id.* at 1012.

108. Pete Guither, *Why Is Marijuana Illegal?*, DRUGWARRANT.COM, http://www.drugwarrant.com/articles/why-is-marijuana-illegal/ (last visited Feb. 17, 2013) (referring, in chronological order, to California, Wyoming, Texas, Iowa, Nevada, Oregon, Washington, Arkansas, Nebraska, and Montana).

said to be sold on the Texas–Mexican border."[109] Accordingly, the early days of marijuana illegalization appeared targeted toward the Mexican immigrants, the drug's primary user group, and arguably reflected the American West's negative view of immigrants and immigration.[110]

What does this brief overview of our nation's marijuana war have to do with the criminalization of immigration laws? Marijuana was feared as subversive.[111] Mexican immigrants (along with other minority groups in the East) were the main users during this period.[112] For this reason, the law banning marijuana can reasonably be viewed as a prophylactic measure designed, at least in part, to protect citizens from the Mexican immigrants who used the drug.[113] As Professors Bonnie and Whitebread put it, "We conclude that the legislative action and judicial approval [of marijuana restrictions] were essentially kneejerk responses uninformed by scientific study or public debate and colored instead by racial bias and sensational myths."[114]

This perception of immigrants as criminals bringing drugs to our country has not abated.[115] Kevin Johnson points to an "all-too-common . . . headline: 'Illegal Alien Indicted for Possession With Intent to Distribute Marijuana.'"[116] According to Johnson, "[t]he reference to 'illegal alien,' . . . serves to inflame passions and tilt the debate toward favoring more immigration enforcement (especially at the expense of 'criminal aliens') and more restrictive immigration laws."[117] Furthermore, the Anti-Drug Abuse Act of 1988 described its policy goal as providing a "drug-free America" by "reducing the number of drug users and decreasing the availability of illegal drugs."[118] One available inference is that by keeping out immigrants (specifically, Mexican and South American immigrants), the United States can curb the availability and use of illegal drugs within her borders.

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109. *See* Bonnie & Whitebread, *supra* note 99, at 1014 (quoting the June 19, 1923 *Austin Texas Statesman*) (internal quotation mark omitted).

110. *See id.* at 1012, 1015 (pointing out "that public perception of marijuana's ethnic origins and crime-producing tendencies often went hand in hand, especially in the more volatile areas of the western states," and although there was not much public awareness of the drug, newspapers in the 1930s would include the occasional "vociferous allusion to the criminal conduct inevitably generated when Mexicans ate 'the killer weed'").

111. *See, e.g.*, REEFER MADNESS (Motion Picture Ventures 1936).

112. Bonnie & Whitebread, *supra* note 99, at 1012.

113. *See id.* at 1012–16.

114. *Id.* at 1010.

115. *See* Johnson, *supra* note 84, at 1633.

116. *Id.* (quoting *Illegal Alien Indicted for Possession with Intent to Distribute Marijuana*, STATES NEWS SERV., Dec. 10, 2009) (internal quotation marks omitted).

117. *Id.* (quoting Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4181) (internal quotation marks omitted).

118. Podgorny, *supra* note 84, at 292.

Another modern example of how the perception of immigrants as dangerous has served to shape immigration law is the USA PATRIOT Act, passed in the aftermath of September 11, 2001.[119]

Just as the War on Drugs had its effect on immigration, the War on Terror had a marked effect on the criminalization of immigration.[120] A fear of *all* immigrants based on the immigrant status of the terrorists led to heightened immigration measures premised on the need for national security.[121] Based on an "examination of the rhetoric behind the recent immigration laws," Diana Podgorny interprets three justifications for the increasingly strict criminal immigration laws: "[T]he perception that non-citizens are the reason for increasing criminality in the United States, a desire to protect . . . the economic interests of citizens, and a blurred line between crime control efforts related to non-citizens and protection of national security."[122]

B. The Blurred Line Between Civil and Criminal Law in the Immigration Context

A cognizable trend in modern American immigration law is that the criminal code has been imported and transmuted into the body of civil-based immigration law.[123] Although immigration law has always contained at least some aspects of the penal system,[124] the modern trend has been accused of unfairly taking "the enforcement components of criminal justice without the corresponding adjudication components."[125] An example of the "lacking adjudication" component is arguably the fact that deportation of immigrants subsequent to criminal proceedings does not fall within the category of double jeopardy as deportation is consid-

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119. *See, e.g.*, Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849, 856 (2003) ("The USA PATRIOT Act expands the definition of 'terrorist activity' for purposes of the immigration laws in ways that may result in an additional removal ground for noncitizens convicted of assault and similar crimes. 'Terrorist activity' thus has gone the way of 'aggravated felony' for immigration purposes, expanded well beyond what one normally would consider to be truly 'terrorist' in nature. The USA PATRIOT Act further provides that a spouse or child of a 'terrorist' generally is inadmissible. A noncitizen also may be deemed inadmissible for being 'associated with a terrorist organization,' broad terms reminiscent of the principle of guilt by association, a discredited law enforcement technique popular during the dark days of the McCarthy era. Fears also have been expressed that the expanded definition of 'terrorist activity' in the USA PATRIOT Act will adversely affect bona fide asylum-seekers fleeing persecution in their native lands." (footnotes omitted)).

120. *See* Podgorny, *supra* note 84, at 298–300 ("[T]he primary motivation behind the 1996 Acts and the USA PATRIOT Act was a concern over national security."); *see also* Johnson, *supra* note 119.

121. *See, e.g.*, Legomsky, *supra* note 3, at 508–10.

122. Podgorny, *supra* note 84.

123. *See, e.g.*, Legomsky, *supra* note 3, at 469 ("Sometimes dubbed 'criminalization,' the trend has been to import criminal justice norms into a domain built upon a theory of civil regulation.").

124. Podgorny, *supra* note 84, at 289 ("Immigration law has always contained some elements of penal law in its attempt to preempt criminal aliens from seeking naturalization in the United States, but the lines between immigration and penal law have recently become increasingly blurred." (footnote omitted)).

125. Legomsky, *supra* note 3, at 473.

ered a collateral consequence rather than a direct, punitive consequence of an immigrant's criminal proceeding.[126]

Recent laws have added enhanced punishments for immigrants convicted of crimes as well as easier avenues of deportation.[127] The Anti-Drug Abuse Act of 1988 introduced the notion of an aggravated felony, which provided for harsher penalties of imprisonment, expedited removal, and longer bans on reentry for immigrants guilty of the crimes falling within the "aggravated felony" definition.[128] While this started as a very narrow definition, limited to murder and trafficking of weapons or drugs, it has since expanded so that "now an aggravated felony need no longer be either aggravated or a felony" for purposes of removing immigrants.[129] The increased ease of deportation based on these criminal statutes has greatly increased the number of such federal prosecutions. "Immigration cases are now the largest single category of federal prosecutions, accounting for 32% of the annual total"[130] and "surpassing even drug prosecutions."[131]

It is in this current context of criminalized immigration that we turn to *United States v. Rosales-Garcia*. Earlier this year, the Tenth Circuit decided this immigration case, which involved an illegal immigrant who was convicted and imprisoned on a drug charge. He was released on parole and deported, and was then caught having illegally reentered the United States, a violation of both his parole and federal law.[132] The question at issue in the case was whether the enhancement of the defendant's federal sentence could be based on the parole-revocation sentence following deportation or whether it had to be based on the original sentence prior to deportation.[133]

126. *See id.* at 481–82 ("[C]riminal prosecution is therefore an add-on, not a substitute, for deportation.").

127. *See* 8 U.S.C. § 1252 (2012).

128. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181 (codified throughout 8 U.S.C.); *see also* Legomsky, *supra* note 3, at 484 ("In its nascent form, the aggravated felony definition was defined narrowly, in keeping with the harsh consequences . . . . The term included only murder, weapons trafficking, and drug trafficking. [The aggravated felony definition] is now a colossus." (footnote omitted)); Podgorny, *supra* note 84, at 292.

129. Podgorny, *supra* note 84, at 289.

130. Legomsky, *supra* note 3, at 479–80 (referring to the increase in Department of Homeland Security's recommended immigration prosecutions).

131. Podgorny, *supra* note 84, at 308.

132. *See* 8 U.S.C. § 1326 (2012); United States v. Rosales-Garcia, 667 F.3d 1348, 1349 (10th Cir. 2012).

133. *Rosales-Garcia*, 667 F.3d at 1349.

IV. *UNITED STATES V. ROSALES-GARCIA*

"Oh help me in my weakness"

I heard the drifter say

As they carried him from the courtroom

And were taking him away.

—Bob Dylan, *Drifter's Escape*[134]

A. Facts and Procedural History

In 2008, a Utah state court convicted Raul Rosales-Garcia of a drug-trafficking felony and sentenced Rosales to ninety days in jail and three years' probation.[135] Upon being released on probation, Rosales was deported.[136] Following his removal, Rosales reentered the country in violation of 8 U.S.C. § 1326 and was soon arrested by federal agents.[137] The Utah state court imposed a probation-revocation sentence as a consequence for Rosales illegally reentering the country in violation of the terms of his probation.[138] While the original state drug-trafficking sentence was a term of ninety days, the probation-revocation sentence was a term of one to fifteen years.[139] Rosales served his time in state prison and was then released into federal custody to be prosecuted for his illegal reentry.[140]

Rosales chose to participate in the district of Utah's fast-track program by agreeing to plead guilty to the federal charge.[141] In its Presentence Report, the United States Probation Office recommended a 16-level enhancement of Rosales' sentence based on section 2L1.2(b)(1)(A) of the U.S. Sentencing Guidelines and Rosales's fifteen-year state probation-revocation sentence.[142] Not surprisingly, Rosales objected to the 16-level enhancement.[143] Unlike the drifter in Bob Dylan's song,[144] Rosales had no opportunity for escape, but he did have the opportunity for appealing the Presentence Report.[145] Specifically, Rosales challenged the "procedural reasonableness of his [federal] sentence" because his state

134. BOB DYLAN, *Drifter's Escape*, *on* JOHN WESLEY HARDING (Columbia Records 1967).
135. *Rosales-Garcia*, 667 F.3d at 1349.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* Note that, for purposes of section 2L1.2 of the U.S. Sentencing Guidelines, the maximum term of the previous sentence is used for purposes of calculating a sentencing enhancement. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.1(B)(vii) (2012).
143. *Rosales-Garcia*, 667 F.3d at 1349.
144. *See* DYLAN, *supra* note 134.
145. *Rosales-Garcia*, 667 F.3d at 1350.

sentence for the base offense of drug trafficking did not exceed thirteen months at the time of his illegal reentry and thus, argued Rosales, should not satisfy the 16-level enhancement requirements of section 2L1.2(b)(1)(A).[146] Rosales conceded that his original sentence made him eligible for a 12-level enhancement of his sentence but was not willing to concede his eligibility for the 16-level enhancement, which relied on the state probation-revocation sentence rather than on the sentence for his base drug-trafficking conviction.[147] Rosales properly reserved his issue for appeal, arguing that the statutory language only allows enhancements for the sentence imposed at the time of his illegal reentry.[148] The Tenth Circuit reviewed the case de novo.[149] If the court were to agree with Rosales, he would face a 12-level enhancement, providing a sentence range of twenty-four to thirty months' imprisonment for the federal charge.[150] If the court were to agree with the federal Government, Rosales would face a 16-level enhancement, providing a sentence range of thirty-seven months to forty-six months.[151]

B. The Majority Opinion

The appeal in this case was based solely on a question of law. The facts, as summarized above, were, according to the Tenth Circuit, straightforward, uncomplicated, and uncontested.[152] The narrow issue before the court was whether a sentence can be enhanced based on a prior sentence that did not exceed the minimum sentence length until *after* the deportation and subsequent illegal reentry.[153] The Sentencing Guidelines contained in section 2L1.2 allow for more severe punishments for illegal immigrants who have committed sufficiently serious prior crimes.[154] The relevant provision directs the government to increase the base offense level by sixteen levels "[i]f the defendant previously was deported . . . after . . . a conviction for a felony that is . . . a drug trafficking offense for which the sentence imposed exceeded 13 months."[155] Therefore, the question presented for the court was, when may a predicate sentence be imposed in order to be eligible for calculation of section 2L1.2 sentence enhancements.[156]

146. *Id.* at 1349–50.
147. *Id.* at 1355.
148. *Id.* at 1349–50.
149. *Id.* at 1350 (citing United States v. Ford, 613 F.3d 1263 (10th Cir. 2010)) ("We review *de novo* a district court's interpretation of the Sentencing Guidelines where the appellant's argument was properly preserved before the district court.").
150. *Id.*
151. *Id.*
152. *Id.* at 1349.
153. *Id.*
154. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A)(i) (2012).
155. *Id.*
156. *See Rosales-Garcia*, 667 F.3d at 1349.

Ultimately, the Tenth Circuit agreed with Rosales's interpretation of the Guidelines and remanded the case to the U.S. District Court for the District of Utah for resentencing.[157] Because the Tenth Circuit concluded that the predicate sentence must have been imposed *before* the defendant's deportation, the court remanded the case for resentencing based on the length of Rosales's original state jail sentence, eligible only for the 12-level enhancement.[158] The court reached its conclusion by focusing on the language of the statute,[159] the Sentencing Commission's accompanying application notes, and analogous precedent.[160]

C. The Dissenting Opinion

Whereas the majority concluded that Rosales's interpretation of the Sentencing Guidelines was correct,[161] the dissent concluded that the Government's interpretation was preferable.[162] In his opinion, Judge Gorsuch dissected the statutory language.[163] After pointing out the ambiguity in the construction of the statute, Judge Gorsuch turned to the accompanying commentary and concluded that it resolved the ambiguity by specifically stating that the predicate "sentence imposed" includes "any terms of imprisonment given upon revocation of probation, parole, or supervised release."[164] The dissent held that "any terms of imprisonment" would include even those given on revocation of parole following the defendant's deportation and illegal reentry.[165] This conclusion was in accord with the Second Circuit's decision in *United States v. Compres-Paulino*,[166] a case which presented the same issue of when a predicate sentence must have been imposed in order to apply for the higher 16-level sentence enhancement.[167]

Based on the dissent's interpretation of the Sentencing Guidelines and accompanying commentary, Rosales' state sentence imposed after his deportation and subsequent reentry would apply for purposes of the Guidelines.[168] Because his probation-revocation sentence of one to fifteen years exceeded thirteen months, Rosales would then be subject to

157. *Id.* at 1355.

158. *Id.*

159. "If the defendant previously was deported, or unlawfully remained in the United States after . . . a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded thirteen months[, add a sentence enhancement]." U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A).

160. *Rosales-Garcia*, 667 F.3d at 1350–55.

161. *Id.* at 1355.

162. *See id.* at 1357 (Gorsuch, J., dissenting).

163. *See id.* at 1355–57.

164. *Id.* at 1357 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.1(B)(vii)) (internal quotations marks omitted).

165. *Id.* at 1356–57 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.1(B)(vii)) (internal quotations mark omitted).

166. 393 F.3d 116 (2d Cir. 2004) (per curiam).

167. *Id.* at 118.

168. *Rosales-Garcia*, 667 F.3d at 1357 (Gorsuch, J., dissenting).

the 16-level enhancement for his federal sentence.[169] Judge Gorsuch's dissenting opinion therefore held that the district court "got it right" and properly applied the 16-level enhancement.[170]

V. ANALYSIS

I asked him for water, he poured me some wine

We finished the bottle, then broke into mine.

—Bob Weir, *The Greatest Story Ever Told*[171]

A. The Question Presented

The question on appeal was whether the district court had correctly applied the 16-level enhancement to Rosales's federal sentence.[172] As previously noted, the 16-level enhancement provided in the Sentencing Guidelines can only be applied when the preceding conviction carried a sentence longer than thirteen months.[173] Rosales's original state sentence (prior to his deportation and subsequent reentry) would not satisfy the 16-level enhancement requirements set out above because his original ninety-day sentence did not exceed thirteen months.[174] However, Rosales's one- to fifteen-year probation-revocation sentence, if used for the calculation of enhancing the federal illegal reentry sentence, certainly would qualify Rosales for the 16-level enhancement.[175] Even if Rosales were to only serve the minimum of that sentence (i.e., one year, which would not exceed thirteen months), it would not matter for the purpose of section 2L1.2 because the accompanying commentary clearly states that when the previous sentence is a range of time, the maximum length of that sentence is to be used for sentencing purposes.[176] In the event that Rosales's enhanced state drug-trafficking sentence could be used for sentencing, fifteen years would be the length of the sentence imposed, thereby clearly subjecting Rosales to the 16-level enhancement.

B. The "[S]entence [O]nly a [G]rammar [T]eacher [C]ould [L]ove"[177]

Both the dissenting opinion and the majority opinion point out that the phrasing of the statute allows for two separate interpretations.[178] The

169. *Id.*; *see also id.* at 1349 (majority opinion).

170. *Id.* at 1357 (Gorsuch, J., dissenting).

171. BOB WEIR, *The Greatest Story Ever Told*, *on* ACE (Warner Bros. Records 1972).

172. *Rosales-Garcia*, 667 F.3d at 1349 (majority opinion) ("The sole question presented before us on appeal is whether the 16-level enhancement in USSG § 2L1.2(b)(1)(A) applies to a defendant whose sentence for an earlier drug trafficking felony was made longer than 13 months *after* the defendant was deported and committed the base offense of illegal reentry.").

173. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A) (2012).

174. *Id.* § 2L1.2 cmt. n.1(B)(vii); *see also Rosales-Garcia*, 667 F.3d at 1349 (majority opinion).

175. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A).

176. *Id.* § 2L1.2 cmt. n.1(B)(vii).

177. *Rosales-Garcia*, 667 F.3d at 1356 (Gorsuch, J., dissenting).

majority went with the interpretation of a temporal restriction on when a predicate sentence was imposed;[179] the dissent interpreted the statute to mean any predicate sentence, whether imposed before or after deportation and subsequent reentry.[180]

While certain phrases, such as "venial syntactical sins"[181] and the alliterative "prudent penological policy,"[182] seem unnecessarily overblown, Judge Gorsuch's dissenting opinion made it readily apparent that he agreed with the Government's interpretation of the Sentencing Guidelines.[183] To be fair, this interpretation was in accord with that of the Second Circuit.[184] Nonetheless, Rosales's interpretation, shared by the majority and the Fifth and Seventh Circuits, was plausible, not precluded by the language, and preferred in light of the policy behind the Sentencing Guidelines.[185] As the dissent's reasoning focused more on an analysis of the language, we shall look first to the dissent's analysis.

The dissent turned first to the relevant language of section 2L1.2(b)(1)(A), denouncing it as "a sentence only a grammar teacher could love."[186] The language of the statute is as follows: "If the defendant previously was deported, or unlawfully remained in the United States, after . . . a conviction for a felony that is . . . a drug trafficking offense for which the sentence imposed exceeded thirteen months[, add a sentence enhancement]."[187] The dissent pointed to the string of prepositional phrases,[188] the passive voice,[189] and the "scraggly expression of time"[190] as the "gnarled" grammar of the statute.[191]

The dissent observed that the use of the past tense is not particularly helpful in the statute. Judge Gorsuch reasoned that the past tense of "imposed" and "exceeded" could equally indicate a sentence given prior to deportation *or* any other sentence imposed before the current prosecution.[192] The majority agreed that this was a plausible interpretation but

178. *See id.* at 1351–52, 1356–58.
179. *See id.* at 1351 (majority opinion).
180. *Id.* at 1357 (Gorsuch, J., dissenting).
181. *Id.* at 1355.
182. *Id.* at 1358.
183. *Id.* at 1357.
184. United States v. Compres-Paulino, 393 F.3d 116, 118 (2d Cir. 2004) (per curiam).
185. *Rosales-Garcia*, 667 F.3d at 1351–52 (majority opinion).
186. *Id.* at 1356 (Gorsuch, J., dissenting).
187. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A) (2012).
188. *Id.* ("If the defendant previously was deported, or unlawfully remained in the United States, after . . . a conviction *for a felony* that is . . . a drug trafficking offense *for which the sentence* imposed exceeded thirteen months[, add a sentence enhancement]." (emphasis added)).
189. *Id.* ("If the defendant previously *was* deported, or unlawfully remained in the United States, after . . . a conviction for a felony that is . . . a drug trafficking offense for which the sentence imposed exceeded thirteen months[, add a sentence enhancement]." (emphasis added)).
190. *Id.* ("If the *defendant previously was deported*, or unlawfully remained in the United States, *after* . . . a conviction for a felony that is . . . a drug trafficking offense for which the sentence imposed exceeded thirteen months[, add a sentence enhancement]." (emphasis added)).
191. *Rosales-Garcia*, 667 F.3d at 1356.
192. *Id.*

declined to concede that it was the better interpretation based on the Sentencing Commission's commentary and the purpose behind the Sentencing Guidelines.[193] The dissent agreed that the first prepositional phrase made clear that the prior conviction must occur before deportation.[194] However, the dissent reasoned, "[W]e can have no similar confidence that the 'sentence imposed' must [come prior to deportation]" because the prepositional phrase modifying "sentence imposed" is placed "two modifying phrases away."[195]

Let us walk through the grammar ourselves. At its most basic, the sentence in section 2L1.2 is an if–then statement. If the court is dealing with a prior drug-trafficking conviction that imposed a sentence longer than thirteen months, then add a sentence enhancement. Based on the facts in this case, we may ignore the "or unlawfully remained in the United States" line because Rosales was deported and illegally reentered.[196] The string of prepositional phrases referenced by the dissent read, "[W]as deported . . . after . . . a conviction for a felony that is . . . a drug trafficking offense for which the sentence imposed exceeded 13 months."[197] Both the phrase "for which the sentence imposed exceeded 13 months" and "for a felony that is a drug trafficking offense" modify the term "conviction."[198] It does not matter that the "sentence imposed" phrase "comes at the caboose of the prepositional train."[199] What matters is that both phrases modify conviction, and the conviction must come after deportation. Therefore, the grammatical construction of the sentence, as the majority held, indicates that the conviction and its corresponding sentence must come before the deportation. Said in a slightly simpler fashion, if the defendant was deported after a drug-trafficking felony conviction for which the sentence imposed exceeded thirteen months, then apply the 16-level enhancement.

C. The Purpose Behind the Sentencing Guidelines

The majority's discussion of the overall purpose behind section 2L1.2 provides a helpful foundation for understanding the reasoning of the court.[200] As the majority pointed out, both parties in the case agreed that "the purpose of § 2L1.2(b)(1) is to punish illegal reentry more severely where the defendant has committed one or more of certain enumerated prior crimes," including the drug-trafficking felony at issue here.[201] The method for determining the seriousness of the prior crime is

193. *Id.* at 1351 n.2 (majority opinion).
194. *Id.* at 1356 (Gorsuch, J., dissenting).
195. *Id.*
196. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A).
197. *Id.*
198. *Id.*
199. *Rosales-Garcia*, 67 F.3d at 1356 (Gorsuch, J. dissenting).
200. *Id.* at 1353–54 (majority opinion).
201. *Id.* at 1353.

to look at the maximum sentence imposed on the defendant.[202] The court stated that using the sentence as a measure of the prior crime's magnitude may be rough, but it is nonetheless one that provides at least a modicum of consistency and "numerically prescribed" precision.[203] Simply put, the longer the sentence a defendant received in state court, the more serious the offense would appear in a situation like this.[204]

In spite of the fact that his probation-revocation sentence was "technically imposed as part of the punishment process for an earlier felony," the majority agreed with Rosales's interpretation of the Commission's intentions.[205] This interpretation was that "the Commission did not intend consideration of a sentence imposed as a result of post-deportation actions."[206] As the court adroitly pointed out, the increased sentence stemming from Rosales's failure to comply with his probation by reentering the country had nothing to do with the seriousness of the original drug-trafficking offense.[207] The court reasoned that this interpretation, which looks only to the sentence of the prior offense before the deportation, is consistent with the distinction between pre- and post-deportation and reentry drawn by section 2L1.2.[208]

The dissent expressed the concern that the majority, by accepting Rosales's interpretation and the distinction between pre- and post-deportation proceedings, altogether ignored probation-revocation sentences when calculating the seriousness of an offense.[209] The majority's response to this concern was that the categorization as original sentence or as probation-revocation sentence was not the determining aspect and cited *United States v. Moreno-Cisneros*,[210] where a probation-revocation sentence was taken into consideration during sentencing.[211] However, in *Moreno-Cisneros*, the revocation of probation occurred before deportation.[212] Thus, the *Rosales-Garcia* court held that the temporal placement of the sentence, whether it occurs before or after deportation, is definitive when applying the Sentencing Guidelines.[213]

This temporal focus is, according to the *Rosales-Garcia* court, supported by the language of both the statute and the accompanying notes supplied by the drafters.[214] In his argument, Rosales stressed the choice

202. *Id.* at 1353–54.
203. *Id.*
204. *Id.* at 1354.
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.* at 1358 (Gorsuch, J., dissenting).
210. 319 F.3d 456 (9th Cir. 2003).
211. *Id.* at 457.
212. *Id.* at 458.
213. *Rosales-Garcia*, 667 F.3d at 1355 (majority opinion).
214. *Id.* at 1350–53.

and placement of the word "after" in section 2L1.2(b)(1), along with the "repeated use of the past tense . . . in referring to the predicate drug trafficking felony sentence."[215] In the language of the statute, "[i]f the defendant previously was deported . . . after . . . a conviction for a felony,"[216] the conviction is read to precede the deportation.[217] The use of the past tense for the words "imposed" and "exceeded" was interpreted by Rosales and the majority to mean that that there must be some date of reference before which the predicate sentence was given.[218] The court reasoned that the date of reference is the same for both the prior conviction and the predicate sentence;[219] therefore, because there is no dispute that the prior conviction must take place before deportation, the predicate sentence must occur before deportation as well.[220]

In its argument, the Government countered that the Sentencing Commission's commentary to section 2L1.2(b)(1) indicates that any sentence prior to the federal sentence is eligible for the purposes of sentence enhancement.[221] The commentary defines "sentence imposed" as "any term of imprisonment given upon revocation of probation."[222] The majority accused the Government of "urg[ing] a simple truism: 'any' means 'any.'"[223] While the dissent was persuaded by this "simple truism," the majority was not.[224] Instead, the majority relied on the fact that the commentary did not mention the temporal aspect at issue here.[225] Because the commentary did not mention the temporal constraint at issue in *Rosales-Garcia* and similar cases, the majority concluded that the Government's interpretation was not consistent with the commentary.[226]

Furthermore, the court explained "any term of imprisonment" for sentences imposed by way of the "relation back" doctrine.[227] Rather than referencing any conviction as an indication that post-deportation convictions count, the *Rosales-Garcia* court understood the commentary to be instructing courts to consider all of the defendant's convictions prior to the illegal reentry, regardless of how far in the past those convictions occurred.[228]

The dissent proceeded to respond to the remaining points made in the majority opinion. Judge Gorsuch found that the commentary's silence

215. *Id.* at 1351.
216. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A) (2012).
217. *Rosales-Garcia*, 667 F.3d at 1351.
218. *Id.*
219. *Id.* at 1351–52.
220. *Id.* at 1351.
221. *Id.* at 1352.
222. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.1(B)(vii).
223. *Rosales-Garcia*, 667 F.3d at 1352.
224. *Id.*
225. *Id.*
226. *Id.* at 1353.
227. *Id.* at 1352.
228. *Id.*

on the temporal restraint, and the analogous silence regarding the issue in the four supporting cases cited by the Commission, did not indicate "limiting language" about the sentence imposed.[229] The dissent accused the majority of relying on mere guesswork about the commentary's silence and omission to amend in light of the circuit split.[230] The dissent also rejected the policy concern of arbitrary anomalous results based on "whether state or federal officials happen to collar the defendant first" because the federal courts have the discretion in sentencing to consider fairness concerns such as this.[231] Of course, this discretion suggests that federal courts can do exactly the same overreach of authority that the dissent accused the majority of doing: using discretion when applying the Sentencing Guidelines. In short, the dissent did not convincingly respond to the analysis of the majority.

D. Precedential Support and the Circuit Split

Throughout its opinion, the *Rosales-Garcia* majority included references to precedential support. For persuasive authority, the court cited four opinions from other circuits regarding the same issue: *United States v. Lopez*,[232] *United States v. Bustillos-Pena*,[233] *United States v. Jimenez*,[234] and *United States v. Guzman-Bera*.[235] In all these cases, the courts similarly concluded that a sentence enhancement under section 2L1.2 could only be based on a conviction prior to deportation.[236] Additionally, the Seventh Circuit agreed in *Lopez* that the Sentencing Commission's commentary did not support the Government's view that any conviction, including those after deportation, would apply for section 2L1.2.[237]

Additionally, the court offered the fact that none of the four cases[238] chosen by the Sentencing Commission to support the commentary's definition of "sentence imposed" implicated the temporal issue of post-deportation convictions.[239] In all of the four cases offered by the commentary, the previous sentence imposed occurred before deportation and subsequent illegal reentry.[240] The court pointed out that the commentary included these four cases but excluded *Guzman-Bera*, which implicates

229. *Id.* at 1357 (Gorsuch, J., dissenting).
230. *Id.* at 1358 n.1.
231. *Id.* at 1358–59.
232. 634 F.3d 948 (7th Cir. 2011).
233. 612 F.3d 863 (5th Cir. 2010).
234. 258 F.3d 1120 (9th Cir. 2001).
235. 216 F.3d 1019 (11th Cir. 2000).
236. *Lopez*, 634 F.3d at 950; *Bustillos-Pena*, 612 F.3d at 869; *Jimenez*, 258 F.3d at 1125–26; *Guzman-Bera*, 216 F.3d at 1021.
237. *Lopez*, 634 F.3d at 953.
238. United States v. Moreno-Cisneros, 319 F.3d 456 (9th Cir. 2003); United States v. Compian-Torres, 320 F.3d 514 (5th Cir. 2003); United States v. Hidalgo-Macias, 300 F.3d 281 (2d Cir. 2002) (per curiam); United States v. Rodriguez-Arreola, 313 F.3d 1064 (8th Cir. 2002).
239. United States v. Rosales-Garcia, 667 F.3d 1348, 1353 (10th Cir. 2012).
240. *See id.*

the temporal constraint.[241] And so, the court did not find an intention by the commentary to include post-deportation sentences within the meaning of a "sentence imposed" for purposes of section 2L1.2.[242] The court noted that this conclusion did not strip the commentary of all meaning; for any probation-revocation sentence imposed prior to deportation, the enhancement provisions set forth in section 2L1.2 would certainly apply based on the definition set forth in the commentary.[243]

The opinion also acknowledged the presence of a circuit split on the precise issue of the case.[244] The majority specifically referenced *United States v. Compres-Paulino*, a per curiam case that came to precisely the opposite conclusion as that of the *Rosales-Garcia* court.[245] In *Compres-Paulino*, the Second Circuit found that "any punishment assessed for a violation of probation is actually imposed for the underlying conviction."[246] The court in *Rosales-Garcia* chose to follow the Fifth and Seventh Circuits not only for the reasons outlined above but also because the *Rosales-Garcia* court was concerned with the "needless and nonsensical aberrant results" that would flow from the *Compres-Paulino* holding.[247] Specifically, the aberrant results with which the court was concerned were that a defendant like Rosales could be punished more or less severely based solely upon "the happenstance that his state probation was revoked before his federal prosecution commenced."[248] In other words, the *Rosales-Garcia* court disdained the consequence of different sentences based only upon the coincidence of sequencing.[249] Under the holding in *Compres-Paulino*, Rosales would have received only the 12-level enhancement had the State of Utah revoked his probation after the federal trial but the higher 16-level enhancement if Utah had revoked the probation before the federal sentence.[250] According to the majority, avoidance of this type of arbitrary difference in sentencing further bolsters the *Rosales-Garcia* conclusion.[251]

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241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.* at 1354 ("We acknowledge that our decision is squarely in conflict with the Second Circuit's holding in *United States v. Compres-Paulino*.").
245. *Id.* at 118–19; *Rosales-Garcia*, 667 F.3d at 1354.
246. *Compres-Paulino*, 393 F.3d at 118 (quoting United States v. Huerta-Moran, 352 F.3d 766, 770 (2d Cir. 2003)) (internal quotation marks omitted).
247. *Rosales-Garcia*, 667 F.3d at 1354.
248. *Id.*
249. *Id.* ("One particular concern we have with [the *Compres-Paulino*] decision is the disparate treatment it gives to like offenders whose prosecutions have happened to differ sequentially. As Mr. Rosales points out, if we were to adopt the Second Circuit's rule, Mr. Rosales would face more substantially increased punishment solely because of the happenstance that his state probation was revoked before his federal prosecution commenced. . . . [This] bolster[s] our conclusion . . . by acknowledging that it avoids needless and nonsensical aberrant results.").
250. *See Compres-Paulino*, 393 F.3d at 118–19.
251. *Rosales-Garcia*, 667 F.3d at 1354.

The court also noted that the Sentencing Commission omitted amending its Guidelines contained in the commentary in spite of the holdings of the Fifth and Seventh Circuits in *Bustillos-Pena* and *Lopez*, respectively.[252] The decision in *Bustillos-Pena* presented the first circuit split on the temporal issue of pre- and post-deportation.[253] And yet, the Sentencing Commission did not amend its commentary.[254] The opinion in *Lopez*, which agreed with the Fifth Circuit, was issued a mere month before the Sentencing Commission submitted proposed amendments to the 2011 congressional session.[255] And still, the Commission failed to amend the definition of "sentence imposed."[256] While the court admitted that this failure to amend is far from dispositive, the court noted, "[T]he Commission's failure to address this [narrow] issue . . . offers at least a modicum of further support for the notion that the Fifth and Seventh Circuits' construction of the provision is not inconsistent with the Commission's intention."[257] In conclusion, the majority held that Rosales's interpretation of the U.S. Sentencing Guidelines was the better interpretation by way of an opinion that was thoughtful, well reasoned, well supported, and complete with rational responses to the reasoning contained in the dissent.[258]

E. Judge Gorsuch's Plea for Clarification

To his credit, Judge Gorsuch ended his dissent well. He closed with "a plea for syntactical assistance" from the Sentencing Commission.[259] He closed by calling upon the Commission to clear up the confusion once and for all.[260] Because, as he rightly pointed out, the current state of affairs means that "similarly situated defendants receive different sentences only because of the happenstance of the circuit in which they sit."[261] Although I agree with the reasoning and holding of the majority, I also agree that clarity on this issue, one way or the other, is to be desired.

It would appear that the Sentencing Commission heard Judge Gorsuch's plea.[262] Effective November 1, 2012, Amendment 764 to the Sentencing Guidelines confirmed that the majority's interpretation of a temporal restraint on when a "sentence imposed" may apply is correct[263]: A sentence following revocation of probation may still apply for purposes

252. *Id.*
253. *Id.* (discussing United States v. Bustillos-Pena, 612 F.3d 863 (5th Cir. 2010)).
254. *Id.*
255. *Id.* (discussing United States v. Lopez, 634 F.3d 948 (7th Cir. 2011)).
256. *Id.*
257. *Id.* at 1355.
258. *See generally id.* at 1349–55.
259. *Id.* at 1359 (Gorsuch, J., dissenting).
260. *Id.*
261. *Id.*
262. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.1(B)(vii) (2012); *see also* United States v. Catalan, 701 F.3d 331, 333 (9th Cir. 2012) (per curiam).
263. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.1(B)(vii); United States v. Rosales-Garcia, 667 F.3d 1348, 1355 (10th Cir. 2012).

of section 2L.1 but only when the revocation occurred before deportation.[264] The Sentencing Commission indicated that the amendment responds to and resolves a "circuit conflict" and discussed the holding in *Rosales-Garcia*.[265] So, as it turns out, the majority got it right. And because Judge Gorsuch's plea for clarification by the Sentencing Commission was granted, defendants in Rosales's position will receive consistent treatment in all the federal circuits. Indeed, one such similarly situated defendant has already felt the effect of the amendment.[266] In *United States v. Catalan*, the amendment was applied retroactively to a defendant who had been given a higher level of sentence enhancement based on his post-deportation probation-revocation sentence.[267] As was Rosales's, Catalan's fate was remanded back to the district court for sentencing based on a 12-level, not a 16-level, enhancement.[268]

F. The Paradox of Punishing and Removing

What does this case teach us? For starters, the case illustrates the level of complexity now standard within immigration law.[269] The difference between the holding in *Rosales-Garcia* and the holding in the Second Circuit also illustrates the "inconsistent and unpredictable application" of immigration laws.[270] The *Rosales-Garcia* decision further serves as an example of the increasing "criminalization" of immigration law through the use of enhanced sentencing.[271] But the case also highlights a paradox—the fact that Rosales was both imprisoned in the United States and removed from the country. What sense does this make? When the law provides for removal of illegal immigrants, including those who, like Rosales, have committed crimes in this country, why do we feel the additional need to punish prior to deportation? As it currently stands, immigration law views deportation not as punishment but rather as a consequence divorced from the punishment of incarceration.[272] Therefore, un-

264. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.1(B)(vii) ("The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release, but only if the revocation occurred before the defendant was deported or unlawfully remained in the United States.").

265. *See Catalan*, 701 F.3d at 333 (quoting U.S. SENTENCING COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 26 (2012)).

266. *Id.*

267. *Id.* at 333 ("Pursuant to the amendment, which we apply retroactively, we hold that the district court erred in imposing a 16-level enhancement under section 2L1.2(b)(1)(A), rather than a 12-level enhancement under section 2L1.2(b)(1)(B).").

268. *Id.*

269. *See* Bettwy, *supra* note 84.

270. Podgorny, *supra* note 84, at 315.

271. *See* United States v. Rosales-Garcia, 667 F.3d 1348, 1349 (10th Cir. 2012); Legomsky, *supra* note 3, at 476.

272. *See, e.g.*, Legomsky, *supra* note 3 ("[B]ecause deportation has been held not to be punishment, the constitutional bar on double jeopardy does not preclude the government from bringing deportation proceedings once the person has completed his or her criminal sentence." (footnote omitted)).

documented immigrants like Rosales can be both imprisoned and removed.[273]

Can it really be argued that deportation is not punishment? The courts insist that "deportation is not punishment."[274] However, most people would see deportation—being sent into exile away from the place considered home and the people considered friends and family—as a punishment.[275] Historically, deportation was used as punishment (e.g., the practice of sending convicted criminals out of English prisons and into the American and Australian colonies).[276] The current argument that deportation is not punishment "is tautological: deportation is not punishment because we do not view it as punishment."[277]

In spite of the insistence that deportation is not punitive, it seems that the ends of deportation bear a striking resemblance to traditional theories of punishment, "particularly retribution, deterrence, and incapacitation." [278] The most obvious connection between deportation and traditional theories of punishment is the connection between incapacitation and deportation.[279] Incapacitation is "the isolation of the undesirable offender from society."[280] It does not require sophisticated scholarship to see that deportation serves the purpose of incapacitation even better than imprisonment; if the individual is removed from a country, then he is no longer able to cause trouble in that country. The deterrence theory of punishment provides that the individual offender (specific deterrence) as well as potential future offenders (general deterrence) will be discouraged from committing the offense through knowledge of the attendant consequences if caught.[281] This same general deterrence theory arguably holds true for deportation as well.[282] If immigrants are aware of the possible consequence of deportation, they are less likely to commit the offense that could carry a deportation consequence with it.[283] The retribution theory of punishment has perhaps the weakest connection with deportation.[284] However, "even retribution might well come into play when

273. *See id.*

274. *See id.* at 472.

275. *See, e.g.*, Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1895 (2000) ("[M]ost people undoubtedly do see deportation as punishment.").

276. *See, e.g.*, Legomsky, *supra* note 3, at 513 (citing Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law*, 14 GEO. IMMIGR. L.J. 115, 129 (1999)).

277. Kanstroom, *supra* note 275.

278. Legomsky, *supra* note 3, at 488.

279. *See, e.g.*, *id.* at 513–14.

280. *Id.* at 514.

281. *Id.*

282. *Id.*

283. *Id.* at 514–15 ("Congress might well feel that the threat of deportation, with all its long-term effects, deters unlawful entries or violations of the terms of one's admittance.").

284. *See id.* at 514 ("The retribution rationale for criminal punishment admittedly has less universal application to deportation . . . .").

deportation is predicated upon the commission of an independent wrong, rather than upon the remedying of an immigration status violation."[285]

I will not delve further into the connection between deportation and the traditional theories of punishment here. Let it be sufficient for the moment to note that having citizens pay for the jail time of the criminally convicted non-citizen and then having the immigrant deported upon release is overkill. Immigration law needs to consider what the larger purpose behind incarceration and deportation is and then make a rational decision regarding the fate of convicted non-citizens. Either we accept the criminal immigrant, punish him, and release him into our society after his rehabilitation,[286] or we "sentence" him to deportation. It seems to me that current immigration law does not have a sufficient reason for both imprisoning and then deporting.

CONCLUSION

Red and white, blue suede shoes

I'm Uncle Sam, how do you do?

Gimme five; I'm still alive! Ain't no luck; I learned to duck!

—The Grateful Dead, *U.S. Blues*[287]

What is the purpose of immigration law? Dean Johnson has noted that the United States has often been unclear about the goals of the immigration laws.[288] It is clear that we want to protect our citizens. Regardless of whether immigrants pose an actual threat, a perceived threat has resulted in a trend toward criminalizing immigration laws.[289] It is also clear that in order to be naturalized, immigrants coveting American citizenship must have "good moral character."[290] This desire to protect our citizens and to guard our citizenship from those lacking good morals is both natural and beneficial. However, where do we fall on the other end of the spectrum? Do we still retain any of that welcoming, hospitable sentiment that we posted on our Statue of Liberty?[291] In a nation built on

285. *Id.*

286. Of course, this option has its own problems; if such an option were put in place, then the easiest way to become naturalized would be conviction of a crime.

287. THE GRATEFUL DEAD, *U.S. Blues*, *on* FROM THE MARS HOTEL (Grateful Dead Records 1974).

288. Johnson, *supra* note 84, at 1638.

289. *See, e.g.*, Legomsky, *supra* note 3, at 469 ("Sometimes dubbed 'criminalization,' the trend has been to import criminal justice norms into a domain built upon a theory of civil regulation."); Podgorny, *supra* note 84, at 289 ("Immigration law has always contained some elements of penal law in its attempt to preempt criminal aliens from seeking naturalization in the United States, but the lines between immigration and penal law have recently become increasingly blurred." (footnote omitted)).

290. 8 U.S.C. § 1101(f) (2012).

291. Lazarus, *supra* note 35.

mass immigration,[292] is it fair that we have slapped a "NO VACANIES" sign over those words of unqualified welcome? It is time to address the issue of immigration within the context of our modern world and take a stand. If nothing else, consistency in the application of the law needs to be achieved. During his 2004 presidential campaign, President Obama declared:

> Now is the time. Now is the time not just for comprehensive immigration reform at the federal level, but for humane, meaningful immigration reform that respects the dignity of all persons and reflects both a knowledge and embrace of international human rights law . . . that fulfills the promise of our great nation as a haven for persons the world over regardless of race, color, ethnicity, or national origin.[293]

I am not presuming to be able to provide satisfactory answers to all these questions here, nor am I able to suggest a comprehensive reform of one of the most complex areas of U.S. law.[294] I do, however, hope to have illustrated through this Comment that immigration laws, specifically the combination of enhanced punishment by imprisonment and removal that Mr. Rosales encountered, are colored by hostility towards immigrants. In the process of writing, it was pointed out to me that even using the term "illegal immigrant" risks perpetuating the stigma of immigrants as criminals.[295] So, rather than providing the necessary reform, my goal was to expose one of the problems in immigration law and thereby show that reform is necessary.

This is not to say that there should not be laws affecting non-citizen immigrants. The simple fact of the matter is that undocumented persons residing in this country are here illegally. But in determining the conse-

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292. *See, e.g.*, Ayelet Shachar, *Earned Citizenship: Property Lessons for Immigration Reform*, 23 YALE J.L. & HUMAN. 110, 110 n.1 (2011) (noting that the literature supporting America as a "'nation of immigrants' is too vast to cite").

293. *See* Campbell, *supra* note 84, at 457–58.

294. Immigration law has been dubbed as one of the most complex areas of U.S. law. *See* Bettwy, *supra* note 84; Johnson *supra* note 84.

295. *See also* Chacón, *supra* note 93, at 1838–39 ("By the 1950s, the phrases 'illegal immigrant' and 'illegal alien' had become a staple of the popular lexicon. Today, the press, politicians and individuals and organizations promoting restrictionist immigration laws commonly use the phrases 'illegal alien' and 'illegal immigrant' when describing unauthorized migrants in the United States. Thus, in law and language, there is a clear link between irregular status and illegality. Care is not always used in how the 'illegal immigrant' label is applied. With their entry and their labor criminalized, certain groups of migrants—most commonly Mexicans—increasingly bear the label 'illegal aliens,' whether or not that label applies to them. In other words, the term 'illegal alien' (which has no clear legal meaning) is not only used to signify irregular migrants, but also often applied to those perceived as irregular migrants, regardless of actual immigration status. These perceptions of undocumented status are heavily influenced by racial stereotypes." (footnotes omitted)); Clifton R. Gruhn, Comment, *Filling Gaps Left by Congress or Violating Federal Rights: An Analysis of Local Ordinances Restricting Undocumented Immigrants' Access to Housing*, 39 U. MIAMI INTER-AM. L. REV. 529, 529–30 (2008) ("This author deems it inaccurate to refer to a group of people as 'illegal' simply because they have committed a criminal act by entering the United States without obtaining permission from the government. . . . [I]t is more accurate to describe them as undocumented immigrants.").

quences for those illegally present, the law should not be colored by xenophobia. If the purpose is simply to curtail the number of undocumented residents, then deportation is enough and punishment inhospitably gratuitous. Some laws are necessary, but as it stands currently, the additional punishment of imprisonment with the very real possibility of enhanced sentencing goes beyond necessity. This is intended to raise the provocative question of whether we are obliged to incarcerate non-citizens at all.

And so, in closing, I echo Judge Gorsuch's plea for clarification.[296] Instead of clarification of the specific ambiguity presented by section 2L.1, I call for clarification of the need for any level of sentence enhancement. Rather than debating or reforming the level of enhancement and when that enhancement may be imposed, let us question whether we require the sentence in the first place. Does this serve some purpose of criminal justice or does this instead satisfy a xenophobic urge to enhance the punishment of those who dare presume to trespass on our land? I propose that the latter is the better interpretation. At best, the combination of imprisonment and deportation reflects ambivalence in the law's consideration of the theory behind the practices.[297] This urge is not proper within the edicts of blind justice. Justice should be served on the undocumented immigrant either through deportation or jail time, not both. In short, the time for immigration reform has come.

Anna Natalie Rol[*]

296. United States v. Rosales-Garcia, 667 F.3d 1348, 1359 (10th Cir. 2012) (Gorsuch, J., dissenting).

297. *See* Kanstroom, *supra* note 275, at 1934 ("In the field of immigration law in general, and deportation law in particular, the lack of a comprehensive theoretical approach has been . . . problematic. Classifying the proceedings as 'civil' has simply subjected questions of fairness and rights to decisions based on a muddle of models.").

* J.D. Candidate, 2014. Like any writer, I owe much of my work to the response of its readers, past, present, and future. Specifically in the case of the present Comment, I am indebted to the assistance provided by the current *Denver University Law Review* Board, particularly to Edward Shaoul and Melissa Lawson for their excellent guidance, thoughtful suggestions, and limitless energy and patience. Any faults or shortcomings in this Comment are mine alone. Also on the current *Denver University Law Review*, I am much obliged to Trey Arbuckle, my shepherd, and to Alaina Almond, my compatriot in Law Review arms. For the scholarship, proofreading, and reason provided by my family, I owe more than can adequately be expressed even through the richness of the English language. Marco, Angie, and Harry Rol, the debts of gratitude I owe to you are not only my greatest debts but also the ones I bear most happily. *Perge modo.*

AWAD V. ZIRIAX: THE TENTH CIRCUIT'S DEFENSE AGAINST THE POWER OF RELIGIOUS MAJORITY FACTIONS

ABSTRACT

The Establishment Clause of the First Amendment creates a wall of separation between church and state and ensures government neutrality concerning religious beliefs and practices. The Supreme Court has developed the *Lemon* and *Larson* tests to analyze Establishment Clause violations but has not clearly articulated when either test should be applied. The Tenth Circuit grappled with this problem in *Awad v. Ziriax* and, under the heightened *Larson* standard, struck down an anti-Sharia law ballot initiative passed in Oklahoma's 2010 election. More importantly, however, the case raises broader questions about the social movements supporting anti-Sharia law sentiment and how a religious majority can wield power in a democratic system.

This Comment utilizes James Madison's theory regarding representative government as a safeguard against a majority political faction in order to explore religious majority efforts to dictate the morals and behaviors of non-adherents. Madison's cure of a democratic republic largely fails in the context of the modern majority religious faction due to increased communication through technology and a shrinking political sphere. The First Amendment must be understood as protecting the people from religion as much as it protects religious liberties in order to guard unpopular religious and non-religious minorities from the power of a religious majority. Consequently, the *Larson* "strict scrutiny" standard should be extended to laws designed to establish mainstream religious values while burdening non-adherents in order to protect against the establishment of a national religion.

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INTRODUCTION

The case of *Awad v. Ziriax*[1] emerges from the growing movement by states to enact legislation aimed at preventing the use or consideration of Sharia law in U.S. courts. Hearing a challenge to Oklahoma's Save Our State Amendment, which specifically prohibited state courts from considering international law or Sharia Law in making judicial decisions, the U.S. Court of Appeals for the Tenth Circuit held that such enactments clearly violate the First Amendment's Establishment Clause.[2] Although the opinion is well reasoned and thoughtful, that is not why this case holds great interest. The social movements leading up to and surrounding the opinion reveal deeper issues within Establishment Clause jurisprudence and shed light on the dynamics of minority oppression and majority power.

Concerns surrounding the potential dangers of majority rule inherent in democratic societies have existed since the founding of this nation and are addressed by James Madison's musings on the "faction" in *The Federalist Papers*.[3] Madison theorized that the effects of a majority faction could be controlled through a representative government, providing checks and balances on any majority vote that is inconsistent with long-term constitutional rights and protections. But many aspects of Madison's cure have failed the *Awad* case.

Part I of this Comment provides background on how courts interpret and apply the religious protection conferred by the First Amendment's Establishment Clause. Part II summarizes the facts, procedural history, and majority opinion in *Awad*. Part III provides an analysis of why the State of Oklahoma attempted to institute a clearly unconstitutional amendment, explains Madison's theory of the democratic republic as a safeguard against the majority political faction and why the theory large-

1. 670 F.3d 1111 (10th Cir. 2012).
2. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").
3. THE FEDERALIST NO. 10 (James Madison).

ly fails in this case, and offers some alternative solutions to continue the Tenth Circuit's work in upholding protection for unpopular minorities against a moral majority. The Comment concludes that the First Amendment protections provided to unpopular religious minorities must necessarily be expanded to include any unpopular minority being oppressed by legislation motivated by a moral majority agenda. First Amendment freedom of religion includes freedom *from* the majority religious group attempting to impose its particularized morality through a secular government.

I. BACKGROUND

This portion of the Comment will provide background on the legal doctrine used by the Tenth Circuit in determining the *Awad* case. First, it will broadly describe the Establishment Clause jurisprudence developed by the Supreme Court in analyzing government and religion interactions. Second, it will describe the *Lemon* test and the *Larson* test, and explain the different applications of the tests.

A. The Establishment Clause

As interpreted by federal courts, the Establishment Clause has given rise to a complex and layered doctrine that applies to a wide range of government conduct.[4] The original intent of the Founders when enacting the Establishment Clause was "to erect 'a wall of separation between Church and State.'"[5]A broad principle of the Establishment Clause is complete, official neutrality by the government,[6] although some scholars have argued that complete neutrality is impossible and the Establishment Clause requires only that the government give no official religious mandate.[7] The Supreme Court has stated that the Establishment Clause primarily protects against governmental "sponsorship, financial support, and active involvement of the sovereign in religious activity."[8] The Establishment Clause is applicable if the government action involves aid to religious institutions or entanglement between religion and government.[9]

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4. *See generally* Richard F. Duncan, *The "Clearest Command" of the Establishment Clause: Denominational Preferences, Religious Liberty, and Public Scholarships that Classify Religions*, 55 S.D. L. REV. 390 *passim* (2010).

5. Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).

6. Robert A. Sedler, *Understanding the Establishment Clause: The Perspective of Constitutional Litigation*, 43 WAYNE L. REV. 1317, 1338–39 (1997).

7. *See, e.g.*, Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146, 148 (1986) ("To insist on strict neutrality in all cases arising under the religion clauses would be wholly inconsistent with the demands of free exercise and, as the separationists would emphasize, nonestablishment as well. Protections for religious liberty are no more 'neutral' toward religion than freedom of the press is 'neutral' toward the press").

8. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)) (internal quotation marks omitted).

9. Russell W. Galloway, Jr., *Basic Establishment Clause Analysis*, 29 SANTA CLARA L. REV. 845, 850 (1989).

In *Everson v. Board of Education*,[10] the Supreme Court considered a New Jersey law that provided taxpayer funds to parochial schools to cover bus fares for children commuting to and from school.[11] The Court held that, because the primary nature of parochial schools is to teach children through a religious lens, any state funding going to parochial schools is a violation of the Establishment Clause. Government funding of schools teaching a particular religious view gave the appearance of government support of a religious institution,[12] despite the fact that the funding was aimed at the secular purpose of providing bus fares.[13] Although New Jersey could not make a special provision just for parochial schools, the state would not have been precluded from sponsoring bus fares for all students, public and private.[14] In *Colorado Christian University v. Weaver*,[15] the Tenth Circuit considered a Colorado statute that subsidized higher education costs for in-state students but excluded funds to universities that were deemed "pervasively sectarian" based on certain factors.[16] The court held that the law discriminated among higher educational institutions in determining which ones would receive state aid based upon the level of sectarianism within the institution, thereby violating the Establishment Clause's command of government neutrality concerning religious sects.[17]

The purpose of preventing entanglement between government and religion is "to prevent, as far as possible, the intrusion of either into the precincts of the other."[18] Elements to consider when determining whether "excessive entanglement" exists are the character and purpose of the benefited institution, the nature of the state aid, and the resulting relationship between government and the religious entity.[19] One underlying concern of entanglement is that a law may involve government in religious contexts that are better resolved within the religious institution itself.[20] The Supreme Court considered the excessive entanglement standard in the context of a government Christmas display with a Christian nativity scene in *Lynch v. Donnelly*.[21] The Court was reluctant to create a bright-line test for determining entanglement in "this sensitive area"[22] but ultimately found that the nativity scene did not cause government entanglement with religion because there was no government

10. 330 U.S. 1 (1947).
11. *Id.* at 3.
12. *Id.* at 16.
13. *Id.* at 17.
14. *Id.*
15. 534 F.3d 1245 (10th Cir. 2008).
16. *Id.* at 1250.
17. *Id.* at 1257–58.
18. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).
19. *Id.* at 615.
20. Sedler, *supra* note 6, at 1410–11.
21. 465 U.S. 668, 671 (1984).
22. *Id.* at 679.

contact with any particular religious entity, a minimal amount was spent on the display, and it caused very little interaction between any church and state organizations.[23]

B. The Lemon *and* Larson *Tests*

1. The *Lemon* Test

In *Lemon v. Kurtzman*,[24] the Supreme Court developed a three-part test for Establishment Clause analysis: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[25] The case combined challenges to similar statutes passed in Pennsylvania and Rhode Island that provided state aid to nonpublic schools, most of which were affiliated with the Roman Catholic church.[26] The state statutes provided that state support would go towards secular aspects of the school's needs, specifically the salaries of teachers of secular subjects.[27]

The main issue in *Lemon* was whether the statutes created "excessive government entanglement with religion."[28] To determine the level of entanglement, a court must "examine the character and purposes of the institutions that are benefited" by the statute, the nature of the state benefit provided, and the resulting relationship between government and the benefited institution.[29] The Court found that the institutions receiving aid were clearly religious and the aid was directed at teacher salaries.[30] The resulting relationship created excessive entanglement because it is difficult for teachers of even secular subjects to be sufficiently religiously neutral while working in a religiously affiliated school of their own faith.[31] Although purely secular teaching materials like textbooks can be provided by the state, a teacher of a secular subject within a religious environment is likely unable to remain religiously neutral[32]; therefore,

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23. *Id.* at 684.
24. 403 U.S. 602 (1971).
25. *Id.* at 612–13 (citation omitted) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 667 (1970)) (internal quotation marks omitted).
26. *Id.* at 606, 609–10.
27. *Id.* at 607, 609.
28. *Id.* at 613–14 (quoting *Walz*, 397 U.S. at 674) (internal quotation marks omitted) (finding the first two prongs of the test to be satisfied).
29. *Id.* at 615.
30. *Id.* at 616, 641.
31. *Id.* at 618.
32. *Id.* at 618, 626. The Court explained that a teacher in a parochial school of even a purely secular subject likely cannot remain religiously neutral because he or she is employed by the religious organization, is subject to direction and discipline by that employer, and works in a system designed to rear children in a particular faith. *Id.* at 618. This immersion in the religious organization obstructs a clear separation of a secular-subject teacher from the established tenants of the religion. *Id.* at 618–19.

government aid for teachers' salaries is a violation of the Establishment Clause.[33]

In later cases, the Court began to carve out and refine the *Lemon* prongs.[34] In her concurring opinion in *Lynch v. Donnelly*, Justice O'Connor introduced the endorsement test as an extension of the *Lemon* test.[35] This clarification focused on avoiding excessive entanglement of government and religion that would create the appearance of the government endorsing or disapproving of religion.[36] Justice O'Connor explained that the *Lemon* test's prongs are about the message communicated to the public by the government action at issue—Does the government have a "purpose" to endorse or disapprove a religion and does the conveyance of that message have an "effect" on the community?[37] If the answer is yes to either question, there is excessive entanglement due to the government endorsement of religion; therefore, the action is invalid.[38] Justice O'Connor viewed the avoidance of government endorsement of religion as the basic principle of the Establishment Clause because endorsement caused non-believers to feel like outsiders in the political community and indicated that believers were the favored insiders.[39] She later clarified in *Wallace v. Jaffree*[40] that the determination of when a government action communicates government endorsement of a particular religion is based upon "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement . . . ."[41] The *Lemon* test and its modifications remain pivotal to the analysis of Establishment Clause cases involving government action that advances or burdens a particular religious group.[42]

2. The *Larson* Test

In *Larson v. Valente*,[43] the Supreme Court held that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[44] The Court held that statutes that discriminated among religious groups are per se unconstitutional unless they are justified by a compelling governmental interest and

33. *Id.* at 618–19.

34. Jeffrey R. Wagener, *A Survey of the Supreme Court's Approach to the Establishment Clause in Light of* County of Allegheny v. American Civil Liberties Union, 35 ST. LOUIS U. L.J. 169, 169 (1990).

35. *See* Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

36. *Id.* at 688–89.

37. *Id.* at 690.

38. *Id.*

39. *Id.* at 688.

40. 472 U.S. 38 (1985).

41. *Id.* at 76.

42. Stephanie E. Russell, Note, *Sorting Through the Establishment Clause Tests, Looking Past the Lemon*, 60 MO. L. REV. 653, 676 (1995).

43. 456 U.S. 228 (1982).

44. *Id.* at 244.

"closely fitted to further that interest" under a "strict scrutiny" test.[45] *Larson* concerned the Minnesota Charitable Solicitation Act, which required charitable organizations to disclose detailed fundraising information.[46] The Act contained an exception for religious organizations but only if the organizations received more than half of their contributions from members or affiliated groups.[47]

The Court found that the statute facially discriminated among religious groups based on their charitable funding sources and therefore must satisfy the "compelling interest" standard to be upheld.[48] The State argued that it had a compelling interest in ensuring that its charities were properly soliciting funds in order to prevent fraud.[49] Organizations in which less than 50% of the funds came from third parties were believed to be more in control of the funds because the organization's members acted as safeguards for proper fund uses, whereas organizations with less than 50% from its own members lack this safeguard and needed public disclosure of the funds to prevent fraud.[50] The Court ruled that the State failed to show that the statute had a compelling interest because there was nothing in the record to suggest that a religious organization receiving more than half of its contributions from third parties would need any more state supervision of funding records through public disclosure than organizations receiving less than half.[51] There was no reason to believe that members supervised their organizations' funds any differently depending on the mix of funding sources.[52] Because there was no compelling state interest for the arbitrary standard of 50%, the Court held the statute was unconstitutional.[53]

In *Larson*, the Court took the opportunity to delineate the differences in applicability between the newly prescribed *Larson* test and the previously established *Lemon* test. The Court explained that "the *Lemon v. Kurtzman* 'tests' are intended to apply to laws affording a uniform benefit to *all* religions, and not to provisions . . . that discriminate *among* religions"[54] for which the Court developed the *Larson* standard. However, the *Larson* Court went on to say that "[a]lthough application of the *Lemon* tests is not necessary to the disposition of the case before us, those tests do reflect the same concerns that warranted the application of strict scrutiny."[55] The Court also applied *Lemon*'s prongs despite just

45. *Id.* at 246–47.
46. *Id.* at 230–31.
47. *Id.* at 231–32.
48. *Id.* at 246–47.
49. *Id.* at 248.
50. *Id.*
51. *Id.* at 249.
52. *Id.*
53. *Id.* at 251.
54. *Id.* at 252.
55. *Id.*

having created the heightened *Larson* standard. The Court's language distinguishing *Lemon*'s application to "all" religions and *Larson*'s to "among" religions did not clarify when either standard should be used[56] and in many instances, both tests are arguably applicable.[57] Ultimately, the *Larson* test created a strict scrutiny standard for government actions that discriminate among religious groups, whereas the *Lemon* test is a lower scrutiny standard reserved for government action that favors a religion over non-religion.[58]

II. *AWAD V. ZIRIAX*

A. Facts

In May 2010, the Oklahoma legislature passed House Joint Resolution 1056, placing a proposed amendment to the state constitution, known as the Save Our State Amendment, on the 2010 mid-term election ballot.[59] The Amendment provided that "courts shall *not look to* the legal precepts of other nations or cultures. Specifically, the courts *shall not consider international law or Sharia Law*."[60] The Amendment defined international law as "the law of nations. It deals with the conduct of international organizations and independent nations, such as countries, states, and tribes"[61] and defined Sharia law as "Islamic law . . . based on two principal sources, the Koran and the teaching[] of Mohammed."[62]

The Save Our State Amendment was placed on the Oklahoma ballot as State Question 755 (SQ 755).[63] The Amendment was approved by a 70% majority of the voters.[64]

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56. Daniel W. Evans, Note, *Another Brick in the Wall: Denominational Preferences and Strict Scrutiny Under the Establishment Clause*, 62 NEB. L. REV. 359, 378 (1983).

57. *See* Jeremy Patrick-Justice, *Strict Scrutiny for Denominational Preferences:* Larson *in Retrospect*, 8 N.Y. CITY L. REV. 53, 105 (2005) ("Laws that would warrant strict scrutiny under *Larson* because they create denominational preferences will frequently lack a primarily secular purpose under *Lemon*. More importantly, a denominational preference almost by definition endorses the religious beliefs of that denomination, rendering the practice invalid under the endorsement inquiry of the 'effects' prong of *Lemon*. Other laws creating denominational preferences will also create an excessive government entanglement with religion under *Lemon*, such as the law at issue in *Larson* itself." (footnotes omitted)).

58. *Id.* at 86–87.

59. Awad v. Ziriax, 670 F.3d 1111, 1117 (10th Cir. 2012).

60. *Id.* at 1118 (quoting H.R.J. Res. 1056, 52nd Leg., 2d Reg. Sess. (Okla. 2010)) (internal quotation marks omitted).

61. *Id.* (quoting Okla. State Senate, *Issues to Be Referred to Oklahoma Voters for Approval or Rejection at the 2010 Elections*, LEGIS. BRIEF, July 2010, at 5, 5, *available at* http://www.oksenate.gov/publications/legislative_briefs/legis_brief_2010/state_questions_2010.pdf) (internal quotation marks omitted).

62. *Id.* (emphasis omitted) (quoting Okla. State Senate, *supra* note 61) (internal quotation marks omitted).

63. *Id.*

64. *Id.*

B. Procedural History

Two days after the election, Muneer Awad, a Muslim U.S. citizen and resident of Oklahoma, sued the Oklahoma State Election Board.[65] He sought a preliminary injunction to prevent the certification of the election results of SQ 755 and preclude the Oklahoma legislature from amending the state constitution to prevent state courts from considering international and Sharia law in their determinations.[66] Awad claimed that the proposed amendment violated his constitutional rights under the First Amendment's Establishment and Free Exercise Clauses for two reasons: (1) it negatively identified his religion specifically and, (2) it hindered his practice of Islam by preventing Oklahoma courts from probating his will, which contained references to Sharia law, and by providing inadequate relief in the judicial system for Muslims.[67] The district court granted the preliminary injunction, and the Oklahoma State Election Board appealed to the U.S. Circuit Court of Appeals for the Tenth Circuit.[68]

C. Majority Opinion

The Tenth Circuit voted unanimously to affirm the decision of the Oklahoma district court in granting the preliminary injunction.[69] Two issues were before the court: (1) whether Awad's claim was justiciable, and (2) whether the district court abused its discretion in granting the preliminary injunction.[70] The court of appeals addressed only Awad's Establishment Clause claim in determining these issues, finding sufficient cause to uphold without having to analyze the Free Exercise Clause claim.[71]

On the issue of whether the claim was justiciable, the court addressed Awad's standing to bring the claim and its ripeness.[72] The Oklahoma State Election Board argued that Awad did not have legal standing because he had not suffered any injury in fact and any condemnation of his religion was merely his own perception.[73] The court reviewed its precedent of injury in Establishment Clause cases and found that injury is not required to be physical or economic but must be a direct consequence of the alleged unconstitutional state action.[74] "[P]ersonal and unwelcome[d] contact" with the state-sponsored action is sufficient to establish standing in an Establishment Clause case.[75] The court then de-

65. *Id.* at 1118–19.
66. *Id.* at 1119.
67. *Id.*
68. *Id.*
69. *Id.* at 1132.
70. *Id.* at 1119.
71. *Id.*
72. *Id.* at 1119–20.
73. *Id.* at 1120.
74. *Id.* at 1121.
75. *Id.* at 1122 (quoting Am. Atheists, Inc. v. Davenport, 637 F.3d 1095, 1113 (10th Cir. 2010)) (internal quotation marks omitted).

termined that Awad had established standing because the explicit and public condemnation of his religion was personal and unwelcomed conduct by the state that inflicted adverse treatment of his religion in state courts.[76] The Oklahoma State Election Board also argued that Awad's claim was not ripe for review.[77] The court held that because Awad challenged the constitutionality of the amendment on its face, the court did not have to analyze the amendment in the context of a particular factual scenario.[78] In its determination, the court must balance the hardships of both parties against withholding review. Here, it held that Awad faced immediate injury without judicial review, whereas the Government did not face any injury, thereby making the claim ripe for review.[79]

Finding the claim justiciable, the court then applied the "rational basis" test to determine whether the district court abused its discretion in granting the preliminary injunction.[80] To obtain a preliminary injunction, a plaintiff must show that on balance the following factors weigh in his favor: (1) likely success on the merits of the claim; (2) if denied the injunction, he will suffer irreparable injury; (3) his injury outweighs any potential injury to the opposing party; and (4) the injunction is in the public interest.[81] In analyzing the merits of the claim, the court initially had to determine whether the case should be analyzed under the *Lemon* test, which addresses laws pertaining to all religions, or the *Larson* test, which addresses laws that discriminate against one particular religion.[82] The court found that the *Larson* test applied in this case because the amendment specifically delineated Islam as the target..[83]

The court then clarified that the burden of proof was on the Government to show that the amendment was not facially unconstitutional, which is a strict scrutiny level of review under the *Larson* test.[84] *Larson* required the Government to show that (1) there is a compelling government interest, and (2) the amendment is closely fitted to that interest.[85] The Oklahoma State Election Board argued that "Oklahoma certainly has a compelling interest in determining what law is applied in Oklahoma courts."[86] The court did not find that interest compelling and noted that the state board of elections did not cite a single instance of an Oklahoma court considering either Sharia law or precepts of other nations or cultures, indicating that the amendment did not serve to solve any existing

76. *Id.* at 1122–23.
77. *Id.* at 1124.
78. *Id.*
79. *Id.* at 1125.
80. *Id.*
81. *Id.*
82. *Id.* at 1126–27.
83. *Id.* at 1128.
84. *Id.* at 1129.
85. *Id.*
86. Supplemental Brief of Appellant at 16, Awad v. Ziriax, 670 F.3d 1111 (10th Cir. 2012) (No. 10-6273), 2011 WL 5518034, at *16.

problem within the state.[87] The Government failed to satisfy the first part of the *Larson* test because the alleged harm to the state was "speculative at best and cannot support a compelling interest."[88] Although the state failed to establish a compelling interest in support of the amendment, the court went on to say that the amendment is also not closely fitted to the alleged state interest because a complete ban on even the consideration of Sharia law in judicial decision making, rather than just a limitation on applying Sharia law, was not a narrowly tailored solution to the perceived harm.[89]

The court then addressed the remaining factors used in determining whether to grant a preliminary injunction. It held that Awad's claim alleging a condemnation of his religion was sufficient to show irreparable injury if the injunction were denied because suffering a violation of a constitutional right is very difficult to remedy with monetary compensation after the fact.[90] To show that the Government's potential injury from granting the preliminary injunction outweighed Awad's injury from a denial, the Oklahoma State Election Board asserted that Oklahoma voters have a stronger interest in the manifestation of their majority vote.[91] The court disagreed, holding that when the majority votes against the explicit provisions of the U.S. Constitution, its collective will cannot outweigh individual constitutional rights.[92] Finally, the court held that the injunction was in the public interest because upholding individual constitutional rights is always in the long-term public interest, even over the short-term public interest to vote and enact the majority view.[93]

III. ANALYSIS

The Tenth Circuit's holding in *Awad* was well-reasoned and followed Supreme Court precedent. The decision was supported under the *Larson* standard because the Oklahoma amendment was clearly discriminating among religious groups by burdening only Muslims without any compelling government interest for that burden. The more interesting questions arising from this case are the current and future social implications of the amendment and the voters who passed it. First, this Comment will explore why the Oklahoma legislature and voters believed the amendment was necessary despite its blatant unconstitutionality. Second, it will discuss the tensions inherent in a democratic system between the short-term majority vote and the long-term interest in personal freedom and protected individual rights. Finally, it will review wider trends in Establishment Clause jurisprudence.

87. *Awad*, 670 F.3d at 1130.
88. *Id.*
89. *Id.* at 1131.
90. *Id.*
91. *Id.*
92. *Id.* at 1131–32.
93. *Id.* at 1132.

A. Why Pass a Blatantly Unconstitutional and Apparently Unnecessary Amendment?

Oklahoma's State Question 755 explicitly placed restrictions on courts considering two areas of law: international law and Sharia law. This subpart analyzes why the restrictions were unconstitutional and harmful to Oklahoma's residents and examines the motivation for the provision. First, the restrictions were in conflict with longstanding doctrines of international and contract law. Preventing courts from considering international law undermined the Supremacy Clause of the Constitution with regard to the federal government's preeminent power to make and enforce U.S. treaties as law and complicated the interpretation of international agreements and contracts. Contract law is further undermined by the restriction on courts from considering international or Sharia law by limiting Oklahoma residents' freedom to contract. Second, this subpart explores why state legislators believed the restrictions were necessary, and how a large percentage of the population was persuaded to agree.

1. State Question 755 in Conflict with Fundamental U.S. Doctrines: International and Contract Law

Oklahoma's State Question 755 included a preclusion of any consideration of international law by state courts and defined international law as "the law of nations. It deals with the conduct of international organizations and independent nations, such as countries, states and tribes. It deals with their relationship with each other. It also deals with some of their relationships with persons."[94] International law comes from three general sources: (1) customary law, (2) international agreements, and (3) derived principles common to all major legal systems.[95] The federal Constitution explicitly states that all treaties made by the United States are the supreme law of the land and bind the judges of the states.[96] It has been well settled throughout U.S. legal history that international law is incorporated into U.S. law.[97] Not only is international law validly a part of U.S. law, but courts are bound to consider international law when the question presented concerns an international issue and there is no treaty or other law on point.[98] Additionally, on issues not settled by conven-

94. *Id.* at 1118 (quoting Okla. State Senate, *supra* note 61) (internal quotation marks omitted).

95. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW: SOURCES OF INT'L LAW § 102(1)(a)–(c) (1987).

96. U.S. CONST. art. VI., cl. 2 ("[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . .").

97. The Paquete Habana, 175 U.S. 677, 700 (1900), *aff'd*, Sosa v. Alvarez-Machain, 542 U.S. 692, 730 (2004).

98. *Id.* ("International law is part of our law, and *must* be ascertained and administered by the courts of justice . . . as often as questions of right depending upon it are duly presented for their determination." (emphasis added)).

tional law, the opinions of foreign and international jurists can be given great consideration in U.S. courts.[99]

Oklahoma's proposed amendment seemed to include the "law of nations" in its ban.[100] This ban included treaties (international agreements) as well as domestic contracts with choice of law clauses because they fall within "relationships with person" as part of SQ 755's definition of international law.[101] This component of the proposed amendment was per se unconstitutional in light of various federal holdings and was impractical and harmful to the state and citizens of Oklahoma.[102] An amendment to ban courts from considering international law in decision making went directly against the Constitution's mandate that treaties are the supreme law of the land and Supreme Court precedent that incorporates international law into U.S. law.[103] SQ 755 explicitly stated that the provision's complete ban on considering international law shall apply even to cases of first impression, which is in direct conflict with the principle acknowledged in *Paquete Habana* that courts should give great weight to international sources on questions of unsettled law in the U.S.[104]

SQ 755 was not only outright unconstitutional but also actually harmful to the residents and judicial system of Oklahoma. The amendment did not allow Oklahoma courts to look to the rulings and decisions made in other states if they were based upon international or Sharia law,[105] thereby inhibiting the Full Faith and Credit Clause.[106] SQ 755 would disempower Oklahoma courts to enforce judgments made in other states if the decision discussed international or Sharia law in any way,[107] causing conflicts for Oklahoma residents seeking to enforce divorce decrees or property rights within their home state if they contain language references to international or Sharia law. The amendment also created problems for business transactions and freedom of contract because Oklahoma courts would be unable to (a) adjudicate any foreign choice of law clause because the statute provided that the courts "shall *not look to*

99. *Id.* at 701.

100. Robert E. Michael, *The Anti-Shari'a Movement and Oklahoma's Save Our State Amendment—Unconstitutional Discrimination or Homeland Security?*, 18 ILSA J. INT'L & COMP. L. 347, 355 (2012).

101. *Id.*

102. *Id.* at 367–68.

103. *Id.* at 355, 357.

104. *Compare* Awad v. Ziriax, 670 F.3d 1111, 1118 (10th Cir. 2012) ("The provisions of this subsection shall apply to all cases before the respective courts including, but not limited to, cases of first impression." (quoting H.R.J. Res.1056, 52nd Leg., 2d Reg. Sess. (Okla. 2010))), *with Paquete*, 175 U.S. at 700–01 ("[I]n the absence of higher and more authoritative sanctions, the ordinances of foreign states, the opinions of eminent statesmen, and the writings of distinguished jurists, are regarded as of great consideration on questions not settled by conventional law." (quoting 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 18 (Legal Classics Library ed., 1986) (1826)) (internal quotation mark omitted)).

105. *Awad*, 670 F.3d at 1118.

106. U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.").

107. Michael, *supra* note 100, at 358.

the legal precepts of other nations,"[108] or (b) enforce contracts that refer to any Sharia principles throughout the agreement.[109] These restrictions on Oklahomans enforcing contracts and business transactions in court are the unintended negative consequences of a provision that was seemingly meant to restrict only religious practice. The restriction of such a fundamental right necessarily leads to a ripple effect that ultimately impairs other valued protections in U.S. law.

2. State Question 755 in Conflict with Religious Protections

The Tenth Circuit's First Amendment analysis of SQ 755 found that the proposed Oklahoma amendment presented a clear violation.[110] The law singled out a specific religion by name and subsequently gave no compelling interest to support the action.[111] The more interesting question is why, despite the clear constitutional violation of the First Amendment, did the state legislators, and subsequently an overwhelming majority of voters, continue to pursue this unconstitutional and unnecessary amendment.

Several Oklahoma news sources, explaining the mid-term election questions and making voting recommendations, gave SQ 755 a "no" recommendation and described the ballot question in a variety of terms indicating its obsoleteness: "[a] feel-good measure . . . [that v]oters should reject . . . as unnecessary,"[112] "no need for this law,"[113] and "seeks to solve a nonexistent problem."[114] If the journalistic consensus, presumably providing an objective analysis of the ballot measures, was that the proposed amendment was unnecessary to solve for any impending problem concerning Sharia law infiltrating the Oklahoma government, why did SQ 755 get such wide support in the Oklahoma congress[115] and gain a 70% majority by voters?[116] What caused this deviation? The political messaging surrounding the amendment has something to do with these results.

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108. *Awad*, 670 F.3d at 1118 (quoting H.R.J. Res. 1056, 52nd Leg., 2d Reg. Sess. (Okla. 2010)) (internal quotation marks omitted).

109. Michael, *supra* note 100, at 361.

110. *See supra* Part II.

111. *See supra* Part II.C.

112. Editorial, *We Support Four of 11 State Questions on Ballot: Our SQ Choices*, OKLAHOMAN (Okla. City, Okla.), Oct. 17, 2010, at 13A.

113. Editorial, *Our Take on the State Questions*, ENIDNEWS.COM (Enid, Okla.) (Oct. 18, 2010), http://enidnews.com/opinion/x154637225/Our-take-on-the-state-questions.

114. Editorial, *State Questions*, TULSAWORLD.COM (Tulsa, Okla.) (Oct. 24, 2010, 5:30 AM), http://www.tulsaworld.com/opinion/article.aspx?subjectid=61&articleid=20101024_61_0_Eleven670211&r=4250.

115. Marc Ambinder, *Oklahoma's Preemptive Strike Against Sharia Law*, ATLANTIC (Oct. 25, 2010, 10:10 AM), http://www.theatlantic.com/politics/archive/2010/10/oklahomas-preemptive-strike-against-sharia-law/65081/ (noting that the amendment passed the state legislature with an 82–10 vote in the house and a 41–2 vote in the senate).

116. Awad v. Ziriax, 670 F.3d 1111, 1118 (10th Cir. 2012).

The inspiration for the Save Our State Amendment came from various judicial decisions emerging from courts outside of Oklahoma. There has been a pattern of recent decisions made by European courts that include considerations of Sharia law in divorce decrees.[117] Also concerning to the proponents of the Amendment was a New Jersey case in which a trial court judge, referencing Sharia principles advocated by a party in the case, denied a protection order petition against a man abusing his wife, finding that he did not have the criminal intent because the husband believed his religion allowed him to treat his wife however he wished.[118] The case was quickly overturned by the New Jersey court of appeals.[119] Following these events, the primary author of SQ 755, Republican State Representative Rex Duncan, envisioned the Amendment as a "preemptive strike against Sharia law coming to Oklahoma."[120] Representative Duncan asserted that "America was founded on Judeo Christian Principles," and fighting against the coming of Sharia law (or "the face of the enemy") to the United States is "a culture war, it's a social war, it's a war for the survival of our country."[121] The organization ACT! for America also supported SQ 755 by spending $60,000 promoting the Amendment through advertising and robo-calling throughout Oklahoma.[122] Even the name "Save Our State" was a signal of the perceived imminent doom Oklahoma faced from the oncoming threat of Sharia law.

The wider purpose of language advocating a culture war against Sharia law, and ultimately Muslim-American citizens, was to create urgency for voters to go to the polls.[123] Creating a message of fear that a state or country is in danger of an invasion by an enemy force that is infiltrating the system of American justice as we know it is effective in motivating voters to engage in the "fight" to "Save Our State."[124] Who would vote against saving their state? Motivation through fear of Islam is a component of a bigger movement that has been developing since the September 11 terrorist attacks.[125] The Republican state legislators in Oklahoma sought to build on this tried-and-true strategy through the ra-

117. Nicholas Riccardi, *Oklahoma May Ban Islamic Law*, L.A. TIMES, Oct. 29, 2010, at 6.

118. Matt Smith, *Arguments to Take Place in Oklahoma over Ban on Islamic Law in Courts*, CNN.COM (Nov. 22, 2010, 6:21 AM), http://www.cnn.com/2010/US/11/22/oklahoma.islamic.law/index.html.

119. S.D. v. M.J.R., 2 A.3d 412, 428 (N.J. Super. Ct. App. Div. 2010).

120. Mark Schlachtenhaufen, *Sharia Law, Courts Likely on 2010 Ballot*, EDMONDSUN.COM (June 4, 2010), http://www.edmondsun.com/local/x1996914371/Sharia-law-courts-likely-on-2010-ballot (quoting State Representative Rex Duncan, Republican from Sand Springs).

121. *MSNBC Live* (MSNBC television broadcast June 11, 2010) (interviewing State Representative Rex Duncan, Republican from Sand Springs).

122. Andrea Elliot, *Behind an Anti-Shariah Movement*, N.Y. TIMES, July 31, 2011, at A1.

123. Ambinder, *supra* note 115.

124. *Id.*

125. Yaser Ali, Comment, *Shariah and Citizenship—How Islamophobia Is Creating a Second-Class Citizenry in America*, 100 CALIF. L. REV. 1027, 1043–44 (2012) (noting the history of anti-Islam sentiment including Attorney General Ashcroft's negative comparisons of Islam and Christianity and President Bush's description of the War on Terror as a "crusade").

tionale and message behind SQ 755. Because the proposed amendment was scrutinized by the local press as largely unnecessary to address any true threat of Sharia law to the state,[126] the resulting deviation from this view by the Oklahoma voters has a "feel-good"[127] aspect that likely comes from the sentiment of voting for the "American" religion against any impeding and threatening "un-American" religion. The powerful emotion of fear of the "other" explains why a substantial portion of Oklahomans supported an amendment that is both unnecessary[128] and transparently unconstitutional, as indicated by the Tenth Circuit's application of the *Larson* test.[129]

B. Protecting Against the Power of the Faction: The Tension Between the Will of the People and Individual Rights

The Tenth Circuit balanced the interests of each party against the public interest in determining whether to grant an injunction and found that "when the law that voters wish to enact is likely unconstitutional, their interests do not outweigh Mr. Awad's in having his constitutional rights protected"[130] and that "the public has a more profound and long-term interest in upholding an individual's constitutional rights."[131] This subpart (1) discusses how federal courts have failed to protect religious minorities against majority moral sentiment in the past, (2) provides background on James Madison's theory of protecting against the political faction with a democratic republic and how the theory has failed in the face of a powerful moral majority faction, and (3) presents some possible solutions to guard against majority oppression as the Tenth Circuit did in *Awad*.

1. Examples of Religious Majority Oppression of the Minority

As discussed above, it is not always clear when the *Lemon* or *Larson* test determines the level of scrutiny to be applied to the challenged government action.[132] It is also not clear why discrimination among religions receives the heightened *Larson* strict scrutiny standard while government actions that promote religion over non-religion receive a lesser *Lemon* standard.[133] In other words, laws that benefit a particular religious group while also burdening non-religious minority groups are not viewed by the court as essential to strike down as are laws that favor and burden

126. *See supra* notes 112–14.

127. *See supra* note 112.

128. *See* Ali, *supra* note 125, at 1029; *supra* notes 112–14.

129. See *supra* Part II.C for a discussion regarding the *Awad* court's holding that the Amendment is void of a legitimate, compelling government interest and not narrowly tailored to address the alleged government interest.

130. Awad v. Ziriax, 670 F.3d 1111, 1131 (10th Cir. 2012).

131. *Id.* at 1132 (quoting Awad v. Ziriax, 754 F. Supp. 2d 1298, 1308 (W.D. Okla. 2010), *aff'd*, 670 F.3d 1111 (10th Cir. 2012)) (internal quotation mark omitted).

132. *See id.* at 1126–27; Patrick-Justice, *supra* note 57; Evans, *supra* note 56, at 361 n.12.

133. Patrick-Justice, *supra* note 57, at 81–82.

different religious denominations.[134] The following examples of polygamous marriage practices and same-sex marriage illustrate when a law benefits or promulgates mainstream Christianity while burdening historically "unaccepted" practices based upon a penchant of mainstream morality. Laws that are fundamentally based upon majority Christian beliefs and designed to burden those outside of that majority should be just as suspect under the *Larson* standard as are laws that burden one religion over another because the Establishment Clause's protection extends to people's freedom from majority religious influence from the government.

First, courts have allowed the government to violate First Amendment religious rights through the power of the majority in the treatment of the Church of Jesus Christ of Latter-day Saints and its historical practice of polygamy. The foundational case against polygamous marriage is *Reynolds v. United States*.[135] The Supreme Court held that the First Amendment did not protect Mormons who believed that they must engage in polygamous marriages to fulfill the tenants of their religious teachings[136] because marriage is a civil contract within the scope of government regulation and states can determine the form of marriage as they wish.[137] The true motivation behind this ruling is hinted at in the Court's statement that "[p]olygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people."[138] This dictum seems to indicate that it was not contract law nor states' rights on which the Court was opining, but rather on a belief that Western European religion is "America's religion" and that foreign or unfamiliar religious practices are not protected by the First Amendment because they are not in the mainstream. The Supreme Court reaffirmed this view a few years after *Reynolds* in *Davis v. Beason*[139] when it stated, "Bigamy and polygamy are crimes by the laws of all *civilized* and *Christian* countries."[140] Denial of religious protections in these cases was based upon what American society would find morally distasteful rather than upon the First Amendment's protection of religious practice.

Second, the Court has discussed the role of the morals of the majority faction in cases that concern laws pertaining to sexual orientation. This discussion is relevant to how the Court views the protection of unpopular minorities in the context of American mainstream religious values be-

134. *Id.*
135. 98 U.S. 145, 166 (1878).
136. *Id.* at 161 ("[I]t was an accepted doctrine of that church that it was the duty of male members of said church, circumstances permitting, to practise polygamy . . . .").
137. *Id.* at 165–66.
138. *Id.* at 164.
139. 133 U.S. 333, 341 (1890).
140. *Id.* (emphasis added).

cause the legal issues surrounding lesbian, gay, bisexual, and transgender (LGBT) rights and same-sex marriage are often framed in terms of religious values. In *Lawrence v. Texas*,[141] the Court struck down a Texas anti-sodomy law by overturning *Bowers v. Hardwick*[142] and relying heavily on Justice Stevens's dissenting argument from *Bowers* that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[143] Justice Scalia offered a warning in his dissent in *Lawrence* that if morality were no longer a compelling government interest, the Court would be bound to strike down a variety of laws pertaining to polygamy, prostitution, and obscenity, among others.[144] However, this warning against invalidating morality as a compelling government interest is amiss because the Court has been moving in the direction of delegitimizing "morality as interest" for the past two decades.[145] Although *Lawrence* was a positive step in protecting LGBT rights, the Court has yet to decide further on the constitutionality of state restrictions on same-sex marriage.[146] At best, the Court's protection of unpopular minority groups by condemning governmental actions based upon a religious moral majority has been inconsistent, outdated, and incomplete.

2. Madison's Cure of the Democratic Republic and Its Failings

In *The Federalist No. 10*, James Madison defined a faction as "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."[147] Madison recognized the common fear of majority power as a threat to private rights to which he offered two solutions: (1) remove the root cause of a faction or (2) control the power of the faction.[148] The first solution, he argued, is more undesirable than is the majority ruling faction itself.[149] Dismantling the faction completely would require eliminating the liberty of the democratic system (so as not to allow the majority to gain power through voting) or forcing all citizens to have the same opinion, which is impracticable.[150]

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141. 539 U.S. 558, 564 (2003).
142. 478 U.S. 186 (1986).
143. *Id.* at 216 (Stevens, J., dissenting).
144. *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting).
145. *See* discussion *infra* Part III.B.3.c.
146. *See* Tom Goldstein, *The Proposition 8 Oral Argument*, SCOTUSBLOG (Mar. 26, 2013, 11:57 AM), http://www.scotusblog.com/2013/03/the-proposition-8-oral-argument/ (arguing that the Supreme Court, after hearing oral arguments in *Hollingsworth v. Perry*, will likely not decide the merits of whether California's ban on same-sex marriage is constitutional).
147. THE FEDERALIST NO. 10, at 51 (James Madison) (Bantam Dell Publishing Group ed., 1982).
148. *Id.*
149. *Id.*
150. *Id.* at 51–52.

Madison proposed that the only way to protect against the power of the majority faction is to control its effects on decision making that may be detrimental to the minority or to individuals.[151] He argued that a true democracy will always suffer at the hands of a powerful faction, but a democratic republic will better serve to protect the minority from oppression.[152] According to Madison, elected officials have the experience and wisdom to better determine the long-term public interests of the nation than does the majority of voters, including for the protection of individual rights and minority groups, because it is within the duty of their position to protect the public good.[153] Additionally, a representative government in the form of a union of states is prophylactic against faction oppression because it is more difficult for factions to develop and organize, and the influence of any majority group that is successful in rising up in one state will likely be checked and tempered by the other states of the union, preventing the faction from spreading.[154]

James Madison recognized the potential and power of a majority faction that rises up within a democratic government,[155] even pinpointing religion as a particular source of faction power.[156] His proposed solution to oppression of minorities by a powerful majority faction was to control the effects of factions through a representative governmental system that seeks to (1) represent the people through wise public officials who can better determine and uphold the public interest, and (2) widen the representative scope so that factions are less able to communicate and organize into powerful forms.[157]

Madison's theory of a representative government depends upon the election of representatives "whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations."[158] This basic premise proved untrue in the events leading up to *Awad*, as demonstrated by the vast support that the ballot proposal had in both houses of the Oklahoma state legislature, passing with an 82–10 vote in the house and a 41–2 vote in the senate.[159] Those representatives who supported the ballot proposal failed to recognize and uphold the "long-term interest in upholding an individual's constitutional rights"[160] as the *Awad* court did

151. *Id.* at 54.
152. *Id.* at 54–55.
153. *Id.* at 55.
154. *Id.* at 57–58.
155. *Id.* at 50.
156. *See id.* at 52 ("A zeal for different opinions concerning religion . . . divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than, to co-operate for their common good.").
157. *Id.* at 54–55.
158. *Id.* at 55.
159. *See* Ambinder, *supra* note 115.
160. Awad v. Ziriax, 670 F.3d 1111, 1132 (10th Cir. 2012) (quoting Awad v. Ziriax, 754 F. Supp. 2d 1298, 1308 (W.D. Okla. 2010)) (internal quotation mark omitted).

and Madison presumed all good public officials would. Madison's second guard against the faction—a representative government that "[e]xtend[s] the sphere"[161] of the people represented, preventing the development of factions by limiting communication and organization—is also problematic in a modern world that Madison was unable to imagine. In an age of Internet communication and mass media, people with similar interests, be they religious, political, or otherwise, are substantially more able to connect and organize into larger factions and spread their message to others quickly and effectively.[162] ACT! for America's radio advertisement[163] is an example of how much wider a message can be broadcast today to catalyze support than in Madison's far-flung, slow-moving republic. The safeguard of distance between factions to inhibit organization and communication is no longer a viable precaution against wide-ranging, powerful majorities.

The failure of Madison's two safeguards will lead to more frequent occurrences of majority factions wielding greater power. Religious factions, in particular, have distinguishing features that make them even less likely to be constrained by Madison's defenses.[164] Religious factions are arguably less subject to be persuaded to change their position and more resistant to compromise because they base many of their positions on pre-established religious teachings and principles rather than on personal opinion.[165] They are also more organized within a community of common believers, while often being more isolated from people who are non-believers.[166] Madison assures us that even if a majority faction gains governmental control in a particular state, the wide scope of a democratic republic will keep the majority faction from spreading and influencing other states in the Union.[167] This theory is only partially accurate. As of September 2012, anti-Sharia law bills have been introduced in twenty states,[168] and House Bill 825 was proposed in the U.S. House of Representatives to ban courts from considering any legal codes outside of codes developed in U.S. courtrooms.[169] It appears that the wide scope of Madison's representative government has not prevented the spread of anti-Sharia movements engineered by a majority faction. However,

161. THE FEDERALIST NO. 10, *supra* note 147, at 57.

162. *See* Peter Dahlgren, *The Internet, Public Spheres, and Political Communication: Dispersion and Deliberation*, 22 POL. COMM. 147, 154–55 (2005).

163. *See* Elliot, *supra* note 122.

164. Christopher L. Eisgruber, *Madison's Wager: Religious Liberty in the Constitutional Order*, 89 NW. U. L. REV. 347, 372 (1995).

165. *Id.* at 372–73.

166. *Id.*

167. THE FEDERALIST NO. 10, *supra* note 147, at 57–58.

168. Moni Basu, *Rising Anti-Islamic Sentiment in America Troubles Muslims*, CNN.COM (Sept. 5, 2012, 1:19 PM), http://religion.blogs.cnn.com/2012/09/05/rising-anti-islamic-sentiment-in-america-troubles-muslims/.

169. Robert P. Jones, *The State of Anti-Sharia Bills*, WASH. POST (Feb. 29, 2012, 3:55 PM), http://www.washingtonpost.com/blogs/figuring-faith/post/the-state-of-anti-sharia-bills/2012/02/29/glQAql5miR_blog.html.

House Bill 825 did receive public criticism from various religious groups, causing it to be sent back to committee for now,[170] and suggesting that expanding the reach of this type of legislation to a national level, and therefore a more diverse population, might temper the movement. Although Madison's safeguards have largely failed in the realm of anti-Sharia legislation, there are other solutions to minimize the effects of a majority faction.

3. Alternative Solutions

In his survey of anti-Sharia initiatives from the September 11, 2001 terrorist attacks through the 2010 Oklahoma ballot initiative, Yaser Ali proposes some solutions to stem the public's fear of Islam and the creation of anti-Islam legislation.[171] First, he proposes public education about actual Sharia law to deflate the threat being purported by supporters of the anti-Sharia legislation and eliminate the public's unfounded fear of Islamic takeover and culture wars.[172] Second, Ali encourages public officials to take a stronger stand against religious intolerance and anti-Sharia legislation to dispel the generated fear of Islam.[173] This harkens back to Madison's argument that enlightened public officials have a "love of justice"[174] and will speak up for the minority. As discussed above, this theory largely failed in the face of the large support for the anti-Sharia proposals from the congressional representatives who failed to protect their vulnerable religious minority constituents.[175]

As public and political opinions remain in flux, one option to counteract anti-Sharia legislation is for the judiciary to remain vigilant in enforcing the First Amendment's protection of minority religions that may be currently unpopular. Courts that are presented with a question of religious minority oppression should follow the lead of the Tenth Circuit in *Awad*. Judicial enforcement of the Constitution to protect the rights of vulnerable minorities is well-established.[176] In determining whether there should be any religious exception for Jehovah's Witnesses to a state law requiring schoolchildren to salute and pledge allegiance to the U.S. flag, the Supreme Court recognized:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. . . . [F]undamental rights

170. *Id.*
171. Ali, *supra* note 125, at 1067.
172. *Id.*
173. *Id.*
174. THE FEDERALIST NO. 10, *supra* note 147, at 55.
175. *See* Ambinder, *supra* note 115.
176. Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 160 (1998).

> may not be submitted to vote; they depend on the outcome of no elections.[177]

The Tenth Circuit followed this reasoning in its *Awad* decision, citing several precedents establishing that a majority vote cannot outweigh the constitutionally protected rights of individuals.[178]

The *Larson* test should continue to be applied to laws that attempt to single out an unpopular religion and should even be expanded to questions of moral majority oppression, such as laws that discriminate based upon sexual orientation. The First Amendment's freedom of religion should be construed to include freedom *from* religious majority influence in government actions. The Supreme Court hinted at this in *Romer v. Evans*[179] when it decided upon a Colorado state constitutional amendment that repealed all local ordinances creating a protected status for sexual orientation, holding that "desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[180] Historically, the LGBT community has been "politically unpopular" among those espousing the religious and moral majority sentiment.[181] The next logical step in protecting minorities singled out for discrimination based upon a moral agenda is to extend the *Larson* test to require that all government actions based upon majority Christian morality have a "compelling governmental interest."[182] The reasoning in *Romer*, therefore, would not allow for government to invoke morality as a basis to discriminate against unpopular or minority lifestyles, choices, or viewpoints because it would not be considered a compelling governmental interest by the Court.[183]

CONCLUSION

The Establishment Clause's protection extends to groups burdened by government actions that support the religious majority in creating "American" values. Because the government is precluded from establishing a national religion, courts must apply a strict scrutiny standard to laws based upon the practices or beliefs of the majority religion that appear to create a burden on non-adherents. The problematic issue is less the oppression of one religious minority and more the powerful control of one religious majority that can affect the secular freedom of those who

177. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

178. Awad v. Ziriax, 670 F.3d 1111, 1131–32 (10th Cir. 2012); *see also* Williams v. Rhodes, 393 U.S. 23, 29 (1968) ("[G]ranted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution."); Coal. for Econ. Equity v. Wilson, 122 F.3d 692, 699 (9th Cir. 1997) ("[T]he court merely reminds the people that they must govern themselves in accordance with principles of their own choosing.").

179. 517 U.S. 620 (1996).

180. *Id.* at 634 (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)) (internal quotation mark omitted).

181. *See supra* Part III.B.1.

182. Larson v. Valente, 456 U.S. 228, 245–47 (1982).

183. *See Romer*, 517 U.S. at 634.

do not hold the same moral values. A moral majority should not be able to dictate the morals of individuals. So long as religious or secular practices do not harm others[184]—whether by following the tenets of Sharia law, engaging in polygamy, or maintaining same-sex relationships—the government should not be able to establish a moral law against such practices through a majority vote either in Congress or on a ballot. The Tenth Circuit in *Awad* was able to clearly articulate why SQ 755 violated the First Amendment's protection for minority religion, but the judicial system must continue protecting minority interests against a powerful religious moral majority at work.

Renee Sheeder[*]

184. *See* Wisconsin v. Yoder, 406 U.S. 205, 224 (1972) ("A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.").

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